

Summer 2017

Opposing Sexual Harassment May Not Be Enough for a Retaliation Claim Under Title VII: Why Refusing Sexual Advances Is Not Enough, 50 J. Marshall L. Rev. 1007 (2017)

Simi Lorenz

Follow this and additional works at: <https://repository.jmls.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Simi Lorenz, Opposing Sexual Harassment May Not Be Enough for a Retaliation Claim Under Title VII: Why Refusing Sexual Advances Is Not Enough, 50 J. Marshall L. Rev. 1007 (2017)

<https://repository.jmls.edu/lawreview/vol50/iss4/8>

This Comments is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

OPPOSING SEXUAL HARASSMENT MAY NOT BE ENOUGH FOR A RETALIATION CLAIM UNDER TITLE VII: WHY REFUSING SEXUAL ADVANCES IS NOT ENOUGH

SIMI LORENZ

I.	INTRODUCTION	1007
II.	BACKGROUND	1009
	A. Discrimination Claims under Title VII.....	1009
	B. Vicarious Liability under Title VII.....	1011
	C. Retaliation Claims under Title VII	1012
	1. Statutorily Protected Activity	1012
	a. Participation Clause	1013
	b. Opposition Clause.....	1013
	2. Adverse Action	1016
	3. Causal Link	1017
III.	ANALYSIS	1019
	A. The Second Circuit and its District Courts	1020
	B. The Fifth Circuit and its District Courts.....	1022
	C. Sixth Circuit and its District Courts.....	1022
	D. Seventh Circuit and its District Courts	1024
	E. Eighth Circuit and its District Courts	1026
	F. Ninth Circuit and its District Courts	1028
	G. Eleventh Circuit and its District Courts	1028
	H. The D.C. District Court.....	1029
IV.	PROPOSAL	1029
V.	CONCLUSION.....	1034

I. INTRODUCTION

The right to privacy and autonomy, while not explicitly stated in the United States Constitution, has been created by the courts out of interpretation of the Fourteenth Amendment,¹ which states, “[n]o state shall ... deprive any person of life, liberty, or property, without due process of law.”² The right to autonomy protects the workplace from sexual harassment, which is a form of sexual discrimination.³ Title VII of the Civil Rights Act of 1964 allows for retaliation claims where “the employee’s submission to the

1. *Personal Autonomy*, LII / LEGAL INFORMATION INSTITUTE, www.law.cornell.edu/wex/personal_autonomy (last visited Sept. 25, 2017) (The right to autonomy and privacy has grown out of the liberty interest as protected by the Fourteenth Amendment).

2. U.S. CONST. AMEND. XIV.

3. 42 U.S.C. § 2000e-2(b) (2012) (“It shall be an unlawful employment practice for an employment agency . . . to discriminate against, any individual because of his race, color, religion, sex, or national origin. . . .”); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–66 (1986) (holding that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment” without showing an economic effect on the plaintiff’s employment).

unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment[.]”⁴

In the case of *Kauffman v. Allied Signal, Inc.*, the plaintiff, Lucille, was employed for fourteen years as a machine operator.⁵ After returning from medical leave for breast enhancement surgery, which Lucille chose to keep confidential, Lucille's supervisor asked, “Why didn't you tell me you were getting new tits? When do I get to see them?”⁶ He also attempted to look down her shirt, but Lucille shoved his hand away saying, “that's enough, Don.”⁷ The following day, the supervisor removed Lucille from her usual machine, and instead placed her on a difficult to handle manual machine.⁸ He told a coworker that he was punishing her for refusing to “show [him] her tits.”⁹ Lucille filed two claims for sexual harassment stemming from these instances.¹⁰ However, the district court granted summary judgment in favor of the defendant on both counts.¹¹

Would this negative outcome for Lucille have been different if she had instead filed a retaliation claim? That depends on the jurisdiction in which the plaintiff sued for retaliation.¹² Unfortunately, some jurisdictions hold that the act of telling a supervisor “no” does not create a retaliation claim under Title VII of the Civil Rights Act of 1964.¹³ In addition, the Supreme Court of the United States has not decided whether rejecting sexual advances constitutes a protected activity for a Title VII retaliation claim, and the Circuit Courts are split and inconsistent in their

4. *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir. 1992).

5. *Id.* at 180.

6. *Id.*

7. *Id.*

8. *Id.* (stating the machine was “torture,” required more manual labor than her usual machine, and the operator needed to continually babysit the machine).

9. *Id.*

10. *Id.* at 181.

11. The Appellate Court affirmed one summary judgment, but remanded the other. *Id.* at 187.

12. Lucille Kauffman did not bring a retaliation claim, but rather two sexual harassment claims. *Id.* at 180. However, it would have been possible for her to bring a retaliation claim based on the facts of the case. *Id.*

13. See *St. Juste v. Metro Plus Health Plan*, No. CV-4729, 2014 U.S. Dist. LEXIS 42653 at *28 (E.D.N.Y. Mar. 28, 2014) (stating “courts in the Second Circuit are split as to whether the rejection of unwanted sexual advances constitutes a protected activity, and the Second Circuit has not made a definitive ruling on the issue.”); see also *Frank v. Harris County*, 118 F. App'x 799, 804 (5th Cir. 2004) (holding that one instance of rejecting a supervisor's harassment did not constitute a protected activity); see also *Farfaras v. Citizens Bank & Trust of Chicago*, No. 01 C 87200, 2004 U.S. Dist. LEXIS 17612 at *2 (N.D. Ill. Aug. 30, 2004) (declining to hold that rejecting sexual advances qualifies as protected activity for purposes of a retaliation claim).

rulings, instead choosing to rely on District Court decisions.¹⁴ The Circuit Courts should look to the Sixth and the Eighth Circuit rulings on the issue. Both Circuits have analyzed the issue thoroughly and found that refusing sexual advances is a protected activity, while also addressing and rejecting concerns from other Circuit and District Court decisions.¹⁵

Part II of this paper outlines Title VII of the Civil Rights of 1964 retaliation claims, types of protected activity, and types of sexual harassment. Part III will analyze the District Court and Circuit Court decisions discussing refusing sexual harassment as a protected activity. Part IV outlines the standards that the Circuit Courts should follow in determining what is necessary to constitute a protected activity. Part V examines the policy goals achieved in setting standards for how rejecting sexual harassment constitutes a protected activity. Further, Part IV outlines the analysis used by the Sixth and Eighth Circuits, which should be used going forward.

II. BACKGROUND

A. *Discrimination Claims under Title VII*

Title VII governs discrimination and retaliation in the work place, and it makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”¹⁶ Sexual harassment is a form of sex-based discrimination under Title VII.¹⁷ Sexual harassment is defined as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁸

There are two types of sexual harassment that courts recognize under Title VII: “hostile work environment” and *quid pro quo* sexual harassment.¹⁹ A hostile work environment claim is one that entails “bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.”²⁰ “Quid pro quo harassment conditions employment (or promotion) on sexual favors.”²¹ In other words, *quid pro quo* sexual harassment

14. *Id.*

15. *EEOC v New Breed Logistics*, 783 F.3d 1057 (6th Cir. 2015); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

16. 42 U.S.C. § 2000e-2(b) (2012).

17. *See* 29 C.F.R. § 1604.11(a) (2014) (stating that sexual harassment is a form of discrimination based on sex).

18. 29 C.F.R. § 1604.11(a) (2014).

19. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751–52 (1998).

20. *Id.*

21. Eugene Scalia, Article, *The Strange Career of Quid Pro Quo Sexual*

occurs when giving in to an employer's or coworker's sexual demands is "made a condition of employment benefits," as opposed to harassment that does not effect an employee's job standing or benefits.²² The Equal Employment Opportunity Commission Guidelines on Sexual Harassment²³ defines conduct as sexual harassment when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.²⁴

While both types of harassment are similar and both actionable under Title VII,²⁵ the terms "*quid pro quo*" and "hostile work environment" are still used to differentiate between cases involving threats that are carried out (*quid pro quo*) and cases involving general offensive conduct (hostile work environment).²⁶ Thus, the two types of harassment require different elements to prove a *prima facie* case for sexual harassment under Title VII.²⁷

To prove *quid pro quo* sexual harassment, one must show that:

(1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment.²⁸

Harassment, 21 HARV. J.L. & PUB. POL'Y 307, 308 (1998).

22. *Bryson v. Chi. State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996).

