I. INTRODUCTION

In *Moberly v. Midcontinent Communication*,[1] the United States District Court for the Southern Division of South Dakota determined whether or not to grant summary judgment in favor of the defendant on claims of sexual harassment and retaliation in violation of Title VII.[2] The plaintiff's claims originated from interactions at work with her supervisor over the course of about eleven months that culminated in her being denied a bonus and terminated from her position.[3] The court analyzed the plaintiff's claims under the *McDonnell Douglas* burden-shifting framework[4] to determine if enough issues of material fact existed to survive summary judgment.[5]

The plaintiff in *Moberly* set forth two separate claims under Title VII: first, that the defendant had discriminated against her based on her sex by way of "quid pro quo" sexual harassment and second, that the defendant retaliated against her for her opposition to sexual harassment.[6] The court set forth three elements that the plaintiff needed to satisfy in order to state a claim for retaliation: 1) the plaintiff needed to be engaged in "protected activity", 2) a reasonable person would perceive the alleged retaliatory action to be "materially adverse", and 3) the adverse action was causally linked to the protected behavior.[7] Showing these three elements

[1] Moberly v. Midcontinent Communication, 711 F. Supp. 2d 1028, 1031 (S.D.S.D. 2010).

[2] 42 U.S.C. § 2000e-3(a).

[3] *Moberly*, 711 F. Supp. 2d at 1031-36.

[4] *Id.* at 1037; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[5] *Moberly*, 711 F. Supp. 2d at 1036; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[6] *Moberly*, 711 F. Supp. 2d 1028.

[7] *Id.*

provides a plaintiff with a presumption that she was retaliated against.[8] The defendant may rebut this presumption by showing a valid, non-discriminatory reason for the action that was taken against the employee.[9]

The retaliation component of the *Moberly* decision involved analysis of the meaning of "protected activity" necessary to state a claim under Title VII.[10] In finding that the plaintiff's requests to her supervisor that he stop conduct that she found offensive constituted "protected opposition",[11] the court followed guidance from both the Eighth Circuit and the United States Supreme Court offering a broad interpretation of "opposition".[12] However, there is considerable case law supporting a narrower view of protected activity[13], and the question of what constitutes opposition remains unsettled at the Supreme Court.[14]

Moberly is a foreseeable outcome of the development of case law surrounding Title VII. Part II of this note describes the evolution of Title VII retaliation claims in recent years, specifically with regard to the elements necessary to state a claim for retaliation. Part III analyzes *Moberly* under the lens of this evolution. Part IV concludes that although *Moberly* was decided adequately in light of recent case developments, the lines between the different areas of Title VII have begun to blur to the point that they no longer serve their original purposes, and therefore that a different outcome would have been proper. Finally, the note suggests that the

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[8] *Id.*

[9] *Id.*

[10] *See generally id.*

[11] *Id.* at 1044.

[12] *Id. See also* Crawford v. Metro. Gov't of Nashville & Davidson County, 555 U.S. 271 (2009).

[13] *See, e.g.*, Rachel-Smith v. FTData, Inc., 247 F. Supp. 2d 734 (D.Md. 2003); Fitzgerald v. Henderson, 36 F. Supp. 2d 490 (N.D.N.Y. 1998).

[14] *See Crawford*, 555 U.S. at 280 (Alito, J., concurring).

Supreme Court should address the definition of opposition in a way that returns each separate area of Title VII to serving its original purpose.

II. BACKGROUND

Title VII protects employees against, among other things, their employer discriminating against them because they opposed an employment practice made unlawful by Title VII or participated in an investigation into claims of such practices.[15] This portion of Title VII, which provides a cause of action for "retaliation", is separate from the portion that protects employees against harassment.[16] Essentially, harassment claims are meant as a remedy for actions taken against employees for *who they are*, while retaliation claims are meant as a remedy taken against employees for *what they do*.[17]

Sexual harassment claims generally fall into one of two recognized categories: harassment that creates a hostile work environment; and *quid pro quo* harassment, where sexual favors are an express or implied condition to receive job benefits.[18] To state a claim for *quid pro quo* sexual harassment, a plaintiff "must show that: (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) Plaintiff's reaction to the harassment affected tangible aspects of compensation, terms, conditions, or privileges of employment; and (5) the employer knew or should have known of the harassment and took no effective remedial action."[19]

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[15] 42 U.S.C. § 2000e-3(a).

[16] *Compare* 42 U.S.C. § 2000e-3(a) *with* 42 U.S.C. § 2000e-2(a). *See also* Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 63 (2006).

[17] *Id.* at 63.

[18] *Rachel-Smith*, 247 F. Supp. 2d at 745.

