
**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF STETSON
METTS CITY DIVISION**

LINDSAY BOOTH,

Plaintiff,

V.

CASE NO.: 15:17-cv-0068-CHR-ESM

SUDDEN VALLEY CONSTRUCTION COMPANY,

Defendant.

**PLAINTIFF LINDSAY BOOTH'S RESPONSE IN OPPOSITION TO
DEFENDANT SUDDEN VALLEY CONSTRUCTION COMPANY'S
MOTION TO DISMISS COMPLAINT**

/s/ 1722
1722

Attorneys for Plaintiff

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QUESTIONS PRESENTED

- I. Title VII of the Civil Right Act of 1964 (“Title VII”) prohibits employment discrimination where the victim can demonstrate the discrimination was based on sex. Lindsay Booth suffered discrimination because he is a man who is attracted to other men. Does Title VII protect Booth from discrimination based on sexual orientation because it is inseparable from discrimination based on sex?

- II. The “opposition clause” of 42 U.S.C. § 2000e-3(a) prohibits retaliation against an employee who opposes an unlawful employment practice. Lindsay Booth rejected his supervisor’s sexual advances and was subject to a materially adverse demotion as a result. Has Booth properly pled a claim for retaliation because he opposed his supervisor’s advances and factually alleged that, but-for the opposition, he would not have been demoted?

STATEMENT OF JURISDICTION

Lindsay Booth, a resident of Metts City, Stetson, brought this sexual-orientation discrimination action in the Southern District of Stetson against Sudden Valley Construction Company (“SVCC”), a Stetson corporation. The United States District Court for the Southern District of Stetson has jurisdiction over this case under 28 U.S.C. § 1343, which provides that United States District Courts shall have jurisdiction over actions based on Title VII of the Civil Rights Act of 1964 (“Title VII”). Jurisdiction is also proper under 28 U.S.C. § 1331, which authorizes federal courts to hear cases arising under federal law. Venue is proper under 28 U.S.C. § 1391. This case is properly before this Court.

STATEMENT OF FACTS

Plaintiff Lindsay Booth is a construction engineer who, before rejecting his supervisor's sexual advances, received exceptional performance reviews while working for Defendant, SVCC. Compl. ¶¶ 17, 27. Booth is also a homosexual man. Compl. ¶ 8.

SVCC guaranteed Booth work as a project engineer for the duration of a project called Milford Manor, earning \$85,000 yearly plus performance bonuses. Compl. ¶ 6. At SVCC, Booth supervised a team and reported to superintendent Jesse Bowers ("Bowers"). Compl. ¶¶ 7, 11. Bowers managed daily operations, set development schedules, and supervised four project engineers. Compl. ¶ 10.

Booth was "an efficient and effective project engineer."

Booth's team was assigned to the Northeast quadrant, where a Jaguar Land Rover ("JLR") dealership was to be constructed. Compl. ¶ 14. JLR's lease with SVCC allowed JLR to terminate the lease due to "substantial delay." Compl. ¶ 15.

In May, scaffolding collapsed and three workers were injured, causing delays. Compl. ¶¶ 16-17. Still, Booth received a glowing quarterly review plus a \$4,500.00 bonus. Compl. ¶ 17-18. Signed by Bowers, the review celebrated Booth as "an efficient and effective project engineer" who "handled the stresses and problems of the first quarter of development with ease." Compl. ¶ 17.

In September, Booth and Bowers were alerted to defects requiring JLR's foundation to be demolished and rebuilt. Compl. ¶ 19. Booth fired the negligent workers but SVCC refused to hire replacements, delaying the opening of Booth's quadrant by three weeks. Compl. ¶¶ 20-21.

Bowers would "take care of the review, if [Booth] took care of him."

To offset the delays, Booth and Bowers agreed to work overtime. Compl. ¶ 22. While working together in October, Bowers asked Booth about his upcoming review. Compl. ¶ 23. Booth expressed concern, but Bowers said he was "impressed with Booth's diligence in dealing with the delays in development." Compl. ¶ 23. Bowers then squeezed Booth's buttocks, cooing that he would "take care of the review, if [Booth] took care of him." Compl. ¶ 23. Booth rejected the advance, stating he did not want a sexual relationship with his supervisor. Compl. ¶ 24. Bowers fled and did not work overtime the next week. Compl. ¶¶ 24-25.

