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# Supervisors, Sex, and the Seventh Circuit: No Should Always Mean No

Joshua I. Grant

*IIT Chicago-Kent College of Law*

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## **SUPERVISORS, SEX, AND THE SEVENTH CIRCUIT: NO SHOULD ALWAYS MEAN NO**

JOSHUA I. GRANT\*

Cite as: Joshua I. Grant, *Supervisors, Sex, and the Seventh Circuit: No Should Always Mean No*, 4 SEVENTH CIRCUIT REV. 291 (2009), at <http://www.kentlaw.edu/7cr/v4-2/grant.pdf>.

### INTRODUCTION

Imagine a world in which a supervisor begins to have sex with a subordinate employee. After a year of sex with the supervisor, the employee gets married and decides to end the relationship. But when the employee tries to end the sexual relationship, the supervisor says that the employee will lose their job if the sex does not continue. Eventually the supervisor summons the employee into the supervisor's office and asks the employee if a choice has been made. The employee says that there will be no more sex.irate, the supervisor tells the employee to leave and follows the employee out, yelling that the employee will be fired. The next morning, the employee is fired.

This situation, in fact, requires no imagination. The employee's name was Alshafi Tate, his supervisor's name was Dawn Burban, and Tate was forced to choose between sex and losing his job.<sup>1</sup> Tate chose to end the sexual relationship, and he was fired the morning after he told Burban that he wasn't "messing with" her anymore.<sup>2</sup> Not every

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\* J.D. candidate, May 2009, Chicago-Kent College of Law; B.A., Bradley University. The author would like to thank Professor Richard J. Gonzalez of Chicago-Kent College of Law for his mentorship throughout law school and guidance in writing this article.

<sup>1</sup> See *Tate v. Executive Mgmt. Serv., Inc.*, 546 F.3d 528, 529-31 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (2009).

<sup>2</sup> *Id.*

employee is fired the morning after refusing an ultimatum for sex from their supervisor. However, for many employees across the country, the situation described above, in which a subordinate employee must resist the sexual advances of a supervisor, is all too common. Employees in these situations must make a choice between submitting to their supervisor's demands or rejecting the harassment. For those employees who reject the advances, they risk the consequences attendant to rebuffing a supervisor's sexual advances. While some supervisors may merely accept that no means no, other supervisors may continue to harass employees or seek retribution for the rejection by changing work assignments, demeaning the employee, giving negative performance evaluations, or as in Mr. Tate's case, firing the employee.

Employees in these situations who are sexually harassed by their supervisors and oppose such harassment are protected by the retaliation provision of Title VII of the Civil Rights Act of 1964.<sup>3</sup> For the protections of Title VII's retaliation provision to apply, however, an employee must have engaged in a protected activity.<sup>4</sup> The retaliation provision provides that an employee has engaged in a protected activity if they have "opposed" an unlawful employment practice.<sup>5</sup> Some activities by an employee in opposition to an unlawful employment practice, such as complaining of unwanted harassment to management or human resources, or filing a charge the Equal Employment Opportunity Commission, are widely accepted as fitting within Title VII's retaliation provision.<sup>6</sup> But Title VII does not define

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<sup>3</sup> See 42 U.S.C. § 2000e-3(a) (2006) (barring an employer from retaliating against an employee because the employee "has opposed any practice made an unlawful employment practice by" Title VII).

<sup>4</sup> See *id.*

<sup>5</sup> *Id.*

<sup>6</sup> See 42 U.S.C. § 2000e-3(a) (2006); *Johnson v. Booker T. Wash. Broad. Serv., Inc.*, 234 F.3d 501, 507 (11th Cir. 2000) ("Statutorily protected expression includes filing complaints with the EEOC and complaining to superiors about sexual harassment."); Joan M. Savage, Note, *Applying the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 222 (2004) ("The most typical type of

opposed, and the exact limits of what an employee must do to have opposed unlawful activity are unclear.<sup>7</sup> In particular, despite how often it may occur in the workplace, the question of whether an employee who rejects a supervisor's sexual advances has opposed an unlawful employment practice is an unanswered and controversial issue.

The Supreme Court has never ruled on the issue. Numerous district courts have touched on it, but they are sharply divided.<sup>8</sup> Some hold that resisting sexual advances falls squarely within Title VII's protections,<sup>9</sup> while others hold that without more, mere rejection of sexual advances is not protected activity.<sup>10</sup> Only two federal circuit courts of appeal have addressed the issue and those circuits are also split. The Fifth Circuit recently held that an express rejection of a supervisor's sexual advances does not qualify as protected activity under Title VII.<sup>11</sup> The Eight Circuit, on the other hand, has held that an employee engages in "the most basic form of protected activity" by resisting a supervisor's sexual advances.<sup>12</sup> Faced with this precise

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participation involves the plaintiff filing a discrimination charge against his or her employer, but also includes other activities, such as providing testimony or assisting in an investigation."); Anna Ku, Note, "*You're Fired!*" *Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim*, 64 WASH. & LEE L. REV. 1663, 1669 (2007) ("A complaining party may make a formal discrimination charge against her employer . . . Also, an employee may informally testify or otherwise participate in a discrimination charge against her employer.") (citations omitted).

<sup>7</sup> See 42 U.S.C. § 2000e-3(a) (2006).

<sup>8</sup> See, e.g., *Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041, 1049 (D. Haw. 2000) (collecting cases); *Ross v. Baldwin County Bd. of Educ.*, 2008 WL 820573, \*4-6 (S.D. Ala. 2008) (collecting cases).

<sup>9</sup> E.g. *Quarles v. McDuffie County*, 949 F. Supp. 846, 853 (S.D. Ga. 1996) (holding that rebuffing a supervisor's sexual advances is "the most basic form" of protected activity).

<sup>10</sup> E.g. *Speer v. Rand McNally & Co.*, 1996 WL 667810, \*8 n.4 (N.D. Ill. 1996) ("While [plaintiff] also alleges that [her supervisor] retaliated against her for her refusal of his sexual advances, her refusal is not the type of 'protected activity' which is properly the source of a Title VII retaliation claim.>").

<sup>11</sup> *LeMaire v. Louisiana Dep't of Transp. & Dev.*, 480 F.3d 383, 389 (5th Cir. 2007).

<sup>12</sup> *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000).

issue in *Tate v. Executive Management Services, Inc.*, the Seventh Circuit declined to decide the issue but held that Mr. Tate's rejection of his supervisor's advances and ultimatum did not constitute protected activity under Title VII.<sup>13</sup>

The Seventh Circuit's decision in *Tate* and holdings by other courts that rebuffing a supervisor's sexual advances is not protected activity under Title VII could have significant consequences for employees resisting workplace harassment. It is an unfortunate reality that many employees face sexual harassment in the workplace. Congress recognized that reality when it enacted Title VII to protect employees from harassment.<sup>14</sup> It is another unfortunate reality that many employees who resist or oppose unlawful employment practices like sexual harassment face retribution from their employer. That is why Congress included a retaliation provision in Title VII.<sup>15</sup> The retaliation provision of Title VII is designed allow employees to protect themselves and oppose what they believe in good faith to be an unlawful employment practice.<sup>16</sup>

As more employees try to protect themselves from unlawful employment practices, retaliation claims filed with the E.E.O.C. have doubled over the past fifteen years.<sup>17</sup> While reporting harassment to human resources or participating in an investigation are clearly protected activities under Title VII,<sup>18</sup> an employee's first line of

<sup>13</sup> 546 F.3d 528, 533 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (U.S. 2009). The court held that Mr. Tate did not have a reasonable good faith belief that he was harassed by his supervisor and therefore had not engaged in protected activity under Title VII. *Id.*

<sup>14</sup> See 42 U.S.C. § 2000e-2(a) (2006) (forbidding discrimination in employment on the basis of sex).

<sup>15</sup> See 42 U.S.C. § 2000e-3(a) (2006) (outlawing an employer from retaliating against an employee because the employee "has opposed any practice made an unlawful employment practice by" Title VII).

<sup>16</sup> See 42 U.S.C. § 2000e-3(a) (2006); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-72 (2001) (*per curiam*) (an employee does not have to oppose an employment practice that is actually unlawful, employee must merely have a reasonable belief that the practice violates Title VII).

<sup>17</sup> Glenn George, *Revenge*, 83 TUL. L. REV. 439, 441 (2008).

<sup>18</sup> See *supra* note 6 and accompanying text.

defense against a harasser may often be the rejection of sexual advances. The question of whether rejecting a supervisor's sexual advances is protected by Title VII may have an extraordinary impact on how employees can resist workplace harassment and whether an employer could be liable when a supervisor gives the ultimatum, "continue to have sex or forfeit your job," and the employee says "no." If courts like *Tate* continue to draw the line in favor of employers, employees across the country may lose protection for one of the simplest ways to oppose harassment and the practical impact of Title VII's retaliation clause will be diminished.

This comment argues that to avoid these consequences and remain true to the language, purpose, and practical applications of Title VII's retaliation clause, courts should hold that in most circumstances, an employee who rebuffs their supervisor's sexual advances has "opposed" an unlawful employment practice. Courts should still examine the facts of each case, but when the facts are close, the line should be drawn in favor of the employee.

Part I provides a brief introduction to the relevant Title VII sexual harassment and retaliation law necessary to understand the Seventh Circuit's holding in *Tate*. Part II examines the judicial precedent set for *Tate*, including the circuit split between the Fifth and Eighth circuits. Part III discusses the facts, holding, and reasoning of *Tate*. Part IV examines the *Tate* decision in light of the language of the retaliation provision and its recent interpretation by the Supreme Court. Part V discusses additional policy considerations that weigh in favor of protecting employees in this situation, including the importance of the supervisor-employee relationship, the purpose of the retaliation provision, and the practical impact of the retaliation clause. Finally, this comment concludes that the Seventh Circuit's holding in *Tate* was incorrect and that opposition activity under the retaliation provision should usually include employees who rebuff their supervisor's sexual advances.

## I. TITLE VII

### A. *Sexual Harassment*

Title VII was enacted to promote equality and reduce discrimination in the workplace.<sup>19</sup> As part of these goals, Title VII forbids discrimination in employment on the basis of sex.<sup>20</sup> A significant body of case law on sexual harassment law has developed out of Title VII's ban on sex based discrimination. While a sexual harassment claim is distinct from a retaliation claim, a basic understanding of sexual harassment claims is important because this body of law can impact whether an employee's opposition is covered by the retaliation provision and the two types of claims are usually brought together.<sup>21</sup> A plaintiff alleging sexual harassment under Title VII can allege two different causes of action—a hostile work environment or quid pro quo claim. The primary difference between the two is that a hostile work environment claim focuses on proof that the harassment was severe or pervasive enough to create a hostile or offensive work environment,<sup>22</sup> whereas a quid pro quo

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<sup>19</sup> See 42 U.S.C. § 2000e-2(a) (2006); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (“The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”). Title VII's language has been construed and interpreted broadly in order to accomplish the statute's remedial purpose. *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1344 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

<sup>20</sup> 42 U.S.C. § 2000e-2(a) (2000) (providing that “[i]t shall be an unlawful employment practice for an employer. . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . .sex”).

