

When “No” Is Not Enough: The Express Rejection of Sexual Advances under Title VII

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INTRODUCTION

The antiretaliation provision of Title VII of the Civil Rights Act of 1964¹ provides that it is unlawful for an employer to discriminate against an employee after the employee opposes a practice that is unlawful under Title VII.² To establish a retaliation claim under Title VII’s opposition clause, the employee must prove that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) the protected activity was the but-for cause of the adverse action.³ Recently, a circuit split has developed over whether rejecting a supervisor’s sexual advances constitutes “protected activity” sufficient to establish an actionable retaliation claim. This Comment seeks to determine whether an employee engages in protected activity when “expressly rejecting” her supervisor’s sexual advances—that is, by simply stating “no” in response to the advances.⁴

The Fifth Circuit has taken the view that an employee does not engage in protected activity when rejecting a supervisor’s sexual advances,⁵ whereas the Eighth Circuit has determined that the employee engages in the “most basic form of protected activity” when rebuffing a supervisor’s advances.⁶ District courts reaching the Fifth Circuit’s conclusion have expressed two rationales for not considering the rejection alone to constitute protected activity: (1) Title VII’s antidiscrimination and antiretaliation provisions protect different types of conduct, and the refusal is better protected by the antidiscrimination provision; and

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¹ Title VII of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000e et seq.

² 42 USC § 2000e-3(a).

³ *Murray v Chicago Transit Authority*, 252 F3d 880, 890 (7th Cir 2001).

⁴ An “express rejection” of sexual advances includes the employee either stating “no” to the supervisor’s advances or stating “no” with an ambiguous statement, such as “I do not like you.” An express rejection does not include the employee stating “no” in addition to stating that the advance is unlawful. For a further discussion of the express rejection, see Part II.A.

⁵ See *LeMaire v Louisiana Department of Transportation*, 480 F3d 383, 389 (5th Cir 2007); *Frank v Harris County*, 118 Fed Appx 799, 804 (5th Cir 2004).

⁶ *Ogden v Wax Works Inc*, 214 F3d 999, 1007 (8th Cir 2000).

(2) the rejection of a supervisor's advances lacks the antiretaliation provision's requirement that the employee speak out against a practice. On the other hand, courts reaching the Eighth Circuit's conclusion have relied primarily on one rationale: the employee should be protected when rejecting a supervisor's sexual advance because the advance itself is an unlawful employment practice under Title VII.

Part I of this Comment begins with a brief overview of Title VII's antidiscrimination and antiretaliation provisions and the Supreme Court's limited guidance on the antiretaliation provision. Part II examines the various approaches taken by the circuit and district courts to determine whether the rejection of sexual advances constitutes protected activity. Part III then reevaluates Title VII's protected activity prong under two distinct factual situations: the single express rejection of a sexual advance and the express rejection of an advance that is part of a larger pattern of similar advances. This Part explains that courts should examine each fact pattern in light of whether the employee had a reasonable belief that the supervisor's conduct violated Title VII and whether the employee spoke out against an unlawful practice. This Part concludes by explaining that although an employee's express rejection of sexual advances does not constitute protected activity, the employee could fall within the protections of the antiretaliation provision by explaining her reasons for refusing the advance to the supervisor. Ultimately, this Comment does not seek to remove Title VII protection when an employee rejects her supervisor's advances but advocates evaluating the employee's rejection under the proper Title VII provision. This Comment concludes by explaining when Title VII's anti-discrimination provision—rather than the antiretaliation provision—applies to an employee's objections.

I. BACKGROUND: TITLE VII'S STATUTORY PROVISIONS

A. Title VII's Antidiscrimination Provision

Title VII's antidiscrimination provision seeks to protect employees from discrimination in the workplace based on social statuses, such as race, color, religion, sex, and national origin. There are two basic types of discrimination that are protected under the antidiscrimination provision: discrimination in normal business operation and sexual harassment. Discrimination in normal business operation includes termination of employment, demotion, and the refusal to hire or promote an

employee because of that employee’s social status.⁷ Sexual harassment includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁸

Within the realm of sexual harassment, courts traditionally have recognized two forms of harassment: quid pro quo harassment and hostile work environment harassment. Quid pro quo sexual harassment occurs when an employer or supervisor attempts to extract sexual favors from an employee by making threats or promises. To establish a successful quid pro quo claim, the employee must prove that: (1) her supervisor tried to elicit sexual favors; and (2) she experienced some changed term or condition of employment following the harassment.⁹ Hostile work environment harassment differs from quid pro quo harassment in that the employee does not experience a tangible adverse employment action as a result of the discrimination. Instead, an employee claiming hostile work environment harassment must establish that the employer’s harassment was “sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere,” and that the harassment was unwelcome.¹⁰ Courts consider the “frequency” and “severity” of the harassing conduct when assessing a hostile work environment claim.¹¹

The Supreme Court has explained that an employer is generally vicariously liable for the discriminatory actions of its supervisors but allows the employer to assert an affirmative defense against liability under certain circumstances. In *Burlington Industries, Inc v Ellerth*,¹² the Court explained that the employer is always liable for its supervisor’s actions so long as the actions lead to a tangible employment action, which includes “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹³ In practice, this means that an employer is generally liable when a supervisor engages in quid pro quo harassment. On the other

⁷ For a discussion of Title VII harassment, see Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 Harv J L & Pub Pol 307, 308 (1998).

⁸ 29 CFR § 1604.11(a).

⁹ See, for example, *DeClue v Central Illinois Light Co*, 223 F3d 434, 437 (7th Cir 2000).

¹⁰ See, for example, *McNeal v Montgomery County*, 307 Fed Appx 766, 776 (4th Cir 2009).

¹¹ Id (concluding that “five accusations of theft and [the supervisor’s] requirement that [the employee] bring in doctor’s notes and provide for more detail about his sick leave hardly rise to the level of ‘hostile or abusive’ treatment”).

¹² 524 US 742 (1998).

¹³ Id at 761 (noting that a “bruised ego” is not sufficient to establish a tangible employment action).

hand, the Court explained that when no tangible employment action is taken (in a hostile work environment claim), the employer may raise an affirmative defense to liability.¹⁴ This defense includes: (1) that the employer exercised reasonable care to prevent and correct promptly the sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventative opportunities afforded by the employer.¹⁵ In practice, this means that an employer can often avoid liability for hostile work environment harassment, so long as it can establish that it took reasonable steps to rectify the harassment.

B. Title VII's Antiretaliation Provision

Title VII's antiretaliation provision protects employees based on their conduct, as opposed to employees' statuses (which are protected by the antidiscrimination provision). The relevant text of the antiretaliation provision states:

It shall be an unlawful employment practice¹⁶ for an employer to *discriminate* against any of his employees or applicants for employment . . . because he has *opposed* any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under [Title VII].¹⁷

The first provision of the antiretaliation clause is known as the opposition clause; the second provision is known as the participation clause. This Comment focuses solely on the opposition clause.¹⁸

To establish the *prima facie* case of retaliation under the opposition clause, lower courts require the employee to demonstrate that: (1) she engaged in an activity that Title VII protects (such as reporting a Title VII violation to a human resources supervisor); (2) she was subjected to an adverse action; and (3) a causal connection exists be-

¹⁴ *Id.* at 765.

¹⁵ *Id.* See *Faragher v City of Boca Raton*, 524 US 775, 807 (1998).

¹⁶ For purposes of this Comment, an unlawful employment practice is either *quid pro quo* or hostile work environment harassment.

¹⁷ 42 USC § 2000e-3(a) (emphasis added).

¹⁸ The participation clause, which covers nearly all incidents in which an employee communicates allegations or evidence of discrimination to a civil rights enforcement agency or participates in an employer's internal investigation pursuant to an Equal Employment Opportunity Commission (EEOC) charge, does not apply when the employee complains directly to her supervisor. See *Abbott v Crown Motor Co.*, 348 F3d 537, 543 (6th Cir 2003); *EEOC v Total System Services Inc.*, 221 F3d 1171, 1174 n 2 (11th Cir 2000) (noting that the participation clause does not protect an employee's participation in "an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC").

tween the opposition and the adverse action.¹⁹ A minority of circuit courts also requires that the employee prove a fourth element—that the employer was aware of the employee’s opposition.²⁰ For the purposes of this Comment, protected activity involves an employee’s opposition to an unlawful employment practice—namely, her opposition to her supervisor’s sexual advances.