23. The EEOC has written guidelines to answer questions that Title VII has left open. These guidelines the EEOC's interpretations of Title VII. Margaret H Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 388 (2010). While Congress did not look to the EEOC guidelines and authority in enacting Title VII, courts have stated that EEOC guidelines may be looked to for guidance, weighing the validity of the reasoning and the consistency with other pronouncements. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

24. 29 C.F.R. § 1604.11.

25. *See Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1026 (8th Cir. 2004) (stating that both types of claims arise out of the same legal theory under Title VII).

26. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1006 (8th Cir. 2000).

27. *See Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d 1055, 1079 (N.D. Iowa 2008) (listing the elements of both times of harassment as quoted from *Ogden*, 214 F.3d at 1006 n.8-9).

28. *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995).

While hostile work environment claims must prove similar elements, they differ in two important ways.²⁹ For a hostile work environment claim, the plaintiff must show that:

(1)[s]he belongs to a protected group; (2) [s]he was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.³⁰

In contrast to *quid pro quo* claims, a plaintiff claiming a hostile work environment only needs to prove that she was subjected to unwelcome sexual harassment; she need not show that it was in the form of sexual advances or requests for sexual favors.³¹ To prove that the harassment affected a term, condition, or privilege of employment, the plaintiff must show that it was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."³² The conduct must be such that not only did the plaintiff subjectively view it as creating an abusive working environment, but that an objectively reasonable person would also view it as such.³³ Because both sexual harassment claims and retaliation claims require some showing of a job detriment,³⁴ they often blend together under Title VII.³⁵

B. Vicarious Liability under Title VII

The Supreme Court held that an employer is subject to vicarious liability to an employee when a supervisor sexually harasses that employee, even when the employee takes no tangible adverse employment action.³⁶ However, in cases where no tangible employment action was taken, the employer may raise an affirmative defense.³⁷ This affirmative defense requires two

29. See *Tenge v. Phillips Modern Ag Co*, 446 F.3d 903 (8th Cir. 2006) (distinguishing between *quid pro quo* and hostile work environment claims).

30. *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1999).

31. *Ogden*, 214 F.3d at 1006.

32. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

33. *Harris*, 510 U.S. at 21–22.

34. *Id.* at 1006 n.8–9. While *quid pro quo* claims require a showing of either a tangible job detriment or a showing that submitting to sexual demands was a condition for job benefits, here we focus only on the job detriment, as retaliation claims also require a job detriment. *Id.*

35. Allison Westfall, Comment, *The Forgotten Provision: How the Courts Have Misapplied Title VII in Cases of Express Rejection of Sexual Advances*, 81 U. CIN. L. REV. 269, 278.

36. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764–5 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

37. *Burlington*, 524 U.S. at 765.

elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁸ However, no affirmative defense is available to employers when the supervisor’s harassment results in a tangible, adverse employment action such as “discharge, demotion, or undesirable reassignment.”³⁹

C. Retaliation Claims under Title VII

1. Statutorily Protected Activity

Title VII of the Civil Rights Act of 1964 governs retaliatory discharge claims for employees discharged for reporting alleged discriminatory acts.⁴⁰ To state a claim for retaliation, a plaintiff must allege the following: “(i) that she engaged in a statutorily protected activity, (ii) she suffered an adverse action at the hands of the defendant, and (iii) there was a causal link between the protected activity and the adverse action.”⁴¹ A protected activity includes a plaintiff opposing discriminatory practices or participating in an “investigation, proceeding, or hearing” under Title VII.⁴² Two clauses explain what constitutes protected activity: the participation clause, and the opposition clause.⁴³

38. *Id.*

39. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

40. 42 U.S.C. § 2000e-3(a) (2012) (stating “it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”).

41. *Van v. Ford Motor Co.* No. 14 cv 8708, 2016 U.S. Dist. LEXIS 40012, at *11 (N.D. Ill. Mar. 28, 2016). Some states add fourth element requiring that the employer be aware of the defendant’s activity against the plaintiff. *Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998).

42. 42 U.S.C. § 2000e-3(a) (2012) (stating “it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”).

43. *See Offor v. Mercy Med. Ctr.*, No. 15-cv-2219 (ADS)(SIL), 2016 U.S. Dist. LEXIS 31598, at *47 (E.D.N.Y. Mar. 10, 2016) (stating that protected activity can be alleged through the “participation clause” or the “opposition clause”).

a. Participation Clause

The participation clause defines protected activity as one where a plaintiff has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”⁴⁴ Courts have consistently held that participation in an internal investigation, not connected with a formal EEOC charge, does not qualify as a protected activity under the participation clause.⁴⁵ Some courts have gone further and suggested that protected activity under the participation clause can only occur within a formal EEOC proceeding.⁴⁶ However, the participation clause is not the clause at issue when determining the effect of rejecting sexual advances and retaliation claims.⁴⁷ It is clear that if one files an EEOC claim based on sexual harassment and then is retaliated against by an employer, one has a retaliation claim under Title VII.⁴⁸

b. Opposition Clause

The opposition clause makes it unlawful for an employer to retaliate against an employee “because he has opposed any practice made an unlawful employment practice by [Title VII].”⁴⁹ Therefore,

44. 42 U.S.C. § 2000e-3(a) (2012)

[I]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

Id.

45. *Townsend v. Benjamin Enters.*, 679 F.3d 41, 49 (2d Cir. 2012).

46. *See Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (stating that in this case, the participation clause was irrelevant as the plaintiff had not filed an EEOC charge until after the alleged retaliation occurred).

47. *See EEOC v New Breed Logistics*, 783 F.3d 1057, 1068 (6th Cir. 2015) (concluding that the opposition clause offers protection for resisting sexual harassment).

48. *See Cristia v. Sys. Eng'g & Sec., Inc.*, No. 03-2138, 2004 U.S. Dist. LEXIS 15970, at *29–30 (E.D. La. Aug. 12, 2004) (holding that an EEOC charge based on a reasonable belief of sexual harassment is enough to survive summary judgment on a claim for retaliatory discharge under Title VII); *see also Green v. Adm'Rs of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002) (stating “Title VII does not require that a plaintiff prove that the conduct opposed was actually in violation of Title VII, but only that a charge was made, or that participation in an investigation of a violation of Title VII occurred.”).

49. 42 U.S.C. § 2000e-3(a) (2012).

[I]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in

the opposition clause protects informal protests not filed with the EEOC.⁵⁰ Further, like the participation clause, the plaintiff does not need to prove the merit of the underlying discrimination complaint to establish that the opposition is protected under Title VII.⁵¹ Rather, the plaintiff only needs to establish that he had a reasonable belief that a violation occurred, and that he acted in good faith.⁵² Further, the United States Supreme Court has held that the plaintiff does not need to be the one who initiated the investigation.⁵³ The protected activity of opposing unlawful practice extends to someone who speaks out during an investigation that the employee himself did not initiate.⁵⁴

The Supreme Court has looked at the meaning of “oppose” under Title VII in *Crawford v. Metro. Gov’t of Nashville & Davidson County*.⁵⁵ In that case, the plaintiff was fired after willingly answering questions during an investigation of a coworker’s claims of harassment against a supervisor.⁵⁶ Since “oppose” is not defined in the statute, the Court held that the word carries its ordinary, everyday meaning.⁵⁷ The Court used the dictionary definition of “oppose,” which is: “[to] resist or antagonize . . . ; to contend against;⁵⁸ to confront; resist; withstand.” “When an employee communicates to her employer a belief that the employer has

an investigation, proceeding, or hearing under [Title VII].

Id.

50. *Sumner v. United States Postal Serv.*, 899 F.2 203, 209 (2d Cir. 1990) (“informal protests of discriminatory employment practices, including 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.”).

51. *Id.*

52. *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988) (stating that a plaintiff must show a “good faith, reasonable belief that the underlying challenged actions of the employer violated the law.” (citing *Abel v. Bonfanti*, 625 F. Supp. 263, 267 (S.D.N.Y. 1985)); *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403, 412 (S.D.N.Y. 1982)).

53. *Crawford v. Metro. Gov’t of Nashville & Davidson County*, 555 U.S. 271, 277–78 (2009).

54. *Id.*

[A] person can “oppose” by responding to someone else’s question just as surely as by provoking the discussion, and 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.

Id.

55. 555 U.S. 271 (2009).

56. *Id.* at 274.

57. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

58. *Crawford*, 555 U.S. at 276 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1957)).

engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee' *opposition* to the activity."⁵⁹ While lower courts had previously held that opposition required active and consistent opposition – perhaps even the initiation of a complaint – to be covered under the opposition clause,⁶⁰ the Supreme Court has taken a broader view in *Crawford*. “Countless people were known to “oppose” slavery before Emancipation . . . without writing public letters, taking to the streets, or resisting the government.”⁶¹ The Court further stated, “we would call it ‘opposition’ if an employee took a stand against an employer's discriminatory practices not by ‘instigating’ action, but . . . by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons.”⁶²

In deciding whether certain conduct is a protected activity, courts attempt to balance Title VII's goal in protecting employees taking action through “reasonable opposition activities” (what courts have held to be protected activities) with the need to allow employers to select their own employees.⁶³ The scope of what courts have held constitutes protected activity under the opposition clause in sexual harassment includes, sending an email complaining of sexual harassment, answering questions about a co-workers sexual harassment claim during an investigation, efforts to help a co-worker in filing and pursuing a sexual harassment complaint with the Human Resources Department, and informal complaints to management.⁶⁴

59. *Id.* (citing Brief for the United States as Amicus Curiae, *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271 (2009) (No. 06-1595)); citing EEOC Compliance Manual §§ 8-II-B(1), (2), p 614:0003 (Mar. 2003)(emphasis in original).

60. *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 211 F. App'x 373, 376 (6th Cir. 2006).

61. *Crawford*, 555 U.S. at 277.

62. *Id.* (quoting 42 U.S.C. § 2000e-3(a) (citing *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) where the court found that an employee was protected under Title VII when he allowed a subordinate employee to file an EEOC charge, and his employer retaliated against him)).

63. Matthew W. Green, *Express Yourself: Striking a Balance between Silence and Active, Purposive Opposition Under Title VII's Antiretaliation Provision*, 28 HOFSTRA LAB. & EMP. L.J. 107, 117 (2010).

64. *See Furr v. Ridgewood Surgery & Endoscopy Ctr., LLC*, No. 14-1011-KHV, 2016 U.S. Dist. LEXIS 84808, at *42 (D. Kan. June 28, 2016) (holding that an e-mail to her supervisor and Vice President of the company complaining of sexual harassment and detailing sexual harassment complaints by other employees the year before constitute protected activity); *see also Crawford*, 555 U.S. at 276 (holding that a statement made during a separate investigation constituted a protected activity when plaintiff stated a fellow employee was sexually harassing her); *see also Collazo v. Bristol-Myers Squibb Mfg.*, 617 F.3d 39, 42–4 (1st Cir. 2010) (holding that an employee who attempts to assist a co-worker in filing a sexual harassment grievance with Human Resources, follows up with an e-mail to Human Resources and met with Human Resources engages

Courts generally grant less protection for employee activities protected by the opposition clause than activities protected by the participation clause.⁶⁵ “Activities [protected] under the participation clause are essential to ‘the machinery set up by Title VII.’”⁶⁶ Under the participation clause, an employee is protected even if the protected activity includes false, defamatory, or malicious allegations.⁶⁷ However, under the opposition clause, the conduct must be such that an objectively reasonable person would believe the conduct was unlawful.⁶⁸ The opposition clause allows for a wider array of conduct to be considered a protected activity (which only allows retaliation for formal charges), it allows for more claims to move forward that would be unable to be brought under only the participation clause.⁶⁹

2. Adverse Action

A plaintiff must also show that she has suffered an adverse employment action.⁷⁰ Under Title VII, an adverse employment action must be either an ultimate employment decision, or it must

in protected activity under the opposition clause); *see also* Speed v. WES Health Sys., 93 F. Supp. 3d 351, 356 (E.D. Pa. 2015) (stating “[i]nformal complaints to management have specifically been found to fall within the scope of protection afforded by Title VII’s opposition clause.”).

65. Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989).

66. Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 259 n.4 (4th Cir. 1998) (quoting Hashimoto v. Dalton, 118 F.3d 671, 689 (9th Cir. 1997)).

67. *See* Daravin v. Kerik, 355 F.3d 195, 203–04 (2d Cir. 2003) (explaining that a plaintiff is protected under the participation clause even if the charge includes facts that are incorrect, defamatory, or malicious); *see also* Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (stating that a plaintiff is protected under the participation clause even if the charge “lacks merit.”).

68. *See* Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (holding that the anti-retaliation provision of Title VII protects “those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.”); *see also* Higgins v. New Balance Athletic Shoe, Inc., 195 F.3d 252, 261–62 (1st Cir. 1999) (stating that Title VII requires that the employee believed the activity was unlawful).

69. Matthew W. Green, *Express Yourself: Striking a Balance between Silence and Active, Purposive Opposition Under Title VII’s Antiretaliation Provision*, 28 HOFSTRA LAB. & EMP. L.J. 107, 117 (2010).

70. 42 U.S.C. § 2000e-3(a) (2012)

[I]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

Id.

“meet some threshold level of substantiality.”⁷¹ An ultimate employment decision is one that results in the employee’s termination, the employee’s demotion, or a failure to hire.⁷² Not every decision by an employer that results in negative consequences for an employee will rise to the level of an adverse action under Title VII.⁷³ Courts have held that subjective injuries such as humiliation, adverse reassignment, or loss of reputation within the work place do not rise to the level of adverse actions.⁷⁴ Further, the Supreme Court held that “trivial harms,” “petty slights,” and “minor annoyances” differ from the “materially adverse” actions required under Title VII.⁷⁵

In cases involving Title VII, the plaintiff has the initial burden of proof to show discrimination and adverse employment action in a retaliation case.⁷⁶ If the plaintiff meets this burden, the burden shifts to the defendant.⁷⁷ The defendant then must show legitimate reasons for an adverse employment action.⁷⁸ Once the defendant has shown legitimate reasons for the adverse employment action, the burden then shifts back to the plaintiff to show that these reasons are pre-textual.⁷⁹

Finally, once a defendant offers a nondiscriminatory reason for the adverse action, the court must analyze whether the employer’s reasoning for the adverse action is actually non-discriminatory in nature, or whether it is pre-textual.⁸⁰

3. *Causal Link*

The conduct that an employee is opposing must be made unlawful by Title VII.⁸¹ At a minimum, the plaintiff needs a reasonable belief that the conduct was unlawful under Title VII.⁸² There also must be a causal link between the protected activity and

71. *Stavropoulos v. Firestone*, 361 F.3d 610, 617 (11th Cir. 2004) (quoting *Bass v. Bd. Of County Comm’rs, Orange County, Fla.*, 256 F.3d 1095, 1118 (11th Cir. 2001)).

72. *Id.*

73. *Ware v. Billington*, 344 F. Supp. 2d 63, 71 (D.D.C. 2004).

74. *Forkkio v. Powell*, 306 F.3d 1127, 1130–31 (D.C. Cir. 2002).

75. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)

76. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

77. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (holding that a plaintiff had the burden of proof in showing that the defendant’s proffered reasons for terminating the plaintiff were, in fact, pretextual).

78. *Id.*

79. *Id.*

80. *Morales v. Gotbaum*, 42 F. Supp. 3d 175, 187–88 (D.C. Cir. 2014); *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493–94 (D.C. Cir. 2008).

81. 42 U.S.C. § 2000e-3(a) (2012).

82. *Dea v. Wash. Suburban Sanitary Comm’n*, 11 Fed. Appx. 352, 357–58 (4th Cir. 2001).

the adverse employment action.⁸³ In order to show this causal link, the plaintiff must show that the adverse action would not have occurred “but for” the plaintiff’s protected activity.⁸⁴ Title VII’s causation standard states that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁸⁵ This is a lesser causation standard than the “but for” standard that courts have used.⁸⁶ However, the Supreme Court has held that it is not enough that the protected activity be a “motivating factor” in the adverse employment action; it must, in fact be, the “but-for” causation.⁸⁷ The Court looked to “[t]he text, structure, and history of Title VII” and held that a plaintiff making a retaliation claim under Title VII must establish that “his or her protected activity was a but-for cause of the alleged adverse action by the employer.”⁸⁸

When looking at whether refusing sexual advances constitutes a protected activity, the opposition clause is used to determine whether the refusal is a protected activity under Title VII.⁸⁹ The EEOC holds sexual harassment as a type of discrimination based on sex.⁹⁰ Because sexual harassment is an unlawful activity under Title VII,⁹¹ courts have held that opposing sexual harassment constitutes protected activity.⁹² The EEOC guidelines both define sexual harassment and label it as a type of discrimination based on sex.⁹³ While the EEOC guidelines on sexual harassment are not

83. *Beall v Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997).

84. *Klein v. Trustees of Indiana Univ.*, 766 F.2d 275, 280 (7th Cir. 1985)

85. 42 U.S.C. § 20003-2(m).

86. *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526 (2013).

87. *Id.* at 2534.