<sup>21</sup> See generally Eisha Jain, Note, *Realizing the Potential of the Joint Harassment/Retaliation Claim*, 117 YALE L.J. 120 (2007) (discussing the interplay between harassment and retaliation claims).

<sup>22</sup> To establish a prima facie case of sexual harassment based on hostile work environment, a plaintiff must demonstrate that: (1) she was subjected to unwelcome harassment; (2) the harassment was based on sex; (3) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that seriously affected the

harassment claim focuses on situations where an employee's submission to sexual demands is made a condition of tangible employment benefits.<sup>23</sup>

These categories of cases are relevant to retaliation claims because a retaliation claim requires a plaintiff to show that they had a reasonable, good faith belief that they opposed an unlawful employment practice.<sup>24</sup> Since retaliation claims and harassment claims are usually brought together, the underlying harassment claim can impact the reasonableness of the plaintiff's belief that she opposed an unlawful employment practice.<sup>25</sup> The facts supporting harassment and

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psychological well-being of the plaintiff; and (4) there is a basis for employer liability. *Robinson v. Sappington*, 351 F.3d 317, 328-29 (7th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004). To prove that a hostile work environment existed, a plaintiff must also prove that the conduct was so severe or pervasive that it altered the conditions of her employment. *Jackson v. Co. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007).

<sup>23</sup> To establish a prima facie case of sexual harassment based on quid pro quo harassment, a plaintiff must prove that: (1) he is a member of a protected group; (2) the sexual advances were unwelcome; (3) the harassment was sexually motivated; (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment; and (5) employer liability has been established. *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996). *See Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 n.7 (7th Cir. 1997) (“[H]arassment, occurs when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances.”). The Supreme Court has largely abandoned the use of the quid pro quo and hostile work environment labels and instead distinguishes harassment claims based on whether a supervisor takes a tangible employment action against a subordinate. A tangible employment action constitutes a significant change in employment status, “such as hiring, firing, failing to promote, [or] reassignment with significantly different responsibilities.” *Burlington Indus. v. Ellerth*, 524 U.S. 742, 760-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, (1998). Many plaintiffs still frame their causes of action using those categories because they have separate analytical frameworks that are useful in distinguishing between different types of cases. *See supra* notes 22-23.

<sup>24</sup> *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002).

<sup>25</sup> *See Clover v. Total Sys. Serv., Inc.*, 176 F.3d 1346, 1351-52 (11th Cir. 1999) (holding that the plaintiff did not engage in a statutorily protected activity because her belief that she opposed hostile work environment sexual harassment was not objectively reasonable).



retaliation claims also frequently overlap, although the claims have different analytical frameworks.

### *B. Retaliation*

Title VII's retaliation provision protects employees from retribution by employers when speaking out against unlawful employment practices.<sup>26</sup> The retaliation provision provides, in pertinent part:

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 by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>27</sup>

The sentence outlawing discrimination because an employee has opposed an unlawful employment practice is known as the retaliation provision's opposition clause.<sup>28</sup> The following sentence, which bans discrimination based on participation in an investigation of an unlawful employment practice is known as the participation clause.<sup>29</sup> Both clauses protect an employee from retaliation but different sets of facts implicate each clause. An employee's rebuff of a supervisor's sexual advances, without reporting or discussing the advances with anyone else, falls under the opposition clause.<sup>30</sup>

To prove a *prima facie* case of retaliation under either clause, a plaintiff must show that (1) he engaged in a statutorily protected activity, (2) an adverse action was taken by his employer, and (3) there is a causal

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<sup>26</sup> 42 U.S.C.A. § 2000e-3 (2006).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See Tate v. Executive Mgmt. Servs, Inc.*, 546 F.3d 528, 529-31 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (U.S. 2009).

connection between the two.<sup>31</sup> The second two elements have been the subject of extensive litigation. With regard to the second element, the Supreme Court has adopted a broad objective standard for what constitutes an adverse employment action and noted that an adverse action may constitute a wide variety of actions depending on each workplace and employee.<sup>32</sup> To prove the third element of causation, a plaintiff must present evidence that an employer would not have taken an adverse employment action “but for” her protected activity.<sup>33</sup>

The first element of a plaintiff’s prima facie retaliation case is less developed. To prove that a plaintiff engaged in protected activity, a plaintiff may claim that he engaged in protected activity under either the participation or opposition clause of Title VII’s retaliation

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<sup>31</sup> *Boumehti v. Plastag Holdings, L.L.C.*, 489 F.3d 781, 792 (7th Cir. 2007); *Murray v. Chicago Transit Auth.*, 252 F.3d 880, 890 (7th Cir. 2001). An employee’s claim for retaliation under either clause is analyzed under the standard Title VII McDonnell Douglas burden shifting formula. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If a plaintiff proves a prima facie case of retaliation, the burden of proof shifts to the employer to show a legitimate nondiscriminatory reason for its actions. If the employer produces “evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action,” then the burden shifts back to the employee to prove that the reason was merely a pretext for discrimination. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 508-10 (1993); *E.E.O.C. v. Our Lady of the Resur. Med. Ctr.*, 77 F.3d 145, 148-49 (7th Cir. 1996).

<sup>32</sup> *Burlington Northern v. White*, 548 U.S. 53, 67-70 (2006). The Seventh Circuit has noted that an adverse employment action must not be a mere inconvenience. *Griffin v. Potter* 356 F.3d 824, 829 (7th Cir. 2004). A plaintiff may prove an adverse employment action by presenting direct evidence showing “a ‘convincing mosaic’ of circumstantial evidence that ‘allows a jury to infer intentional discrimination by the decision maker’” or indirectly by showing that she was treated less favorably by similarly situated employees. *Rhodes v. Ill. Dep’t of Trans.*, 359 F.3d 498, 504 (7th Cir. 2004); *Moser v. Ind. Dep’t of Corr.*, 406 F.3d 895, 905 (7th Cir. 2005). Adverse employment actions include “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (2000); *Rehling v. City of Chicago*, 207 F.3d 1009, 1018 (7th Cir. 2000).

<sup>33</sup> *Moser v. Ind. Dep’t of Corr.*, 406 F.3d 895, 904 (7th Cir. 2005) (quoting *Wells v. Unisource Worldwide, Inc.*, 289 F.3d 1001, 1008 (7th Cir. 2002)).

provision.<sup>34</sup> The participation clause covers an employee's participation in any type of investigation of an unlawful employment practice.<sup>35</sup> Under the opposition clause, an employee must have opposed any unlawful employment practice.<sup>36</sup> A plaintiff does not have to prove that the practice he opposed was actually unlawful.<sup>37</sup> Rather, an employee only needs to show that he reasonably believed in good faith that he opposed a practice that violated Title VII.<sup>38</sup> Thus, a plaintiff can lose on his sexual harassment claim but still prevail under a retaliation theory.<sup>39</sup>

Still, what qualifies as having opposed unlawful discrimination under the opposition clause is unclear. Title VII does not define "opposed," but it is commonly understood to include making a formal or sometimes informal complaint to an employer about the harassment.<sup>40</sup> This serves to put an employer on notice about the harassment, and notice is an implicit element in a Title VII retaliation claim.<sup>41</sup> Whether rebuffing a supervisor's sexual advances constitutes opposition activity within the meaning of Title VII, however, is an unsettled question.

<sup>34</sup> See 42 U.S.C.A. § 2000e-3 (2006).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002).

<sup>38</sup> *Id.* This requirement has both an objective and a subjective component. *Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 959-60 (11th Cir. 1997) ("A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices but also that his belief was objectively reasonable in light of the facts and record presented.").

<sup>39</sup> *Fine*, 305 F.3d at 752 ("[A] plaintiff need not prevail on her Title VII discrimination claim or have opposed an action that in fact violated Title VII to win a retaliation claim").

<sup>40</sup> The E.E.O.C.'s Compliance manual provides four examples of opposition activity: (1) "threatening to file a charge or other formal complaint alleging discrimination;" (2) "complaining to anyone about alleged discrimination against oneself or others;" (3) "refusing to obey an order because of a reasonable belief that it is discriminatory;" and (4) "requesting reasonable accommodation or religious accommodation." See EEOC Compliance Manual § 8-II-B(2) (May 20, 1998).

<sup>41</sup> *Durkin v. City of Chicago*, 341 F.3d 606, 614 n.4 (7th Cir. 2003).

## II. THE CIRCUIT SPLIT

Only the Eighth and Fifth circuit courts of appeal have applied this statutory and judicial framework to the question of whether the rejection of a supervisor's advances constitutes protected activity under Title VII. This section will examine the relevant facts and holdings of the Eight Circuit's decision in *Ogden v. Wax Works, Inc.*<sup>42</sup> and the Fifth Circuit's decision in *LeMaire v. Louisiana Department of Transportation & Development*.<sup>43</sup>

### A. *Ogden v. Wax Works, Inc.*

#### 1. Factual Background

On May 3, 1987 Wax Works Inc. hired Kerry Ogden as the sales manager of a music store.<sup>44</sup> Ogden reported to a district manager who performed yearly evaluations of her performance; the evaluations were required for Ogden to receive her yearly raise.<sup>45</sup> Ogden was an "outstanding" manager, increased sales of her store, and received bonuses and awards for her work.<sup>46</sup> Robert Hudson became Ogden's district manager in 1993 and Ogden claimed that he began sexually harassing her in late June or early July, 1994.<sup>47</sup> Ogden detailed three separate incidents in which Hudson subjected her to unwelcome physical advances. First, Hudson grabbed her waist while asking her into his hotel room when the two were leaving a restaurant.<sup>48</sup> Second, Hudson put his arm around her while intoxicated in a bar with other

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<sup>42</sup> 214 F.3d 999 (8th Cir. 2000).

<sup>43</sup> 480 F.3d 383 (5th Cir. 2007).

<sup>44</sup> *Ogden*, 214 F.3d at 1002-03.

