

CHAPTER ONE

OVERVIEW

It is telling that in the overview to the Third Edition of their seminal tome *Employment Discrimination Law*, published in 1996, Barbara Lindemann and Paul Grossman, reflecting on the Second Edition of the book published in 1982 and the changes such as enactment of the 1991 Civil Rights Act that took place in the intervening years, wrote:

“[I]n many areas it has been the [Supreme] Court itself that has taken existing statutes and shaped the law under them. The table of contents of this book underscores one such change: the law of sexual harassment. The topic received only nine pages of one chapter in the second edition of this book. Now it is a chapter of scores of pages in its own right...”

Id. at p. 3.

Ironically, though, sex discrimination was not much on the collective mind of Congress in enacting the 1964 Civil Rights Act. Indeed, the amendment adding sex as a basis of discrimination to a statute that was focused on discrimination on the bases of race, color, sex, and national origin was passed only one day before the Act itself was passed by the House of Representatives. See *Diaz v. Pan American Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971). The amendment came without any significant debate and virtually no legislative history. If the notion of sexual harassment was even entertained by those voting for the Act, it was not in the form of preventing it.

The development of the law of sexual harassment, and the concurrent extension of that law to other bases of discrimination, has been influenced by three major factors: 1) the broad scope of the language of Title VII that applies to the terms and conditions of employment; 2) the equally broad interpretation of Title VII by the courts and the Equal Employment Opportunity Commission (EEOC, Commission) of what is covered by the terms and conditions of employment; and 3) the changing social morays of the last 50 or so years. The impact of the last factor simply cannot be underestimated. We have just come to the end of a long and hotly-contested presidential election with a female Democratic nominee. Without any attempt to argue that we have thrown aside the last vestiges of discrimination or gone backwards, we have, to quote an old television commercial, “come along way, baby.” Perhaps nowhere is there more evidence of how far we’ve come and, perhaps, how far we still have to go than in the Commission’s and the court’s treatment of sexual orientation and gender identity under Title VII. As discussed in [Chapter Six](#), the Commission, in the federal sector, has held that sexual orientation and gender identity are covered within the prohibition of discrimination on the basis of sex under Title VII. The circuit courts of appeal have split on the issues and the matter will without doubt be decided by the Supreme Court.

Just as the prohibition against discrimination on the basis of sex had its origins in the legislative desire to ban discrimination on other bases, so, too, the origin of sexual harassment claims grew out of other cases involving race and national origin discrimination. There is common agreement that the first case to recognize the possibility that the work environment itself could become so hostile that it could actually constitute a term and condition of employment and, as a result, violate Title VII was *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058 (1972). The plaintiff in the case, an optometrist’s assistant of Spanish heritage, brought a claim based on national origin alleging that she was not permitted to work on white patients and was subject to abuse by her white coworkers. *Rogers* resulted in an opinion by Judge Irving Goldberg with language that has been cited countless times since:

An employee’s psychological as well as economic fringes are statutorily entitled to protection from employer abuse.... [T]he phrase “terms, conditions, or privileges of employment” in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.... *One can readily envision working environments so heavily polluted with discrimination to destroy completely the emotional and psychological stability of minority group workers....*”

Id., at 237–38 (emphasis added). From that simple declaration the law of sexual harassment has evolved, *albeit* over a long period of time, to its current state.

A few years after *Rogers*, the D.C. Circuit became one of the first federal courts to recognize sexual harassment as a violation of Title VII. The court, in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), overcame one of the major hurdles to finding that sexual harassment was a form of sex discrimination. Overturning a grant of summary judgment by the district court on a claim that the plaintiff had been subject to sexual advances and eventually had her job abolished for rebuffing those advances, the D.C. Circuit rejected the logic of the district court that the plaintiff was not subjected to adverse treatment because she was a woman but because she had not succumbed to the supervisor’s advances. Although the original legislative history of Title VII with regard to sex provided little in the way of guidance, the court found that subsequent developments did provide guidance. As the court in *Barnes v. Costle*, 561 F.2d at 987–88, explained:

When, however, the 1964 Act was amended by the Equal Employment Opportunity Act of 1972, there was considerable discussion on the topic. Not surprisingly, it then became evident that Congress was deeply concerned about employment discrimination founded on gender, and intended to combat it as vigorously as any other type of forbidden discrimination. The report of the House Committee on Education and Labor declared in ringing tones that the statute—eight years after passage—still had much to accomplish in order to elevate the status of women in employment.

Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.

The Committee emphasized that women’s employment rights are not “judicial divertissements,” and that “[d]iscrimination against women

is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." The report of the Senate Committee on Labor and Public Welfare reveals a similar commitment to eradication of sex discrimination:

While some have looked at the entire issue of women's rights as a frivolous diversion, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics.

Not unexpectedly, then, during the thirteen years since enactment of Title VII it has become firmly established that the Act invalidates all "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of... impermissible classification[s]." Title VII has been invoked to strike down a wide variety of impediments to equal employment opportunity between the sexes, including insufficiently validated tests, discriminatory seniority systems, weight-lifting requirements, and height and weight standards solely those of one gender. Congress could hardly have been more explicit in its command that there be no sex-based discrimination "against any individual with respect to his... terms, conditions, or privileges of employment...."

(Footnotes omitted).

Significantly, the *Barnes* court noted that it "was much too late in the day" to have different employment standards for men and women when those standards were not "reasonably related to performance on the job." The court went on to note:

The District Court felt, however, that appellant's suit amounted to no more than a claim "that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." In a similar vein, appellee has argued that "[a]ppellant was allegedly denied employment enhancement not because she was a woman, but rather because she decided not to furnish the sexual consideration claimed to have been demanded." We cannot accept this analysis of the situation charged by appellant. But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.^[55] Put another way, she became the target of her supervisor's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. The circumstances imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor. Thus gender cannot be eliminated from the formulation which appellant advocates, and that formulation advances a *prima facie* case of sex discrimination within the purview of Title VII.

[55] It is no answer to say that a similar condition could not be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at the bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.

Id., at 990. (other footnotes omitted).

Other courts would follow suit and by 1980, the EEOC had enacted its own regulations barring sexual harassment as a form of sex discrimination. Shortly after the Commission issued its regulations, the D.C. Circuit would again break ground by taking a case where the plaintiff had alleged no loss of a tangible job benefit. In *Bundy v. Jackson*, 641 F.2d 934, 945–46 (D.C. Cir. 1981), the court, relying heavily upon *Rogers*, found that sexual harassment that resulted in a hostile work environment violated Title VII:

Moreover, an important principle articulated in *Rogers v. Equal Employment Opportunity Commission*, *supra*, suggests the special importance of allowing women to sue to prevent sexual harassment without having to prove that they resisted the harassment and that their resistance caused them to lose tangible job benefits. Judge Goldberg noted that even indirect discrimination is illegal because it

may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees. As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees.

* * *

454 F.2d at 239. Thus, unless we extend the *Barnes* holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking other tangible actions against her in response to her resistance, thereby creating the impression—the one received by the District Court in this case—that the employer did not take the ritual of harassment and resistance "seriously."

Indeed, so long as women remain inferiors in the employment hierarchy, they may have little recourse against harassment beyond the legal recourse Bundy seeks in this case. The law may allow a woman to prove that her resistance to the harassment cost her her job or some economic benefit, but this will do her no good if the employer never takes such tangible actions against her.

And this, in turn, means that so long as the sexual situation is constructed with enough coerciveness, subtlety, suddenness, or one-sidedness to negate the effectiveness of the woman's refusal, or so long as her refusals are simply ignored while her job is formally undisturbed, she is not considered to have been sexually harassed. C. MacKinnon, *Sexual Harassment of Working Women* 46–47 (1979).

It may even be pointless to require the employee to have "resisted" the harassment at all. So long as the employer never literally forces sexual relations on the employee, "resistance" may be a meaningless alternative for her. If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor

rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would only do so at the risk of making her life on the job even more miserable. *Id.* at 43–47. It hardly helps that the remote prospect of legal relief under *Barnes* remains available as she objects so powerfully that she provokes the employer into firing her.

The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. The woman then faces a "cruel trilemma." She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave the job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.

(Footnote omitted).

Ultimately, the Supreme Court would follow suit in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986), in an opinion written by Justice William Rehnquist prior to his elevation to Chief Justice.