Title VII indicates that all opposition claims must include an underlying discrimination claim, although the employee is not required to succeed on her discrimination claim to prevail on a retaliation claim. The typical sequence of events in an opposition clause case based on quid pro quo harassment proceeds as follows: (1) the supervisor solicits sexual favors but is rebuffed; (2) an adverse employment action is taken against the employee; (3) the employee opposes the conduct (for example, by complaining of the adverse action to a human resources representative); and (4) an adverse action is taken against the employee *because of* her opposition.²¹ If the employee alleges hostile work environment harassment, then the first two steps of the sequence instead involve multiple discriminatory acts.²² Although an employee can file both a discrimination claim and a retaliation claim, Title VII’s statutory cap on compensatory and punitive damages often limits an employee’s total potential recovery.²³ Thus, some individuals will not gain additional damages for concurrent discrimination and retaliation claims,²⁴ whereas others will obtain additional damages when bringing concurrent claims.²⁵

¹⁹ See, for example, *Davis v Coca-Cola Bottling Co.*, 516 F3d 955, 978 n 52 (11th Cir 2008); *Harvill v Westward Communications*, 433 F3d 428, 439 (5th Cir 2005).

²⁰ See, for example, *McMenemy v City of Rochester*, 241 F3d 279, 282–83 (2d Cir 2001).

²¹ The first two elements constitute the underlying discrimination claim, and the second two elements form the retaliation claim. See, for example, *Russell v University of Texas*, 234 Fed Appx 195, 198–200 (5th Cir 2007) (outlining a sequence that began with unwanted sexual advances by a supervisor, rejection of those advances by the employee, the supervisor’s rejection of employee’s application for a tenure-track position, the employee filing an informal grievance for harassment, and failure of the supervisor to renew the employee’s contract).

²² A hostile work environment claim does not include an adverse employment action in response to the discriminatory act, which means that the second element is not present for these claims. See, for example, *Williams v WD Sports, Inc.*, 497 F3d 1079, 1084 (10th Cir 2007).

²³ See 42 USC § 1981a(b). For example, for employers with more than five hundred employees, the statutory cap is set at \$300,000. *Id.*

²⁴ See, for example, *Ogden v Wax Works Inc.*, 214 F3d 999, 1002, 1009–11 (8th Cir 2000) (noting that the plaintiff could only recover \$260,000 even though the jury awarded \$300,000 for her hostile work environment claim due to the statutory cap).

²⁵ For example, in *Hudson v Reno*, 130 F3d 1193 (6th Cir 1997), because the plaintiff only received \$250,000 for her discrimination claim, the district court allowed her to recover an additional \$50,000 in damages for her retaliation claim. *Id.* at 1196. Although the jury originally

The opposition clause excludes from protected activity any claims that are “completely groundless.”²⁶ The plaintiff must establish: (1) that she has a good faith belief that the employer is engaging in an unlawful employment practice; and (2) that the belief is objectively reasonable in light of the facts.²⁷ This only requires that the discrimination claim appear legitimate on the surface. It does not require that the employee prevail on her Title VII discrimination claim or have opposed a practice that in fact violated Title VII before succeeding on a retaliation claim.²⁸ Thus, it is improper for an employer to retaliate against any employee making a good faith, yet unsuccessful, discrimination complaint. Courts have found opposition conduct under the antiretaliation provision in a number of circumstances, such as when an employee files an Equal Employment Opportunity Commission (EEOC) complaint,²⁹ files a formal complaint with the employer’s human resources department,³⁰ or files a police report.³¹

The Supreme Court recently addressed the scope of the opposition clause in *Crawford v Metropolitan Government of Nashville*,³² holding that the opposition clause extends to an employee who speaks out against discrimination during an employer’s internal investigation, even when the employee does not initiate the complaint to the Human Resources department.³³ The Court explained that there is “nothing in [Title VII that] 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.”³⁴ Thus, the Court determined that it is sufficient that the employee notify

awarded the employee \$500,000 for the retaliation claim, the court capped this amount at \$50,000 to comply with Title VII’s statutory cap. *Id.*

²⁶ *Fine v Ryan International Airlines*, 305 F3d 746, 752 (7th Cir 2002) (stating that courts find claims to be groundless when they rest on “facts that no reasonable person possibly could have construed as a case of discrimination”). See also *McDonnell v Cisneros*, 84 F3d 256, 259 (7th Cir 1996) (“There is nothing wrong with disciplining an employee for filing frivolous complaints.”).

²⁷ *Peters v Jenney*, 327 F3d 307, 321 (4th Cir 2003). See *Brannum v Missouri Department of Corrections*, 518 F3d 542, 547 (8th Cir 2008); *Fine*, 305 F3d at 752.

²⁸ See, for example, *Fine*, 305 F3d at 752 (noting that the claim is not groundless when discovery and a harder look at the full picture reveal that apparently legitimate claims ultimately lack merit).

²⁹ See, for example, *Fischer v Avandale, Inc.*, 519 F3d 393, 409 (7th Cir 2008); *Ray v Henderson*, 217 F3d 1234, 1240 n 3 (9th Cir 2000); *Walker v Thompson*, 214 F3d 615, 629 (5th Cir 2000).

³⁰ See, for example, *Mariani-Colon v Department of Homeland Security*, 511 F3d 216, 223 (1st Cir 2007); *Kasper v Federated Mutual Insurance Co.*, 425 F3d 496, 502 (8th Cir 2005).

³¹ See, for example, *Scarborough v Board of Trustees, Florida A&M University*, 504 F3d 1220, 1222 (11th Cir 2007); *Worth v Tyer*, 276 F3d 249, 265 (7th Cir 2001).

³² 129 S Ct 846 (2009).

³³ *Id.* at 849.

³⁴ *Id.* at 851.

her employer of her supervisor’s conduct by answering questions, even if this opposition is merely reactive.³⁵

Although the Supreme Court answered the question of whether an employee must initiate the opposition conduct in an internal investigation (finding that this is not a requirement), the Court did not answer the question presented by this Comment: whether an employee engages in protected activity under Title VII’s opposition clause when she expressly rejects her supervisor’s sexual advances. In fact, the two concurring justices in *Crawford* emphasized that “[t]he question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear.”³⁶ Instead, the Court simply highlighted the ambiguity in this area, without speaking to the present issue.

II. CONFLICTING CASE LAW ON THE EXPRESS REJECTION OF SEXUAL ADVANCES

Within the last two decades, the circuit and district courts have attempted to differentiate the type of conduct that is and is not protected by Title VII’s antiretaliation provision. The courts currently are split or undecided on the issue of whether rejecting a supervisor’s sexual advances constitutes protected activity under Title VII’s opposition clause. Whereas the Eighth Circuit and a number of district courts have held that rejecting a supervisor’s sexual advances constitutes protected activity, the Fifth Circuit and an equally large number of district courts have held that the rejection does not constitute protected activity. Additionally, a number of circuit courts have recognized this issue but have failed to reach a decision on the merits.³⁷ De-

³⁵ *Id.*

³⁶ *Crawford*, 129 S Ct at 855 (Alito concurring). Although the majority, in dicta, rejected the employer’s argument that inappropriate conduct, such as “flip[ping] [the supervisor] a bird,” did not constitute protected activity, *id.* at 851 n 2, the concurrence made clear that the Court was not addressing the question presented in this Comment. Rather, the majority’s statement was simply concerned with the employee’s characterization of her response to the human resources representative, not her response to the supervisor. See *id.* at 855.

³⁷ See *Tate v Executive Management Services, Inc.*, 546 F3d 528, 532 (7th Cir 2008) (declining to resolve the circuit split because the plaintiff did not establish that he “reasonably believed in good faith [that] the practice [he] opposed violated Title VII”); *Fitzgerald v Henderson*, 251 F3d 345, 366 (2d Cir 2001) (concluding that because the plaintiff’s retaliation claim was coextensive with her hostile work environment claim and would not warrant a distinct award, the court need not reach the issue of whether the plaintiff engaged in protected activity when resisting a supervisor’s sexual advances); *Farrell v Planters Lifesavers Co.*, 206 F3d 271, 279 n 4 (3d Cir 2000) (noting that because the issue was not raised on appeal, it did not have to be decided before the

spite the relative evenness of the split, few courts have provided the same justifications for their decisions.

This Part first explains the scope of this Comment and the question that this Comment seeks to answer: whether an express rejection of sexual advances constitutes protected activity. Part II.B–C then provides an overview of the approaches used by courts finding that the rejection of sexual advances should constitute protected activity and those finding that this conduct should fall outside the antiretaliation provision.