<sup>45</sup> *Id.* at 1003.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

employees.<sup>49</sup> Third, Hudson again physically grabbed or touched Hudson.<sup>50</sup> Each time she told Hudson not to touch her and to leave her alone.<sup>51</sup>

Hudson also routinely propositioned Ogden at work<sup>52</sup> and took an inappropriate interest in her personal life.<sup>53</sup> For example, Hudson berated her and became angry when learning of any relationship with male friends outside of work.<sup>54</sup> Whenever Ogden rebuffed Hudson's advances, he criticized her work performance and regularly yelled at her in front of other employees over job related matters.<sup>55</sup> Ogden believed that Hudson refused to complete her 1995 evaluation, and therefore refused to give her a raise, in retaliation for her refusal to give in to his advances.<sup>56</sup> In April, 1995, Hudson's supervisor ordered him to perform Ogden's evaluation.<sup>57</sup> Hudson did not do so, however, and in June, 1995 he told Ogden he would only perform the evaluation if she went a three-day gambling spree with him; Ogden refused<sup>58</sup> Hudson responded by yelling at her and then refused her request to take a vacation.<sup>59</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Ogden actually responded to the third incident of harassment with a physical threat against Hudson. *Id.*

<sup>52</sup> *Id.* Hudson asked Ogden to drinks after work, to stay with him at his home and "party," to go to a motel room with him during a convention, and to attend a concert with him. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* Hudson also offered to stay with Ogden to "protect" her from her ex-husband.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1003-04.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1004. Hudson also told Ogden about affairs he had with other employees and how he had secured raises and promotions for those employees. He told Ogden she would not have received a raise in 1994 if it was not for his efforts. *Id.*

<sup>59</sup> *Id.*

A later confrontation between Hudson and Ogden in August over a managerial decision resulted in Hudson following Ogden to her car, screaming, smacking his fist, and saying he would “squish [her] out like a little fly.”<sup>60</sup> Ogden called Wax Work’s home office and reported the incident and that Hudson yelled at her because she would not go out with him.<sup>61</sup> She eventually told the management office about Hudson’s conduct, including his offers to stay at his home.<sup>62</sup> Management visited the Sioux City store, but Ogden was unable to come in to work due to illness.<sup>63</sup> After Wax Works concluded that Hudson was an asset to the company and would not be fired, the company terminated Ogden.<sup>64</sup> Ogden never received her 1995 raise and left Wax Works in September of 1995.<sup>65</sup> During the alleged harassment, Ogden lost forty pounds, became depressed, and frequently left work in tears.<sup>66</sup>

Ogden brought suit again Wax Works under Title VII for hostile work environment, quid pro quo sexual harassment, and retaliation.<sup>67</sup> A jury found in favor of Ogden on all three claims and Wax Works moved for judgment as a matter of law or in the alternative, a new trial.<sup>68</sup> The district court denied the motion and Wax Works appealed.<sup>69</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1004-05.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* Management claimed that it fired her because of her allegations against Hudson.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1002.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

## 2. The Eight Circuit's Opinion

The Eight Circuit began its analysis by noting that its review of a jury verdict would be “extremely deferential”.<sup>70</sup> The court concluded that Hudson’s numerous physical advances were sufficient to create a hostile work environment.<sup>71</sup> The court also held that Ogden’s quid pro quo claim was properly supported by Hudson’s conditioning her 1995 raise on her submission to his unwelcome advances.<sup>72</sup> The court next found that Wax Work’s investigation was inadequate, and Ogden had put the employer on notice about the conduct by complaining about Hudson.<sup>73</sup>

Turning to Ogden’s retaliation claim, the Eight Circuit examined Wax Work’s argument that Ogden failed to engage in “protected activity” under Title VII. The court held that Ogden “engaged in ‘the most basic form of protected activity’ when she told her supervisor. . .to stop his offensive conduct.”<sup>74</sup> The court, quoting the language of Title VII’s opposition clause, held that a jury could have reasonably concluded that Ogden opposed discriminatory conduct by telling her supervisor to stop harassing her.<sup>75</sup> The court further held that Ogden’s testimony that she opposed discriminatory conduct was bolstered by the jury’s conclusion that Hudson’s denial of the raise

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<sup>70</sup> *Id.* at 1006. The court said it would only overturn a jury verdict if there was no reasonable interpretation of the evidence that could support Ogden’s position. *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1006-07.

<sup>74</sup> *Id.* at 1007 (quoting *Quarles v. McDuffie County*, 949 F. Supp. 846, 853 (S.D. Ga. 1996)). In *Quarles*, an employee told her supervisor, who was verbally and physically harassing her, that his harassment made her uncomfortable and must stop. The court held that the employee “engaged in the most basic form of protected conduct; namely, telling a harasser, who also was serving as her supervisor, to cease all forms of physical and verbal harassment.” *Quarles*, 949 F. Supp. at 853.

<sup>75</sup> *Ogden*, 214 F.3d at 1007 (quoting 42 U.S.C. § 2000e-3(a) (2000)) (citations omitted).

was causally connected to Ogden's opposition to his advances.<sup>76</sup> Finally, the court held that Wax Works retaliated against Ogden for opposing the discriminatory conduct when Hudson denied her 1995 raise because of Ogden's opposition.<sup>77</sup> Accordingly, the court upheld the jury verdict on Ogden's retaliation claim.<sup>78</sup>

*B. LeMaire v. Louisiana Department of Transportation & Development*

1. Factual Background

In March 2001 Rene LeMaire started working for the Louisiana Department of Transportation and Development ("LaDOTD") as a bridge operator.<sup>79</sup> Milton Endres and Rodney Jones supervised LeMaire.<sup>80</sup> In November 2001, LeMarie and a friend ran into Endres while LeMaire was being dropped off at work.<sup>81</sup> Endres told the two he had been molested as a child and that he had molested LeMaire's friend's ex-husband when he was a child.<sup>82</sup> Endres also told the men about his sex life and that he enjoyed being close with other men like his gay friends, who had been molested.<sup>83</sup> During the exchange,

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<sup>76</sup> *Id.* The court also upheld the jury's verdict on Ogden's constructive discharge claim, upheld the jury's award of front pay damages, and reduced the jury's award of punitive damages. *Id.* at 1007-10.

<sup>77</sup> *Id.* at 1007 n.12.

<sup>78</sup> *Id.* The court also upheld the jury's verdict on Ogden's constructive discharge claim, upheld the jury's award of front pay damages, and reduced the jury's award of punitive damages. *Id.* at 1007-10.

<sup>79</sup> *LeMaire v. Louisiana Dep't of Transp. & Dev.*, 480 F.3d 383, 385 (5th Cir. 2007). LeMaire's job "consisted of operating power-driven drawbridges and performing or overseeing preventative maintenance on the drawbridges." *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



LeMaire repeatedly requested that Endres change the conversation topic.<sup>84</sup>

In February 2002, LeMaire claimed that Endres told him that he had been with gay men who were having sex at Mardi Gras.<sup>85</sup> LeMaire was upset that he was forced to listen to Endres' sexual comments.<sup>86</sup> On June 15, 2002, Endres again spoke to LeMaire about sexually explicit topics.<sup>87</sup> Endres also told LeMaire that he would make it impossible for him to transfer and that his only way to get away from him was to quit.<sup>88</sup> Endres then ordered LeMaire to spray herbicide in a particular area by his work station.<sup>89</sup>

Spraying herbicide was not outside of LeMaire's job duties, but LeMaire believed that the specific order on June 15 was retaliation for his resistance to Endres' sexual stories.<sup>90</sup> LeMaire refused to spray the herbicide, left his job site, and reported the incident and alleged harassment to Jones, who was also Endres' supervisor.<sup>91</sup> Jones convinced LeMaire to file a grievance alleging "unfair/unjust treatment" instead of a formal sexual harassment complaint.<sup>92</sup> LeMaire received a letter on June 18, 2002 stating that there was no conclusive evidence of misconduct by Endres.<sup>93</sup> Later, on June 28, 2002, LeMaire was suspended for two days without pay for refusing to spray herbicide as Endres directed and for leaving the job site without authorization.<sup>94</sup> LeMaire was then involved in a series of incidents in which he allegedly slept on the job, arrived late to work, and refused

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

an order by Endres to mow grass around a bridge.<sup>95</sup> LeMaire received a thirty day suspension as a result of those incidents. LaDOTD then investigated LeMaire's conduct and eventually fired him on August 15, 2002.<sup>96</sup>

LeMaire brought sexual harassment and retaliation claims under Title VII against LaDOTD.<sup>97</sup> The employer moved for summary judgment and in a single page order providing no reasons for its decision, the district court granted the employer's motion on all claims.<sup>98</sup> LeMaire appealed.

## 2. The Fifth Circuit's Opinion

The Fifth Circuit began its discussion by noting that its review was complicated by the district court's lack of analysis and sparse briefing by the parties.<sup>99</sup> The court then reversed the district court's dismissal of the sexual harassment claim because the defendant had merely denied the existence of the allegedly offensive remarks and filed a motion citing no legal authority on the issue.<sup>100</sup> Turning to LeMaire's retaliation claims, the court identified four potential sources of retaliation. Those sources included (1) Endres' order to LeMaire to spray herbicide;<sup>101</sup> (2) other general acts of retaliation by Endres;<sup>102</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 385-86.

<sup>97</sup> *Id.* at 386-87. While it is unclear from the court's opinion, it appears that LeMaire filed hostile work environment and quid pro quo sexual harassment claims against LaDOTD. *See id.* at 388.

<sup>98</sup> *Id.* at 386-87. The district court stated that "written reasons" for its decision would be filed at a later date. The district court, however, never filed any reasons for its decision. *Id.*

<sup>99</sup> *Id.* at 387.

<sup>100</sup> *Id.* at 387-88 (stating that the defendant "filed a bare-bones motion that failed to cite to any legal precedent or standards regarding sexual harassment").

<sup>101</sup> *Id.* at 389.

<sup>102</sup> The court did not identify what other "general acts" of retaliation it was referring to. *Id.*

(3) LeMaire's two-day suspension;<sup>103</sup> and (4) LeMaire's termination.<sup>104</sup> The court analyzed each potential act of retaliation separately to determine whether LeMaire could establish a *prima facie* case.