Cases involving harassment on bases other than sex, i.e., race, color, national origin, religion, age, disability, and even retaliation for protected activity, had for years been making their way through the courts, but it was the dramatic increase in sexual harassment cases that defined harassment, also referred to as a hostile environment, as a distinct theory of discrimination under Title VII, the Rehabilitation Act and the ADEA.

Historically, the courts and the Commission had extended protection from sex discrimination only to situations that involved heterosexual harassment. However, as the court in *Barnes v. Costle* explained, gender cannot be eliminated from the formulation even when a subordinate of either gender is harassed by a homosexual superior, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977), a proposition adopted, at least conceptually, by the Supreme Court in *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75 (1996), in finding that same-sex harassment could violate Title VII. In the wake of *Oncale*, however, the contours of same-sex harassment remained unclear and the Commission and the courts continued to draw a distinction between harassment based on sex and harassment based on sexual orientation or gender identity, holding that the latter claims fell outside the ambit of Title VII's protections.

In recent years, the Commission moved toward a position that there was no distinction between discrimination based on sex and discrimination based on sexual orientation or gender identity. In two federal sector cases—*Macy v. Attorney General*, 0120120821 (2012) (gender identity) and *Baldwin v. Secretary of Transportation*, 0120133080 (2015) (sexual orientation)—the Commission definitively held that either type of discrimination constitutes sex discrimination under Title VII. As of the writing of this book, the Commission has been actively litigating cases through the court system with some success, no doubt, with the intended ultimate result of having the Supreme Court weigh in on the issue.

As authors, we cannot predict the outcome of any case that might reach the Supreme Court nor, for that matter, predict what, if any, impact the new administration will have on the EEOC's current position on sexual orientation and transgender discrimination. All we can do is to relate the law as it currently exists at the time of publication with the further admonition to "stay tuned."

While other bases of harassment are discussed in this book, the primary is sexual harassment. The main reason for this is that the law, particularly at the Supreme Court level, has been developed in sexual harassment cases. As a general rule, the law as it applies to sexual harassment cases also applies to all other bases of harassment. We also have organized the book in this way because there is little difference in applying the law of harassment to any basis other than sex. Also, there are far more harassment cases filed on the basis of sex than any other basis. As a result, most major developments in the law, even outside of the Supreme Court, have emerged from sexual harassment cases. Tangible employment action cases—where a supervisor takes a personnel action because of submission to or rejection of sexual advances—also distinguish sexual harassment cases from other bases of harassment.

Whether certain conduct is welcome sets sexual harassment cases apart from the other bases as well. Comments or conduct directed at a person based on his or her race, national origin, color or religion are almost universally unwelcome and serve no socially useful purpose. The same is not always true with comments and conduct related to sex. A 2014 study reported that 55% of men surveyed said that they have been involved in some kind of work place relationship. Of the women surveyed, 56% surveyed said that they had done the same. Seventeen percent of those relationships for women resulted in "long term relationships," while 11% of men engaged in long term work place relationships. Vault Careers, *Love Is In The Air: Vault's 2014 Office Romance Survey*, Vault (Feb. 12, 2014), <http://www.vault.com/blog/workplace-issues/love-is-in-the-air-vaults-2014-office-romance-survey/>. Not all conduct based on gender, then, is inherently unwelcome and, in the proper context, can serve a socially useful purpose.

CHAPTER TWO

TANGIBLE EMPLOYMENT ACTIONS

The focus of this chapter is on harassment that culminates in a so-called “tangible employment action.” The origin of this type of case involved claims of sexual harassment, then commonly referred to as *quid pro quo* harassment; quite simply “something for something.” In the instance of sexual harassment, this translated into the grant or denial of employment benefits premised on the submission to or rejection of sexual advances. The Supreme Court changed the vernacular in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), but it did so while noting that the term *quid pro quo* remains “helpful.” 524 U.S. at 751. In fact, the *quid pro quo* label is still used with great frequency in court decisions simply because it is descriptive: if the employee submits to sexual advances, he or she is spared an adverse employment action or granted a favorable one. When the employee resists such advances and suffers a negative employment action as a result, or must submit to advances to retain employment benefits, this theory of harassment, whatever label is used to describe it, comes into play.