88. *Id.*

89. *See Mealus v Nirvana Spring Water N.Y. Inc.*, No. 7:13-cv-00313(MAD/DEP), 2014 U.S. Dis. LEXIS 128968, at *37–38 n.5 (N.D.N.Y. Sep. 16, 2014) (stating that courts have found refusing to submit to sexual advances is a “protected activity” because it is opposing sexual harassment, an unlawful practice under Title VII).

90. *See* 29 C.F.R. § 1604.11(a) (stating that it is unlawful to harass someone based on his/her sex).

91. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (analyzing the language of Title VII and stating that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex.”).

92. *See Livingston v. Marion Bank & Trust Co.*, 30 F. Supp. 3d 1285, 1316 (N.D. Ala. 2014) (holding a complaint to a supervisor regarding sexually harassing conduct is protected when the employee reasonably believes the harassment is unlawful under Title VII).

93. The EEOC has written guidelines to answer questions that Title VII has left open. These guidelines are the EEOC’s interpretations of Title VII. Margaret H Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency*

controlling on the courts, they do “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁹⁴

III. ANALYSIS

Circuit courts are split on the issue of whether rejecting a supervisor’s sexual harassment reaches the level necessary to create a protected activity under the opposition clause.⁹⁵ Leading to further confusion, district courts have inconsistent rulings with different reasons for their holdings.⁹⁶

The Second Circuit has declined to rule on the issue, and the district courts are split on their holdings.⁹⁷ The Fifth Circuit has repeatedly held that refusing sexual advances is not enough on its own to create a protected activity under Title VII.⁹⁸ The Sixth Circuit has held that rejecting a supervisor’s sexual advances creates a protected activity under Title VII.⁹⁹ The Seventh Circuit has also declined to rule on the issue, and the district courts are split in their holdings.¹⁰⁰ However, the majority of district courts in the Seventh Circuit have either rejected the argument that refusing sexual advances is a protected activity, or they have also declined to rule on the issue.¹⁰¹ The Eighth Circuit has also held that

Interpretations of Title VII, 63 VAND. L. REV. 363, 388 (2010). While Congress did not look to the EEOC guidelines and authority in enacting Title VII, courts have stated that EEOC guidelines may be looked to for guidance, weighing the validity of the reasoning and the consistency with other pronouncements. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

94. *Gilbert*, 429 U.S. at 142 (1976) (applying this analysis of the role of interpretive rulings to the EEOC guidelines) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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

96. *Id.* at 528 (stating “[d]espite the relative evenness of the split, few courts have provided the same justifications for their decisions.”).

97. *Mealus v. Nirvana Spring Water N.Y. Inc.*, No. 7:13-cv-00313(MAD/DEP), 2014 U.S. Dis. LEXIS 128968, at *37–38 n.5 (N.D.N.Y. Sep. 16, 2014)

98. *LeMaire v. Louisiana*, 480 F.3d 383, 389 (5th Cir. 2007).

99. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067-68 (6th Cir. 2015).

100. *EEOC v. Caterpillar, Inc.*, 628 F. Supp. 2d 844, 875 n.8 (N.D. Ill. 2009) (stating “[t]he Seventh Circuit has expressly declined to address the issue.”); *see also Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528, 532 (7th Cir. 2008) (deciding the issue based on other ground and choosing not to discuss the issue); *see also Murray v. Chi. Transit Auth.*, 252 F.3d 880, 890 (7th Cir. 2001) (stating “we need not decide whether a plaintiff who rejects a sexual invitation from a supervisor has met the first element of a claim for retaliation.”).

101. *Caterpillar, Inc.*, 628 F. Supp. 2d at 875 n.8; *see also Farfaras v. Citizens Band & trust of Chicago*, No. 01 C 8720, 2004 U.S. Dist. LEXIS 17612, at *2 (N.D. Ill. Aug. 30, 2004) (declining to hold that rejecting sexual advances

rejecting sexual advances is enough to constitute a protected activity under Title VII.¹⁰² The Ninth and Eleventh Circuits have yet to rule on the issue.¹⁰³ The District Courts in the Ninth Circuit have held that refusing sexual advances is not, on its own, a protected activity, but the District Courts in the Eleventh Circuit have held the opposite, finding that it is enough.¹⁰⁴ Finally, the D.C. District Court has repeatedly found that such conduct is a protected activity under Title VII, and cites to Eighth Circuit cases in its reasoning.¹⁰⁵

A. *The Second Circuit and its District Courts*

The Second Circuit has declined to rule on this issue.¹⁰⁶ In *Fitzgerald v. Henderson*, the Second Circuit specifically chose not to address whether resisting sexual advances was enough to state a retaliation claim.¹⁰⁷ As recently as 2014, the Second Circuit has continued to decline considering this issue.¹⁰⁸

The district courts do not offer clear guidance within the Second District, either, as they are split on this issue.¹⁰⁹ Some courts have found that rejecting sexual advances constitutes a protected

is enough to create a protected activity to form a retaliation claim under Title VII).

102. See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (finding that a plaintiff engaged in the most “basic form of protected conduct” when she told her supervisor to stop harassing her).

103. *Alhozbur v. McHugh*, No. C 09-01576 EJD, 2011 U.S. Dist. LEXIS 79407, at *22 (N.D. Cal. July 21, 2011).

104. *Id.* at *24 (quoting *Del Castillo v. Pathmark Stores*, 941 F. Supp. 437, 439 (S.D.N.Y. 1996)); *Ross*, No. 06-0275-WS-B, 2008 U.S. Dist. LEXIS 23715, at *20–21 (stating “[t]he reasoning of the Ogden line of authority is sound.”).

105. See *LeMaire v. Louisiana*, 480 F.3d 383, 389 (5th Cir. 2007). (holding that a “single, express rejection” of sexual advances does not constitute “protected activity” for purposes of a Title VII retaliation claim); *Contrast with EEOC v New Breed Logistics*, 783 F.3d 1067-68 (6th Cir. 2015), 783 F.3d 1957 (stating that if an employee resists a supervisor’s sexual harassment, then the opposition clause provides protection for that behavior) and *Ogden*, 214 F.3d at 1007 (finding that a plaintiff engaged in protected conduct when telling a supervisor to stop harassing her).

106. *Mealus v Nirvana Spring Water N.Y. Inc.*, No. 7:13-cv-00313(MAD/DEP), 2014 U.S. Dis. LEXIS 128968, at *37–38 n.5 (N.D.N.Y. Sep. 16, 2014)

107. See *Fitzgerald v. Henderson*, 251 F.3d 345, 366 (2d Cir. 2001) (declining to reach the issue of whether “a valid retaliation claim must allege that the employee suffered adverse employment consequences because she lodged or threatened to lodge a complaint about her supervisor, and is insufficient if it alleges “only” that she suffered such consequences because she resisted her supervisor’s sexual advances.”).

108. See *Pedrosa v. City of N.Y.*, No. 13 Civ. 01890, 2014 U.S. Dist. LEXIS 3315, at *26 n.1 (S.D.N.Y. Jan. 9, 2014) (stating that “[t]he Second Circuit has yet to settle this question.”).

109. Watral, *supra* note 95, at 528.

activity under the opposition clause of Title VII.¹¹⁰ These courts hold that because sexual harassment is an unlawful activity under Title VII, an employee who rejects such activity is opposing it and has protection under Title VII.¹¹¹ In *Laurin v. Pokoik*, the plaintiff alleged that her continuous rejection of her supervisor's sexual harassment resulted in her termination.¹¹² The court held that because the defendant had no formal policies regarding sexual harassment and no formal avenue of making complaints, the plaintiff's only option to oppose the harassment was by rejecting the advances.¹¹³ Therefore, in this instance, with no other options in place, rebuffing sexual advances constituted a protected activity.¹¹⁴

On the other side, some district courts in the Second Circuit have held 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."¹¹⁵ These courts also focus on the idea that if refusing sexual advances were enough to constitute a protected activity for a retaliation claim, then every harassment claim would automatically state a retaliation claim as well.¹¹⁶ For example, in *Rashid v. Beth Isr. Med. Ctr.*, the plaintiff was terminated only three days after the alleged sexual assault, and the court concluded that this better fit a *quid pro quo* sexual harassment claim, and a retaliation claim was "duplicative and unnecessary."¹¹⁷

110. *Id.*

111. See *Laurin v. Pokoik*, No. 02-CV-1938, 2005 U.S. Dist. LEXIS 6728, *4 (S.D.N.Y. Apr. 18, 2005) (holding that indirectly complaining to a supervisor by "rebuffing" his sexual advances constitutes a protected activity); *Little v. NBC*, 210 F. Supp. 2d 330, 386 (S.D.N.Y. 2002) (stating that rejecting the sexual advances from an employer constitutes a protected activity); *Lange v. Town of Monroe*, 213 F. Supp. 2d 411, 420 (S.D.N.Y. 2002) (declaring that "resisting sexual harassment is a means of opposing unlawful conduct . . . and hold that plaintiff engaged in a protected activity when she rebuffed Montanye's advances.").

