When Women Fare Better by Saying “No”: Re-Legitimizing Constructive Discharge and Circumventing Suders by Styling Constructive Discharge Claims as Retaliation Claims

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I. Introduction

The passage of Title VII of the Civil Rights Act in 1964\(^1\) made it unlawful for employers to engage in discriminatory employment practices on the basis of an employee’s membership in a protected class, such as sex. Discriminatory employment practices violative of Title VII include disparate treatment (adverse employment decisions intentionally based on sex)\(^2\) and disparate impact (“facially neutral qualification standards [that act] disproportionately to exclude women from eligibility for employment”).\(^3\) It was not until 1986 that the Supreme Court recognized

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harassment as a violation of Title VII’s proscription of discriminatory employment practices. In *Meritex Savings Bank, FSB v. Vinson*, the Supreme Court adopted Equal Employment Opportunity Commission Guidelines specifying that sexual harassment, including “[unwelcome] sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,” is a form of sex discrimination prohibited by Title VII.\(^4\) Thus, the Supreme Court concluded that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”\(^5\)

In the most unfortunate of cases, a hostile work environment is created where a supervisor demands sex in return for the maintenance of the employee’s status quo of employment.\(^6\) If a plaintiff says yes, she has “submitted.”\(^7\) Lower courts are split on whether an employee’s submission to a supervisor’s sexual proposition (a) leads to strict liability for the employer or (b) allows the employer to avail itself of the affirmative defense developed in the Supreme Court companion cases of *Burlington Industries, Inc. v. Ellerth*\(^8\) and *Faragher v. City of Boca Raton*.\(^9\) In jurisdictions that follow the former approach, only employees who submit can hold the employer strictly liable.\(^10\) In jurisdictions that follow the latter approach, the employee must suffer something *more* than coerced sexual submission to hold the employer strictly liable.\(^11\) Legal scholars have

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6 Throughout this paper, these kinds of cases will be referred to as “submission cases” because employees are coerced into sexual submission to maintain their employment or avoid a detrimental employment action.
7 This paper will often refer to the hypothetical plaintiff in the gender-specific pronoun typically used for females because most plaintiffs in harassment cases are females. Cf. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY 2010 – FY 2018, available at https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (84.1% of charges alleging sexual harassment filed with the EEOC during 2018 were filed by females).
noted with displeasure that in those jurisdictions that follow the former approach, “plaintiffs who opt to have intimate relations with their supervisors and fail to report their harassment [are] far better off than those who resist the propositioning of their bosses but fail to report the problem.”

Plaintiffs are further disincentivized from refusing their supervisor’s sexual demands because of the Supreme Court decision in Pennsylvania State Police v. Suders. In Suders, the Supreme Court held that there is no basis for employer strict liability where a plaintiff is harassed to the point that her working conditions are so intolerable that she voluntarily quits. The effect of Suders is two-fold: First, and most obviously, the Supreme Court foreclosed the possibility of holding employers strictly liable for a work environment so abusive that an employee’s only reasonable reaction is to resign. Suders has also led to a second, more unintended, consequence: the Supreme Court’s rationale in Suders has since been used to preclude the assertion of coerced sexual submission as a basis for employer strict liability.

In its wake, Suders has placed plaintiffs in a Catch-22 when faced with their supervisor’s sexual demand: If they say “yes” in a jurisdiction that does not recognize submission as a tangible employment action, they cannot hold the employer strictly liable. If they say “no” in a jurisdiction that recognizes submission as a tangible employment action, they haven’t suffered a tangible employment action if they haven’t submitted, so they cannot hold the employer strictly liable,

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14 Id. at 140–41.
15 Id.
either. If they quit—a more palpable way of saying “no”—they cannot hold the employer strictly liable post-
Suders.

What is a woman faced with a supervisor’s sexual demands to do? First, despite the unfairness inherent in the above-described scenarios, this paper suggests saying “no.” Then, rather than only plead sexual harassment based on the Meritor elements and roll the dice with the Ellerth/Faragher affirmative defense, plaintiffs who say “no” by resigning should supplement their sexual harassment claim with a retaliation claim. This is a superior—and arguably, the only remaining—route to relief for several reasons. First, the holding in Suders is relatively narrow: constructive discharge is not a tangible employment action. Because of its heinous nature, courts continue to recognize that constructive discharge constitutes an adverse employment action. Second, courts are increasingly recognizing that the rejection or refusal of a supervisor’s sexual advances constitutes protected activity for the purposes of establishing unlawful discharge. Therefore, retaliation, which requires that the employee suffer an adverse employment action as a result of engaging in protected activity, is the only claim left for the reasonable workers who quit their jobs in response to their supervisor’s unwelcome and coercive sexual demands.

First, Section II will provide a background on the law of sexual harassment as developed in Meritor Savings Bank, FSP v. Vinson and the framework for vicarious liability developed in

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17 See discussion infra Section II.A.
the Supreme Court companion cases of Burlington Industries, Inc. v. Ellerth21 and Faragher v. City of Boca Raton.22 After introducing the vicarious liability framework established in Ellerth and Faragher, Section II will illustrate lower courts’ attempts to expand the definition of tangible employment action (and therefore, create a new basis for employer liability) to include constructive discharge and coerced sexual submission. Although the Supreme Court has provided an answer as to constructive discharge in Pennsylvania State Police v. Suders,23 the same cannot be said for coerced sexual submission. With district and circuit courts on different pages as to whether submission to a supervisor’s sexual demands leads to strict liability, it is not clear where coerced sexual submission fits within the Ellerth/Faragher liability framework.