With regard to the second allegation of retaliation, the court reversed the district court's grant of summary judgment on the miscellaneous allegations because LaDOTD did not move for summary judgment on those claims.<sup>105</sup> On the third allegation, LeMaire's two day suspension, the court noted that facts regarding the order to spray herbicide, which led to the suspension, were unclear, and that it was similarly unclear whether Endres was involved in the decision to suspend LeMaire. The court therefore reversed the district court's grant of summary judgment because of the unclear facts underlying the two-day suspension.<sup>106</sup> On the fourth allegation, LeMaire's termination, the court affirmed summary judgment because LeMaire failed to refute LaDOTD's legitimate, non-discriminatory reasons for firing him.<sup>107</sup>

With regard to the first allegation, the order to spray herbicide, the court considered LeMaire's argument that the order was retaliation for his rejection of Endres' sexual advances.<sup>108</sup> The court noted that at the time of Endres' order to spray herbicide and LeMaire's refusal to follow the order, LeMaire had not yet complained to anyone about the harassment.<sup>109</sup> Therefore, since LeMaire had not yet complained to anyone of Endres' conduct, the only protected activity he could have engaged in was actually rejecting Endres' sexual advances.<sup>110</sup> The

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<sup>103</sup> *Id.* at 389.

<sup>104</sup> *Id.* at 389.

<sup>105</sup> *Id.* at 390-91.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 390-91. LaDOTD's legitimate, non-discriminatory reasons for firing LeMaire included sleeping on the job, being four hours late to work, and refusing to mow the grass. *Id.*

<sup>108</sup> *Id.* at 389.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

court held that LeMaire had provided no authority “for the proposition that rejecting sexual advances constitutes a protected activity for purposes of a retaliation claim under Title VII.”<sup>111</sup> To support its holding, the Fifth Circuit cited *Frank v. Harris County*,<sup>112</sup> an unpublished Fifth Circuit decision that, without citing any authority, reached the same conclusion.<sup>113</sup> The Fifth Circuit therefore held that LeMaire’s rejection of Endres’ sexual advances was not a protected activity under Title VII and affirmed summary judgment for Wax Works on that issue.<sup>114</sup>

### III. TATE V. EXECUTIVE MANAGEMENT SERVICES

#### A. *Factual Background*

On August 19, 2002, Executive Management Services hired Alshafi Tate to clean office buildings.<sup>115</sup> Dawn Burban was Tate’s immediate supervisor and picked him to work under her on a team of employees to clean buildings.<sup>116</sup> Within approximately one week, the two began having consensual sex two to three times a week while at work or at the home of a co-worker.<sup>117</sup> The two continued having sex throughout his employment, except for a short period in 2003.<sup>118</sup>

<sup>111</sup> *Id.*.

<sup>112</sup> 118 Fed. Appx. 799, 804 (5th Cir. 2004) (unpublished).

<sup>113</sup> *Id.* The court in *Frank* held that an employee’s rejections of her supervisor’s sexual advances was not opposition activity because she “provide[ed] no authority for the proposition that a single ‘express rejection’ . . . constitutes as a matter of law a protected activity for purposes of retaliation.” *Id.*

<sup>114</sup> *LeMaire*, 480 F.3d at 389, 392. One judge concurred in part and dissented in part on the basis that he would have affirmed the district court’s entire order of summary judgment. *Id.* at 392-96 (DeMoss, J., concurring in part, dissenting in part)

<sup>115</sup> *Tate v. Executive Mgmt. Serv., Inc.*, 546 F.3d 528, 529 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (2009).

<sup>116</sup> *Id.* at 529-30.

<sup>117</sup> *Id.* Burban denied that the two ever had a sexual relationship. *Id.*

<sup>118</sup> *Id.* Tate worked in a different building than Burban for this short time period. *Id.*

Based on Burban's recommendation, EMS promoted Tate after only one week of work and raised his pay.<sup>119</sup> In August, 2003, Tate got married.<sup>120</sup> Burban, however, continually called Tate's home, which upset his wife.<sup>121</sup> Tate testified that he wanted to "keep the slate clean" between himself and his wife and tried to end the sexual relationship with Burban in October, 2003.<sup>122</sup>

Burban, however, refused to end the sexual relationship. She told Tate that she expected the relationship to continue and that he would lose his job if it did not.<sup>123</sup> In December, 2003, while at a holiday dinner party with co-workers, Burban told Tate that they must continue having sex or it would cost him his job.<sup>124</sup> Tate told her that he did want to continue the relationship. Burban responded by telling him that he could have a couple days to think about it.<sup>125</sup> Two weeks later, Burban again asked Tate whether he had "made a choice yet."<sup>126</sup> It was not clear how Tate responded to that inquiry. On January 13, 2004, Tate arrived to work for an evening shift.<sup>127</sup> Burban summoned him to her office, closed her door, and asked him if he had made a decision. Tate said that he had "wasn't messing with her anymore."<sup>128</sup> At this point, Burban raised her voice and yelled that Tate did not "know who [he was] f---king with" and that he "could leave right now."<sup>129</sup>

When Tate left Burban's office, she followed him into a break room, yelling that she would "have [his] job" and was going "to have

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<sup>119</sup> *Id.* at 530.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* Tate testified that he believed Burban was "was trying to make a hard choice for me." *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

[his] ass fired.”<sup>130</sup> Tate told Burban to call Darren Taylor, Burban’s supervisor who was not in the office at the time. Burban called Taylor but did not allow Tate to speak with him.<sup>131</sup> Taylor told Burban to tell Tate to go home and he was escorted out by a security guard around 4:45 P.M.<sup>132</sup> Burban claimed that she sent Tate home because he refused, without reason, to go to a new work assignment and became loud and belligerent.<sup>133</sup> Tate, on the other hand, argued that Burban did not give him any work-related assignment before he was sent home.<sup>134</sup> Burban then called EMS’s general manager, Nancy Scheumann, and reported that Tate had refused to do his assigned work and was sent home. Burban subsequently prepared an “insubordination” report for Tate.<sup>135</sup>

The following day, Scheumann had made the decision to fire Tate by 8:50 a.m.<sup>136</sup> EMS claimed that Scheumann’s decision to fire Tate was based on Tate’s employment record and conversations with Burban, Taylor, and the security officer.<sup>137</sup> Tate tried to call Scheumann and Taylor that day to discuss the incident. He contacted

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* The security guard heard Burban and Taylor arguing and heard Burban tell Taylor “If you can’t do what I tell you to do, just leave.” *Id.* See Brief of Plaintiff-Appellee, Tate v. Executive Mgmt. Serv., Inc., 546 F.3d 528 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (2009), 2008 WL 401044 (stating that the security guard approached Tate and Burban around 4:45 P.M.).

<sup>133</sup> *Tate*, 546 F.3d at 530-31.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Burban wrote that Tate said cleaning a particular building was not part of his job, that he only needed to complete certain tasks that would not have taken eight hours to complete, and that Burban told him he needed to complete eight hours of work. Burban further wrote that she told Tate to go home after he continued to refuse to do the work, and that a security guard heard the argument and escorted Tate out of the building. *Id.*

<sup>136</sup> *Id.* at 531.

<sup>137</sup> *Id.* The security officer, however, testified that he did not speak to Scheumann until approximately one month after the incident. Scheumann also testified that an investigation was not warranted because of Tate’s alleged insubordination. *Id.*

EMS's corporate headquarters and reached a human resources official who told him that he had been terminated for insubordination.<sup>138</sup> Tate asked if he could explain his side of the story but was not given an opportunity to do so and the conversation lasted less than one minute.<sup>139</sup> Burban signed Tate's termination form.<sup>140</sup>

Tate brought harassment and retaliation claims against EMS.<sup>141</sup> The jury found against Tate on his sexual harassment claim but returned a verdict in his favor on the retaliation claim.<sup>142</sup> EMS renewed its previous motion for judgment as a matter of law or in the alternative, a new trial.<sup>143</sup> EMS argued that it had no knowledge of Burban's retaliatory motive and discharged Tate based on the report of the security officer, a neutral and disinterested witness. EMS also argued that Tate did not engage in a protected activity when he told Burban he would not have sex with her to keep his job.<sup>144</sup>

### B. The District Court's Opinion

Addressing EMS's post-trial motion, the district court began by examining the language of the opposition clause of Title VII's retaliation provision.<sup>145</sup> The court stated that threatening a person with termination if he or she refuses to continue a sexual relationship is an unlawful employment practice.<sup>146</sup> The court held that based on Title VII's language, a "straightforward reading of the statute's text requires

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* Curiously, the jury awarded Tate no compensatory damages on his retaliation claim. *Tate v. Executive Mgmt. Servs., Inc.*, 2007 WL 1650410 (N.D. Ind. 2007), *overruled by* *Tate v. Executive Mgmt. Servs, Inc.*, 546 F.3d 528 (7th Cir. 2008), *cert. denied*, 2009 WL 62165 (U.S. 2009).

<sup>143</sup> *Tate*, 546 F.3d at 531.

<sup>144</sup> *Id.*

<sup>145</sup> *See Tate*, 2007 WL 1650410 at \*2 (citing 42 U.S.C. § 2000e-3(a) (2006)).

<sup>146</sup> *Id.* (citing *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 n. 7 (7th Cir. 1997)).

finding that rebuffing sexual harassment can in some situations be considered opposition to an unlawful employment practice.”<sup>147</sup> Further, the court held that when an employee refuses a supervisor’s ultimatum to continue having a sexual relationship or else be terminated, the employee could reasonably be opposing the sexual relationship or change in the terms of employment.<sup>148</sup> In this case, the court found that Tate refused Burban’s ultimatum to have sex, but did so under the threat of termination.<sup>149</sup>

The court then addressed the concerns of other courts holding that rebuffing a supervisor’s sexual advances is not opposition activity. First, the court rejected the argument that rebuffing sexual advances cannot constitute a form of protected activity because if it did, every harassment claim would automatically include a retaliation claim.<sup>150</sup> The court reasoned that when an employee is fired for saying no to a supervisor’s ultimatum to continue having sex or end employment, the reason for firing could be the employee’s opposition to the change in employment terms, the sexual harassment, or both.<sup>151</sup> The court found that the reasons for an employee’s opposition in this situation, while intertwined, are not identical and represent separate claims—one for harassment (opposing the sexual relationship) and another for retaliation (opposing the change in employment terms now condition upon acquiescence to the harassment).<sup>152</sup> The court therefore dismissed the concern that every harassment claim would automatically state a retaliation claim. Second, the court rejected the concern that a retaliation claim in this situation is duplicative and might confuse a jury, reasoning that those hypothetical concerns were

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* (citing *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438-39 (S.D. N.Y. 1996)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



not sufficient to ignore the plain language of Title VII's retaliation provision.<sup>153</sup>

Thus, the court found that it was reasonable for the jury to conclude that Tate was fired for opposing the unlawful practice of making employment contingent on sex.<sup>154</sup> Accordingly, the court denied EMS's motions for judgment notwithstanding the verdict and for a new trial.<sup>155</sup> EMS appealed.