112. *Laurin*, No. 02-CV-1938, 2005 U.S. Dist. LEXIS 6728, at *5.

113. *Id.* at *12.

114. *Id.*

115. *Del Castillo v. Pathmark Stores*, 941 F. Supp. 437, 438–39 (S.D.N.Y. 1996).

116. *Id.*; See also *Fitzgerald v. Henderson*, 251 F.3d 345, 355 (2d Cir. 2001) (reasoning that "rejection of sexual advances is not a protected activity."); *Rashid v. Beth Isr. Med. Ctr.*, No. 96 Civ. 1833 (AGS), 1998 U.S. Dist. LEXIS 15602, *6–7 (S.D.N.Y. Oct. 2, 1998) (stating that a retaliation claim and a *quid pro quo* harassment claim are duplicative, and refusing sexual advances is not enough to create a protected activity).

117. *Rashid v. Beth Isr. Med. Ctr.*, No. 96 Civ. 1833 (AGS), 1998 U.S. Dist. LEXIS 15602, *6–7 (S.D.N.Y. Oct. 2, 1998)

B. The Fifth Circuit and its District Courts

The Fifth Circuit first looked at this issue in *Frank v. Harris County* and found that the plaintiff “provide[d] no authority for the proposition that a single ‘express rejection’ to [a harassing supervisor] constitutes as a matter of law a protected activity.”¹¹⁸ However, in the *Frank* decision, the court did not explain why an informal complaint to a harassing supervisor was not enough to constitute a protected activity, nor did it look to the opposition clause of Title VII in its analysis.¹¹⁹

In 2007, the Fifth Circuit once again stated that the plaintiff had not offered any authority to support his claim that rejecting a supervisor’s sexual harassment was a protected activity.¹²⁰ In *LeMaire v. Louisiana*, the plaintiff objected to his supervisor’s sexually explicit stories and comments, and he claimed he received assignments outside of his job description as a result.¹²¹ When he refused to perform these assignments outside of his job description, he was suspended and ultimately fired.¹²²

The court provided no reasoning for its decision that objecting to sexual advances was not a protected activity, and instead relied on the *Franks* decision in stating that the plaintiff had not shown any positive authority for his claim that this was a protected activity under Title VII.¹²³

C. Sixth Circuit and its District Courts

The Sixth Circuit first ruled on this issue in *EEOC v. New Breed Logistics* in 2015. Prior to that ruling, the district courts in the Sixth Circuit had held that “telling a harasser, who also was serving as her supervisor, to cease all forms of physical and verbal harassment” was “engag[ing] in the most basic form of protected conduct.”¹²⁴ The district courts in the Sixth Circuit have consistently held that complaints to a harassing supervisor constitute a protected activity under Title VII.¹²⁵

118. *Frank v. Harris County*, 118 F. App’x 799, 804 (5th Cir. 2004).

119. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1068 (6th Cir. 2015).

120. *LeMaire v. Louisiana*, 480 F.3d 383, 389 (5th Cir. 2007).

121. *Id.* at 390.

122. *Id.*

123. *Watral*, *supra* note 95, at 531.

124. *Quarles v. McDuffie Cty.*, 949 F. Supp. 846, 853 (S.D. Ga. 1996).

125. *See Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1070 (M.D. Tenn. 2000) (holding an employee had engaged in protected conduct when she told her immediate supervisor directly to stop sexually harassing her and relying on the reasoning laid out in *Quarles*, 949 F. Supp. at 853. *See also* *Berthiaume v. Appalachian Christian Vill. Found., Inc.*, No. 2:07-CV-46, 2008 U.S. Dist. LEXIS 78724, at *11 (E.D. Tenn. Sep. 4, 2008) (following the holdings in *Quarles* and *Reed*).

In *EEOC v. New Breed Logistics*, the Sixth Circuit concluded that it would follow the holdings and opinions of the district courts.¹²⁶ The plaintiffs alleged that their supervisor repeatedly and daily made sexually explicit comments to them, as well as physically sexually harassed them.¹²⁷ The plaintiffs repeatedly told the supervisor to leave them alone.¹²⁸ In response to the plaintiff's rebuffing of the supervisor's advances, the plaintiffs were transferred and eventually terminated.¹²⁹ The Sixth Circuit held that "a complaint to a harassing supervisor qualifies as protected activity[.]" focusing its reasoning on the language of the opposition clause in Title VII.¹³⁰

In examining the opposition clause, the Sixth Circuit stated that sexual harassment is an unlawful practice under Title VII, and therefore "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice . . . the opposition clause's broad language confers protection to this conduct."¹³¹ The court in *EEOC v. New Breed* also focused on the fact that the opposition clause does not require the plaintiff complain or direct the protected activity at a specific person designated by the company, but rather can complain to anyone in a supervisory position.¹³² Therefore, even complaints to the harassing supervisor constitute protected activity under the opposition clause.¹³³

The Sixth Circuit went one step further in this opinion and addressed the argument that all harassment claims will turn into retaliation claims if rejecting sexual advances is a protected activity.¹³⁴ The court, in addressing this concern, explained that a harassment claim cannot turn into a retaliation claim unless the harasser initiates an adverse employment action against the victim in response to opposing the harassment.¹³⁵ "Thus, giving retaliation victims protection where they complain to the harasser will not morph all harassment claims into a retaliation claim, absent some materially adverse action."¹³⁶

126. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015).

127. *Id.* at 1062–63.

128. *Id.*

129. *Id.*

130. *Id.* at 1067.

131. *Id.* at 1067–68.

132. *Id.*; *see also* *Warren v. Ohio Dep't of Pub. Safety*, 24 F. App'x 259, 265 (6th Cir. 2001) (holding "[t]here is no qualification on who the individual doing the complaining may be or on who the party to whom the complaint is made.").

133. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1062–63 (6th Cir. 2015).

134. *Id.*

135. *Id.*

136. *Id.* at 1068.

D. Seventh Circuit and its District Courts

The Seventh Circuit has expressly chosen not to address whether rebuffing sexual advances is a protected activity.¹³⁷ The district courts in the Seventh Circuit are split on the issue, with the majority either holding that refusing sexual advances is not a protected activity, or declining to hold that refusing sexual advances is a protected activity.¹³⁸ One court reasoned that the purpose of the anti-retaliation provision in Title VII “is to prevent employee grievances and Title VII claims from being deterred,” not to protect an employee who rejects a supervisor’s sexual advances.¹³⁹ In *Bowers v. Radiological Soc’y of North America, Inc.*, the court held that rejection was not enough.¹⁴⁰ Rather, a retaliation claim requires submitting a complaint to management or filing a charge against the harasser.¹⁴¹ Because the Seventh Circuit has expressly declined to rule on this issue, the court has chosen to side with the majority opinion of its district courts in “declining to hold that rejecting sexual advances qualifies as protected activity for purposes of making a retaliation claim.”¹⁴²

However, two judges in the district courts have ventured to state that refusal of sexual advances may constitute a protected activity under certain circumstances.¹⁴³ In one such case, the court held that refusing sexual advances only constituted protected activity because under the circumstances, it was one of the only options the plaintiff had at his disposal to oppose sexual

137. *EEOC v. Caterpillar, Inc.*, 628 F. Supp. 2d 844, 875 n.8 (N.D. Ill. 2009) (stating “[t]he Seventh Circuit has expressly declined to address the issue.”); *see also Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528, 532 (7th Cir. 2008) (deciding the issue based on other ground and choosing not to discuss the issue); *see also Murray v. Chi. Transit Auth.*, 252 F.3d 880, 890 (7th Cir. 2001) (stating “we need not decide whether a plaintiff who rejects a sexual invitation from a supervisor has met the first element of a claim for retaliation.”).

138. *Caterpillar, Inc.*, 628 F. Supp. 2d at 875 n.8; *see also Farfaras v. Citizens Bank & Trust of Chicago*, No. 01 C 8720, 2004 U.S. Dist. LEXIS 17612, at *2 (N.D. Ill. Aug. 30, 2004) (declining to hold that rejecting sexual advances is enough to create a protected activity to form a retaliation claim under Title VII).