However, clarification is untenable: asking whether sexual submission is a tangible employment action operates on the flawed premise that a woman need say “yes” in order to obtain relief. Such a premise ignores the realities of what it takes (physically, emotionally and psychologically) to submit. Further, if submission—as opposed to rejection or refusal—is where courts are drawing the line between strict liability and no liability, women who refuse to sleep with their supervisors will never obtain relief. Creating a framework wherein the performance of sexual acts results in strict liability may seem to empower women whose employment lies in the hands of abusive and perverted supervisors, but such a framework, combined with the holding of Suders, fails (and disincentivizes) those women who have the courage to say no.

Instead, plaintiffs should be finding ways to obtain relief by saying “no.” That is where retaliation comes in. Section III will provide a background of the law on retaliation under Title VII, including the elements of a prima facie case and the three steps of the McDonnell Douglas v.

burden-shifting framework. Section IV will use the retaliation framework outlined in Section III and apply a particular set of facts to show that Suders, while diserving plaintiffs who submit, can be circumvented to obtain relief for those plaintiffs who resist. This section relies on the following facts: (a) a subordinate suffers sexual harassment by a supervisor who imposes a sexual demand; (b) the sexual demand gives rise to intolerable working conditions; and (c) the subordinate resigns. This section also presupposes that the sexual demand creates working conditions so intolerable that any reasonable employee would feel compelled to resign.

This paper aims to provide a creative and practical guide to circumventing Suders. While constructive discharge may not be legally recognized as a tangible employment action, that does not mean that intolerable working conditions that coerce a reasonable employee into resigning do not exist. Reasonable people leave their workplaces every day in response to hostile and abusive working conditions. Their courage to leave and their fight towards relief should not end with Suders.

II. Legal Overview: Sexual Harassment and Vicarious Liability

Although the Meritor Court held that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor discriminate[s] on the basis of sex[,]” the Court recognized that “not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII.” Thus, to establish a prima facie case of sexual harassment under Title VII, an employee must prove five elements. First, that she belongs to a protected group. Second, that she has been

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26 Id. at 67 (quotations omitted).
27 42 U.S.C. § 2000e-2(a)(1) (emphasis added) (“[I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”).
subjected to unwelcome sexual harassment.\textsuperscript{28} Third, that the harassment was based on her sex.\textsuperscript{29} Fourth, that the harassment was objectively and subjectively severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment.\textsuperscript{30} Last, that a basis for holding the employer liable exists.\textsuperscript{31}

A. Establishing a Basis for Employer Liability: Tangible Employment Actions

In order to establish the fifth element, courts consider whether the employee, in addition to meeting the four other Meritor elements, has suffered a tangible employment action at the hands of a supervisor.\textsuperscript{32} If the employee has suffered a tangible employment action, the employer is strictly liable.\textsuperscript{33} If the employee has not suffered a tangible employment action, the employer may be liable, but only after being given the opportunity to assert an affirmative defense.\textsuperscript{34}

The Ellerth Court defined a tangible employment action as a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”\textsuperscript{35} By placing heavy emphasis on the Ellerth Court’s use of the restrictive modifier “such as,” some courts provide that the Ellerth list of tangible employment actions is non-exhaustive.\textsuperscript{36} However, other

\textsuperscript{28} Meritor, 477 U.S. at 68 (quoting 29 CFR § 1604.11(a) (1985)) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”).
\textsuperscript{29} Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (quoting 42 U.S.C. § 2000e-2(a)(1)) (“Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discrimination . . . because of . . . sex.’”).
\textsuperscript{30} Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (quotations omitted) (“When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.”).
\textsuperscript{32} In Vance v. Ball State University, the Supreme Court defined “supervisor” as “those possessing the authority to effect a tangible change in a victim’s terms or conditions of employment.” 570 U.S. 421, 439 (2013).
\textsuperscript{33} Burlington Indus., 524 U.S. at 765.
\textsuperscript{34} Faragher, 524 U.S. at 807.
\textsuperscript{35} Burlington Indus., 524 U.S. at 807.
In any case, tangible employment actions are “the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” Thus, tangible employment actions require “an official act of the enterprise,” are often “documented in official company records, and may be subject to review by higher level supervisors.” Holding employers strictly liable in cases where a supervisor takes a tangible employment against the subordinate ensures that “more than the mere existence of the employment relation aids in commission of the harassment[.]”

However, when no tangible employment action has been taken, an employer may raise the Ellerth/Faragher affirmative defense. The affirmative defense requires a showing that (a) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” This affirmative defense may be raised to avoid liability or damages, and it is subject to proof by a preponderance of the evidence.

B. Attempts to Expand the Ellerth List of Tangible Employment Actions: Constructive Discharge and Sexual Submission

The first attempt to expand the Ellerth list of tangible employment actions reached the Supreme Court in 2004 in Pennsylvania State Police v. Suders. Nancy Suders, hired by the Pennsylvania State Police as a police communications operator in 1998, suffered “a continuous

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38 Burlington Indus., 524 U.S. at 762.
39 Id.
40 Id. at 760.
42 Id.
barrage of sexual harassment that ceased only when she resigned from the force.” Suders alleged that her supervisors discussed bestiality each time she entered their office, told her that “young girls should be given instruction in how to gratify men with oral sex[,]” and made obscene gestures both in her presence and directed towards her “as many as five-to-ten times per night throughout [her] employment . . . .” Suders complained to the Pennsylvania State Police’s Equal Employment Opportunity Officer that she was being harassed and was afraid. According to Suders, the Officer’s response was both insensitive and unhelpful. Shortly after her complaint, Suders was falsely accused of stealing the results of an exam administered to all officers of the Pennsylvania State Police. She was then handcuffed, photographed, and questioned. Suders explained that she felt “abused, threatened and held against her will.” When she tendered a written resignation and attempted to leave the barracks where she was being questioned, her supervisors detained her in an interrogation room for further questioning. It was only after Suders demanded to be released and reiterated her intent to resign that her supervisors permitted her to leave. Resignations reasonably provoked by “unendurable working conditions” such as Suders’ resignation in Pennsylvania State Police v. Suders came to be known as constructive discharges.