Later, Booth overheard a team member, Marta Estrella, refer to Booth by a derogatory homosexual slur. Compl. ¶ 26. When confronted, Estrella spilled that Bowers had used the explicit term in reference to Booth. Compl. ¶ 26.

SVCC requires "strong moral values that Booth lacks."

Issued only days after the groping and signed by Bowers, the next review maligned that Booth's performance had "declined significantly, to the point that the Milford Manor team may need to be restructured to accommodate for delays

attributed to Booth's dreary leadership." Compl. ¶ 27. It further claimed the project required "strong moral values that Booth lacks." Compl. ¶ 27.

Delays left construction two weeks behind and on November 2, 2016, JLR terminated its lease citing the delays and "the civil unrest in the United Kingdom caused by the Brexit referendum." Compl. ¶¶ 28-29. Days later, Bowers maligned Booth personally and professionally in a meeting with Tobias Funk, SVCC Vice President. Compl. ¶ 30.

The next day, Bowers met with Booth, denied him a quarterly bonus, and demoted him to weekend shift supervisor to allow him to "spend more time with his spouse." Compl. ¶ 32. Booth's earnings were reduced to \$18 per hour, and his schedule cut to three days per week. Compl. ¶ 33. He was also informed the demotion was permanent "so long as the British continue[d] to be up in arms." Compl. ¶ 34. Ultimately, Booth resigned, informing SVCC that its actions amounted to constructive discharge. Compl. ¶ 35.

Booth filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that SVCC discriminated against Booth and retaliated against him after he rejected Bowers's sexual advances. Compl. ¶ 36. The EEOC issued a right-to-sue letter on June 6, 2017. Compl. ¶ 37.

SUMMARY OF THE ARGUMENT

This Court should deny the Defendant's Motion to Dismiss for two reasons. First, Booth suffered discrimination under Title VII because discrimination based on sexual orientation is inseparable from discrimination based on sex, which is cognizable under Title VII. Additionally, sexual-orientation discrimination is associational sex-based discrimination and violates Title VII because this type of discrimination necessarily relies on the gender of the victim in relation to the gender of the person with whom he associates. Alternatively, the type of sexual-orientation discrimination that Booth faced constitutes same-sex harassment that is prohibited by Title VII.

Second, Booth has sufficiently pled his retaliation claim under Title VII. Booth engaged in protected activity under the "opposition clause" because he resisted his supervisor's sexual advances. Booth also faced an adverse employment action consisting of a reduction in salary from \$85,000 plus quarterly bonuses to \$18.00 per hour for three days per week. Finally, Booth has established but-for causation by showing that Bowers made Booth's performance review and subsequent demotion dependent upon Booth's willingness to grant him sexual favors. Accordingly, the Defendant's Motion to Dismiss should be denied.

ARGUMENT

I. This Court should deny Defendant’s Motion to Dismiss because Booth suffered discrimination based on his sexual orientation, which is cognizable “because of sex” discrimination under Title VII.

Sexual-orientation discrimination is discrimination based on sex. Title VII prohibits employers from discriminating on the basis of a person's “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a) (2012). To establish discrimination under Title VII, a plaintiff must first establish that he is a member of a protected class. *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004). Next, a plaintiff establishes a claim of discrimination by demonstrating either that he suffered an adverse job action, or that the discrimination amounted to a hostile work environment. *Id.* at 149. This Court requested supplemental briefing address only the protected class element of a discrimination claim and Title VII’s prohibition of discrimination based on sexual orientation. *See* Order Requiring Supp. Briefing at 1.

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff “need not allege facts sufficient to make out a classic prima facie case, but must simply provide enough factual matter to plausibly suggest intentional discrimination.” *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1253 (11th Cir. 2017). Factual allegations are taken as true and viewed in the light most favorable to the plaintiff. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017).

Booth is a member of a protected class because discrimination based on sexual orientation is cognizable as discrimination based on sex under Title VII. Admittedly, the majority of courts to have addressed the issue agree that Title VII does not prohibit discrimination based on sexual orientation. *Evans*, 850 F.3d at 1257.¹ Despite the circuit split, this Court should follow the holding of the Seventh Circuit, which most recently decided this issue. *Hively*, 853 F.3d at 345. The Seventh Circuit identified the inherently sex-based nature of sexual-orientation discrimination using two concepts: the comparative method and the associational theory. *Id.* Both concepts support the same conclusion—sexual orientation is inseparable from sex. *Id.* Further, the United States Supreme Court has held that same-sex sexual harassment, like Booth suffered, violates Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). This Court should deny the Defendant’s Motion to Dismiss.