A. The Express Rejection of Sexual Advances

This Comment addresses whether an employee engages in protected activity under Title VII’s antiretaliation provision when she rejects her supervisor’s sexual advances. For the purposes of this Comment, “sexual advances” is used to describe a broad range of conduct whereby a supervisor³⁸ solicits an employee for sexual activity or discusses sexually explicit topics with the employee. For example, sexual advances can include explicit conduct, such as asking the employee to engage in sexual relations,³⁹ inviting the employee to a motel room,⁴⁰ and asking the employee to engage in a relationship,⁴¹ or less extreme conduct, such as telling the employee sexually explicit stories.⁴²

This Comment is also limited to evaluating situations in which an employee makes an “express rejection” to her supervisor’s sexual advances. An express rejection occurs when an employee simply states “no” in response to her supervisor’s advances or states “no” in addition to a personal reason for the rejection.⁴³ Thus, this Comment’s discussion of an employee’s express rejection does *not* refer to those rejections that include an explanation for the opposition that references

court); *Jordan v Clark*, 847 F2d 1368, 1376 (9th Cir 1988) (determining that the district court’s findings were not clearly erroneous that the “advances [did not] actually occur[] and were [not] an ‘unlawful employment practice’”).

³⁸ All of the circuit and district court cases in this Comment address the employee’s rejection of a supervisor’s advances, as compared to a coworker’s or an employer’s advances.

³⁹ See, for example, *Clark*, 847 F2d at 1371.

⁴⁰ See, for example, *Ogden v Wax Works Inc*, 214 F3d 999, 1003 (8th Cir 2000); *Coe v Northern Pipe Products, Inc*, 589 F Supp 2d 1055, 1069 (ND Iowa 2008).

⁴¹ See, for example, *Tate*, 546 F3d at 530.

⁴² See, for example, *LeMaire v Louisiana Department of Transportation*, 480 F3d 383, 385 (5th Cir 2007).

⁴³ Courts often rely on the phrase “express rejection” to describe an employee’s refusal of sexual advances. For example, if the employee stated, “No, I am married,” this constitutes an express rejection because the employee has not indicated that she believes the advance to be unlawful. See *Tate*, 546 F3d at 530 (indicating that the employee expressly rejected his supervisor’s sexual advances, when he stated that he “just wanted to keep the slate clean between [him] and [his] wife”).

Title VII or makes some indication that the employee believes the conduct to be unlawful.

B. Eighth Circuit’s Approach: The Rejection of Sexual Advances Is Protected Activity

The Eighth Circuit has determined that an employee engages in protected activity when rejecting a supervisor’s sexual advances. In *Ogden v Wax Works, Inc.*,⁴⁴ the employee, Kerry Ogden, was propositioned multiple times by her supervisor,⁴⁵ and, when she rebuffed his advances, he criticized her performance and routinely screamed at her.⁴⁶ Ogden also alleged that her supervisor conditioned her evaluation and her raise on her willingness to submit to his advances and that he declined her request to take vacation leave after she refused to accompany him on a three-day vacation.⁴⁷ The court agreed with Ogden that she engaged in the “most basic form of protected activity” when she told her supervisor to stop his offensive conduct, which established a valid retaliation claim.⁴⁸ The court relied on lower court cases reaching the same conclusion without providing any additional justification or explanation for its holding.⁴⁹ In addition to the retaliation claim, the court also upheld the jury’s finding that there was sufficient evidence to support Ogden’s quid pro quo and hostile work environment harassment claims under the antidiscrimination provision.⁵⁰

Most district courts finding protected activity rely on the reasoning that opposing sexually harassing behavior constitutes “opposing any practice” made unlawful by Title VII. Because these courts determine that sexual harassment is an unlawful employment practice, and an employee’s refusal is a means of opposing such behavior, they conclude that the refusal should constitute protected activity.⁵¹ For example, in *Roberts v County of Cook*,⁵² the plaintiff alleged that her supervisor repeatedly reduced her job responsibilities after she resisted his

⁴⁴ 214 F3d 999 (8th Cir 2000).

⁴⁵ Id at 1003 (indicating that Ogden’s supervisor grabbed Ogden by her waist and asked her to a hotel room and put his arm around Ogden in a bar while intoxicated on two occasions).

⁴⁶ Id.

⁴⁷ Id at 1003–04. Ogden ultimately ended her employment with Wax Works before receiving an annual raise based on her supervisor’s evaluation. Id at 1004.

⁴⁸ *Ogden*, 214 F3d at 1007.

⁴⁹ See id.

⁵⁰ Id at 1006.

⁵¹ See, for example, *Little v NBC*, 210 F Supp 2d 330, 385–86 (SDNY 2002). See also *Wagner v Burnham*, 2006 WL 266551, *17 (NDNY) (collecting cases).

⁵² 2004 WL 1088230 (ND Ill).

sexual advances.⁵³ The court found that her refusals constituted protected activity because sexual harassment is an unlawful employment practice under Title VII.⁵⁴ The court also based its conclusion on Title VII's purpose of protecting employees in the workplace, stating that the "victim of harassment should not fear retaliation if she resists sexually predatory behavior by colleagues or supervisors."⁵⁵ Other district courts have reached the same conclusion by citing to older district court cases without providing any further discussion.⁵⁶

In addition, the Southern District of New York has found that rejecting a supervisor's sexual advances constitutes protected activity when the specific circumstances of the case indicate that the plaintiff does not have other means available for reporting the discriminatory conduct.⁵⁷ In *Laurin v Pokoik*,⁵⁸ the plaintiff, Eleanor Laurin, complained that she was fired after she rejected her supervisor's sexual advances.⁵⁹ The court noted that although Laurin's retaliation claim seemed duplicative of her discrimination claim, no formal internal complaint mechanism was in place to allow her to voice her opposition when her alleged harasser was also her supervisor.⁶⁰ Because declining the sexual advances was one of very few options available for opposing the conduct, the court concluded that, "given the circumstances," her refusals constituted protected activity.⁶¹ The court did not address Laurin's discrimination claim because it was not before the court on summary judgment.

⁵³ *Id.* at *3. See *Roberts v County of Cook*, 213 F Supp 2d 882, 886 (ND Ill 2002) ("Roberts alleges that she was demoted from an office manager to a receptionist, transferred from an office to a space in a file room, that her responsibilities were significantly reduced to menial ones, and her opportunities for promotion were diminished.").

⁵⁴ *Roberts*, 2004 WL 1088230 at *4-5.

⁵⁵ *Id.* at *5.

⁵⁶ These older court cases include: *Fleming v South Carolina Department of Corrections*, 952 F Supp 283, 288 (D SC 1996); *Equal Employment Opportunity Commission v Dominos Pizza, Inc.*, 909 F Supp 1529, 1536 (MD Fla 1995); *Burrell v City University of New York*, 894 F Supp 750, 761 (SDNY 1995); *Boyd v James S. Hayes Living Health Care Agency, Inc.*, 671 F Supp 1155, 1167 (WD Tenn 1987).

⁵⁷ *Laurin v Pokoik*, 2005 WL 911429, *4 (SDNY). See also *Estes v Illinois Department of Human Services*, 2007 WL 551554, *4 (ND Ill) (holding that the plaintiff engaged in protected activity when the alleged harasser was the plaintiff's supervisor and the company made no effort to apprise the plaintiff of its sexual harassment policy).

⁵⁸ 2005 WL 911429 (SDNY).

⁵⁹ *Id.* at *1-2 (explaining that the sexual advances included sexual jokes and comments in the office and Laurin's supervisor groping her on several occasions).

⁶⁰ *Id.* at *4 (noting that the only other two possible supervisors included her harasser's business partner and an attorney).

⁶¹ *Id.*

C. Fifth Circuit’s Approach: The Rejection of Sexual Advances Is Not Protected Activity

The Fifth Circuit, on the other hand, has held that an express rejection of a supervisor’s sexual advances does not constitute protected activity. In *LeMaire v Louisiana Department of Transportation*,⁶² the employee, Rene LeMaire, alleged that his supervisor, Milton Endres, told him sexually explicit stories on two occasions and subjected him to derogatory comments.⁶³ After LeMaire objected to these stories, Endres ordered LeMaire to spray herbicide on a large lawn, which LeMaire considered to be outside of his job description and a retaliatory act as a result of his objection.⁶⁴ LeMaire later complained to another supervisor about the sexually explicit stories and Endres’s supposed retaliatory conduct.⁶⁵ Approximately two weeks after the incident, LeMaire was given a two-week suspension for refusing to spray the herbicide as directed by Endres and ultimately was terminated two months after the incident.⁶⁶

Despite this “arguabl[y] protected activity,” the Fifth Circuit concluded that “LeMaire . . . provides no authority for the proposition that rejecting sexual advances constitutes a protected activity for purposes of a retaliation claim under Title VII.”⁶⁷ The court relied on an unpublished Fifth Circuit opinion reaching the same conclusion but, like the Eighth Circuit, provided no further substantive reasoning.⁶⁸ Although the court did not find in favor of LeMaire for the retaliation claim, it determined that the district court erred in granting the employer’s motion for summary judgment on LeMaire’s hostile work environment and same-sex harassment claims and, accordingly, remanded the case to the district court.⁶⁹

A significant number of district courts also have determined that the refusal of a supervisor’s sexual advances is not protected by Title VII’s

⁶² 480 F3d 383 (5th Cir 2007).