The assertion of constructive discharge as a tangible employment action in sexual harassment cases left lower courts in a circuit split before 2004. On one hand, courts treating constructive discharges as tangible employment actions reasoned that “holding an employer

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44 Id. at 135.
45 Id.
46 Id. at 135–36.
47 Id.
48 Id.
50 Id.
51 Id.
52 Id.
strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in Ellerth and Faragher . . . .”\textsuperscript{54} Those courts found that a constructive discharge prompted by a supervisor’s sexually harassing conduct is “no less the ‘act of the employer’ than a firing, failure to promote, demotion, or reassignment.”\textsuperscript{55} Those courts further reasoned that a constructive discharge, by definition, occurs when a supervisor’s intent of forcing the employee to resign renders the employee’s working conditions intolerable.\textsuperscript{56} Simply put, “[w]hen a constructive discharge is found, an employee’s resignation is treated—for the purpose of establishing a prima facie case of employment discrimination—as if the employer had actually discharged the employee.”\textsuperscript{57}

On the other hand, courts holding that a constructive discharge was not a tangible employment action\textsuperscript{58} focused on the idea that unendurable working conditions could be created by \textit{anyone} in the workplace:

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker’s arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another’s pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.\textsuperscript{59}

\textsuperscript{54} Suders, 325 F.3d at 454.
\textsuperscript{55} Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1173 (N.D. Iowa 2000).
\textsuperscript{56} Id. (quotations omitted).
\textsuperscript{57} Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987).
Thus, the capability to force an employee to resign as a result of intolerable abuse is not within the special province of a supervisor; co-workers could just as easily create unendurable working conditions that would force an employee to resign.\(^{60}\) Furthermore, “unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer.”\(^{61}\) Because a constructive discharge is an action taken by the employee, it simply cannot be said to be “a tangible employment action taken by the supervisor [which] becomes for Title VII purposes the act of the employer.”\(^{62}\)

The Supreme Court in *Pennsylvania State Police v. Suders* resolved the split, holding that constructive discharge was not a tangible employment action because “[u]nlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be.”\(^{63}\) Constructive discharge, reasoned the *Suders* Court, involves two elements: (1) the employee’s own decision to leave and (2) triggering conduct.\(^{64}\) The Supreme Court explained that neither element could be a tangible employment action on its own, nor could it be a tangible employment action when the two are combined: (1) the employee’s own decision to leave involves no official action and (2) triggering conduct may or may not involve official action.\(^{65}\) The uncertainty as to “the extent to which the supervisor’s misconduct has been aided by the agency relation” in both of those elements justifies the employer’s opportunity to assert an affirmative defense and, thereby, avoid strict liability.\(^{66}\)

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\(^{60}\) See Desmarteau, 64 F. Supp. 2d at 1079 (“[The Ellerth Court’s] focus on the tangible actions of the supervisor would logically exclude actions which are only ‘constructively’ attributed to him, and would exclude employment consequences arising from a plaintiff’s particular reaction to a hostile working environment.”).

\(^{61}\) Caridad, 191 F.3d at 294.

\(^{62}\) *Burlington Indus.*, 524 U.S. at 762 (emphasis added).


\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id. at 148–49.
In a similar vein, lower courts presently struggle with determining whether an employee’s submission to a supervisor’s sexual demand is a tangible employment action leading to employer strict liability. The Second⁶⁷ and Ninth Circuit⁶⁸ have explicitly held that a supervisor’s conditioning of a benefit, a detriment, or the maintenance of status quo on sexual submission is a tangible employment action. For example, in Jin v. Metropolitan Life Insurance Co., Min Jin, an insurance sales agent, was subjected to a “pattern of egregious conduct” by her supervisor including crude sexual remarks in the office and via telephone at home, offensive touching to Jin’s buttocks, breasts, and legs, and weekly meetings in a locked office during which Jin’s supervisor would “kiss, lick, bite and fondle her,” among performing other aggressive sexual acts.⁶⁹ Jin’s supervisor repeatedly threatened to fire her if she did not accede to his sexual demands.⁷⁰ Jin argued to the Second Circuit that her supervisor “used his authority to impose on her the added job requirement that she submit to weekly sexual abuse in order to retain her employment.”⁷¹

The court agreed and explained that because Metropolitan Life Insurance Co. empowered Jin’s supervisor to make economic decisions affecting employees under his control, Jin’s supervisor was enabled by the employer to force Jin into submission.⁷² The court also relied on the fact that Jin’s supervisor used her submission to sexual acts as a basis for granting her the job benefit of continued employment.⁷³ Thus, her supervisor’s decision to condition the terms and conditions of her employment on the submission to his sexual demands fell “squarely within the definition of ‘tangible employment action’ that the Supreme Court announced in Faragher and

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⁶⁹ Jin, 310 F.3d at 88 (detailing how Jin’s supervisor would “attempt to undress her, physically force her to unzip his pants and fondle him, push against her with his penis exposed, and ejaculate on her”).
⁷⁰ Id. at 89.
⁷¹ Id. at 94.
⁷² Id.
⁷³ Id. at 97.
Finally, as a matter of policy, the court reasoned that “[i]t would be anomalous to find an employer liable when an employee was able to stand up to a supervisor’s sexual demands, and therefore provoke an action such as termination, but to find no liability when the employee was unable to refuse and was actually subjected to sexual abuse.”

On the other hand, several district courts have held that: (a) maintenance of the status quo is not sufficient to create strict liability because Ellerth requires a significant change in status and continuing to work with the same job, pay, benefits, and responsibilities is not a change in status; (b) submission for the purpose of avoiding a tangible employment action does not further the Supreme Court’s intent in Ellerth and Faragher; and (c) “[w]ithout an observable act, [t]he employer has no way of knowing that its delegated authority has been brandished in such a way as to coerce sexual submission.”