A. Sexual-orientation discrimination is a form of non-conformity to gender stereotypes and is inherently discrimination based on sex.

SVCC violated Title VII by discriminating against Booth because he is a man who is attracted to other men, defying the stereotype that a man should be

¹ See also *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

attracted to women. The Supreme Court has conclusively decided this issue: Title VII prohibits discrimination based on failure to conform to gender stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The Court announced, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250. Using the comparative method, the *Hively* court drew a similar analogy: A woman who is subjected to discrimination based on a belief that a woman should not be attracted to other women has been the victim of discrimination based on gender. 853 F.3d at 346-47. Here, Booth has suffered from discrimination based on sex because his choice of sexual partner does not conform to traditional notions of male sexuality.

The traditional example of the comparative method is a comparison of the treatment of males and females in a workplace. If females, for example, are subject to more arduous requirements than males, discrimination based on sex has been exposed. But that example does not capture the essence of the problem in gender-stereotyping discrimination. To determine if a woman has suffered discrimination based on the belief that women should not be attracted to women, the proper comparison is between women who are attracted to women and men who are attracted to women. *Id.* A comparison between women who are attracted to women and men who are attracted to men is improper because it changes too many variables—both the gender of the employee and the gender of the person to

whom she is attracted. *Id.* But the former comparison isolates both the gender of the victim and the gender stereotype in question. *Id.*

The critical question in Booth's case, then, is whether females at SVCC are subject to discrimination based on their sexual interest in men. A jury would find that Booth would not have been attacked with homosexual slurs and unwanted physical contact if he had been a woman attracted to men. No evidence suggests that Bowers levied derogatory slurs at women who are interested in men. There is also no evidence that Bowers approached any women in the workplace to request sexual favors.

The nature of the derogatory slurs Bowers used to refer to Booth also demonstrates that sexual-orientation discrimination is based on sex. As the Fifth Circuit noted, homosexual epithets, such as "fa--ot," "pu--y" and "princess," are based on a failure to conform to gender stereotypes; consequently, their use constitutes discrimination based on sex. *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 457 (5th Cir. 2013).

Additionally, the EEOC, the agency charged with enforcing Title VII, has approved the notion that sexual-orientation discrimination is discrimination based on sex, explaining that "sexual orientation discrimination is motivated by a desire to enforce heterosexually defined gender norms." *Baldwin v. Foxx*, EEOC Appeal

No. 0120133080, 2015 WL 4397641, at *8 (July 16, 2015) (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). The *Centola* court wrote:

stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women . . . The harasser may discriminate against an openly gay co-worker . . . because he thinks, “real men don't date men.” The gender stereotype at work here is that “real” men should date women, and not other men.

183 F. Supp. 2d at 410.

Moreover, congressional refusal to amend Title VII to include “sexual orientation” as a protected class does not necessarily mean that Congress did not intend to prohibit sexual orientation discrimination. *Hively*, 853 F.3d at 343-44. Instead, congressional refusal to amend Title VII could mean that Congress understands “because of sex” to include sexual-orientation discrimination. *Id.* The EEOC’s support for the position that Title VII prohibits sexual-orientation discrimination makes this understanding plausible. *Id.* at 344.

The Supreme Court also continues to highlight facets of sexual-orientation discrimination that are consistent with discrimination based on sex, as it did in *Hopkins* and *Oncale*. *Id.* Because congressional intent is unclear, the Seventh Circuit held that the pronouncements made by the *Oncale* Court were instructive: Statutory prohibitions often go far beyond the principal evil to cover reasonably comparable evils—in the case of Title VII, prohibitions reach any sexual

harassment that meets the statutory “because of sex” requirements. *Id.* (quoting *Oncale*, 523 U.S. at 79-80).

Moreover, the Seventh Circuit explained it is “impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.” *Id.* at 350-51. As the EEOC explained,

A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite-sex.