⁶³ *Id.* at 385.

⁶⁴ *Id.* (noting that LeMaire’s job normally consisted of operating power-driven drawbridges and performing or overseeing maintenance on the bridges).

⁶⁵ *Id.*

⁶⁶ *LeMaire*, 480 F3d at 385–86.

⁶⁷ *Id.* at 389.

⁶⁸ See *id.*, citing *Frank v Harris County*, 118 Fed Appx 799, 804 (5th Cir 2004) (rejecting the plaintiff’s claim when the opposition “consisted largely of unexpressed disapproval and was not reported to the county or the EEOC prior to termination”). Although *LeMaire* was decided after *Ogden*, the *LeMaire* court did not mention the possibility that *Ogden* would provide authority for LeMaire’s retaliation claim.

⁶⁹ *LeMaire*, 480 F3d at 388.

antiretaliation provision. These courts traditionally have relied on two rationales to reach this conclusion: (1) that including the refusal of sexual advances within Title VII's antiretaliation provision would conflate the antidiscrimination and antiretaliation provisions; and (2) that rejecting a supervisor's advances lacks the antiretaliation provision's requirement of speaking out against a discriminatory practice.⁷⁰

Courts applying the first rationale—that the antidiscrimination and antiretaliation provisions should remain separate protections for Title VII plaintiffs—have concluded that the refusal of sexual advances does not fall within the antiretaliation provision. For example, in *Del Castillo v Pathmark Stores*,⁷¹ the Southern District of New York held that, even under the broadest interpretation of the antiretaliation provision, rejecting a harasser's sexual advances does not constitute protected activity.⁷² The court feared that “otherwise, every harassment claim would automatically state a retaliation claim as well,” especially when the supervisor was the only individual to know of the alleged protected activity.⁷³ Many courts also have reasoned that Title VII's antiretaliation provision should not protect conduct that is already protected by the antidiscrimination provision.⁷⁴

District courts applying the second justification have held that “[c]entral to all of the[] illustrative examples of behavior protected by

⁷⁰ A third group of courts has refused to extend Title VII's antiretaliation provision to protect an employee from a supervisor's sexual advances, stating that there is no authority to indicate that the refusal of sexual advances constitutes protected activity. See *Monteagudo v Asociacion de Empleados Del Estado Libre Asociado de Puerto Rico*, 425 F Supp 2d 206, 212–13 (D PR 2006) (“Neither the First Circuit, nor any other circuit, has ruled on whether resisting an employer's sexual advances constitutes protected activity for purposes of establishing retaliation.”). But see *NBC*, 210 F Supp 2d at 385 (relying on the same reasoning that circuit courts have not addressed this issue but concluding that the antiretaliation provision's protections apply to the rejection of sexual advances). This does not appear to be a distinct rationale as to why an employee's conduct should not constitute protected activity.

⁷¹ 941 F Supp 437 (SDNY 1996).

⁷² *Id.* at 438–39.

⁷³ *Id.* at 439.

⁷⁴ See *Farfaras v Citizen Bank and Trust of Chicago*, 2004 WL 2034077, *2 (ND Ill) (ruling that although the plaintiff did not assert a valid retaliation claim, the rejection of her supervisor's advances formed a valid sex discrimination claim); *Schwartz v Bay Industries, Inc.*, 274 F Supp 2d 1041, 1046 (ED Wis 2003) (determining that the plaintiff's rejection of sexual advances “seem[s] to state a claim of quid pro quo sexual harassment rather than retaliation”); *Jones v County of Cook*, 2002 WL 1611606, *4 (ND Ill) (“While [the refused sexual advances] may give rise to a claim for sexual discrimination, it does not state a claim for retaliation.”); *Rashid v Beth Israel Medical Center*, 1998 WL 689931, *2 (SDNY) (“A retaliation claim, under these circumstances, is duplicative and unnecessary, and runs the risk of confusing a jury.”); *Finley v Rodman & Renshaw, Inc.*, 1993 WL 512608, *3 (ND Ill) (“Plaintiff's allegations that [her supervisor] retaliated against her for not reciprocating his advances is a charge that fits more readily under her sexual harassment claim.”).

the opposition clause is the element of speaking out against a practice . . . because the plaintiff believes it is illegal.”⁷⁵ In *Rachel-Smith v FTData, Inc.*,⁷⁶ for example, the Victoria Rachel-Smith’s supervisor, Frank McLallen, approached her on several occasions and made sexual advances toward her.⁷⁷ After Rachel-Smith sent an email to McLallen informing him of “her desire to cease all kissing and other sexual episodes,” she was informed that she would be terminated from her position.⁷⁸ The court held that Rachel-Smith’s verbal communications to McLallen did not constitute protected activity because she did not voice complaints about a practice that she thought was illegal.⁷⁹ The court indicated that “the purpose of this speaking out or reporting requirement is a logical one: in order to protect an employee from an employer’s retaliation for opposing a practice, the employer must first have been placed on notice of a problematic practice.”⁸⁰ Accordingly, Rachel-Smith’s conduct did not qualify for the antiretaliation provision’s protections because her verbal communications neither spoke out against McLallen’s behavior nor reported the behavior to an outsider.⁸¹

III. SOLUTION: REEVALUATING PROTECTED ACTIVITY

This Comment argues that the courts reaching the Eighth Circuit’s conclusion incorrectly determine that the refusal of a supervisor’s sexual advances per se constitutes protected activity under Title VII’s antiretaliation provision. These courts, as well as the courts reaching the Fifth Circuit’s conclusion, err by considering all rejections of sexual advances in the same manner, instead of distinguishing between those cases that involve a single sexual advance and those that begin with a pattern of discriminatory conduct and culminate in a sexual advance. Without considering the factual differences between these cases, courts fail to determine whether the employee reasonably believed that her supervisor’s conduct constituted discrimination and

⁷⁵ See *Rachel-Smith v FTData, Inc.*, 247 F Supp 2d 734, 748 (D Md 2003). See also *Coe*, 589 F Supp 2d at 1105 (explaining that the employee did not engage in protected activity when she did not indicate to her employer that she believed the advance constituted protected activity until after the adverse employment action occurred); *Jones*, 2002 WL 1611606 at *3. Compare *Robinson v MINACT, Inc.*, 2007 WL 2874602, *3 (WD La) (noting that the employee did not engage in protected activity when she did not report her supervisor’s sexual advance to other supervisors in the company).

⁷⁶ 247 F Supp 2d 734 (D Md 2003).

⁷⁷ *Id.* at 741–42.

⁷⁸ *Id.*

⁷⁹ *Id.* at 748.

⁸⁰ *Rachel-Smith*, 247 F Supp 2d at 748.

⁸¹ *Id.* at 748–49.

whether the employee rejected the advance for the reason that it constituted unlawful discrimination under Title VII.

This Part provides a framework under which courts should determine whether an employee engages in protected activity when rejecting a supervisor's sexual advances. Part III.A explains that courts should consider two factors in determining whether an employee engages in protected activity: whether the employee reasonably believed that her employer's conduct constituted unlawful discrimination and whether the employee spoke out against an unlawful employment practice. Although some courts have considered these factors in isolation, no court has considered both requirements together. Part III.B then explains the two circumstances under which the sexual advance can arise and argues that courts should consider the important factual differences between these scenarios. Part III.C applies the principles established in Part III.A to the two scenarios explained in Part III.B, concluding that an employee does not engage in protected activity when expressly rejecting a supervisor's advances, both when the advance is an isolated incident and when the incident is preceded by a pattern of discrimination. Part III.D concludes with an explanation of when a court *should* find that an employee engaged in protected activity when rejecting a supervisor's sexual advance, and when the antidiscrimination provision instead protects the employee.

A. Requirements for Protected Activity

When evaluating an employee's express rejection of her supervisor's sexual advances, courts should consider whether the employee had a reasonable belief that the supervisor's conduct violated Title VII and whether the employee effectively spoke out against a practice because that practice is unlawful under Title VII. Although courts generally require employees to establish these elements in other Title VII retaliation contexts, the courts discussing the express rejection of sexual advances surprisingly have been silent on these requirements. This Part advocates that courts should reintegrate these factors into their discussions of the rejection of sexual advances.

1. The employee must reasonably believe that her supervisor's conduct violated Title VII.

Courts examining Title VII retaliation cases traditionally have examined whether the employee reasonably believed that she opposed an unlawful employment practice. Curiously, courts addressing the present question overwhelmingly have not referenced this re-

quirement.⁸² This Part argues that courts should conduct this reasonable belief inquiry when determining whether an employee engages in protected activity when rejecting a supervisor’s sexual advances in order to align the present issue with other areas of antiretaliation case law. So long as the employee had a reasonable belief that her supervisor’s conduct constituted discrimination—regardless of the success of the discrimination claim—the employee should be permitted to bring a retaliation claim.