The question of whether a discrimination claim involves a tangible employment action is a threshold determination that dictates how the case will be analyzed, as well as the rules of liability that will attach. When a case does not involve a tangible employment action, it is analyzed as a “hostile environment” case—an analysis that is discussed in [Chapters Three](#) through [Seven](#). While the tangible employment action theory is unique to claims of sexual harassment, the Commission still analyzes other bases of harassment, i.e., race, color, national origin, gender, religion, age, disability and reprisal, under the tangible employment label.

In many respects, tangible employment action harassment cases are no different from traditional intentional discrimination cases. An employment action has occurred, and the alleged reason is prohibited discrimination. There are some unique aspects of sexual harassment cases because they specifically entail either submission to sexual advances or rejection of sexual advances as the cause of an employment action. To prevail on a claim of tangible employment sexual harassment, an employee must show: (1) he or she suffered a tangible employment action and (2) the tangible employment action resulted from his or her acceptance or rejection of his or her supervisor’s alleged sexual advances. Put another way, the employee must show that the employer “explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee’s acceptance of sexual conduct.” *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994). An employee who has been subjected to a tangible employment action need not prove severe and pervasive conduct, as in a hostile environment claim, because “any carried-out threat is itself deemed an actionable change in the terms or conditions of employment.” *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1027 (8th Cir. 2004).

If the employee proves that a tangible employment action was taken as a result of refusing sexual advances, the agency is strictly liable for the harassment, and cannot raise an affirmative defense. Liability, along with the affirmative defense, is discussed thoroughly in [Chapter Nine](#). Moreover, retaliation for reporting tangible employment action harassment is prohibited. As with any variation of sexual harassment, women or men can be either the perpetrator or victim, and same-sex harassment is prohibited as long as the basis of the harassment is gender.

By definition, *quid pro quo* harassment claims could only be based on sexual harassment. It is somewhat unclear whether the same can be said of tangible employment action claims. A hostile environment on any prohibited basis that culminates in a tangible employment action leads to strict liability on the part of the employer.

The Commission has analyzed harassment cases not involving sexual conduct under the rubrics of the tangible employment action harassment theory. Because sexual harassment is simply a subcategory of gender discrimination, the authors believe that there is no statutory basis for analyzing harassment cases involving other bases of discrimination any differently than sexual harassment cases. As the Commission noted in *Tera B. v. Social Security Administration*, 0720120009 (2013):

[T]he issue of whether there was a tangible employment action is applicable regardless of whether the claim at issue involves sexual harassment. In fact, our [Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999)] expressly states that “the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment. Thus, the standard of liability set forth in [Ellerth and Faragher] applies to all forms of unlawful harassment.” Moreover, the Enforcement Guidance provides that “the rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability.”

For that reason, our discussion of tangible employment actions is not broken down between cases alleging sexual harassment and those that allege harassment on other protected bases. A problem does arise, however, in dealing with retaliation cases because the standard of injury to state a claim is different than under the Title VII provision barring discrimination on the bases of race, color, national origin, religion or sex. That problem is discussed in the section on [“Reprisal.”](#)

I. TANGIBLE EMPLOYMENT ACTION DEFINITION

Of course, the first thing an employee must show to prevail on a claim of tangible employment action harassment is that he or she actually was subjected to a tangible employment action. The Supreme Court has defined 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.” *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 808 (listing as examples of tangible employment actions: discharge, demotion or undesirable reassignment).

While this sounds relatively simple, the question of what constitutes a tangible employment action is not always easily answered. In some cases, such as terminations, demotions, suspensions or other personnel actions with a clear-cut economic component, the definitional part of the analysis is simple and straightforward. The employee who is terminated for refusing to submit to her boss’s demands for sex will not have to spend

a lot of time or effort to prove the existence of a tangible employment action. Other scenarios are not as simple. Is a reassignment to a different position with the same grade and pay a tangible employment action? What if the employee's job title remains the same but less desirable duties are assigned?