### C. The Seventh Circuit's Opinion

The Seventh Circuit turned directly to the issue of whether Tate engaged in a protected activity under Title VII.<sup>156</sup> After quoting Title VII's retaliation provision, the court recognized the circuit split between the Eighth and Fifth Circuits.<sup>157</sup> The court declined to decide the issue but was willing to assume that there may be situations in which a plaintiff who rejects his supervisor's advances has engaged in a protected activity.<sup>158</sup> The court held that even under this assumption, Tate did not engage in a protected activity because he did not reasonably believe that he opposed an unlawful employment practice.<sup>159</sup>

The court focused its analysis on the requirement that a plaintiff must have subjectively believed they were opposing an unlawful employment practice.<sup>160</sup> The court cited precedent in which employees demonstrated their belief that they were being harassed by

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<sup>153</sup> See *id.* (examining *Rashid v. Beth Israel Med. Cent.*, 1998 WL 689931, \*2 (S.D.N.Y.1998)).

<sup>154</sup> *Id.* at \*2-3. The court also concluded that there was a sufficient basis for employer liability because Scheumann acted as Burban's "rubber stamp" in firing Tate, there was no independent investigation, and Tate was prevented from telling his side of the story. *Id.* at \*3-4.

<sup>155</sup> *Id.* at \*4-5.

<sup>156</sup> *Tate*, 546 F.3d at 532.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (citing *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002)).

<sup>160</sup> *Id.*

complaining directly to management or threatening to go the EEOC with complaints.<sup>161</sup> The court then examined several statements from Tate that it considered particularly important to the issue of whether he believed he was being harassed.<sup>162</sup> First, when Bourban gave him the final ultimatum, he told her they “were not good with each other” and that he “was not messing with her anymore.”<sup>163</sup> Second, if Tate would have had an opportunity to explain his story to upper level management, he would have said that he was not insubordinate and was “wrongly mistreated.”<sup>164</sup> Third, Tate said he would have liked management to know that Burban had called his home and had an argument with his wife.<sup>165</sup> Finally, Tate testified that he “wanted to leave Dawn” so that he could “start off with a clean slate” and “be true” to his wife.<sup>166</sup>

The court found that while there was no doubt that Tate protested Burban’s actions, his statements indicated personal reasons for ending the sexual relationship, rather than a belief that he was being harassed.<sup>167</sup> In fact, the court found the record “devoid” of any statements proving that Tate believed he was opposing an unlawful employment practice.<sup>168</sup> The court reasoned that protecting an employee who did not believe he was being harassed would not serve the purpose of the reasonable good faith requirement.<sup>169</sup> Finding that

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<sup>161</sup> *Id.* (citing *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1450 (7th Cir. 1994), and *Holland v. Jefferson Nat’l Life Ins. Co.*, 883 F.2d 1307, 1315 (7th Cir. 1989)).

<sup>162</sup> *Id.* at 532-33.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 533.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (holding that Tate’s “statements point to personal reasons for ending the relationship rather than concerns about the legality of Burban’s behavior.”).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (citing *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir.2004) (“The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees *who in good faith protest the discrimination they believe they have*

Tate did not in oppose what he believed was harassment, the court held that he had not engaged in a protected activity.<sup>170</sup> Accordingly, the Seventh Circuit reversed the district court's ruling and held that EMS was entitled to judgment as a matter of law on Tate's retaliation claim.<sup>171</sup>

#### IV. THE LANGUAGE OF TITLE VII: DEFINING OPPOSED

The Seventh Circuit's decision in *Tate* did not focus on the definition of oppose.<sup>172</sup> However, the ultimate result of the case, that an employee who rebuffed his superior's demands for sex did not oppose an unlawful employment activity, creates precedent that affects how opposed will be defined in this situation. Holdings like the Seventh Circuit's in *Tate* that an employee who rejects his supervisor's demands for sex did not oppose an unlawful employment practice run counter to the definition of oppose. This section will show how an employee who rebuffs a supervisor demands for sex satisfies the retaliation clause's opposition requirement by examining (A) the plain language of Title VII; (B) the retaliation clause's legislative history; and (C) the Supreme Court's recent interpretation of the retaliation clause in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*<sup>173</sup>

##### A. *The Plain Language of Title VII*

The first step in any form of statutory interpretation is to examine the plain language of a statute.<sup>174</sup> The opposition clause of Title VII's

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*suffered* and to ensure that such employees remain free from reprisals or retaliatory conduct.") (emphasis added by the court)).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> The court in *Tate* focused on the requirement that an employee have a good faith reasonable belief that they are opposing unlawful discrimination. *Id.*

<sup>173</sup> 129 S.Ct. 846 (2009).

<sup>174</sup> See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (holding that "[o]ur precedents make clear that the starting point for . . . analysis is the statutory text" and

retaliation provision states that an employer may not retaliate against an employee who “has opposed any practice made an unlawful employment practice by” Title VII.<sup>175</sup> Sexual harassment, whether hostile work environment or *quid pro quo* harassment, is an unlawful employment practice.<sup>176</sup> Since a supervisor’s sexual advances are an unlawful employment practice, it follows that refusing to submit to those advances or verbally objecting to them is a method of opposing the unlawful employment practice. In fact, many district courts have followed this exact method of analysis in holding that rebuffing a supervisor’s sexual advances is opposition activity under Title VII’s retaliation clause.<sup>177</sup> Still, Title VII’s plain language does not define opposed or make its definition clear.

### B. Legislative History

The legislative history behind the retaliation provision offers no guidance on how to interpret or apply it, or even why it was added to Title VII. The committee reports simply repeat the retaliation provision’s language without any explanation for its meaning.<sup>178</sup> The

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that “where. . .the words of the statute are unambiguous, the ‘judicial inquiry is complete.’”) (quoting *Connecticut Nat.’l Bank v. Germain*, 503 U.S. 249, 253-254, (1992)).

<sup>175</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>176</sup> See 42 U.S.C. § 2000e-2(a)(1) (2006); *supra* notes 22-23 and accompanying text.

<sup>177</sup> *Little v. NBC*, 210 F. Supp. 2d 330, 385-86 (S.D. N.Y. 2002) (holding that “sexual harassment by an employer or supervisor is an unlawful practice, and an employee’s refusal is a means of opposing such unlawful conduct”); *Fleming v. South Carolina Dep’t of Corr.*, 952 F. Supp. 283, 288 (D. S.C. 1996) (holding that the employer’s “alleged conduct of requesting sex from the plaintiff is an unlawful practice and the plaintiff’s refusal is opposition to such unlawful conduct”); See also *Ogden v. Wax Works, Inc.* 214 F.3d 999, 1007 (8th Cir. 2000) (using similar reasoning).

<sup>178</sup> See Edward C. Walterschied, *A Question of Retaliation: Opposition Conduct As Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 BOSTON C. L. REV. 391, 393-94 (1988) (examining the committee reports). The proceedings and floor debates concerning the retaliation clause also reveal nothing about its purpose or intended application. See *Hochstadt v. Worcester Found.* for

only statement of congressional intent related to the provision occurs in the statement that “management prerogatives. . .are to be left undisturbed to the greatest extent possible. Internal affairs of employers. . .must not be interfered with except to the limited extent that correction is required in discrimination practices.”<sup>179</sup> The rest of the history surrounding Title VII is similarly unhelpful.<sup>180</sup> Courts, therefore, have been left to interpret the meaning of the retaliation clause and have traditionally relied on its plain language. This reliance makes sense, especially given that at the time of every previous decision on the issue of what constitutes opposition activity for purposes of retaliation, the Supreme Court had never offered guidance on the meaning of opposed. In its recent decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* however, the Supreme Court, for the first time, discussed the meaning of opposed.<sup>181</sup>

*C. Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*

1. Factual Background

The plaintiff in *Crawford* was asked by her employer’s human resources department, as part of an ongoing investigation into rumors

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Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976) (“Neither in its wording nor legislative history does section 704(a) make plain how far Congress meant to immunize hostile and disruptive employee activity when it declared it unlawful for an employer to discriminate against an employee ‘because he has opposed any practice made an unlawful employment practice by this subchapter . . . .’ 42 U.S.C. s 2000e-3(a). The statute says no more, and the committee reports on the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1963, which later became Title VII of the Civil Rights Act, repeat the language of 704(a) without any explanation.”)

<sup>179</sup> See Walterschied, *supra* note 178, at 393.

<sup>180</sup> Title VII’s legislative history has been declared “judicially incomprehensible.” *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1138 n.7 (5th Cir. 1971).

<sup>181</sup> 129 S.Ct. 846 (2009).

of sexual harassment by a supervisor, if she had ever witnessed inappropriate behavior by the supervisor.<sup>182</sup> The plaintiff reported several instances of inappropriate sexual behavior by the supervisor and two other employees gave similar reports.<sup>183</sup> The employer took no action against the supervisor and fired all three accusers after the investigation was complete.<sup>184</sup> The employee filed suit, claiming the she was fired in retaliation for reporting the supervisor's conduct, in violation the opposition and participation clauses of Title VII's retaliation provision.<sup>185</sup>

The district court granted summary judgment for the employer, finding that simply answering questions by investigators in an already ongoing internal investigation initiated by another employee was not opposition activity under Title VII.<sup>186</sup> The court also found that participation in the investigation did not fit under Title VII's participation clause because it was not done pursuant to a pending EEOC charge.<sup>187</sup> The Sixth Circuit affirmed, holding that Title VII's opposition clause "demands active, consistent 'opposing' activities to warrant. . . protection against retaliation."<sup>188</sup> The court held that answering questions in an investigation started by someone else and then not taking any other action after the investigation, such as filing an EEOC charge, was not the type of "overt opposition" that Title VII protects.<sup>189</sup> The court also concluded that since the investigation was not conducted due to a pending EEOC charge, there was no violation of the participation clause.<sup>190</sup> The plaintiff appealed and the Supreme

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<sup>182</sup> *Id.* at 849.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* The employer claimed it had fired the plaintiff for embezzlement.

<sup>185</sup> *Id.* at 850.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Crawford v. Metropolitan Gov't of Nashville*, 211 Fed.Appx. 373, \*2-3 (6th Cir. 2006) (quoting *Bell v. Safety Grooving and Grinding, LP*, 107 Fed. App'x. 607, 610 (6th Cir. 2004)), *overruled by Crawford*, 129 S.Ct. at 846.

<sup>189</sup> *Id.* at \*3.

<sup>190</sup> *Id.* at \*3-4.