Traditionally, to establish that the employee had a reasonable belief that her supervisor’s actions constituted discrimination, courts require the employee to show that she had both a subjective and an objectively reasonable belief that her supervisor’s conduct was unlawful.⁸³ Under the first requirement, the subjective belief, the employee must simply establish that she had an “honest and bona fide” belief that the supervisor’s conduct violated Title VII.⁸⁴ Courts generally find that the employee can meet the subjective requirement, absent some contrary indication. The second component of the reasonableness test requires more than the employee’s own belief: “[T]he allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.”⁸⁵ Courts examine whether a reasonable person would have considered the supervisor’s actions to constitute Title VII discrimination. Although the employee does not need to establish that the conduct actually violated Title VII, the claim cannot be supported by hypothetical future events.⁸⁶

When deciding the second prong of the reasonableness test, the objective element, courts often examine whether the employee’s claim

⁸² A survey of antiretaliation cases involving the rejection of sexual advances indicates that only two courts have considered whether the employee’s belief was reasonable. See *Tate v Executive Management Services*, 546 F3d 528, 532–33 (7th Cir 2008); *Coe v Northern Pipe Products*, 589 F Supp 2d 1055, 1104 (ND Iowa 2008).

⁸³ See, for example, *Butler v Alabama Department of Transportation*, 536 F3d 1209, 1213 (11th Cir 2008); *Little v United Technologies*, 103 F3d 956, 960 (11th Cir 1997).

⁸⁴ *United Technologies*, 103 F3d at 960. See also *Rucker v Higher Education Aids Board*, 669 F2d 1179, 1182 (7th Cir 1982) (“[The mistaken belief] must, of course, be a sincere one; and presumably it must be reasonable . . . for it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them.”).

⁸⁵ *United Technologies*, 103 F3d at 960.

⁸⁶ See *Livingston v Wyeth, Inc.*, 520 F3d 344, 352 (4th Cir 2008) (“We rejected the claim [] that a reasonable belief that a violation has occurred or is in progress can include a belief that a violation is about to happen upon some future contingency.”); *Jordan v Alternative Resources Corp.*, 458 F3d 332, 340 (4th Cir 2006) (concluding that the employee could not objectively believe that his coworker’s single racist statement constituted hostile work environment harassment when the coworker did not have a “plan in motion” to continue the harassment).

referenced the relevant elements of Title VII that the supervisor allegedly violated. For example, in *Barker v Missouri Department of Corrections*,⁸⁷ the Eighth Circuit dismissed the employee's retaliation claim because a reasonable person would not have concluded that his supervisor's conduct constituted hostile work environment harassment.⁸⁸ The employee, John Barker, alleged that he was suspended after helping another male employee complain that their female supervisor engaged in discriminatory conduct when she stated that women are better than men at their jobs.⁸⁹ The court concluded that the supervisor's "single, isolated statement, implying that women are more nurturing and better suited for work . . . is insufficient as a matter of law to support an objectively reasonable belief that the statement constituted sexual harassment."⁹⁰ The court cited two other Eighth Circuit cases finding that isolated remarks or short patterns of inappropriate statements are not sufficient to support a conclusion that the supervisor's statement constituted hostile work environment harassment, as the statement was not objectively "severe and pervasive."⁹¹ Accordingly, without an objectively reasonable belief that the supervisor's statement met the elements of a hostile work environment harassment claim, Barker could not succeed on his retaliation claim.⁹²

Courts addressing quid pro quo harassment have reached similar results, finding that an employee cannot reasonably believe that her supervisor engaged in discriminatory conduct when the elements of a quid pro quo claim have not been established. For example, in *Coe v Northern Pipe Products, Inc.*,⁹³ the Northern District of Iowa held that the employee did not have an objectively reasonable belief that her supervisor's sexual advances constituted quid pro quo harassment because she did "not allege that any job benefit or job detriment was expressly or even impliedly made contingent upon her acceptance or rejection of the alleged sexual advances."⁹⁴ Without the adverse action, the court concluded that the employee could not establish the requi-

⁸⁷ 513 F3d 831 (8th Cir 2008).

⁸⁸ Id at 833, 835.

⁸⁹ Id at 833.

⁹⁰ Id at 835.

⁹¹ *Barker*, 513 F3d at 835, citing *LeGrand v Area Resources for Community & Human Services*, 394 F3d 1098, 1101–02 (8th Cir 2005) (ruling that a priest's statements did not constitute harassment when he made unwelcome sexual advances on three separate occasions); *Duncan v General Motors Corp.*, 300 F3d 928, 933–34 (8th Cir 2002) (holding that five incidents are insufficient to establish an actionable hostile work environment harassment claim).

⁹² *Barker*, 513 F3d at 835.

⁹³ 589 F Supp 2d 1055 (ND Iowa 2008).

⁹⁴ Id at 1104.

site elements of the quid pro quo claim, making her belief about the unlawful nature of the sexual advances unreasonable.⁹⁵ Other courts have highlighted the presence of an adverse action against the employee as evidence of the employee’s reasonable belief of quid pro quo harassment.⁹⁶

There are cases, though, where courts have determined that the employee’s belief was reasonable, even when the jury ruled against the employee on the discrimination claim. For example, in *Fine v Ryan International Airlines*,⁹⁷ the Seventh Circuit determined that Ryan International Airlines retaliated against its employee, Lisa Fine, despite the fact that Fine’s discrimination claim lost at the summary judgment stage.⁹⁸ The court noted that when Fine complained of inequitable treatment of female pilots, she knew that she had been experiencing a delay in training that none of her male counterparts received, that she had been treated differently from a similarly situated male employee on one occasion, and that other female employees had been demoted.⁹⁹ Thus, because a jury “could easily find” that Fine reasonably believed she was opposing discriminatory conduct when she complained to a supervisor (even though the jury in this particular case did not), the court denied the employer’s motion for summary judgment on the retaliation claim.¹⁰⁰

2. The employee must “speak out” against an unlawful employment practice.

In addition to the requirement that the employee reasonably believe that her supervisor’s conduct violated Title VII, the employee must also indicate that she is speaking out against the unlawful employment practice to engage in protected activity. 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. Although courts have not uniformly adopted this approach in all

⁹⁵ Id.

⁹⁶ See, for example, *Holland v Jefferson National Life Insurance Co*, 883 F2d 1307, 1314 (7th Cir 1989).

⁹⁷ 305 F3d 746 (7th Cir 2002).

⁹⁸ Id at 752–53.

⁹⁹ Id at 752.

¹⁰⁰ Id.

Title VII contexts,¹⁰¹ this Comment argues that courts should consider this factor when evaluating the express rejection of sexual advances.

The requirement that the employee must speak out against an unlawful employment practice stems from Title VII's statutory language. As explained in Part I.A, the opposition clause of the antiretaliation provision protects an employee who "oppose[s] any practice made an unlawful employment practice" under Title VII.¹⁰² This language indicates that the employee cannot simply state that she is unhappy with workplace conditions, but she must establish that her complaint is related to the supervisor's underlying discrimination. Because an employee could have alternative reasons for rejecting a supervisor's sexual advances, such as personal distaste for the supervisor, courts should require the employee to explain her reasons for the rejection and to indicate that her rejection is based on conduct prohibited by Title VII.

Lower courts generally agree that the employee must state more than a general complaint to be afforded antiretaliation protection.¹⁰³ For example, in *Sitar v Indiana Department of Corrections*,¹⁰⁴ the Seventh Circuit determined that an employee did not engage in protected activity when she complained to her supervisor about her poor treatment in the office.¹⁰⁵ The court explained that these complaints only indicated that she felt picked on, not that she was being discriminated against "because of" her gender.¹⁰⁶ The court acknowledged that while the employee was not required to use "magic words" when making her informal complaint, she "has to at least say something to indicate her [gender] is an issue."¹⁰⁷ Similarly, in *Klopfenstein v National*

¹⁰¹ At least the Seventh and Ninth Circuits have recognized the importance of an employee "speaking out" under Title VII's antiretaliation provision. See, for example, *Sitar v Indiana Department of Corrections*, 344 F3d 720, 727 (7th Cir 2003); *Hernandez v Spacelabs Medical Inc*, 343 F3d 1107, 1113 (9th Cir 2003) ("[Title VII] protects against retaliation for the exercise of the right to speak out against discrimination.").

¹⁰² See 42 USC § 2000e-3(a).