Baldwin, 2015 WL 4397641, at *5. In other words, a person’s designation as homosexual is necessarily predicated upon his gender, and attempts to separate the two ignore the most basic definition of sexual orientation. *Id.*

Because Booth was the victim of discrimination based on his sexual orientation, he was necessarily the victim of discrimination based on his sex and is entitled to the protections of Title VII.

B. Sexual-orientation discrimination also violates Title VII because it is sex-based associational discrimination.

Booth suffered actionable sex discrimination because he was harassed due to his gender and his association with men. Circuit courts have long recognized associational discrimination in the context of race. The Fifth Circuit has held that Title VII prohibits discrimination based on the personal relationship between an employee and a person of a different race. *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d

244, 249 (5th Cir. 2009); *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

As the Seventh Circuit held, the same discriminatory basis is at work in the context of sexual-orientation discrimination. *Hively*, 853 F.3d at 349. Just as analysis of associational discrimination in the racial context requires consideration of the employee’s race, associational discrimination in the context of sexual orientation requires consideration of the employee’s sex. *Id.* The associational theory of discrimination applies in the context of sex-based discrimination because the enumerated categories of protected classes are to be treated the same across the board. *Baldwin*, 2015 WL 4397641, at *5 (citing *Hopkins*, 490 U.S. at 243 n.9; *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980)).

In Booth’s case, associational discrimination was made apparent by Bowers’s comment that Booth’s demotion would permit him to “spend more time with his spouse.” Compl. ¶ 32. Taken in conjunction with Bowers’s use of derogatory homosexual slurs describing Booth, the sentiment was clear—the harassment Booth faced was based on his homosexuality and his gender in relation to the gender of the person he had chosen as a spouse. Compl. ¶ 26.

The Supreme Court has recently issued a line of opinions proclaiming that sexual-orientation discrimination in other areas of the law violates the Constitution; those opinions are especially important here. *Hively*, 853 F.3d at 349. For instance, in overturning a gay marriage ban, the Supreme Court recently acknowledged that laws prohibiting same-sex marriage burden the liberty of same-sex couples and represent blatant inequality. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

The logic employed by the Seventh Circuit is most consistent with the language of Title VII because sexual orientation discrimination is inseparable from discrimination based on sex and gender stereotypes. The Seventh Circuit, as the court which most recently considered this issue, holds significant persuasive authority because the court considered and decided this issue in the broader context of current political and judicial opinion. Therefore, because discrimination based on sexual orientation is cognizable under Title VII as discrimination based on sex, this Court should deny the Defendant's Motion to Dismiss.

C. Alternatively, sexual-orientation discrimination is cognizable under Title VII as same-sex sexual harassment.

By groping Booth and asking for sexual favors, Bowers sexually harassed Booth because of his sex. Though there is debate concerning discrimination based purely on sexual orientation, the Supreme Court has spoken decisively on the issue

of same-sex sexual harassment: Sexual harassment is prohibited between members of the same sex. *Oncale*, 523 U.S. at 79.

One way a plaintiff may demonstrate “because of sex” discrimination in a same-sex harassment case is to prove that the harasser was motivated by sexual desire. *Bibby*, 260 F.3d at 264 (citing *Oncale*, 523 U.S. at 80–81). Booth’s allegations establish that he was the victim of same-sex harassment for the purposes of a Rule 12(b)(6) motion to dismiss. While working overtime alone together, Bowers seized an opportunity to make sexual advances towards Booth by embracing Booth’s buttocks. Compl. ¶ 23. Bowers cooed that he would “take care of [Booth’s upcoming] review, if [Booth] took care of him.” Compl. ¶ 23. Mortified, Booth rejected Bowers’s sexual advance, stating he was not interested in a sexual relationship with his supervisor, and Bowers immediately fled the project site. Compl. ¶ 24.

When taken as true and in the light most favorable to Booth, these factual circumstances demonstrate that Bowers, who is of the same sex as Booth, was motivated by sexual desire. These facts additionally ensure “a reasonable expectation that discovery will reveal evidence of the necessary elements of” the claim. *Phillips v. Cnty of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). For example, Booth can further demonstrate sexual desire if Bowers’s work history

demonstrates a history of sexual aggression towards men, but only discovery can facilitate this revelation.

This Court should find that sexual-orientation discrimination is discrimination based on sex because sexual orientation is inherently linked with sex and gender stereotypes, and because sexual-orientation discrimination is necessarily associational discrimination based on sex. Alternatively, this Court should recognize that Booth was the victim of same-sex harassment motivated by Bowers's sexual desire. This Court should, therefore, deny Defendant's Motion to Dismiss.