Court granted certiorari to answer the question of whether an employee who speaks out about harassment not on her own initiative, but in answering questions during an employer's internal investigation has opposed an unlawful employment practice under Title VII.<sup>191</sup>

## 2. The Majority Opinion

The Supreme Court unanimously reversed the Sixth Circuit's decision and held that an employee who speaks out about discrimination during an employer's investigation is protected by Title VII's retaliation provision.<sup>192</sup> The Court held that since Title VII does not define oppose, the word retains its ordinary meaning.<sup>193</sup> Examining dictionary definitions of the word, the Court held that oppose means "to resist or antagonize. . . ; to contend against; to confront; resist; withstand" and that although those definitions implied affirmative acts, "resist frequently implies more active striving than oppose."<sup>194</sup> In dicta, the court noted that oppose is also defined as "to be hostile or adverse to, as in opinion."<sup>195</sup> The Court also cited the EEOC Compliance manual, which defines opposition as communicating a belief to an employer that it has engaged in employment discrimination.<sup>196</sup>

Under these definitions, the Court held that the plaintiff's statement to her employer about the supervisor was covered by the

<sup>191</sup> *Crawford*, 129 S.Ct. at 849.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 850 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

<sup>194</sup> *Id.* (quoting Webster's New International Dictionary 1710 (2d ed. 1958)) (emphasis in original).

<sup>195</sup> *Id.* (quoting Random House Dictionary of the English Language 1359 (2d ed. 1987)).

<sup>196</sup> *Id.* at 850-51 ("When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'") (quoting Brief for United States as Amicus Curiae, *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn.* 129 S.Ct. 846 (2009) (citing 2 EEOC Compliance Manual §§ 8-II-B(1)-(2) (Mar. 2003))).

opposition clause because it was “an ostensibly disapproving account” of harassment that caused her employer to fire her.<sup>197</sup> The Court also held that the plaintiff’s descriptions of the supervisor’s inappropriate sexual behavior would “certainly qualify in the minds of reasonable jurors” as resistant, antagonistic or antagonistic to the supervisor’s harassment.”<sup>198</sup> Further, the Court expressly rejected the Sixth Circuit’s requirement that opposition requires active behavior or the instigating of a complaint to be protected.<sup>199</sup> In dicta, the Court stated that “[o]ppose’ goes beyond ‘active, consistent’ behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it.”<sup>200</sup> The Court provided examples of this type of silent opposition, such as opposing slavery before Emancipation, opposing capital punishment without writing letters or protesting, and an employee who simply maintains the status quo and refuses to implement an employer’s discriminatory policy.<sup>201</sup>

The Court also rejected the argument that if retaliation is an easier claim for an employee to make, employers will be discouraged from investigating discrimination.<sup>202</sup> Finally, the Court found its holding consistent with the primary objective of the retaliation clause, which is to avoid harm to employees.<sup>203</sup> The Court therefore concluded that the

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 851. The Court also noted that it was not unclear whether the employee opposed the supervisor’s actions because she “gave no indication that [his] gross clowning was anything but offensive to her.” *Id.* at n.2.

<sup>199</sup> *Id.* at 851 (holding that “though these requirements obviously exemplify opposition as commonly understood, they are not limits of it”).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 851-52. The Court held that employers have a strong incentive to inquire about and remedy any potential workplace discrimination and that a broader interpretation of “oppose” posed no threat to that incentive. *Id.*

<sup>203</sup> *Id.* at 852. (“If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others.”).



employee's conduct in answering questions in an internal investigation was opposition activity.<sup>204</sup> Accordingly, the Court reversed the Sixth Circuit's decision.<sup>205</sup>

### 3. Justice Alito's Concurring Opinion

Justices Alito wrote a separate concurring opinion in which Justice Thomas joined to express his understanding that the Court's holding did not and would not extend beyond employees who testify in internal investigations or similar "purposive" conduct.<sup>206</sup> Justice Alito noted that while not all conduct must be active or consistent, the primary definitions of the term oppose require conduct that is "active and purposive."<sup>207</sup> Justice Alito approved of the definition of opposed advanced by the plaintiff,<sup>208</sup> but believed the Court should not expand its definition any further. Specifically, Justice Alito took issue with the Court's citation to the definition of oppose as in "to be hostile or adverse to, *as in opinion*,"<sup>209</sup> which he believed could include silent opposition.<sup>210</sup>

<sup>204</sup> *Id.* at 852-53. ("[N]othing 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.")

<sup>205</sup> *Id.* at 852-53. The Court did not reach the employee's participation clause argument. *Id.* at 853.

<sup>206</sup> *Id.* at 853-55 (Alito, J. concurring).

<sup>207</sup> *Id.* ("For example, the first three definitions of the term in the dictionary upon which the Court principally relies are as follows: '1. to act against or provide resistance to; combat. 2. to stand in the way of; hinder; obstruct. 3. to set as an opponent or adversary.'") (quoting Random Dict. 1359 (2d ed.1987)).

<sup>208</sup> The plaintiff argued, and Justice Alito agreed, that oppose means "taking action (including making a statement) to end, prevent, redress, or correct unlawful discrimination." *Id.* at 854 (quoting Brief for Petitioner, Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. 129 S.Ct. 846 (2009)).

<sup>209</sup> *Id.* at 854 (emphasis added by the Court).

<sup>210</sup> *Id.*

Justice Alito doubted whether silent opposition is covered by Title VII.<sup>211</sup> In particular, he noted that all of the other conduct protected in the retaliation clause, such as making a charge, testifying, or assisting or participating in an investigation, requires active or purposive conduct.<sup>212</sup> He went on to say that protecting conduct that is not active could have the negative consequence of allowing employees to recover on retaliation claims without expressing “a word of opposition to their employers.”<sup>213</sup> Additionally, he noted that with the recent increase in the number of retaliation claims filed at the EEOC, an expansive interpretation of the opposition clause could spur the filing of even more claims.<sup>214</sup> Finally, Justice Alito made clear that the question of whether the opposition clause protected employees who do not communicate their opposition to their employer was not before the Court and that the answer to this question was “far from clear.”<sup>215</sup>

#### 4. Crawford’s Application

The Supreme Court in *Crawford* did not decide whether the opposition clause protects an employee who rebuffs his supervisor’s sexual advances.<sup>216</sup> The Court’s statutory construction and discussion of the meaning of oppose, however, indicates that such conduct constitutes opposition conduct within Title VII’s meaning. First, the activity of saying “no” to an ultimatum for continued sex or termination fits the Court’s definition of opposed.<sup>217</sup> Verbally saying

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<sup>211</sup> *Id.* (“While this is certainly an accepted usage of the term ‘oppose,’ the term is not always used in this sense[.]”).

<sup>212</sup> *Id.* Justice Alito believed that this weighed in favor of interpreting those shared traits of active or purposive conduct to other items in the statute, such as the word opposed. *See id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 854-55.

<sup>215</sup> *Id.* at 855.

<sup>216</sup> *See id.* at 852-53.

<sup>217</sup> Including rebuffing a supervisor’s advances within the definition of opposed would be a new extension of the definition for the Supreme Court and it is not a perfect fit. The Court’s language about the definition of opposed, however,

no to this type of demand, especially when it is repeated, qualifies as having resisted, withstood, or antagonized an unlawful employment practice.<sup>218</sup> The Court also defined opposed as having been hostile or adverse to, “as in opinion.”<sup>219</sup> While this language was dicta, it is instructive. Turning down sexual advances, especially in the face of a threat to be fired, is activity or an opinion that is hostile or adverse to the harassment, thus fitting this definition as well.<sup>220</sup> Further, saying no to a supervisor in this situation qualifies as having communicated a belief to the employer that his activity is harassment, a definition unanimously accepted by the Court.<sup>221</sup>

Second, an employee’s rebuff of a supervisor’s threat shows disapproval of the supervisor’s actions and may often provoke the supervisor to inflict some sort of payback.<sup>222</sup> This scenario fits squarely within the Supreme Court’s holding that the employee in *Crawford* opposed an unlawful employment practice because she made “an ostensibly disapproving account of sexually obnoxious behavior” that led to her termination.<sup>223</sup> Telling a supervisor “no more” is ostensible disapproving behavior that can lead to termination.<sup>224</sup> Further, although dicta, the Court gave several examples of silent opposition that could constitute opposition within the meaning of Title VII.<sup>225</sup> Like the employee who silently refuses to

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indicates that it would be proper to include this type of activity as opposition activity. *See infra* notes 218-219, 221 and accompanying text.

<sup>218</sup> *See supra* note 194 and accompanying text.

<sup>219</sup> *See supra* note 195 and accompanying text.

<sup>220</sup> *See id.*

<sup>221</sup> *See supra* note 196 and accompanying text.

<sup>222</sup> This is exactly what happened to the employee who was fired in *Tate* and the employee who was denied a raise and ultimately fired in *Ogden*. *See Tate v. Executive Mgmt. Serv., Inc.*, 546 F.3d 528, 529-31 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (2009); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1003-04 (8th Cir. 2000).

<sup>223</sup> *Crawford*, 129 S.Ct. at 850.

<sup>224</sup> *See supra* note 221.

<sup>225</sup> *Crawford*, 129 S.Ct. at 851. For example, opposing slavery before Emancipation, opposing capital punishment without writing letters or protesting, and

implement an employer's discriminatory policy, an employee who rebuffs a supervisor's sexual advances silently refuses to participate in unlawful conduct.<sup>226</sup> In fact, when an employee actively rebuffs a supervisor in this situation by saying "no," the employee goes farther than the Supreme Court's examples.

This illustrates the third reason why an employee's actions in this situation fit within *Crawford's* and Title VII's meaning of opposition—saying "no" is not silent opposition. While Justice Alito doubted that the opposition clause could protect silent opposition, actively saying "no" and refusing to participate in harassment is distinguishable from silent opposition.<sup>227</sup> Further, even if an employee's actions in this situation were construed to be silent opposition, such opposition, so long as it is in response to an unlawful employment practice, may still constitute protected activity under Title VII.<sup>228</sup> Thus, the Supreme Court's decision in *Crawford* shows that a proper reading of the opposition clause's statutory language would include protecting an employee who actively and purposefully rebuffs a supervisor's sexual advances.

## V. BEYOND TITLE VII'S LANGUAGE

Several important policy and practical considerations further support reading the opposition clause to protect an employee who rebuffs her supervisor's sexual advances. This section will examine these considerations by discussing (a) the importance of the

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an employee who simply maintain he status quo and refuses to implement an employer's discriminatory policy, would all quality. *Id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* at 853-55 (Alito, J. concurring). Additionally, while an employee who has simply stated, "no," has not initiated an EEOC complaint or participated in an internal investigation, the Supreme Court's majority opinion expressly rejects the notion that the opposition clause requires participation in an investigation. *See id.* at 851.