¹⁰³ See, for example, *Garza v Laredo Independent School District*, 309 Fed Appx 806, 810 (5th Cir 2009) (holding that a general complaint about a principal and the manner in which a school functioned, without any mention of discriminatory issues, did not qualify as a protected activity for the purposes of a retaliation claim); *Curay-Cramer v The Ursuline Academy of Wilmington, Delaware, Inc*, 450 F3d 130, 135 (3d Cir 2006); *Couture v JMJ, Inc*, 1999 WL 140603, *1 (9th Cir); *McNair v Computer Data Systems*, 1999 WL 30959, *5 (4th Cir) (holding that a letter expressing general "concern" about unfair treatment does not qualify as a charge of unlawful discrimination to satisfy the protected activity element).

¹⁰⁴ 344 F3d 720 (7th Cir 2003).

¹⁰⁵ *Id.* at 727.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, quoting *Miller v American Family Mutual Insurance*, 203 F3d 997, 1008 (7th Cir 2000).

Sales and Supply,¹⁰⁸ the Eastern District of Pennsylvania found that the employee did not engage in protected activity when she refused to serve coffee to her male supervisors.¹⁰⁹ The court explained that because Tamara Klopfenstein’s refusal neither alleged unlawful discrimination nor indicated that she was objecting to “subservient gender roles,” it could not “translate into a charge of gender discrimination.”¹¹⁰ Instead, Klopfenstein needed to indicate to her supervisors that her gender was the basis for her claim.

The Eastern District of Wisconsin has applied this analysis more explicitly to the express rejection of sexual advances.¹¹¹ In *Schwartz v Bay Industries Inc.*,¹¹² the employee, Peggy Schwartz, alleged that she rebuffed her direct supervisor’s advances, which included grabbing, fondling, and kissing her at a restaurant, and that she was transferred to another office location as a result.¹¹³ Although her retaliation claim reflected that she continually “rebuffed” her supervisor’s advances, she never indicated that she rejected his behavior because she believed it to be unlawful under Title VII, as compared to rejecting the advances for any number of personal reasons.¹¹⁴ Accordingly, the court rejected her retaliation claim.

Requiring an employee to explain why she is rejecting her supervisor’s advances does not mean, however, that it is necessary for the employee to follow formal complaint mechanisms in order to be afforded antiretaliation protection. Title VII aims to facilitate informal complaint processes,¹¹⁵ such as complaining about a discriminatory practice to a supervisor or using the employer’s internal complaint mechanism, and does not require that the employee use any “magic words,” such as “Title VII discrimination” or “sex discrimination,”

¹⁰⁸ 2008 WL 2331948 (ED Pa).

¹⁰⁹ Id at *2 (explaining that the employee considered serving her male supervisors to be “demeaning and embarrassing” and to “reinforce outdated gender stereotypes,” although she never stated this explanation to her supervisors).

¹¹⁰ Id at *5 n 2.

¹¹¹ Although the court did examine whether the employee spoke out against an unlawful employment practice, it did not consider whether the employee had an objectively reasonable belief that the conduct violated Title VII, as required by Part III.A.1. The Seventh Circuit has also adopted this approach in Title VII cases. See *Gates v Caterpillar, Inc.*, 513 F3d 680, 687 (7th Cir 2008).

¹¹² 274 F Supp 2d 1041 (ED Wisc 2003).

¹¹³ Id at 1044–45.

¹¹⁴ Id at 1046.

¹¹⁵ Although formal complaint mechanisms are beneficial in that they expressly place the employer on notice of the unlawful conduct, courts have allowed employees to follow more informal processes.

when making the complaint.¹¹⁶ The fact that the employee does not have to use specific words, though, does not mean that the employee is not required to explain the basis for her complaint. Instead, it simply means that when she provides her explanation, she does not have to use the language explicitly included within Title VII.

Further, requiring the employee to explain the basis for her objection to the sexual advances directly aligns with the purposes of Title VII:¹¹⁷ the employee is protected so long as she is objecting to conduct that Title VII prohibits. Unless she indicates to her supervisor that her reason for the rejection is the unlawful nature of the advances, the employer would not be aware that the employee believes she is the object of discrimination, as opposed to some other non–Title VII justification for the rejection.¹¹⁸ And without this notice, the employer would be unable to correct the unlawful behavior or otherwise rectify the workplace discrimination.

B. Two Circumstances under which an Employee Can Reject a Supervisor’s Sexual Advances

In addition to considering the factors outlined in Part III.A, this Comment argues that courts should also distinguish between quid pro quo and hostile work environment harassment when evaluating an opposition clause claim. Courts deciding cases involving an employee’s rejection of her supervisor’s sexual advances typically confront two distinct fact patterns that raise the question of protected activity: (1) the supervisor’s sexual advance is an isolated event and the employee’s rejection is an express rejection; and (2) the supervisor harasses the employee on multiple occasions before explicitly making a sexual advance that the employee expressly rejects.¹¹⁹ Each of the cases discussed in Part II involved one of these two situations. The courts addressing this issue, however, have analyzed these two scenarios similarly,

¹¹⁶ However, this “magic word” exception does not excuse the employee from explaining her reasons for the objection. See *Gates*, 513 F3d at 687.

¹¹⁷ See *Halfacre v Home Depot*, 221 Fed Appx 424, 432 (6th Cir 2007) (“The purpose of Title VII’s anti-retaliation provisions is to prohibit ‘employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers,’ and ‘normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.’”), quoting *Burlington Northern & Santa Fe Railway Co v White*, 548 US 53, 54 (2006).

¹¹⁸ See *Gates*, 513 F3d at 687 (“Although an employee can honestly believe she is the object of discrimination, . . . if she never mentions it, a claim of retaliation is not implicated, for an employer cannot retaliate when it is unaware of any complaints.”) (quotation marks omitted).

¹¹⁹ It is also possible that the employee explicitly rejects the supervisor’s advances, explaining that the conduct is unlawful under Title VII. This indisputably would fall under the opposition clause and thus is not at issue in this Comment.

without acknowledging the legal implications of these factual differences. The problem with grouping both fact patterns together is that courts then apply one analysis to determine whether discrimination occurred *generally*, without examining the distinct statutory elements for quid pro quo and hostile work environment harassment.

The first fact pattern, in which the employee rejects a supervisor’s isolated sexual advance, is illustrated by *Jordan v Clark*.¹²⁰ The employee, Evelyn Jordan, alleged that during a lunch meeting, her male supervisor suggested that she engage in sexual relations with him to keep her job.¹²¹ Jordan refused the advances, which resulted in her constructive termination.¹²² The district court found that no other incidents occurred between Jordan and her supervisor during the course of her employment.¹²³

The second fact pattern, in which the supervisor repeatedly harasses the employee before the employee refuses his sexual advances, is illustrated by the Eighth Circuit’s decision in *Ogden*.¹²⁴ The employee, Kerry Ogden, alleged that her supervisor made unwelcomed advances on multiple occasions over a one-year period, including grabbing Ogden by the waist and asking her to go to his motel room, placing his arm around her on two occasions in front of coworkers, asking her to go for drinks after work, asking her to stay with him at his house, and inviting her to his motel room during a convention, all of which Ogden refused.¹²⁵ This behavior culminated in the supervisor asking Ogden to accompany him on a “three-day gambling spree,” which she ultimately refused.¹²⁶ Shortly thereafter, her supervisor refused to conduct her raise evaluation, and Ogden subsequently left her position without the raise.¹²⁷

Without distinguishing between the single, isolated rejection and the multi-incident rejection, courts are unable to properly consider the timeline of events to determine whether each element of the underly-

¹²⁰ 847 F2d 1368 (9th Cir 1988). This fact pattern is also illustrated by *Rashid v Beth Israel Medical Center*, 1998 WL 689931, *1 (SDNY) (indicating that, on one occasion, Rashid’s supervisor “lured her into a conference room” and sexually assaulted her, which Rashid resisted).

¹²¹ *Clark*, 847 F2d at 1371.

¹²² *Id* at 1376–77.

¹²³ See *id* at 1375.

¹²⁴ See Part II.B for a complete discussion of *Ogden*. This fact pattern is also illustrated by *Estes v Illinois Department of Human Services*, 2007 WL 551554, *1 (ND Ill) (explaining that the supervisor asked Estes to engage in a consensual relationship, called Estes her “boy toy,” and asked Estes to engage in sexual relations during a business trip).

¹²⁵ *Ogden*, 214 F3d at 1003.

¹²⁶ *Id* at 1004.

¹²⁷ *Id*.

ing discrimination claim and the subsequent retaliation claim is met in the requisite order.¹²⁸ As explained in Part I.B, an employee's retaliation claim necessarily includes an underlying discrimination claim—quid pro quo harassment if the employer's unlawful conduct led to an adverse action, or hostile work environment harassment if the unlawful conduct was severe and pervasive—as the first step in a retaliation claim.¹²⁹ The employee must establish this first element (or at least that she had a reasonable belief that she was opposing discrimination) before moving to the second and third elements: the protected activity and the adverse action resulting from the protected activity. Because the discrimination and retaliation elements are complex and courts often have a difficult time distinguishing between the necessary elements, courts should differentiate between these two factual circumstances to properly determine the merits of the retaliation claim.