139. *Jones v. Cty. of Cook*, No. 01 C 9876, 2002 U.S. Dist. LEXIS 13075, at *11 (N.D. Ill. July 16, 2002).

140. *Bowers v. Radiological Soc’y of North America, Inc.*, 57 F. Supp. 2d 594, 599 (N.D. Ill. 1999).

141. *Id.*

142. *Farfaras v. Citizens Bank & Trust of Chicago*, No. 01 C 87200, 2004 U.S. Dist. LEXIS 17612 at *7 (N.D. Ill. Aug. 30, 2004); *See also Speer v. Rand McNally & Co.*, No. 95 C 6269, 1996 U.S. Dist. LEXIS 17071, at *24 n.4 (N.D. Ill. Nov. 14, 1996) (holding that refusal of sexual advances is “not the type of “protected activity” which is properly the source of a Title VII, retaliation claim.”).

143. *Caterpillar, Inc.*, 628 F. Supp. 2d at 875 n.8.

harassment.¹⁴⁴ The court focused on the fact that the plaintiff had no knowledge of the sexual harassment policy, that he was alleging that his direct supervisor was the harasser, and that he was instructed not to complain or it would backfire on him.¹⁴⁵ In *Roberts v. County of Cook*, Judge Kennelly analyzed the opposition clause of Title VII and stated that “[o]pposing sexually harassing behavior constitutes ‘opposing any practice made an unlawful employment practice’ by Title VII, and accordingly it is activity protected by § 2000e-3(a).”¹⁴⁶

In two more recent district court decisions, the decision not to rule on the issue has caused an unforeseen circle to emerge. Currently, the district courts are relying on a footnote in *EEOC v. Caterpillar, Inc.* stating that the majority of the district courts do not allow retaliation claims for refusing sexual advances, because it is not a protected activity.¹⁴⁷ This has allowed the Seventh Circuit

144. See *Estes v. Ill. Dep’t of Human Servs.*, No. 05 C 5750, 2007 U.S. Dist. LEXIS 11666, at *11 (N.D. Ill. Feb. 16, 2007) (reasoning that the employee had no option to report the harassment, and therefore refusing his supervisor’s advances was a protected activity under Title VII). In this case, the plaintiff was hired as a special assistant to a Tanya Wertz. *Id.* at *1. Wertz was both his supervisor and the second highest rank in her department. *Id.* Plaintiff was never given a copy of the company’s sexual harassment policy. *Id.* at *7–8. Wertz harassed the plaintiff, telling him she wanted a romantic relationship with him and referring to him as her “boy toy.” *Id.* at *2. On a business trip, she demanded he have sex with her or lose his job, which he refused. *Id.* at *2–3. He then requested a meeting with Wertz’s supervisor, but he was told if he did it would backfire on him. *Id.* at *7–8. He was fired shortly thereafter. *Id.*

145. *Estes*, No. 05 C 5750, 2007 U.S. Dist. LEXIS 11666, at *10–11. The court then cites to *Laurin v. Pokoik*, No. 02-CV-1938, 2005 U.S. Dist. LEXIS 6728, *4 (S.D.N.Y. Apr. 18, 2005).

Viewed favorably to him, the record shows that DHS made no effort to apprise plaintiff of its sexual harassment policy; the alleged harasser is plaintiff’s immediate supervisor, second-in-command at DHS and a decades-long friend of the head of DHS; and, when plaintiff complained to Adams’ assistant about the harassment, he was told not to tell Adams because any report to her would backfire on plaintiff.

Id. Its holding that rejection of sexual advances constitutes protected activity when there is not sexual harassment policy, and the only people to whom the plaintiff could have complained were her alleged harasser’s business partner and finds the situations comparable. *Id.*

146. *Roberts v. Cty. of Cook*, No. 01 C 9373, 2004 U.S. Dist. LEXIS 8089, at *14 (N.D. Ill. May 7, 2004) (quoting 42 U.S.C. § 2000e-3(a)); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (stating that sexual harassment violates Title VII when it is “so ‘severe and pervasive’ as to ‘alter the conditions of [the victim’s] employment and create an abusive working environment.’”) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

147. *Van v. Ford Motors Co.*, No. 14 cv 8708, 2016 U.S. Dist. LEXIS 40012, at *12 (N.D. Ill. Mar. 28, 2016) (citing *EEOC v. Caterpillar, Inc.*, 628 F. Supp. 2d 844, 875 n.8 (N.D. Ill. 2009) (stating that “most courts in this district have held that Title VII does not recognize refusal of an employer’s sexual advances as protected activity” and recognizing that the Seventh Circuit has declined to

to follow the decisions of district courts rather than rule on the issue themselves.¹⁴⁸ This leads to both the district courts and the Seventh Circuit relying on old district court rulings rather than analyzing the issue themselves. For example, in *Van v. Ford Motor Co.*, the Northern District of Illinois held that, absent a ruling from the Seventh Circuit on the issue, the court would not find that refusing sexual advances is enough to constitute a protected activity.¹⁴⁹ Further, in *Doe v. TRP Acquisition, Inc.*, the Northern District once again emphasized that without a ruling from the Seventh Circuit, it would follow the majority of district court decisions in finding that retaliation claims fail when refusal of sexual advances is the only protected activity alleged.¹⁵⁰

E. Eighth Circuit and its District Courts

The Eighth Circuit held that rejecting a supervisor's sexual advances was a protected activity under Title VII in *Ogden v. Wax Works*.¹⁵¹ In *Ogden*, the plaintiff, Kerry Ogden, worked as a sales manager at Wax Works.¹⁵² She alleges that her district manager sexually harassed her for over a year.¹⁵³ She claims that the district manager grabbed her twice while he was intoxicated, once asking her to come back to his motel room with him.¹⁵⁴ Each time she pushed him away and told him not to touch her and to leave her alone.¹⁵⁵ One of the times in which she refused him, he responded with a physical threat.¹⁵⁶ The district manager also offered to stay at her home to "protect" her, regularly asked her to go for drinks, and asked her to stay with him at his home.¹⁵⁷ Ogden repeatedly

address the issue).

148. *Roberts*, No. 01 C 9373, 2004 U.S. Dist. LEXIS 8089, at *14 (quoting 42 U.S.C. § 2000e-3(a)); see also *Faragher*, 524 U.S. at 786 (stating that sexual harassment violates Title VII when it is "so 'severe and pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'") (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

149. *Van*, No. 14 cv 8708, 2016 U.S. Dist. LEXIS 40012, at *12–13 (stating "[u]ntil such time that the Seventh Circuit resolves the issue in this circuit, or the Supreme Court resolves the circuit-split, this Court finds that plaintiffs cannot state a claim for retaliation where the sole protected activity alleged is the refusing of sexual advances.").

150. *Doe v. TRP Acquisition, Inc.*, No. 16 C 3635, 2016 U.S. Dist. LEXIS 89259, at *5 (N.D. Ill. July 11, 2016).

151. See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (finding that a plaintiff engaged in the most "basic form of protected conduct" when she told her supervisor to stop harassing her.).

152. *Id.* at 1003.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1003.

refused the requests and advances, and the district manager began routinely criticizing her performance and “screamed” at her over work matters.¹⁵⁸ Ultimately, the district manager refused to give Ogden her yearly evaluation (which controlled her raise) unless she accompanied him on a “three-day gambling spree,” and when she declined, he denied her vacation request and refused to conduct her evaluation.¹⁵⁹

Ogden also alleged that she had informed her regional manager of the harassment, and he acknowledged that the district manager received warnings previously about his interactions with other employees.¹⁶⁰ The regional manager requested to meet with her, but Ogden was ill and unable to meet during his visit, and the regional manager insisted that she missed her chance by not coming to the meeting to address her complaints.¹⁶¹ She attempted to call the home office twice to complain to the vice president, but her calls went unreturned.¹⁶²

While the *Ogden* court, did not go into great detail in discussing the retaliation claim, the court stated that Ogden engaged in “the most basic form of protected activity” when she asked her immediate supervisor to “stop his offensive conduct.”¹⁶³ The court looked to the opposition clause of Title VII in holding that the jury reasonably concluded that Ogden was opposing discriminatory conduct when she asked her supervisor to stop harassing her.¹⁶⁴

The Eighth Circuit has not re-visited this question since *Ogden*, but recent district court cases have interpreted *Ogden*’s ruling broadly, holding that rejecting a supervisor’s sexual advances constitutes a protected activity even when her sexual harassment claim and sexual discrimination claim both failed.¹⁶⁵ Other Eighth Circuit district courts have cited *Ogden* and held that “telling a supervisor to stop offensive conduct is protected.”¹⁶⁶

158. *Id.*

159. *Id.* at 1003-04.