[19] *Id.*

Retaliation claims, meanwhile, are split into one of two categories based on the type of "protected conduct" being retaliated against: "[opposing] any…unlawful employment practice" ("opposition") and making a charge, testifying, assisting, or participating in an investigation ("participation").[20] To state a claim of retaliation under the opposition clause, a plaintiff must show that "(1) she engaged in a protected activity; (2) she was subjected to adverse employment action; and (3) a causal link exists between her participation in the protected activity and the adverse employment action."[21]

"An employment action is adverse for purposes of Title VII if it is reasonably likely to deter employees from engaging in protected activity."[22] In other words, the alleged action must be one that would dissuade a reasonable employee from taking the protected action in question.[23] The "reasonable employee" standard used in this element was chosen by the Supreme Court because it is judicially administrable, and can therefore be applied objectively from case to case.[24] However, the context of the employment action still matters; an action that is not adverse in one situation might be considered adverse in another.[25] Thus, although there is no bright line test for what constitutes an adverse employment action, a judge would have the ability to make this determination at the summary judgment phase.

Title VII also requires a causal link between the plaintiff engaging in protected activity and the defendant taking an adverse employment action; that is, the defendant must take action

[20] Crawford v. Metro. Gov't of Nashville & Davidson County, 555 U.S. 271, 274 (2009).

[21] Black v. City & County of Honolulu, 112 F. Supp. 2d 1041, 1049 (D. Haw. 2000).

[22] *Id.* (citing Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000)) (internal quotes omitted).

[23] Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).

[24] *Id.*

[25] *Id.* at 69.

because of the plaintiff's conduct.[26] "Causation can be proven by direct evidence of retaliatory motivation or it may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the activity and the allegedly retaliatory employment decision."[27]

Although there is no set rule for the degree of temporal proximity necessary to rise to an inference of causation, it is clear that the allegedly retaliatory action must, at the very least, come *after* the plaintiff engaged in protected conduct.[28] Beyond that, case law suggests that action might have to come within a matter of months to be inferred retaliatory.[29] The need for the requirement that the defendant knew that the plaintiff engaged in protected conduct is fairly straightforward – it would be unreasonable to infer that the defendant retaliated for conduct that he did not know took place.[30]

Meanwhile, the scope of what falls within the opposition clause remains somewhat unsettled.[31] As stated by the Third Circuit, "[w]hen deciding whether a plaintiff has engaged in opposition conduct, we look to the message being conveyed rather than the means of conveyance."[32] Case law shows diverging attitudes towards courts accepting an employee merely resisting the sexual advances of a coworker as opposition under Title VII.[33] Recently, the

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[26] *See, e.g.*, Moberly v. Midcontinent Communication, 711 F. Supp. 2d 1028, (S.D.S.D. 2010).

[27] Black v. City & County of Honolulu, 112 F. Supp. 2d 1041, 1052 (D. Haw. 2000).

[28] *See* Curay-Cramer v. Ursuline Acad. Of Wilmington, Del., Inc., 450 F.3d 130 (3d Cir. 2006).

[29] Little v. National Broadcasting Company, Inc., 210 F. Supp. 2d 330, 387 n.45 (S.D.N.Y. 2002).

[30] *See id.* at 386.

[31] Cite.

[32] *Curay-Cramer*, 450 F.3d at 135.

[33] *Compare* Fitzgerald v. Henderson, 36 F. Supp. 2d 490 (N.D.N.Y. 1998) *with* Crawford v. Metro. Gov't of Nashville & Davidson County, 555 U.S. 271 (2009).

U.S. Supreme Court allowed for a broad interpretation of what constitutes opposition.[34] The Court held that a person can "oppose" conduct without taking an affirmative action, but instead by doing something as simple as "standing pat".[35] This development constituted a major shift in Title VII cases; under this view, a plaintiff's opposition must no longer reach farther than the harassing party.[36] Writing separately, however, Justice Alito stressed that the opposition clause should not extend "beyond employees who testify in internal investigations or engage in analogous purposive conduct."[37] Justice Alito's concern was that such a broad scope of opposition could lead to retaliation claims involving "silent opposition".[38]

This narrow scope of activity that could be considered opposition has been applied to determine that a plaintiff had not engaged in protected opposition by merely resisting the advances of her supervisor.[39] The court reasoned that the plaintiff's resistance did not constitute opposition because her protestations went no further than the supervisor that was harassing her.[40] Rationale for requiring more than this mere resistance is grounded in a desire to keep harassment claims separate from retaliation claims.[41]

III. ANALYSIS

[34] *Crawford*, 555 U.S. 271.

[35] *Id.* at 277.

[36] *Compare* Id. *with* Rachel-Smith v. FTData, Inc., 247 F. Supp. 2d 734 (D.Md. 2003).

[37] *Crawford*, 555 U.S. at 281 (Alito, J., concurring).

[38] *Id.* at 282 (Alito, J., concurring).

[39] *Rachel-Smith*, 247 F. Supp. 2d at 748.

[40] *Id.* at 748-749.

[41] Fitzgerald v. Henderson, 36 F. Supp. 2d 490, 499 (N.D.N.Y. 1998) (citing Del Castillo v. Pathmark Stores, Inc., 941 F. Supp. 437, 438 (S.D.N.Y. 1996) ("If it were otherwise, every harassment claim would automatically state a retaliation claim as well.").