The failure of courts to distinguish between these two factual scenarios has caused multiple courts to erroneously determine that an employee engaged in protected activity when rejecting a supervisor's single sexual advance.¹³⁰ For example, in *Farrell v Planters Lifesavers Co.*,¹³¹ the court held that the employee, Susan Farrell, engaged in protected activity when she rebuffed her supervisor's single attempt to place his hand on her leg and discuss his wife's jealousy of Farrell.¹³² The court explained that because sexual harassment is a form of sex discrimination, "rejecting sexual advances itself must comprise protected activity for which employees should be protected for opposing."¹³³ The court, though, did not explain whether Farrell's rejection constituted a single rejection or whether the rejection was in response to a pattern of discriminatory conduct; instead, the court simply concluded that the supervisor's actions constituted "discrimination."

¹²⁸ For example, courts should consider whether the alleged discrimination and retaliation were separated by an adverse employment action (as this would help determine whether a quid pro quo harassment claim could prevail). See note 21 and accompanying text for a further discussion of the sequence of retaliation claims based on quid pro quo harassment.

¹²⁹ See notes 21–22 and accompanying text.

¹³⁰ See, for example, *Little v NBC*, 210 F Supp 2d 330, 386 (SDNY 2002); *Farrell v Planters Lifesavers Co.*, 22 F Supp 2d 372, 392 (D NJ 1998), affd in part, revd in part on other grounds, 206 F3d 271, 279 n 4 (3d Cir 2000).

¹³¹ 22 F Supp 2d 372 (D NJ 1998), affd in part, revd in part on other grounds, 206 F3d 271, 279 n 4 (3d Cir 2000).

¹³² 22 F Supp 2d at 381 (explaining that "Farrell responded [to her supervisor's inquiry of whether her husband gets jealous] by firmly stating 'no, I don't give him a reason to and I suggest you do the same'").

¹³³ *Id.* at 392.

But had the court acknowledged that the rejection was a single, express rejection and examined the applicable quid pro quo harassment requirements,¹³⁴ it would have instead determined that Farrell did not engage in protected activity. Although Farrell could establish that her supervisor propositioned her, this act did not lead to an adverse action *before* Farrell objected to his behavior. Thus, Farrell could not have had a reasonable belief that she was “opposing” behavior that constituted discrimination,¹³⁵ as her supervisor’s actions did not meet the statutory requirements of discrimination. And without an underlying claim of quid pro quo discrimination—the first event needed for the retaliation claim—Farrell could not have engaged in protected activity.

As demonstrated in *Farrell*, by treating the sexual advance as general discrimination without parsing out the distinct elements of quid pro quo and hostile work environment harassment, courts have failed to adequately determine the merits of the discrimination claim before moving to the retaliation claim. In practical terms, this means that courts have reached incorrect results about protected activity by failing to consider whether a plausible discrimination claim existed prior to the opposition. Thus, although analyzing these fact patterns separately would often lead to the same result (of finding no protected activity), this approach allows for better reasoned opinions and ensures that courts reach correct conclusions in all cases.

C. Application of Protected Activity Standard: The Express Rejection of Sexual Advances Should Not Be Considered Protected Activity

This Part proposes a framework for courts to determine whether an employee has engaged in protected activity. First, courts should choose to analyze the case as quid pro quo or hostile work environment harassment, depending on whether there is an express rejection of a single sexual advance or an express rejection following a pattern of multiple sexual advances. Second, courts should apply the protected activity requirements detailed in Part III.A—that the employee must have a reasonable belief a Title VII violation has occurred and that the employee must provide the reasons for the express rejection. Applying this framework, this Part shows that both the single rejection

¹³⁴ Quid pro quo harassment applies to the single rejection of a sexual advance, as a single event does not meet the “severe and pervasive” requirement needed for hostile work environment harassment. For a further explanation of why hostile work environment harassment does not apply to the single, express rejection, see Part III.C.1.

¹³⁵ For a discussion of the reasonable belief requirement, see Part III.A.1.

and multi-incident rejection result in a finding of no retaliation when the employee only uses an express rejection.

1. The single, express rejection of sexual advances does not constitute protected activity.

An employee does not engage in protected activity by expressly rejecting a single sexual advance because a reasonable person could not objectively believe that a single sexual advance constitutes Title VII discrimination. As explained in Part III.A.1, to establish a reasonable belief of discrimination, the employee must show that she had both a subjective and objectively reasonable belief that the supervisor's conduct violated Title VII.¹³⁶ The first element, the subjective component, should not be difficult for employees to prove unless there is specific evidence suggesting that the employee's belief was not sincere.

However, in the case of a single sexual advance, the employee would not be able to establish the second element—the objective component—because she would not be able to prove that a reasonable person would believe that her employer has violated any provision of Title VII. More specifically, an employee making an isolated rejection would not be able to establish that the employer's conduct constituted hostile work environment harassment because one incident does not create a severe or pervasive working environment. Courts have found that one racial slur or one unwelcome sexual advance does not constitute discrimination or support a reasonable belief of discrimination,¹³⁷ suggesting that a single sexual advance would not reasonably constitute hostile work environment harassment. Additionally, without evidence of a supervisor's comprehensive plan to continue similar advances, the employee could not rely on future contingencies to establish an objectively reasonable belief.¹³⁸

Similarly, the employee would not be able to establish an objectively reasonable belief that the supervisor's sexual advance constituted quid pro quo harassment, as the sexual advance would not meet the requirements of a quid pro quo claim.¹³⁹ As discussed in Part I.A,

¹³⁶ See notes 83–86 and accompanying text.

¹³⁷ See, for example, *Alternative Resources Corp.*, 458 F3d at 339–41; *LeGrand*, 394 F3d at 1101–02 (noting that “[m]ore than a few isolated incidents are required” to establish a hostile work environment), quoting *Tuggle v Mangan*, 348 F3d 714, 720 (8th Cir 2003). But see *Coe*, 589 F Supp 2d at 1104–05 (suggesting that “a single incident may be sufficiently ‘severe’ to support [a hostile work environment] claim or for a person to reasonably believe that she had been subjected to such harassment” without deciding the issue).

¹³⁸ See note 86 and accompanying text.

¹³⁹ See note 21 and accompanying text.

the elements of quid pro quo harassment include: (1) that the supervisor tried to elicit sexual favors from the employee; and (2) that the employee experienced some changed term or condition of employment (an adverse employment action) following the harassment. When rejecting a supervisor’s single sexual advance, the employee could establish the first element of a quid pro quo claim but would not be able to establish the second. At the time of the rejection, the employee has not *yet* experienced an adverse employment action. Although the employee presumably experiences an adverse action *following* the refusal, the adverse action would have to occur *before* the rejection in order to support an objectively reasonable belief of quid pro quo harassment. Because the elements of the claim have not been met when there is no adverse action *preceding* the rejection, the employee could not satisfy the reasonable belief requirement.

Accordingly, courts addressing cases involving the single, express rejection of sexual advances should find that the employee’s rejection does not constitute protected activity because the employee does not have an objectively reasonable belief that her supervisor’s conduct amounted to either hostile work environment or quid pro quo harassment under Title VII.¹⁴⁰ It is thus unnecessary for these courts to examine whether the employee effectively spoke out against an unlawful employment practice, as the rejection *could not* constitute protected activity. As discussed above in Part III.B, though, at least one court—the District of New Jersey in *Farrell*—erroneously determined that an employee engaged in protected activity when she merely rejected a single sexual advance; under the framework proposed in this Comment, the employee would not have recovered under the antiretaliation provision for her single, express rejection.

2. The multi-incident express rejection of sexual advances does not constitute protected activity.

Like the single express rejection of sexual advances, the employee’s express rejection of a supervisor’s sexual advances that follows other harassing behavior, or a multi-incident rejection, does not

¹⁴⁰ This conclusion does not limit the protections afforded by Title VII. If no adverse action followed the express rejection, then neither the antiretaliation provision nor the antidiscrimination provision provides a remedy for the employee. The conclusion in this Comment simply reiterates that no remedy is available under the antiretaliation provision. If an adverse action did follow the express rejection, then Title VII provides a remedy for the employee through its prohibition of quid pro quo harassment. The conclusion in this Comment merely denies an additional remedy under the antiretaliation provision.

constitute protected activity. Unlike the single rejection, though, the express rejection of multiple advances *could* satisfy the reasonable belief requirement. However, the express rejection still would not qualify as protected activity because the employee has not spoken out against a practice that violates Title VII.