<sup>228</sup> *See McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) ("Passive resistance is a time-honored form of opposition[.]").

supervisor-employee relationship, (b) the purpose and policy of the retaliation provision, and (c) other practical considerations.

### *A. The Importance of the Supervisor – Employee Relationship*

The supervisor to employee relationship has been a dominant theme in employment law. In fact, employer liability for harassment turns almost exclusively on whether the harasser is by an employee's supervisor or a coworker.<sup>229</sup> Harassment by a supervisor triggers strict liability for an employer whereas harassment by a mere co-worker triggers liability only if the employer was negligent in discovering or remedying the harassment.<sup>230</sup> A supervisor is an employee with the power to directly affect the terms and conditions of a person's employment.<sup>231</sup> The focus in determining whether an employee is a supervisor is on the power and authority the supervisor has over another employee.<sup>232</sup> A supervisor generally has the power to hire, fire, demote, promote, transfer, or discipline an employee.<sup>233</sup>

The reasons for the distinction between a co-worker and a supervisor and the focus on the power of the supervisor over the employee are important. The Supreme Court discussed these reasons when it established the supervisor basis for employer liability in *Faragher v. City of Boca Raton*.<sup>234</sup> In *Faragher*, the Court noted that a supervisor's role gives the supervisor increased opportunity for contact and access to an employee.<sup>235</sup> Since the supervisor has the power to alter the employee's terms and conditions of employment, the

<sup>229</sup> Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 505-06 (7th Cir.2004).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 506 (“Supervisor” is a legal term of art for Title VII purposes, and an employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor in the Title VII context.”).

<sup>232</sup> Parkins v. Civil Constr. of Ill., Inc., 163 F.3d 1027, 1033-34 (7th Cir.1998) (“the question . . . is how much or what kind of authority must an individual possess to be a true supervisor”).

<sup>233</sup> *Id.* at 1033 n.1.

<sup>234</sup> 524 U.S. 775, 803 (1998).

<sup>235</sup> *Id.*

employee may be less likely to risk complaining about a supervisor.<sup>236</sup> Further, an employee must interact with their supervisor and cannot simply find a way to avoid the harasser in the same way that a mere co-worker can be avoided. The Court found:

When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose “power to supervise-[which may be] to hire and fire, and to set work schedules and pay rates-does not disappear<sup>237</sup>

Additionally, the Court noted that imposing liability based on a supervisory relationship encourages employers to prevent discrimination because they have a greater opportunity to control the actions of their managers.<sup>238</sup> The Supreme Court’s emphasis on the inequality of power between a supervisor and employee is relevant to a consideration of a supervisor’s sexual advances in the retaliation context because the power relationship is the same. An employee who is propositioned by her supervisor cannot merely walk away like she could with a fellow employer.<sup>239</sup> Further, a subordinate employee harassed by a supervisor will be more hesitant to complain about the supervisor than a fellow employee.<sup>240</sup> The employee’s first line of defense against a harassing supervisor is the rejection of the

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (“Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.”).

<sup>239</sup> *See supra* note 237 and accompanying text. Indeed, the plaintiff in *Tate* attempted to walk away but was called into his supervisor’s office. *See Tate v. Executive Mgmt. Serv., Inc.*, 546 F.3d 528, 530 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1379 (2009).

<sup>240</sup> *See supra* note 236 and accompanying text.

supervisor's advances. Given the inequality of power between a supervisor and employee in this situation and employment law's traditional focus on this relationship, the existence of a supervisor to employee relationship weighs in favor of protecting an employee from retaliation when they rebuff a supervisor's advances.<sup>241</sup> Additionally, the supervisor, with his power to change the terms and conditions of employment, stands in for the employer as its agent.<sup>242</sup> When an employee tells a supervisor that his harassment must cease, the employee therefore also puts the employer on notice about the harassment.

### *B. The Purpose and Policy of the Retaliation Provision*

The purpose of Title VII's retaliation provision in relation to the purposes of Title VII provides important guidance on how it should be interpreted and applied.<sup>243</sup> First, as the purpose of Title VII is to provide substantive guarantees to create a workplace free of discrimination,<sup>244</sup> the retaliation provision's "primary purpose" is provide employees with "unfettered access to [Title VII's] statutory remedial mechanisms."<sup>245</sup> In order for Title VII's protections from workplace discrimination to work, employees must feel free to stand

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<sup>241</sup> See also *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1174-75 (9th Cir. 2003) (holding because of "the imbalance of power, persistent unwanted sexual attention from a supervisor has the potential to result in significant harm. A supervisor may find love or companionship with one he oversees, but he may not use his position to extort sexual favors from an unwilling employee").

<sup>242</sup> See generally *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 ("Congress wanted courts to look to agency principles for guidance in this area.").

<sup>243</sup> See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) ("purpose reinforces what [the retaliation provision's] language says").

<sup>244</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801 (1973).

<sup>245</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, (1997); *Burlington Northern*, 548 U.S. at 63 ("The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.").

up and complain when they feel their rights have been violated.<sup>246</sup> By prohibiting retaliation against employees attempting to enforce those rights, the retaliation provision provides employees with the practical protection necessary to guarantee access to Title VII's substantive guarantees.<sup>247</sup> Protecting employees who say "no" when harassed by a supervisor encourages employees to stand up for their rights and helps guarantee the enforcement of Title VII's prohibition on sexual harassment the workplace.

Second, the Supreme Court has interpreted Title VII to support a policy that encourages employees to use informal methods to speak out against discrimination and also encourages employers to prevent and correct harassment. Under the Supreme Court's companion decisions in *Burlington Industries v. Ellerth*<sup>248</sup> and *Faragher v. City of Boca Raton*,<sup>249</sup> an employer may plead an affirmative defense that it had "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer[.]"<sup>250</sup> This affirmative defense is only available, however, when an employer has not taken any adverse employment action against an employee.<sup>251</sup> This standard of employer liability was adopted in order to encourage employees to speak out against harassment and take advantage of an employer's procedures for harassment claims.<sup>252</sup> By encouraging employees to report

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<sup>246</sup> *Burlington Northern*, 548 U.S. at 67 ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.").

<sup>247</sup> *Id.* at 63 ("The anti-retaliation provision seeks to secure [Title VII's] primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.")

<sup>248</sup> 524 U.S. 742 (1998).

<sup>249</sup> 524 U.S. 775 (1998).

<sup>250</sup> *Faragher*, 524 U.S. at 807-08.

<sup>251</sup> *Id.* at 808.

<sup>252</sup> *See Burlington Indus.*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were



harassment, employers have a greater opportunity to prevent and correct harassment, thus avoiding litigation. The effect of the Supreme Court's incentive for employees to speak out against harassment has the inverse result of exposing employees to additional opportunities for retaliation.<sup>253</sup> The opposition clause supports these policies by protecting employees in this situation<sup>254</sup> and should similarly protect an employee who, following the Supreme Court's incentive to speak out and resolve problems early, voices opposition to harassment to her supervisor.<sup>255</sup>

Third, Title VII's policy in favor of encouraging employees to speak out against unlawful discrimination explains the existence of the reasonable good faith belief requirement. Without the ability of an employee to sue for retaliation regardless of whether their employer actually broke the law,<sup>256</sup> employees would be forced to file formal charges or lawsuits when an informal complaint might suffice to end the harassment.<sup>257</sup> Employees also might run the risk of retaliation

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employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, . . . and the EEOC's policy of encouraging the development of grievance procedures. . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."); George, *supra* note 17, at 443 ("[L]iability assessments under harassment law create a legal incentive for an employee to report quickly to the employer behavior that might constitute a violation of the employer's sexual harassment policy[.]").

<sup>253</sup> See generally George, *supra* note 17 (discussing problems with the early reporting incentive).

<sup>254</sup> See 42 U.S.C.A. § 2000e-3 (2006).

<sup>255</sup> Telling a supervisor "no" also provides the employer with an immediate opportunity to correct its behavior and prevent formal charges or litigation.

<sup>256</sup> See *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 959-60 (11th Cir. 1997).

<sup>257</sup> See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 77-78 (2005) ("The opposition clause extends protection from retaliation to persons who complain informally of discrimination, stopping short of invoking the formal legal machinery of Title VII. Such protection is essential to support Title VII policies favoring the prevention of discrimination and the early, informal resolution of complaints. Charges of discrimination rarely reach the EEOC or the courts without some higher-

from their employer with no effective redress if their interpretation of the law turned out to be incorrect.<sup>258</sup> This would create a chilling effect that would discourage employees from asserting their civil rights and undermine the enforcement of Title VII.<sup>259</sup> A similar chilling effect would be created if employees were not protected from retaliation when telling a supervisor to stop what the employee feels is harassment.

The retaliation provision should be construed in accordance with these underlying purposes, which support protecting an employee who rebuffs her supervisor's sexual advances. The Supreme Court has even recently recognized the importance of broadly interpreting the provision in accordance with its purposes.<sup>260</sup> Furthermore, an effective retaliation provision is so important to the effectiveness of an anti-discrimination statute that courts have implied retaliation protection for informal complaints in other federal statutes.<sup>261</sup> Thus, the purposes

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level person first learning of the complainant's concerns. Without protection from retaliation at the early, less formal stages of complaining, challengers would be chilled from ever complaining or be forced into taking formal legal action when informal action might have been a more appropriate response, at least initially.”) (citations omitted).

<sup>258</sup> See *supra* note 256 and accompanying text.

<sup>259</sup> See *Brake, supra* note 257 at 77-78; *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir.1978) (“The purpose of [the retaliation provision’s opposition clause] is to protect the employee who utilizes the tools provided by Congress to protect his rights. If the availability of that protection were to turn on whether the employee’s charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled.”).

<sup>260</sup> See *Burlington Northern v. White*, 548 U.S. 53, 60-68 (2006). The Court in *Burlington* expanded the scope of adverse employment actions protected by the retaliation clause to be larger than those protected by Title VII. *Id.* The Court reasoned that “[i]nterpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of [Title VII’s] primary objective depends.” *Id.* at 67.

<sup>261</sup> See *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1951-55 (2008) (holding that 42 U.S.C. § 1981 includes protection from retaliation); *EEOC v. Romeo Cmty. Schools*, 976 F.2d 985, 989 (6th Cir. 1992) (holding that an employee who informally complained of gender-based discrimination is protected from retaliation under the Equal Pay Act); *Davis v. Flexman*, 109 F. Supp. 2d 776, 803

behind Title VII's retaliation provision support protecting an employee who rebuffs her supervisor's sexual advances and protection of employees in this situation is critical to enforcing Title VII's remedial provisions.