The Supreme Court has not yet dealt with lower courts’ attempts to expand the Ellerth list of tangible employment actions to include coerced sexual submission. However, the Supreme Court need not resolve the lower court split on submission in order for plaintiffs to obtain relief. In fact, under the liability framework developed in Ellerth and Faragher, the Supreme Court’s answer on whether submission leads to strict liability would leave women in a bind, either way. The question of whether a victim who “submits” has suffered a tangible employment action

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74 Id. at 94.
75 Id. at 99.
77 Speaks, 315 F. Supp. 2d at 1225.
78 Santier, 786 F. Supp. 2d at 1235.
focuses exclusively on the victim that says yes, thereby leaving women in a twilight zone of legal liability. She who submits in the Second and Ninth Circuit can obtain relief, while she who does not faces an uphill battle to relief:

[I]n the absence of a tangible employment action, the only alternative available to a sexual extortion victim following Ellerth and Faragher is to demonstrate an actionable hostile work environment and hope that the employer is unable to satisfy both prongs of the affirmative defense. Given the documented pro-employer trend in granting summary judgment on the Ellerth/Faragher affirmative defense, and the courts’ rather cursory and often incorrect analysis of the two prongs, it is highly unlikely that an employer will fail in its efforts to successfully assert the affirmative defense.81

Clearly, in the Second and Ninth Circuits, she who submits fares better than she who resists.82 Plaintiffs are left no better off outside of the Second and Ninth Circuits—in fact, they may be worse off: she who does not submit in the Eleventh83 and Fifth Circuit84 faces the same uphill battle towards relief because she has not suffered a tangible employment action. Damned if she submits, damned if she resists.

Courts’ and scholars’ never-ending focus on the woman who says yes ignores the woman who says no. “Nothing is more destructive of human dignity than being forced to perform sexual acts against one’s will.”85 Thus, creating a framework wherein the performance of sexual acts—rather than the resisting thereof—is the defining line between strict liability and no liability perpetuates the destruction of human dignity. Further, if submission—as opposed to rejection or refusal—is where courts are drawing the liability line, women who refuse to sleep with their supervisors will never obtain relief. The Second and Ninth Circuit may be taking a progressive approach that seems to empower women whose employment lies in the hands of abusive and

81 Murr, supra note 80, at 538 (emphasis added).
82 Cf. Stone, supra note 12, at 29.
85 Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994).
perverted supervisors, but their approach, combined with the holding of Suders, fails (and disincentivizes) those women who have the courage to say no.

III. Legal Overview: Retaliation

Suders has undoubtedly “done an immense disservice to harassment victims” by holding that an employee has a viable legal argument for strict liability only when they continue working in an abusive working environment, even though they have already reached the “the legal point at which one’s workplace conditions compel the most reasonable worker to quit employment.”\(^{86}\)

An unfortunate reality is that while constructive discharge is no longer legally recognized as a tangible employment action post-Suders, that does not mean that workplace conditions so intolerable that an employee’s only reasonable reaction is to quit no longer exist. According to a search on Bloomberg Law from October 14, 2019 to November 14, 2019, forty-nine complaints were filed in which the plaintiff claimed that he or she suffered such intolerable, hostile or abusive working conditions that his or her only reasonable reaction was to resign.\(^{87}\)

Despite these disheartening statistics, a silver lining exists in two ways. First, the holding in Suders is relatively narrow: constructive discharge is not a tangible employment action. Because of its unfortunate nature, courts continue to recognize that constructive discharge constitutes an adverse employment action.\(^{88}\) Second, courts are increasingly recognizing that the rejection or refusal of a supervisor’s sexual advances constitutes protected activity for the purposes of establishing retaliatory discharge.\(^{89}\) Therefore, retaliation, which requires that the employee suffer an adverse employment action as a result of engaging in protected activity, is the only claim left

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\(^{86}\) Stone, supra note 12, at 29 (emphasis added).
\(^{87}\) https://www.bloomberglaw.com/page/law_school (follow “Dockets” hyperlink; then search in search bar for “constructive discharge”) (last visited November 14, 2019).
\(^{89}\) See discussion infra Section IV.A.
for the reasonable workers who quit their jobs in response to their supervisor’s unwelcome and coercive sexual demands.

A. Part 1: Making a Prima Facie Case

Title VII explicitly prohibits retaliatory action against employees.\(^{90}\) In claiming retaliation under Title VII, “the employee must establish a prima facie case by demonstrating the following essential elements: (1) the employee was engaged in statutorily protected activity; (2) the employee suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action.”\(^{91}\)

In considering the first element, courts look to Title VII’s antiretaliation provision, which recognizes two statutorily protected activities: participation and opposition.\(^{92}\) The participation clause of Title VII’s antiretaliation provision forbids employers from discriminating against any of their employees because they have “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under Title VII.\(^{93}\) The opposition clause of Title VII’s antiretaliation provision forbids employers from discriminating against any of their employees because they have “opposed any practice made an unlawful employment practice” under Title VII.\(^{94}\)

In *Crawford v. Metropolitan Government of Nashville & Davidson County*, the Supreme Court clarified that opposition rising to the level of statutorily protected activity need not be active nor consistent.\(^{95}\) “When an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always

\(^{90}\) 42 U.S.C. § 2000e-3(a).
\(^{91}\) Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1310 (11th Cir. 2016).
constitutes the employee’s *opposition* to the activity.””\textsuperscript{96} Thus, in *Crawford*, an employee’s “disapproving account of sexually obnoxious behavior toward her by a fellow employee” made in response to an employer-initiated inquiry into the harasser’s behavior was statutorily protected activity that could not form the basis of the employee’s termination.\textsuperscript{97} In response to the employer’s argument that the opposition clause requires that the *employee*, rather than the *employer*, instigate or initiate a complaint to be protected, the *Crawford* Court stated that “nothing in [Title VII] requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.””\textsuperscript{98}