160. *Id.*

161. *Id.* at 1005.

162. *Id.*

163. *Id.* at 1007.

164. *Id.*

165. *Christensen v. Cargill, Inc.*, No. C14-4121-MWB, 2015 U.S. Dist. LEXIS 132475, at *30–32 (N.D. Iowa Sep. 30, 2015). The court in *Christensen* made this argument even though the defendants claimed that the only protected activity alleged in the complaint was a discussion with management about the harassment. *Id.* The court stated that although the defendants failed to note that the rejection of sexual propositions was a protected activity, it found that this was enough to state a retaliation claim under Title VII. *Id.*

166. *Wendt v. Charter Communs., LLC*, No. 13-1308 (RHK/TNL), 2014 U.S. Dist. LEXIS 176500, at *13 (D. Minn. Dec. 23, 2014); *see also Ramirez v. City of Fredericktown*, No. 1:13-cv-2 SNLJ, 2013 U.S. Dist. LEXIS 67603, at *16 (E.D. Mo. May 13, 2013) (reasoning that although telling a supervisor to stop harassing behavior is protected under *Ogden*’s reasoning, the harassing

F. Ninth Circuit and its District Courts

The Ninth Circuit has not yet addressed this issue, and only one district court has addressed it, holding that “rejecting a sexual advance does not amount to protected activity.”¹⁶⁷ In doing so, it adopted the rationale of *Del Castillo v. Pathmark Stores, Inc.* in finding that if rejecting sexual advances is a protected activity, then “every harassment claim would automatically state a retaliation claim as well.”¹⁶⁸ Further, the court reasoned that rejecting sexual advances fails to meet the criteria for a protected activity because refusal directed towards a harasser, even when the harasser is a supervisor, does not constitute notice to the employer, a requirement that the Ninth Circuit adds to its elements for a retaliation claim.¹⁶⁹

G. Eleventh Circuit and its District Courts

The Eleventh Circuit has not yet addressed the issue, but its district courts have held that refusing a direct supervisor’s sexual advances constitutes a protected activity.¹⁷⁰ In *Livingston v. Marion Bank & Tr. Co.*, the court reasoned that in situations where a plaintiff demands that supervisor stops harassing her, the supervisor would “necessarily be aware of all preceding instances of his own sexually harassing conduct,” thereby rejecting claims that refusing a supervisor’s harassment cannot be considered notice to the employer.¹⁷¹ The court in *Ross v. Baldwin Cty. Bd. Of Educ.*

behavior must be objectively offensive to trigger Title VII and not simply “inappropriate.”).

167. *Alhozbur v. McHugh*, No. C 09-01576 EJD, 2011 U.S. Dist. LEXIS 79407, at *22 (N.D. Cal. July 21, 2011).

168. *Id.* at *24 (quoting *Del Castillo v. Pathmark Stores*, 941 F. Supp. 437, 439 (S.D.N.Y. 1996)).

169. *Id.* (holding that “refusal directed to the alleged harasser, even where the harasser is a supervisor, cannot be equated with notice to the employer.”).

170. *See Livingston v. Marion Bank & Tr. Co.*, 30 F. Supp. 3d 1285, 1316 (N.D. Ala. 2014) (holding that “a complaint made to the harassing supervisor, accompanied by a demand that he cease engaging in sexually harassing conduct generally, may be protected where the employee could reasonably believe that the supervisor’s harassment, viewed cumulatively, was unlawful under Title VII.”); *see also Ross v. Baldwin Cty. Bd. of Educ.*, No. 06-0275-WS-B, 2008 U.S. Dist. LEXIS 23715, at *20-21 (S.D. Ala. Mar. 24, 2008) (holding that a plaintiff demanding that her supervisor stop groping her while at work “unquestionably” was a protected activity under Title VII).

171. *Livingston*, 30 F. Supp. 3d at 1316 (citing *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 954 (9th Cir. 2009)).

[I]f a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all

looked to the Eighth Circuit's reasoning in *Ogden* for its ruling.¹⁷² The court further went on to state that to hold that retaliation claims may only proceed when complaints are made to an official designated by the employer would undermine the purpose of Title VII's protections.¹⁷³ Moreover, this narrow reading of Title VII would frustrate its remedial purpose and "transform the protection against retaliation into a mirage."¹⁷⁴

H. The D.C. District Court

The D.C. District Court has repeatedly held that rejecting sexual advances constitutes a protected activity under Title VII.¹⁷⁵ The court does not give a reasoning for its holdings, but rather cites cases from other districts and circuit courts, like *Ogden*.¹⁷⁶

IV. PROPOSAL

With only three circuits ruling on the issue, there is no clear majority as to how the circuits are addressing this issue.¹⁷⁷ Further causing confusion, in the circuits refusing to address the issue, the district courts are split. However, the rulings in the Sixth and Eighth Circuits provide a detailed analysis of Title VII's opposition clause, giving a well-rounded legal basis for finding that refusing

of the comments to which he or she has been subjected . . . a complaint about one or more of these comments is protected behavior.

Id.

172. *Ross*, No. 06-0275-WS-B, 2008 U.S. Dist. LEXIS 23715, at *20–21 (stating "[t]he reasoning of the *Ogden* line of authority is sound.").

173. *Id.*

174. *Id.*

175. *See Dozier-Nix v. District of Columbia*, 851 F. Supp. 2d 163, 168 (D.D.C. 2012) (stating "[s]tatutorily protected activities include rebuffing unwanted sexual advances."); *see also Miller v. Wash. Metro. Area Transit Auth.*, 2007 U.S. Dist. LEXIS 42385 *, 89 Empl. Prac. Dec. (CCH) P42,860 (D.D.C. June 11, 2007) (holding that a plaintiff participated in a protected activity when rejected sexual advances); *see also McCain v. CCA of Tenn., Inc.*, 254 F. Supp. 2d 115, 124 (D.D.C. 2003) (stating that there is "no question" that rejecting sexual advances is a statutorily protected activity).

176. *See Dozier-Nix*, 851 F. Supp. 2d at 168 (D.D.C. 2012) (compiling cases).

177. *See LeMaire v. Louisiana*, 480 F.3d 383, 389 (5th Cir. 2007) (holding that a "single, express rejection" of sexual advances does not constitute "protected activity" for purposes of a Title VII retaliation claim); *Contrast with EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067-68 (6th Cir. 2015) (stating that if an employee resists a supervisor's sexual harassment, then the opposition clause provides protection for that behavior) and *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (finding that a plaintiff engaged in protected conduct when telling a supervisor to stop harassing her).

sexual advances is a protected activity, and other districts should use this analysis in their rulings.¹⁷⁸

The district courts give varying reasons for their decisions, not all of which are wholly consistent with the language of Title VII. For instance, the district courts in *Del Castillo v. Pathmark Stores* and *Rashid v. Beth Isr. Med. Ctr.* stated that every harassment claim would also be a retaliation claim if refusing sexual advances was a protected activity.¹⁷⁹ However, the Sixth Circuit correctly addressed this in *EEOC v. New Breed Logistics* and looked to the language in Title VII, finding that sexual harassment claims cannot turn into retaliation claims without an adverse employment action, thereby silencing the arguments from the Second Circuit's district courts.¹⁸⁰

The Sixth Circuit's argument is compelling. Sexual harassment claims provide relief for a plaintiff even when no adverse employment action is taken against the employee. It is not logical to conclude that sexual harassment claims will automatically become retaliation claims if refusing sexual advances is considered a protected activity. Retaliation claims require an adverse employment action.¹⁸¹ Further, it is difficult to argue the distinction between a complaint to a harassing supervisor and a complaint to a neutral supervisor about a coworker's harassment. When an employee's supervisor is the one doing the harassing, to whom can an employee voice her complaint? The Northern District of Illinois found that under very specific circumstances, a plaintiff's complaint to a harassing supervisor would be enough to constitute a protected activity.¹⁸² However, those facts are limited to cases where the harasser is an immediate supervisor, second-in-command at the company, old friends with the head of the company, and the harasser did not inform the plaintiff of the sexual harassment policy

178. *See id.* (discussing the opposition clause under Title VII and finding that an employee instructing a supervisor to stop harassing her constitutes protected conduct under Title VII); *see also New Breed Logistics*, 783 F.3d at 1067-68 (finding that refusing sexual advances constitutes a protected activity under the opposition clause because the employee is opposing sexual harassment, an unlawful activity).

179. *Del Castillo v. Pathmark Stores*, 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996); *Alhozbur v. McHugh*, No. C 09-01576 EJD, 2011 U.S. Dist. LEXIS 79407, at *22 (N.D. Cal. July 21, 2011).