II. Booth properly pled his retaliation claim under Title VII because but-for his engagement in the protected act of rejecting of Bowers's sexual advances, Booth would not have been demoted.

SVCC violated Title VII by demoting Booth after he refused to participate in sexual activity with Bowers. Three elements constitute a retaliation claim under Title VII: "(1) the Plaintiff must have been engaged in a statutorily protected activity, (2) the employer must have taken an adverse action against the Plaintiff, and (3) there must be a causal connection between the protected activity and the adverse employment action." *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 388 (5th Cir. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)).

In a Rule 12(b)(6) motion to dismiss, a “court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 507 (2002). All factual allegations are taken as true and viewed in the light most favorable to the plaintiff. *Hively*, 853 F.3d at 345.

The first element of the retaliation analysis is satisfied because Booth opposed Bowers’s sexual advance, which is an unlawful employment practice. *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015). To the second element, the Supreme Court has held that a plaintiff must show injury or harm that might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006). As factual allegations are taken as true, this element is satisfied because Booth alleges that he was demoted and constructively terminated when he was deprived of his quarterly bonus and demoted to weekend shift supervisor where he worked significantly less hours and earned significantly less pay. Compl. ¶¶ 32-33. Finally, the third element is satisfied because Booth has alleged that Bowers explicitly made the outcome of Booth’s performance review dependent on Booth giving Bowers sexual favors. Because each element of the analysis is satisfied as a matter of law, this Court should deny the Defendant’s Motion to Dismiss.

A. Booth engaged in protected activity when he opposed Bowers’s unwanted sexual advance.

Booth's opposition and resistance to Bowers's sexual contact is protected activity. First, to plead a retaliation claim, a plaintiff must show that he has engaged in a protected activity. *New Breed Logistics*, 783 F.3d at 1066. An employer violates Title VII by discriminating against an employee "because he has opposed any practices 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." 42 U.S.C. § 2000e-3(a) (2012). The statute includes two types of protected activity: opposition and participation. *New Breed Logistics*, 783 F.3d at 1067.

In considering the opposition clause, the Eighth Circuit held that where a plaintiff refused sexual advances from her supervisor and asked him to stop the conduct, the plaintiff had engaged in the "most basic form of protected activity." *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000). The majority of circuits to have considered this issue concur: Under the opposition clause, resisting sexual advances alone is enough to satisfy the first element of the retaliation analysis. *See New Breed Logistics*, 783 F.3d at 1066; *Ogden*, 214 F.3d at 1007. *But see LeMaire*, 480 F.3d at 389.

The Sixth Circuit explained that the opposition clause encompasses resistance to sexual advances because the word "oppose," as used in § 2000e-3(a), should be interpreted broadly. *New Breed Logistics*, 783 F.3d at 1066. This is

because the Supreme Court has held that “oppose” in the context of this statute, “carries its ordinary meaning: ‘to resist or antagonize . . . ; to contend against; to confront; resist; withstand.’” *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty*, 555 U.S. 271, 276 (2009). The Sixth Circuit also noted that the statute makes no requirements as to whom the protected activity must be directed and has upheld conduct “including complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices.” *New Breed Logistics*, 783 F.3d at 1066. Finally, the portion of the opposition clause requiring some unlawful employment practice under Title VII is also satisfied because sexual harassment is unquestionably an “unlawful employment practice.” *Id.* at 1067.

Here too, Booth engaged in protected activity by rejecting and resisting his supervisor’s advances. Using Booth’s upcoming performance review as leverage, Bowers physically embraced Booth’s buttocks and said he would “take care of the review, if [Booth] took care of him.” Compl. ¶ 23. Booth backed away from Bowers and unequivocally stated he was not interested in a sexual relationship with his supervisor. Compl. ¶ 24. Bowers then fled the project site. Compl. ¶ 24.

Because resisting the sexual advances of a supervisor is the most basic type of opposition and is consistent with the ordinary meaning of the word, Booth has

satisfied the first element of a retaliation claim. Accordingly, this Court should deny the Defendant's Motion to Dismiss.

B. Booth has established that but-for his rejection of Bowers's sexual advances, he would not have been constructively terminated.