Another important aspect of establishing the first element of a retaliation claim is that the plaintiff does not have to prove that he or she was *actually* discriminated against.\textsuperscript{99} Rather, all that courts require is that the plaintiff have a good faith belief that discrimination actually existed—whether or not the plaintiff can prove the underlying claim of discrimination.\textsuperscript{100} For example, in *Jurado v. Eleven-Fifty Corp.*, an employee claimed that he was fired in retaliation for failing to comply with an English-only rule.\textsuperscript{101} The employee thought the English-only rule was violative of Title VII, opposed the rule as discriminatory, and was allegedly fired in retaliation for his opposition.\textsuperscript{102} The court first explained that the English-only rule was not a violation of Title VII

\textsuperscript{96} Id. at 276 (quotations omitted) (emphasis in original).
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 277–78.
\textsuperscript{99} See Sanchez v. Denver Pub. Sch., 164 F.3d 527, 533 (10th Cir. 1998) (“A meritorious retaliation claim will stand even if the underlying discrimination claim fails.”).
\textsuperscript{100} See Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1494 (11th Cir. 1989) (citations omitted) (“The employee need not prove the underlying claim of discrimination which led to her protest. Instead, an employee’s opposition to discrimination is protected if she could reasonably form a good faith believe that the discrimination in fact existed.”).
\textsuperscript{101} Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987).
\textsuperscript{102} Id.
because it was limited, reasonable and business-related.103 However, even though the employee was opposing a lawful employment practice, the court found that the employee’s speech was protected by Title VII because he had a reasonable, good faith belief that the English-only rule was discriminatory.104 Therefore, the plaintiff successfully established the first element of retaliation.105

The second element of a Title VII retaliation claim—whether the plaintiff suffered an adverse employment action—casts a wider net than the definition of tangible employment action.106 Courts considering whether a plaintiff suffered an adverse employment action ask whether the employee has been subject to an ultimate employment decision such as termination, failure to hire, or demotion.107 Alternatively, courts will find an adverse employment action if the employee suffered a “serious and material change in the terms, conditions, or privileges of employment.”108 Thus, the alleged adverse employment action must “meet some threshold level of substantiality.”109 The threshold level of substantiality is met where the challenged action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”110 “[T]he standard is an objective one, based on the vantage of a reasonable employee, and that the critical inquiry is whether the reprisals might deter a reasonable employee from complaining of discrimination.”111

103 Id.
104 Id.
105 Id.
106 Generally, an adverse employment action “falls into one of three categories: (1) termination or reduction in compensation, fringe benefits, or other financial terms of employment; (2) transfers or changes in job duties that cause an employee’s skills to atrophy and reduce future career prospects; and (3) unbearable changes in job conditions, such as a hostile work environment or conditions amounting to constructive discharge.” Tarpley v. City Colls. of Chi., 752 F. App’x 336, 346–47 (7th Cir. 2018) (quotation omitted).
107 Stavropoulos v. Firestone, 361 F.3d 610, 617 (11th Cir. 2004).
108 Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001).
109 Stavropoulos, 361 F.3d at 617.
111 Booker v. Mass. Dep’t of Pub. Health, 612 F.3d 34, 44 (1st Cir. 2010).
The third element—that a causal link exists between the protected activity and the adverse employment action—is typically established with a showing that the employer knew of the employee’s protected activity, a short amount of time exists between the protected activity and the adverse employment action, or there was an irregular handling of the employee’s protected activity as it led to the adverse employment action.\(^\text{112}\)

**B. Part 2: McDonnell-Douglas Burden-Shifting Framework**

All retaliation claims brought under Title VII are controlled by the familiar three-step burden-shifting framework developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*.\(^\text{113}\) After the plaintiff establishes a prima facie case of retaliation (step one, as outlined in the previous section), the burden of production shifts to the employer to articulate a legitimate, nonretaliatory reason for its actions (step two).\(^\text{114}\) If the employer articulates a legitimate, nonretaliatory reason, the burden shifts back to the plaintiff to prove that the articulated reason is merely a pretext for the retaliation (step three).\(^\text{115}\)

At the second step, legitimate, nonretaliatory reasons are “reasons for [the employer’s] actions which, if believed by the trier of fact, would support a finding that unlawful [retaliation] was not the cause of the employment action.”\(^\text{116}\) Examples of legitimate, nonretaliatory reasons are poor performance, being the subject of a complaint, unprofessional conduct, or causing personnel issues.\(^\text{117}\) It should be noted that because the employer only carries a burden of *production*, “[p]roducing evidence (whether ultimately persuasive or not) of legitimate

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\(^\text{112}\) See, *e.g.*, Petersen v. Utah Dep’t of Corr., 301 F.3d 1182, 1190–91 (10th Cir. 2002).
\(^\text{114}\) *Tourtellotte v. Eli Lilly & Co.*, 636 F. App’x 831, 842 (3d Cir. 2016).
\(^\text{115}\) *Id.*
nondiscriminatory reasons for its actions is enough for the employer to satisfy its burden.” The Title VII plaintiff bears, at all times, the burden of persuasion.\(^{119}\)

At the third step, the plaintiff may show pretext by pointing to evidence, direct or circumstantial, from which a factfinder can reasonably disbelieve the employer’s articulated reason or believe that a retaliatory reason was more likely than not a motivating cause of the adverse employment action.\(^ {120}\) A plaintiff must bring forth evidence that demonstrates “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-[retaliatory] reasons.”\(^ {121}\)

IV. Faring Better Saying “No”

Using the retaliation framework outlined in the previous section, this section will apply a particular set of facts to show that *Suders*, while disserving plaintiffs who submit, can be circumvented to obtain relief for those plaintiffs who resist. This section relies on the following facts: (a) a subordinate suffers sexual harassment by a supervisor who imposes a sexual demand; (b) the sexual demand gives rise to intolerable working conditions; and (c) the subordinate resigns. This section also presupposes that the sexual demand creates working conditions so intolerable that any reasonable employee would feel compelled to resign.\(^ {122}\)


\(^{120}\) See Tomasso v. Boeing Co., 445 F.3d 702, 706 (3d Cir. 2006).