Moberly highlights a growing issue with Title VII jurisprudence: the blurring of the lines between harassment claims and retaliation claims, as well as the implications that could be carried by the tremendous expansion in the scope of what is considered opposition. Title VII does not define what is meant by "opposed" for the purposes of the statute.[42] Thus, it is up to the courts to determine what is considered opposition by using the usual canons of construction available for statutory interpretation, not the least of which is legislative intent.[43]

The difference in language between the harassment provision and the retaliation provision of Title VII is purposeful.[44] The scope of the two provisions is different because they were meant to cover different things; indeed, the scope of the retaliation provision is, in some ways, more broad.[45] However, this added breadth in scope is limited to the retaliatory actions that may give rise to a claim.[46] There is nothing to suggest that the scope of opposition was intended to make retaliation claims available to as broad of a group as general harassment claims. In other words, the harassment provision is intended to protect a broad group of individuals from a narrower scope of behavior, while the retaliation provision is intended to protect a narrower group of individuals from a broad scope of behavior.[47]

In *Moberly*, the court's determination as to whether or not resistance to sexual advances constituted opposition was outcome determinative, but only on the claim of retaliation; there is

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[42] *See* 42 U.S.C. § 2000e-3(a).

[43] *See, e.g.*, Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (2006) (applying legislative intent to a statute to determine the intended definition of a term).

[44] *Id.* at 63.

[45] *Id.* at 67.

[46] *See id.*

[47] *See id.*

no similar requirement to state a claim for *quid pro quo* sexual harassment.[48] Thus, regardless of whether or not the court determined that the plaintiff had engaged in opposition, she still would have been able to maintain her claim for *quid pro quo* sexual harassment.[49] The decision of the court merely allowed the plaintiff to state two causes of action for a single behavior. While this is not unheard of, the intentions of the legislature underlying each cause of action make this outcome questionable.

Furthermore, when a plaintiff requests that a specific behavior cease only to the individual engaging in it, the employer has not been effectively put on notice of the behavior.[50] Since the retaliation provision is designed to protect and encourage employees to speak out to their employers regarding behavior believed to violate other provisions of Title VII, it follows that a situation where the employer is not put on notice in one form or another would not be covered by this provision.[51] Practically speaking, it seems unlikely that the plaintiff in *Moberly* was opposing the advances of her supervisor for the purpose of making her employer aware that she believed that a violation of Title VII had taken place.[52] That is not to say that Title VII did not intend a cause of action to exist where an employee is terminated for resisting the advances of a supervisor; it did, but that falls within the scope of *quid pro quo* harassment, not retaliation.[53]

[48] Moberly v. Midcontinent Communication, 711 F. Supp. 2d 1028, 1038 (S.D.S.D. 2010).

[49] *Id.* at 1047.

[50] Rachel-Smith v. FTData, Inc., 247 F. Supp. 2d 734, 748 (D.Md. 2003).

[51] *Id.*

[52] *See* Moberly, 711 F. Supp. 2d 1028.

[53] *See id.* at 1039.

Additionally, allowing for a broad definition of "oppose" risks the expansion of the scope of the term into all sorts of "opposition" that employers might not be aware of, including so-called "silent opposition".[54] In many of these cases, the plaintiff would have a difficult time showing causation without proof of the employer's knowledge.[55] However, the inference of causation that a plaintiff can create by mere temporal proximity would be enough in some cases to create enough of an issue of material fact for the case to go to trial.[56] That would create an unnecessary risk of an increased burden on both the courts and the EEOC, while in exchange only allowing additional causes of action which the legislative minds behind Title VII never contemplated.[57]

IV. CONCLUSION

Although the court in *Moberly* did not break against any precedent, their decision to include resisting sexual advances within the scope of "opposition" for the purposes of a Title VII retaliation claim[58] is questionable. The decision is indicative of a problem emerging with Title VII claims – the lines between harassment claims and retaliation claims are becoming unnecessarily blurred. This confluence of separate claim areas is unnecessary because the legislative scheme behind Title VII provides causes of action for all behaviors that the legislature wished to prohibit; there is simply no "gray area" currently lacking enforcement that needs to be filled in. Yet the expansion of "opposition" not only creates the risk of duplicative claims, but

[54] Crawford v. Metro. Gov't of Nashville & Davidson County, 555 U.S. 271, 280 (2009) (Alito, J., concurring).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Moberly v. Midcontinent Communication, 711 F. Supp. 2d 1028, 1044 (S.D.S.D. 2010).

also carries the potential of broadening the scope of retaliation claims beyond the legislative intent of the statute.

Moberly would be an ideal case for the U.S. Supreme Court to use to address this issue. Up to this point, the Court has not directly addressed the issue of whether or not the mere rejection of a supervisor's advances constitutes "opposition" for the purpose of Title VII's retaliation provision. Addressing and answering the issue in the negative here would serve the dual purposes of re-establishing the boundary between harassment and retaliation claims as well as clarifying the dicta from *Crawford* and alleviating the concern that employers could become liable for "silent opposition".[59] Such an action by the Court seems both appropriate and necessary.

[59] *Crawford*, 555 U.S. at 280 (Alito, J., concurring).