SVCC violated Title VII by demoting Booth because he refused Bowers's sexual advances. Booth has established that, but-for his rejection of Bowers's sexual advances, he would not have been demoted. "Title VII retaliation claims must be proved according to traditional principles of but-for causation." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). But-for causation can be shown in two ways: "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Hicks v. Baines*, 593 F.3d 159, 170 (2d Cir. 2010). In *Hicks*, claims of but-for causation survived summary judgment where plaintiffs alleged that a supervisor knew plaintiffs were cooperating in an investigation against him and the supervisor told them that he would retaliate. *Id.*

More evidence is before this Court than was present in *Hicks*. First, Bowers made Booth's performance review expressly conditional upon sexual favors by saying he would "take care of the review, if Booth took care of him." Compl. ¶ 23. Moreover, less than ten days after the encounter, Bowers followed through with

that threat by drafting and signing a review of Booth's performance that maligned his character as well as his professionalism, despite prior performance reviews to the contrary. Compl. ¶ 27. After the abysmal review, Bowers also met with Tobias Funk, SVCC Vice President, and attacked Booth personally and professionally. Compl. ¶ 30. Finally, when Bowers demoted Booth to a position where he would earn less than half of the income he had become accustomed to, Bowers scoffed that the demotion would allow Booth to "spend more time with his spouse," alluding to the groping incident. Compl. ¶¶ 23, 32.

Too, Bowers, as the relevant decision-maker, knew of Booth's protected activity of rejecting the sexual advance. *See New Breed Logistics*, 783 F.3d at 1069 (holding where relevant decision-maker was the harasser who knew of the rejection of the sexual advance, employer had knowledge of protected activity). Bowers was the relevant decision-maker because he signed each of Booth's reviews and ultimately demoted him. Compl. ¶¶ 17, 27, 32.

But even if Tobias Funk were the relevant decision-maker, SVCC is responsible for Bowers's demotion of Booth under "cat's paw theory." The Sixth Circuit held, "[w]hen a decisionmaker acts in accordance with a retaliator's bias without himself evaluating the employee's situation, the retaliator clearly causes the tangible employment action, regardless of which individual actually enforces the adverse transfer or termination." *New Breed Logistics*, 783 F.3d at 1069.

Here, Tobias Funk acted in accordance with Bowers's allegations of Booth's poor performance without conducting his own evaluation. Compl. ¶¶ 30, 34.

Accordingly, Bowers, as the retaliator, caused Booth's demotion.

Finally, any non-retaliatory reason for the demotion is mere pretext. The Sixth Circuit has upheld a finding of but-for causation and held that an employer's stated reason for adverse action was pretextual where the employer was not concerned with the employee's "poor performance" before she rejected his sexual advances. *New Breed Logistics*, 783 F.3d at 1070-71. Here too, prior to the groping incident, Booth received a glowing review and a hefty bonus, despite construction delays. Compl. ¶¶ 17-18. Additionally, it was Bowers's responsibility to handle the scheduling of product development, and SVCC that refused to provide additional workers after four were fired. Compl. ¶¶ 10, 20. Booth was not the cause of the delays and any suggestion by SVCC to the contrary is mere pretext for the retaliatory purpose.

When these facts are taken as true and viewed in the light most favorable to Booth, his retaliation claim is properly pled as a matter of law. Booth engaged in protected activity by rejecting his supervisor's advances—the most basic form of opposition. Further, Booth's factual allegations establish that but-for his rejection of Bowers's advances, Booth would not have been subjected to the materially

adverse demotion. Because each element of the retaliation claim has been established, this Court should deny the Defendant's Motion to dismiss.

CONCLUSION

Booth is a member of a protected class for the purposes of Title VII because he was discriminated against on the basis of sexual orientation, which is inherently discrimination based on sex. Further, Booth has properly pled a claim of retaliation against SVCC because he has established he engaged in protected activity by rejecting his supervisor's sexual advances; he suffered an adverse employment action in the form of a constructive discharge; and but-for his rejection of Bowers's advances, he would not have been constructively terminated. For the foregoing reasons, SVCC's Motion to Dismiss should be denied.

Respectfully submitted,

/s/ 1722

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Plaintiffs certify that a true and accurate copy of this memorandum has been served by electronic mail to all attorneys of record on this, the 19th day of September, 2017.

/s/ 1722

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Attorneys for Plaintiff