\(^{121}\) Id. (quotations omitted).

\(^{122}\) “Constructive discharge occurs when an employer deliberately renders the employee’s working conditions intolerable and thus forces her to quit her job. To be liable, the employer must have intended to force the employee to quit, or at least have reasonably foreseen the employee’s resignation as a consequence of the unlawful working conditions it created. Furthermore, the employee must also show that a reasonable person, from an objective viewpoint, would find the working conditions intolerable.” Jackson v. Ark. Dep’t of Educ., 272 F.3d 1020, 1026–27 (8th Cir. 2001) (quotations and citations omitted).
A. Statutorily Protected Activity: Saying “No” to a Supervisor’s Sexual Demand as Opposition to an Unlawful Employment Practice

The first element of a plaintiff’s prima facie case when alleging retaliation requires a showing that the plaintiff engaged in statutorily protected activity. Specifically, that the plaintiff opposed an unlawful employment practice. District courts in several jurisdictions are currently considering whether rejecting a supervisor’s sexual advances—which is, quite literally, the opposition of an unlawful employment practice—constitutes protected activity under Title VII.123

For example, in Little v. National Broadcasting Company, Gilbert Muro, a technical director on NBC’s show “Conan,” alleged that he was terminated in retaliation for refusing to submit to the sexual demands of the show’s director.124 NBC argued that Muro could not claim that his termination constituted retaliation because he had not engaged in “protected activity.”125 Muro’s argument, on the other hand, was that the very refusal to submit to the show’s director’s sexual demands was a protected activity in and of itself.126 The Southern District of New York first noted that neither the Second Circuit, nor any other circuit court, has ruled on whether resisting a supervisor’s sexual demands constitutes protected activity for purposes of retaliation, and noted a district split within the Second Circuit, as well.127 However, finding support in the holdings of district courts outside of the Second Circuit,128 the court held that because the “prohibition against

124 Id. at 385.
125 Id.
126 Id.
retaliation is intended to protect employees who resist unlawful workplace discrimination[,]” rejecting sexual advances from a supervisor constitutes protected activity.129 Simply put, “[s]exual harassment by an employer or supervisor is an unlawful practice, and an employee’s refusal is a means of opposing such unlawful conduct.”130 Accordingly, the court held that Muro stated a valid claim for retaliatory discharge.131

Courts following *Little* have agreed that (1) protected activity “is not limited to formal complaints to the company; rather it also encompasses complaints made directly to the harasser/supervisor to cease harassing activities[]” and (2) “a supervisor’s sexually harassing conduct is clearly a practice rendered unlawful by Title VII, and an employee’s rejection of such activities is plainly a means of opposing such unlawful conduct.”132 In 2018, the Southern District of New York reaffirmed its holding in *Little*:

This Court is mindful that other courts in this Circuit have expressed divergent viewpoints on whether rejecting sexual advances qualifies as protected activity. But in this Court’s view, those positions overlook the complex dynamics underlying a work environment fraught with power disparities. Sexual harassment can manifest itself in many forms. Some are less obvious than others but just as invidious. Formally reporting an incident of sexual assault is one form of protected activity, but it is not always available. An individual who is sexually harassed by her supervisor, or someone with clout within the company, faces a Hobson’s choice—she is either forced to endure her supervisor’s unwanted overtures, or file a complaint that will inevitably bruise his ego and jeopardize her job and career.133

However, not all courts agree with the *Little* holding. Courts holding that rejecting a supervisor’s sexual advances does not constitute protected activity focus on the fact that “allowing

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129 Id. at 385.
130 Id.
131 Id.
declination of a sexual advance to constitute protected activity would merge every harassment claim with a retaliation claim.” Further, because “in many cases” an employee who has been harassed does not inform their employer of the harassing behavior, there is no basis on which to impute knowledge of the discrimination onto the employer. Therefore, requiring employees to do more than simply reject sexual advances will inform the employer of discriminatory conduct and enable the employer to take corrective measures.

Despite some disagreement among the lower courts, the trend of recognizing rejection of a supervisor’s sexual advances as protected activity is likely to continue increasing as (a) courts recognize the inherent power disparities in supervisor-subordinate relationships, (b) scholars advocate for stricter standards of liability based on evolving views of workplace conduct, and (c) the court of public opinion makes itself heard. As long as courts continue the trend of recognizing the unfairness of subjecting women to a Hobson’s choice of enduring her supervisor’s advances.

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135 Id. at *14–15. See also Del Castillo v. Pathmark Stores, 941 F. Supp. 437, 439 (S.D.N.Y. 1996) (“Because an employee who sexually harasses a fellow employee would have no incentive to inform the employer of his actions, the knowledge of the harasser cannot fairly be imputed to his employer.”).
136 Id.
137 See, e.g., Hughes, 304 F. Supp. 3d at 448; Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (“To distinguish between an actual desire for a relationship on one hand, and a mere acquiescence to tendered sexual advances on the other, it is necessary to consider the power disparity between the individuals involved.”); In re Seaman, 133 N.J. 67, 94 (1993) (citations omitted) (“Judicial clerkships are marked by both strong dependence and a significant power imbalance between judge and clerk. The vulnerability of a clerk to a judge is even greater than that in most supervisor-employee relationships.”).
139 For example, “Changed by #MeToo” is a collection of “[e]ssays, videos and interactive projects highlighting the many different ways the #MeToo movement is shifting societal attitudes and changing lives.” See Changed by #MeToo, NBC NEWS, available at https://www.nbcnews.com/think/changed-by-me-too.
unwanted demands or filing a complaint that will jeopardize her career, a plaintiff who has the courage to rebuff her supervisor’s sexual advances can meet the first element of a prima facie case of retaliation.