180. *New Breed Logistics*, 783 F.3d at 1068 (stating, "[a]ssuming the other elements of a prima facie case are present, a harassment claim only becomes a retaliation claim if, after the harassed opposes the harassment, the harasser initiates adverse action against the victim. Thus, giving retaliation victims protection where they complain to the harasser will not morph all harassment claims into a retaliation claim, absent some materially adverse action.").

181. *Van v. Ford Motor Co.* No. 14 cv 8708, 2016 U.S. Dist. LEXIS 40012, at *11 (N.D. Ill. Mar. 28, 2016) (stating the requirements for a retaliation claim, including that there be an adverse employment action against the employee).

182. *Roberts v. Cty. of Cook*, No. 01 C 9373, 2004 U.S. Dist. LEXIS 8089, at *5 (N.D. Ill. May 7, 2004).

and warned her not to complain to management.¹⁸³ These facts should not be necessary; if the alleged harasser is a direct supervisor, requiring a plaintiff to circumvent the supervisor and complain to management that she may not have access to communication with puts an unreasonable burden on the plaintiff.

Moreover, imagine a scenario where an employee rejects a supervisor's sexual advances once. In order to keep her job, the employee may not report this single incident in hopes that the rejection is enough to stop the harasser from continuing. However, imagine that the harasser continues, but fires the employee immediately after she rejects his advances a second time. The employee has not had the opportunity to complain to someone outside of the supervisor, let alone file a complaint with the EEOC. Under the logic of the rulings in cases such as *Bowers v. Radiological Soc'y of North America, Inc.*, the employee will not have a retaliation claim under Title VII without a complaint to management or filing a claim with the EEOC, and there is no cause of action for the employee in this scenario.¹⁸⁴ This kind of logic could potentially incentivize harassers to simply fire employees before they have the chance to file a complaint.

With no guidance from the circuit courts and inconsistent rulings from district courts, it is also nearly impossible for employers and employees to know how to proceed in such retaliation claims. For this reason, the Circuit Courts need to address this issue and give the district courts a standard to follow so that rulings remain consistent. Further, the Circuit Courts should follow the Sixth and Eighth Circuits in their holdings that rejecting sexual advances is protected activity for retaliation claims under Title VII.¹⁸⁵

In 2000, the Eighth Circuit held that Ogden engaged in "the most basic form of protected activity" in telling her supervisor to stop harassing her.¹⁸⁶ However, the court only spent a few sentences of the opinion discussing this holding. The court simply stated that refusing sexual advances was opposing discriminatory conduct under Title VII, therefore constituting a protected activity.¹⁸⁷ This reasoning is based solely on the language of Title VII, looking at the opposition clause, and does not stipulate that certain facts be present. This is the approach that should be taken by other Circuit

183. *Id.*

184. *Bowers v. Radiological Soc'y of North America, Inc.*, 57 F. Supp. 2d 594, 599 (N.D. Ill. 1999) (holding that an employee cannot state a claim for retaliation simply based on rejection of a sexual relationship, but rather must submit a complaint to management or file a charge).

185. *New Breed Logistics*, 783 F.3d at 1068; *TRP Acquisition, Inc.*, No. 16 C 3635, at *5.

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

187. *Id.*

Courts. The basic statutory language of the opposition clause states that it is unlawful to retaliate against an employee for opposing discriminatory conduct.¹⁸⁸ Because sexual harassment is unlawful under Title VII,¹⁸⁹ rejecting a harassing supervisor's advances falls into opposing discriminatory conduct under the opposition clause.

While there is an argument that an employee must explain that she is objecting to unlawful behavior because she reasonably believes that the conduct violates Title VII,¹⁹⁰ this argument is flawed and based on district court cases holding that an employee "has to at least say something to indicate her gender is an issue."¹⁹¹ While this statement may be true in gender discrimination cases not involving sexual harassment, refusing sexual advances of a harassing supervisor logically is opposing discrimination based on gender under Title VII.¹⁹² There is no logic in requiring a victim to go one step farther and tell the supervisor she is rejecting his advances because it is unlawful. Sexual harassment is a gender-based discrimination by its very nature, and commonly known to be unlawful. Moreover, supervisors will likely have more knowledge of the sexual harassment policy their companies have put in place; it is unnecessary to require an employee being harassed by someone put in power over them to have to explain that the conduct is unlawful.

In 2015, the Sixth Circuit, citing *Ogden*, held that "a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII."¹⁹³ The Sixth Circuit also chose to look no further than the language in the opposition clause of Title VII's anti-retaliation provision.¹⁹⁴ The Sixth Circuit also looked to the language used by the Supreme Court of the United States in *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee* in determining that the term "oppose" has a broad meaning, including to "resist."¹⁹⁵ Using the Supreme Court's definition of "oppose" to interpret Title VII, the Sixth Circuit

188. 42 U.S.C. § 2000e-3(a) (172).

189. *Id.*

190. See Watral, *supra* note 95, at 537–38 (stating "It is not sufficient that the employee believe that the supervisor's conduct was objectively unreasonable; she must also explain that she is objecting to the unlawful behavior for the reason that the conduct violates Title VII.").

191. *Sitar v. Indiana Department of Corrections*, 344 F.3d 720, 727 (7th Cir. 2003) (quoting *Miller v. American Family Mutual Insurance*, 203 F.3d 997, 1008 (7th Cir. 2000)).

192. *Sitar* involved an employee who complained to her supervisor that she was being treated badly in her office. *Sitar*, 355 F.3d at 727. The court held that poor treatment did not indicate she was being discriminated against because of her gender. *Id.*

193. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015).

194. *Id.*

195. *Id.*; see also *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271, 276 (2009).

held that demanding a supervisor stop harassing an employee constitutes resisting harassment and therefore is a protected activity under Title VII.¹⁹⁶ The Sixth Circuit also pointed out that other circuits have failed to address the language in the opposition clause when reaching the conclusion that refusing sexual advances is not a protected activity, and therefore found these rulings unpersuasive.¹⁹⁷

Further, as the Sixth Circuit elaborates, holding that rejecting sexual harassment is a protected activity will not conflate harassment and retaliation claims.¹⁹⁸ Without a materially adverse action, a harassment claim will never morph into a retaliation claim.¹⁹⁹ After all, the adverse employment action is the heart of a retaliation claim; it is the “retaliation” portion of a retaliation claim.²⁰⁰ Without an adverse action, one is left with a harassment claim. They are two separate actions that will not be morphed simply because refusing sexual advances is considered a protected activity.

The remaining circuit courts should follow the reasoning set forth in *Ogden* and *New Breed Logistics*, finding that rejecting sexual advances from a supervisor is opposing an unlawful employment practice and therefore is a protected activity for purposes of a retaliation claim under Title VII. This is a clear standard for district courts to follow, and it gives employees and employers an answer when looking at whether valid retaliation claims are possible. Without a clear standard, both employees and employers are litigating retaliation claims without a clear direction on their validity. It is important to solidify this issue to avoid expensive litigation for plaintiffs who currently may not have valid claims. It is also important for employers drafting sexual harassment and anti-retaliation policies to know what is and what is not a protected activity.²⁰¹

196. *New Breed Logistics*, 783 F.3d at 1067–68.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 721 (2nd Cir. 2010) (quoting *Thomlison v. Sharp Elecs. Corp.*, 99 Civ. 9539 (CM), 2000 U.S. Dist. LEXIS 18979, at *12 (S.D.N.Y. Dec. 22, 2000)) (stating “[a]ffirmative efforts to punish a complaining employee are at the heart of any retaliation claim.”).

201. *See* Mark I. Schickman, *Sexual Harassment*, AMERICAN BAR ASSOCIATION. (last visited Sept. 25, 2016). www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/w96shi.html (laying out the elements of a good sexual harassment policy: statement of policy, definition, non-retaliation policy, specific terms for prevention, a reporting procedure, and timely reporting requirement). A proper non-retaliation policy and the reporting procedures could include the information regarding where rejecting sexual harassment fits in. *Id.*

V. CONCLUSION

Without direction from the Circuit Courts, inconsistent district court rulings have left employees with no direction whether or not they have a valid retaliation claim under Title VII for rebuffing sexual advances. Therefore, it is important for the Circuit Courts to begin to deal with this issue, rather than refusing to address it. In addressing it, the Circuit Courts should follow the reasoning of the Eighth and Sixth Circuits and many of the district courts in determining that refusing sexual advances constitutes a protected activity for a retaliatory discharge claim under Title VII.