Under this factual scenario, the employee might be able to satisfy the objective component of the reasonable belief requirement. As discussed in Part I.B.1, the employee need not establish an adverse employment action for a hostile work environment claim but must establish that the harassment was “sufficiently severe or pervasive” to alter the workplace conditions. The employee does not have to prove that the supervisor’s actions actually amounted to an actionable discrimination claim; she need only establish that she had a reasonable belief that they constituted discrimination. So long as the harassing acts created a pattern of discrimination, courts are likely to find that the employee had an objectively reasonable belief that the conduct constituted hostile work environment harassment.¹⁴¹ Accordingly, when faced with more than a single sexual advance, courts could hold that the objectively reasonable belief element has been satisfied.

An employee’s express rejection of a supervisor’s multi-incident sexual advance would fail, though, under the “speaking out” requirement. As explained in Part III.A.2, to prevail on a retaliation claim, the employee must indicate that she is objecting to an unlawful employment practice because this practice violates Title VII. When an employee simply rejects her supervisor’s sexual advances, she does not put her employer on notice that she believes her supervisor’s actions to be unlawful under Title VII. Because of the express nature of the refusal, the employee does not indicate whether her rejection is to the alleged discrimination or whether she is objecting to behavior that she considers generally “offensive.”¹⁴² This is problematic because Title VII requires that the employee oppose an unlawful employment practice and, here, the employee does not indicate that this practice is the basis for her complaint. Further, without providing her employer with adequate notice of the unlawful conduct, the employee has not given the

¹⁴¹ See, for example, *Paul v Northrop Grumman Ship Systems*, 309 Fed Appx 825, 828 (5th Cir 2009) (noting that chronic and frequent cases of non-consensual physical touching would be actionable under Title VII); *Ejikeme v Violet*, 307 Fed Appx 944, 949 (6th Cir 2009), citing *Harris v Forklift Systems, Inc*, 510 US 17, 23 (1993) (considering “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance” in evaluating a hostile work environment claim).

¹⁴² See *Coe*, 589 F Supp 2d at 1105.

employer the opportunity to correct the behavior.¹⁴³ Thus, the employee cannot be afforded antiretaliation protection without explaining the reasons for her complaint.

Many courts that have addressed this factual situation, however, have erroneously determined that the employee did engage in protected activity when rejecting a supervisor’s repeated advances. For example, in *Ogden*, the Eighth Circuit found that the employee engaged in protected activity when she asked her supervisor to stop making sexual advances towards her.¹⁴⁴ Had the court employed the framework introduced by this Comment, though, it would have determined that her statements did not constitute opposition conduct. Although *Ogden* could have had a reasonable belief that her supervisor’s repeated conduct constituted hostile work environment harassment—as he propositioned her on multiple occasions—simply asking him to “stop” his conduct did not satisfy the “speaking out” requirement. A court reviewing her statement would have had no indication whether *Ogden* wanted her employer to “stop” because of personal reasons or because she considered his conduct to violate Title VII. Thus, the Eighth Circuit’s decision would not stand under the framework proposed in this Comment.

D. When Should a Court Find That an Employee Engaged in Protected Activity by Rejecting a Sexual Advance?

Although an employee does not engage in protected activity when *expressly* rejecting a supervisor’s sexual advance, it does not follow that the employee is *never* protected by Title VII. The cases explored in this Comment have only involved instances in which the employee simply states “no” or only provides a personal reason for her refusal, which means that the employee does not meet the reasonableness or “speaking out” requirements. This Comment does not address those instances in which the employee provides a more explicit explanation for why she is refusing the sexual advance. This Part explains when a court could determine that an employee engaged in protected activity and when a court, instead, should apply the antidiscrimination provision to afford the employee Title VII protection.

As discussed in Part III.C.1, in the first factual circumstance—where an employee rejects a supervisor’s single sexual advance and

¹⁴³ The Supreme Court in *Crawford* suggested that notice was an important function of the employee’s opposition conduct. See text accompanying note 35.

¹⁴⁴ For a discussion of *Ogden*, see Part II.B.

subsequently suffers an adverse employment action—the employee should not be protected by the antiretaliation provision. Instead, the employee receives antidiscrimination protection under the *quid pro quo* rationale.

In the second factual circumstance, where the supervisor's sexual advance is preceded by a pattern of discrimination, the employee could be protected by both—or some combination of—the antidiscrimination and antiretaliation provisions by indicating that she is speaking out against her supervisor's discriminatory conduct. In this situation, the employee has already established the reasonable belief requirement: the pattern of discrimination shows that she had a reasonable belief that her supervisor's actions constituted hostile work environment harassment.¹⁴⁵ And by explaining the reasons for her opposition, she could also establish the "speaking out" requirement.

Although Title VII does not provide an exhaustive list of what an employee must state to engage in protected activity, it is possible to provide a few hypothetical examples of what a court could reasonably interpret to constitute "speaking out" against an unlawful employment practice. Whereas the employee need not rely on specific "magic words" when opposing an unlawful employment practice, as discussed in Part III.A.2, a court could look for an indication that the employee's rejection is based on the unlawful nature of the supervisor's conduct or a recognition that the advance is not part of the usual employee-employer relationship.¹⁴⁶ For example, the court could find the following statements to constitute "speaking out": "No, this is inappropriate. Our work relationship does not include a sexual relationship"; "No. You are my boss and it is not right for me to engage in sexual relations with my boss"; or "No. It is not legal for you to ask me to take part in sexual relations." These explanations would indicate to the supervisor that the employee is rejecting an advance that is inappropriate in light of their work relationship and because a supervisor cannot proposition an employee under Title VII. These explanations also do not include any "magic words," such as "gender discrimination," which might place too

¹⁴⁵ See Part III.C.2.

¹⁴⁶ Because the majority of employers now provide all employees with a baseline of sexual harassment training, the "speaking out" requirement does not create too high a burden for the employee opposing the practice. See Equal Employment Opportunity Commission, *Questions & Answers for Small Employers on Employer Liability for Harassment by Supervisors*, online at <http://www.eeoc.gov/policy/docs/harassment-facts.html> (visited Oct 24, 2009) ("Employers should establish, distribute to all employees, and enforce a policy prohibiting harassment and setting out a procedure for making complaints.").

high of a burden on the employee opposing the advance.¹⁴⁷ They do, however, provide significantly more information than the reasons explored earlier in this Comment that should not result in protected activity, such as “No, I’m ‘tired of this shit,’”¹⁴⁸ and make clear that the employee is not basing her rejection on personal reasons.

As this discussion illustrates, the reasonableness and “speaking out” requirements do not prevent an employee from obtaining Title VII protection when rejecting a supervisor’s sexual advance. Instead, the employee maintains the ability to claim protection under the antidiscrimination provision and could potentially succeed under the antiretaliation provision in a number of limited circumstances.

CONCLUSION

Over the past few decades, the circuit courts have been struggling to determine what conduct is protected activity under the antiretaliation provision. Although the circuit courts generally have come to a consensus about most forms of protected activity, the courts are split on whether refusing a supervisor’s sexual advances can be protected by Title VII’s antiretaliation provision. Courts reaching the Eighth Circuit’s conclusion—that this conduct is protected—have expressed valid concerns, including that Title VII should be read broadly to afford the greatest protection possible for employees to prevent workplace discrimination; courts reaching the Fifth Circuit’s conclusion also have expressed significant concerns about over-extending the antiretaliation provision to cover conduct that should be protected instead by the antidiscrimination provision. Nevertheless, the appropriate solution is not to afford protection under the antiretaliation provision every time an employee rejects a supervisor’s advances. Instead, courts should differentiate between an employer’s single express rejection of sexual advances and a rejection that follows multiple advances in order to examine whether the employee reasonably believed that her supervisor’s advances constituted discrimination and whether the employee spoke out against an unlawful employment practice.

¹⁴⁷ Of course, if the employee did use such magic words, she would also engage in protected activity.

¹⁴⁸ See *Wagner v Burnham*, 2006 WL 266551, *3 (NDNY). Other examples of statements that do not constitute protected activity include “No, I’m ‘not messing with [you] anymore’ because I ‘just want[] to keep the slate clean between me and my wife,’” *Tate*, 546 F3d at 530, 532, and “[N]o, I don’t give [my husband] a reason to [be jealous] and I suggest you do the same,” *Farrell*, 22 F Supp 2d at 381.

It does not follow, however, that an employee would not be protected when rejecting a supervisor's advances. As Part III.D explains, the employee simply must state the reasons for her refusal when rejecting a supervisor's sexual advances in order to engage in protected activity. Additionally, the employee still has the opportunity to file a discrimination claim in most circumstances in response to the advance, under the hostile work environment and quid pro quo harassment rationales. Thus, this Comment does not seek to remove protections against workplace discrimination; rather the solution aims to assess the different forms of discrimination under the appropriate provisions of Title VII and encourage courts to afford protection under the anti-retaliation provision only when appropriate.