Additionally, the rule that a plaintiff does not have to prove that he or she was actually discriminated against further supports the conclusion that retaliation is a superior route to relief for plaintiffs who reject their supervisor’s sexual demands. For example, in Johnson v. Galen Health Institutes, Inc., Wanda Johnson claimed that on the last day of class, her instructor touched her in a way that made her feel uncomfortable, at which point she told him she was not interested.\footnote{Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679, 685 (W.D. Ky. 2003) (“She responded, ‘I’m not interested.’ He replied[,] ‘That’s the wrong answer to give on the last day of clinical.’”).} Despite previously giving her favorable reviews, Johnson alleged that the instructor failed her based on her rejection of his advance.\footnote{Id.} Johnson then sued Galen Health Institutes, claiming that her expulsion amounted to retaliation prohibited by Title IX.\footnote{Id. at 681. Courts agree that “Title VII cases provide the proper framework for analyzing Title IX discrimination claims.” Doe v. Columbia Univ., 831 F.3d 46, 55–56 (2d Cir. 2016).} The court clarified that, as a preliminary matter, “courts are in agreement that there is no requirement that a plaintiff must prevail on any underlying claim of intentional discrimination in order to prevail on a claim of retaliation” and that the only standard is “whether the plaintiff had a good faith, reasonable basis for believing the underlying claim existed.”\footnote{Johnson, 267 F. Supp. 2d at 689 n.11.} Therefore, despite whether there was any merit to Johnson’s underlying claim of sexual harassment, her
reasonable belief that she was being harassed in violation of Title IX satisfied the first element of her prima facie case of retaliation.\textsuperscript{145} Similarly, a plaintiff who refuses (opposes) her supervisor’s sexual demands (unlawful employment practice) will only have to show that she had a good faith belief that the supervisor’s sexual demands was violative of Title VII, rather than have to establish all five Meritor elements of sexual harassment to show that it actually violated Title VII.

Therefore, the plaintiff can meet the first element of her prima facie case of retaliation (a) if she can persuade the court to follow the trend of recognizing that the rejection of a supervisor’s sexual advances is opposition protected by Title VII, and (b) as long as she had a good faith, reasonable belief that the sexual advances violated Title VII, even if she fails to prove that the supervisor’s sexual advances actually violate Title VII.

\textbf{B. Adverse Employment Action: Casting a Wider Net and Re-Legitimizing Constructive Discharge}

The second element of a plaintiff’s prima facie case of retaliation requires a showing that the plaintiff was subject to an adverse employment action. Despite the holding in \textit{Suders} that constructive discharge is not a \textit{tangible} employment action, courts continue to hold that constructive discharge is, nonetheless, an adverse employment action.\textsuperscript{146}

Courts have found that “resigning, retiring or transferring from a position . . . may constitute an adverse employment action of constructive discharge . . . if the plaintiff shows that the resignation, retirement or transfer occurred under conditions that forced that choice.”\textsuperscript{147}

Because the second element requires a showing that the adverse employment action “might have

\textsuperscript{145} Id.
\textsuperscript{146} Weeks v. Union Pac. R.R. Co., No. 1:13-CV-1641 AWJ JLT, 2017 U.S. Dist. LEXIS 68441, at *34 (E.D. Cal. May 3, 2017) (“As an adverse employment action, a constructive discharge may meet a key element in either a disparate treatment or retaliation claim.”).
dissuaded a reasonable worker from making or supporting a charge of discrimination[.]

and constructive discharges are treated as an outright dismissal by the employer, there is no ambiguity as to whether constructive discharge is an adverse employment action. A supervisor’s creation of working conditions so intolerable, hostile or abusive that an employee’s only reasonable reaction is to resign is clearly an act that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Moreover, it is clearly established that conduct which “alters the employee’s compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee qualifies as an adverse employment action.” Because constructive discharge adversely affects an employee’s status as an employee and is treated as an outright dismissal, it falls squarely within the definition of adverse employment action. Therefore, with a showing of constructive discharge, the plaintiff can meet the second element of her prima facie case of retaliation.

C. Linking the Refusal to the Resignation: A Light Burden

149 See, e.g., Riding v. Kaufmann’s Dep’t Store, 220 F. Supp. 2d 442, 463 (W.D. Pa. 2002) (“The resignation [as a result of constructive discharge] is treated as if it were an outright dismissal by the employer, rendering the resignation an ‘adverse employment action’ which can serve as the basis for discrimination or retaliation claims.”).
150 See Lapka v. Chertoff, 517 F.3d 974, 985–86 (7th Cir. 2008) (quotations and citations omitted) (“An action is materially adverse if it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Examples of such an action would include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”).
151 Burlington N., 548 U.S. at 68.
152 Akins v. Fulton Cnty., 420 F.3d 1293, 1300 (11th Cir. 2005).
153 Id. at 1301 (11th Cir. 2005) (“Plaintiffs allege that they suffered the following adverse employment actions: unwarranted reprimands, a negative work evaluation, threat of job loss through dissolution of the contracting division, threat of suspension without pay, exclusion from meetings, removal of job duties (followed by reprimands for not completing that work), and constructive discharge. Of the adverse employment actions alleged by Plaintiffs, only constructive discharge or constructive transfer can be said to have negatively affected [their terms and conditions of employment].”).
At the third step of the plaintiff’s prima facie case, the “[p]laintiff merely needs to establish facts adequate to permit an inference of retaliatory motive.”154 “The causal connection component of the prima facie case may be established by showing that the employer had knowledge of the employee’s protected activity, and that the adverse personnel action took place shortly after that activity.”155 In linking the rejection of a supervisor’s sexual demand (statutorily protected activity) to the constructive discharge resulting therefrom (adverse employment action), a plaintiff need only show that the intolerable working conditions that led to her resignation were the result of her supervisor’s sexual demand. Notably, the plaintiff’s evidentiary burden of establishing a prima facie case in the first step of the burden-shifting analysis is one of production, not persuasion, and it is not “onerous.”156 Therefore, with a showing of a link between rejection and resignation, the plaintiff can meet the third element of her prima facie case of retaliation.