### C. Practical Considerations

Several practical considerations further support the need to protect employees who rebuff their supervisor's sexual advances. First, protecting this type of activity under the retaliation provision maintains traditional distinctions between harassment and retaliation claims. Some courts fear that protecting employees in this situation could expand the scope of protection under the retaliation provision so far that "every harassment claim would automatically state a retaliation claim".<sup>262</sup> This type of concern misses the subtle distinctions between harassment and retaliation claims. Similar facts can be plead under all claims, but each claim has a different legal focus.<sup>263</sup>

Even a joint *quid pro quo* and harassment claim based on an employee saying "no" to a demand for "sex or your job" does not impermissibly blur the line between harassment and retaliation. While the facts are the same, the focus of the legal claims is not—one focuses on the harassment of an employee based on their *status* as a man or woman, the other on the employee's *actions* based on that perceived harassment.<sup>264</sup> Further, even if a holding that rebuffing

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n.26 (S.D. Ohio 1999) (protecting an employee from retaliation under the Rehabilitation Act, even though the Act does not contain an express retaliation provision).

<sup>262</sup> *E.g.* Del Castillo v. Pathmark Stores, Inc., 941 F. Supp. 437, 438-39 (S.D. N.Y. 1996).

<sup>263</sup> Harassment claims focus on the underlying sexual activity and how it changed the terms or conditions of employment. *See supra* Part II.A. A retaliation claim, on the other hand, focuses on an employer's reaction to perceived harassment. *See supra* Part II.B.

<sup>264</sup> *See* Tate v. Executive Mgmt. Servs., Inc., 2007 WL 1650410, \*2 (N.D. Ind. 2007), *overruled by* Tate v. Executive Mgmt. Servs., Inc., 546 F.3d 528 (7th Cir. 2008), *cert. denied*, 2009 WL 62165 (U.S. 2009) ("When an employee is given an

sexual advances is protected activity caused harassment and retaliation claims to overlap, different adverse employment actions are covered by harassment and retaliation claims.<sup>265</sup> Thus, depending on the type of adverse employment action an employer takes, one type of claim may be precluded while the other is not.

As a practical matter, these subtle legal differences create different results under each type of claim and juries seem to understand the differences. For instance, when a *quid pro quo* harassment and retaliation claim are brought together under similar facts, a jury may find for the plaintiff on one claim but not the other.<sup>266</sup> Moreover, since the retaliation provision's utility as an enforcement tool of Title VII centers on the fact that it is intentionally broader than Title VII's substantive provisions, it is proper for retaliation claims to be brought with harassment claims in factually similar scenarios.<sup>267</sup> Thus, the purpose of the retaliation provision and the legal differences between

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ultimatum that continued employment depends on continuing a sexual relationship, and the employee says 'no more,' that employee could reasonably be understood to be opposing continuing the sexual relationship and to be opposing a change in the terms of his employment. . . . When the protesting employee is terminated, the termination could be motivated by the opposition to the change in employment terms, the opposition to the sexual relationship, or both. The retaliation claim intertwines with the harassment claim, but they are not identical."); *Burlington Northern*, 548 U.S. at 63 ("The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct."); Brake, *supra* note 257, at 48 ("Intentional discrimination, also known as differential treatment and distinguished from disparate impact, typically denotes unfavorable treatment directed at someone because of his or her race, sex or other protected class status. The touchstone of the retaliation claim, on the other hand, is that the complainant was retaliated against for his or her actions opposing discrimination. . . . Unlike the prototypical intentional discrimination model, the retaliation claim asserts that the harm was inflicted because of the complainant's actions, apart from his or her protected class status.").

<sup>265</sup> See *Burlington Northern* 548 U.S. at 60-68.

<sup>266</sup> This is exactly what happened in *Tate*. See *Tate v. Executive Mgmt. Servs., Inc.*, 546 F.3d 528, 531 (7th Cir. 2008), *cert. denied*, 2009 WL 62165 (U.S. 2009).

<sup>267</sup> See Part V.B.

harassment and retaliation claims demonstrate that the two areas of law will not be improperly expanded or blurred.

Second, protecting employees who rebuff their supervisor's sexual advances is consistent with current precedent and would not expand employer liability too far. In his concurrence in *Crawford*, Justice Alito expressed concern about making employers liable for harassment when an employee fails to express "a word of opposition" to the employer.<sup>268</sup> He noted that an employer could become liable for any adverse employment action taken against an employee who only expresses opposition while chatting to a co-worker around a water cooler, in a telephone conversation overheard by another co-worker, at a restaurant or tavern with co-workers, or at a picnic attended by a friend or relative of a supervisor.<sup>269</sup> Further expanding the scope of an employer's liability to cover these situations could result in plaintiffs filing more retaliation claims against employers.<sup>270</sup>

Holding that an employee who rebuffs her employer's sexual advances has engaged in opposition activity will not result in the type of drastic expansion of retaliation claims that could overburden courts. An employee who complains to her supervisor has in fact communicated a word of opposition to her employer. Further, the situations described by Justice Alito, such as the water cooler or picnic scenarios, involve opposition that is voiced either to a *co-worker* or a *non-coworker* friend.<sup>271</sup> The situation in *Tate*, however, involved voicing opposition to a *supervisor*, not a mere co-worker.<sup>272</sup>

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<sup>268</sup> *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.* 129 S.Ct. 846, 854 (2009) (Alito, J. concurring).

<sup>269</sup> *Id.* Holding employers liable for adverse employment actions in these situations would be problematic because of the lack of notice to management about the employee's opposition. *See id.*

<sup>270</sup> *Id.* at 854-55. Retaliation claims have rapidly increased at the EEOC in recent years. Courts are aware of this phenomena and therefore seem hesitant to expand liability in a way that could have the practical result of flooding the courts with more retaliation lawsuits. *See id.*

<sup>271</sup> *See id.* at 854.

<sup>272</sup> For a discussion of the legally significant difference between supervisors and co-workers, *see supra* Part V.A.

Additionally, unlike a conversation at a bar or picnic, the employee in *Tate* expressed his opposition in the workplace, not outside the workplace.

These factual distinctions are critical because they put the employer on notice and distinguish this situation from those that have the true potential to expand liability for retaliation claims to an unmanageable level. Additionally, other types of informal opposition already protected under the retaliation clause include defying an employer's order,<sup>273</sup> complaining to a newspaper,<sup>274</sup> and maintaining the status quo by refusing to implement an employer's discriminatory order.<sup>275</sup> Protecting an employee who informally complains to her supervisor about harassment is not a radical departure from these precedents. Thus, protecting employees who rebuff their supervisor's advances will not significantly expand the scope of employer liability under the retaliation provision or flood the courthouse doors with retaliation claims.

Finally, employees must have the ability to combat harassment at its point of origin and be free from retaliation for doing so. While few lawsuits are likely to hinge on this precise factual issue,<sup>276</sup> holding that

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<sup>273</sup> See *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir.1994), *cert. denied* (1995).

<sup>274</sup> *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579, 580 (6th Cir.2000), *cert. denied*, 531 U.S. 1052 (2000) (holding that opposition activity includes "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer-e.g., former employers, union, and co-workers.").

<sup>275</sup> See *id.* See also *Yanowitz v. L'Oreal USA, Inc.*, 116 P.3d 1123, 1036 (Cal. 2005) (holding that "that an employee's refusal to follow a supervisor's order that she reasonably believes to be discriminatory constitutes protected activity under the [Fair Employment and Housing Act] and that an employer may not retaliate against an employee on the basis of such conduct when the employer, in light of all the circumstances, knows that the employee believes the order to be discriminatory, even when the employee does not explicitly state to her supervisor or employer that she believes the order to be discriminatory").

<sup>276</sup> Employees will often later oppose harassment in other ways such as complaining to a different member of management, or filing an internal grievance or EEOC charge. See *Ogden v. Wax Works, Inc.* 214 F.3d 999, 1004-05 (8th Cir.

rebuffing a supervisor's sexual advances does not constitute opposition activity may have the practical result of discouraging employees from combating and resolving harassment at its earliest stage. Such a result would undermine the ability of employees to enforce Title VII's remedial provisions, run counter to the language of the retaliation provision, and violate Title VII's most important policies.

### CONCLUSION

The language, purpose, and practical implications of the retaliation clause show that rebuffing a supervisor's demand for sex should usually constitute opposition activity. Courts must still examine the facts of each case and this situation should not qualify as opposition activity as a matter of law. However, when the facts are close, the line should be drawn in favor of holding that an employee who rebuffs his supervisor's sexual advances has opposed an unlawful employment practice. A policy in favor of protecting employees in this situation fits the language of the retaliation provision, follows Supreme Court precedent interpreting the opposition clause, serves the purposes of Title VII and the retaliation provision, and provides protection for employees in a particularly vulnerable situation.

The fact that the employee in *Tate* had engaged in a consensual sexual relationship with his boss and responded to her ultimatum by saying he wasn't "messing with" her anymore presented the jury with a very close factual scenario. The jury resolved it in favor of Tate. The Seventh Circuit, however, resolved it in favor of Tate's employer and a strict reading of the reasonable belief requirement. In doing so, the Seventh Circuit parsed the record for statements indicating that Tate didn't believe he was being harassed and overturned the will of the jury. Given the close factual scenario and established reasonable belief requirement, the Seventh Circuit's decision is understandable. Still, the Seventh Circuit's decision in *Tate* disregards the complete factual

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2000). In addition to rebuffing her supervisor, Ogden later complained to management. *Id.*

circumstances of the case as well as the language and policy considerations that support protecting an employee in Tate's situation.

Alshafi Tate was repeatedly given an ultimatum from his supervisor to choose between sex and his job, he voiced opposition to the supervisor about that ultimatum, and when he finally rebuffed the supervisor's sexual advances, he was sent home and fired before he could report to work the next morning. Employees in these types of situations must be protected from retaliation. A failure to do so may have the perverse result of handicapping an employee's ability to resist harassment while they are actually being harassed. The language of Title VII, the Supreme Court's interpretation of the meaning of opposed, and the purpose of the retaliation provision all demonstrate that in close factual scenarios like the one in *Tate*, courts should draw the line in favor of protecting employees. By doing so, courts not only remain true to the language and purpose of Title VII, but they protect employees when it matters most by giving a legal backbone to the idea that "no means no."