D. We’re Not in Boca Raton, Anymore . . . Burden Shift to the Employer’s Legitimate, Non-Retaliiatory Reason

In the context of retaliation claims, the next step after the plaintiff provides a prima facie case of retaliation is for the employer to provide a legitimate, non-retaliatory reason for the unlawful employment practice. This is a wholly different framework than the one used by a plaintiff who chooses not to plead retaliation—especially given the post-Suders trend of holding that submission is not a tangible employment action. As discussed above in Section II, a plaintiff who frames her case as a “submission case” will have to take her chances with the Ellerth/Faragher affirmative defense—or, as Professor Murr framed it, the victim in a submission case will have to “hope that the employer is unable to satisfy both prongs of the affirmative

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154 Mitchell v. Baldrige, 759 F.2d 80, 86 (D.C. Cir. 1985) (internal quotation marks and citation omitted).
156 Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Cf. Wholf v. Tremco Inc., 26 N.E.3d 902, 912 (Ct. App.) (“Therefore, pursuant to Burdine, the plaintiff is not required to conclusively prove all the elements of his claim at the prima facie stage of the burden-shifting analysis.”).
The chances that the employer will fail both prongs of the affirmative defense is unlikely, given courts’ “documented pro-employer trend in granting summary judgment on the *Ellerth/Faragher* affirmative defense, and the courts’ rather cursory and often incorrect analysis of the two prongs[.]”

However, if plaintiffs frame their constructive discharge claims as retaliation claims, “[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.” Thereafter, “[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.” Even if the employer is not silent in the face of the presumption and provides a legitimate, non-retaliatory reason, the employer would be hard-pressed to provide a reason that justifies a supervisor imposing a sexual demand in order to maintain their subordinate’s status quo of employment.

**V. Conclusion**

When the *performance* of sexual acts results in strict liability, “[t]he law will afford you more protection and support as you go about vindicating your civil rights if you have engaged in a sexual relationship with your harasser than if you have permitted yourself to be forced out of employment.” As long as courts continue asking whether submitting is a tangible employment action, women truly are better off submitting to a supervisor’s sexual demand, especially in the

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157 Murr, *supra* note 80, at 538.
158 *Id.*
160 *Id.*
161 *But see* Carswell v. Monumental Life Ins. Co., Civil Action No. 13-378, 2014 U.S. Dist. LEXIS 93329, at *48–49 (W.D. Pa. July 9, 2014) (“To treat the constructive discharge itself as an ‘adverse employment action’ would make no sense. Moreover, it would put the employer in the impossible position of arguing that it had a legitimate, nondiscriminatory reason for an *employee’s* decision to resign.”).
162 Stone, *supra* note 12, at 72.
face of Suders.\textsuperscript{163} Until the question becomes whether the supervisor’s sexual demand \textit{itself} is a tangible employment action, this paper proposes a simple solution: plaintiffs who refuse their supervisor’s sexual demands by resigning should plead “retaliation” as a cause of action in their complaint and in that way, obtain relief and retain the power in saying “no.” The recent trend in finding that rejecting a supervisor’s sexual demands constitutes opposition protected by Title VII, the well-established rule that constructive discharge is an adverse employment action, and the plaintiff-friendly \textit{McDonnell-Douglas} burden-shifting framework\textsuperscript{164} make retaliatory discharge the superior route to relief for plaintiffs who have the courage to say “no.”

\textsuperscript{163} \textit{Cf.} Christy M. Hanley, \textit{A “Constructive” Compromise: Using the Quid Pro Quo and Hostile Work Environment Classifications to Adjudicate Constructive Discharge Sexual Harassment Cases}, 73 U. CIN. L. REV. 259, 286 (2004) (“Waiting to be fired or reassigned in retaliation for refusing a supervisor’s advances in order to qualify as the victim of a tangible employment action is illogical, an anathema to federal law under Title VII.”).

\textsuperscript{164} At the very least, the \textit{McDonnell Douglas} burden-shifting framework is more plaintiff-friendly than the \textit{Ellerth/Faragher} affirmative defense. \textit{Compare} Deborah Dyson, \textit{Expert Testimony and “Subtle Discrimination” In The Workplace: Do We Now Need A Weatherman to Know Which Way the Wind Blows?}, 34 GOLDEN GATE U.L. REV. 37, 45 (2004) (explaining how “the proof structure established in [McDonnell Douglas] has generally been considered plaintiff-friendly in concept”) \textit{with} Vance v. Ball State Univ., 570 U.S. 421, 466 (2013) (Ginsburg, J., dissenting) (“As a consequence of the Court’s truncated conception of supervisory authority, the \textit{Faragher} and \textit{Ellerth} framework has shifted in a decidedly employer-friendly direction. This realignment will leave many harassment victims without an effective remedy and undermine Title VII’s capacity to prevent workplace harassment.”).