Complicating matters further is the fact that the term "tangible employment action," is similar to, yet distinct from many other terms relevant to discrimination and personnel cases, such as "personnel action," "adverse action," etc. The Supreme Court in *Faragher* and *Ellerth*, *supra*, articulated the term "tangible employment action," but prior to these decisions, the term had only appeared in one opinion, an unreported district court decision. See *Henriquez v. Times Herald Record*, 1997 U.S. Dist. LEXIS 18760, No. 97 Civ. 6176, 1997 WL 732444 (S.D.N.Y. Nov. 25, 1997). As a result, the term "tangible employment action" is still being defined through caselaw.

This section discusses the caselaw that has helped define the parameters of what constitutes a tangible employment action, focusing on the EEOC's Office of Federal Operations' interpretations, with instructive federal court case analysis when appropriate.

A. CHARACTERISTICS OF TANGIBLE EMPLOYMENT ACTIONS

The Commission, in its *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999) (hereinafter *Enforcement Guidance: Vicarious Liability*), sets forth certain characteristics common to most tangible employment actions:

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
 - o it requires an official act of the enterprise;
 - o it usually is documented in official company records;
 - o it may be subject to review by higher level supervisors; and
 - o it often requires the formal approval of the enterprise and use of its internal processes.
2. A tangible employment action usually inflicts direct economic harm.
3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

The Commission provides the following basic examples of tangible employment actions:

- hiring and firing;
- promotion and failure to promote;
- demotion;
- undesirable reassignment;
- a decision causing a significant change in benefits;
- compensation decisions; and
- work assignment.

Id. at Sec. IV.B.

The Commission's *Enforcement Guidance* continues:

Any employment action qualifies as "tangible" if it results in a *significant change* in employment status. For example, significantly changing an individual's duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits. Similarly, altering an individual's duties in a way that blocks his or her opportunity for promotion or salary increases also constitutes a tangible employment action.

Id.

The Commission also views any disciplinary action that is part of a progressive discipline system as "tangible" because each piece of the progressive discipline brings the employee closer to termination. *Id.* at n. 31. If an employment action only results in an insignificant change in an employee's status, it is not considered tangible. *Id.* at Sec. IV.B. The *Enforcement Guidance* uses as an example the changing of an employee's job title. This is not a tangible employment action provided there is no change in "salary, benefits, duties, or prestige, and the only effect is a bruised ego." *Id.* If the new position is less prestigious it may be effectively considered a demotion, and therefore would constitute a tangible employment action. See *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a 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 the particular situation.").

Of course, if an employment action does not qualify as "tangible," the claim becomes one of harassment and the challenged action may be considered, along with other evidence, as part of a hostile work environment claim that is subject to an affirmative defense. *Enforcement Guidance: Vicarious Liability* at Sec. IV.B.

B. COMMITTED BY SUPERVISOR

One characteristic of tangible employment action harassment is that it must be committed by a supervisor. Although we are currently concerned with tangible employment actions case, readers should keep in mind that the definition of what constitutes a supervisor is also relevant to the rules of liability in a hostile environment case with no tangible employment action. This is generally a straightforward notion: only a supervisor has the ability to effectuate employment actions, so only a supervisor is empowered to commit a tangible employment action. For years, circuit courts were split on the question of who qualifies as a supervisor. In 2013, the Supreme Court in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013),

held that “an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.” Well, that clears it up. A tangible employment action can only be taken by a supervisor and a supervisor is an individual who can take a tangible employment action against the complaining employee. Circular as it may seem, there is some clarity in the history of this definitional analysis.

1. 1999 Enforcement Guidance on Vicarious Liability

According to the Commission’s 1999 *Enforcement Guidance: Vicarious Liability* at Sec. III.A, an individual qualifies as a “supervisor” if: (1) “the individual has authority to undertake or recommend tangible employment decisions affecting the employee”; or (2) “the individual has authority to direct the employee’s daily work activities.”

While the second prong of the Commission’s guidance regarding directing an employee’s daily activities was expressly overruled in *Vance*, as discussed more fully below, the first prong of the Commission’s definitional analysis of the term “supervisor” is still applicable. *Enforcement Guidance: Vicarious Liability* at Sec. III.A.1. elaborates on what constitutes “the authority to undertake or recommend tangible employment decisions”:

“Tangible employment decisions” are decisions that significantly change another employee’s employment status.... Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee. As the Supreme Court stated, “[t]angible employment actions fall within the special province of the supervisor.” [*Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2296 (1998)]

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the final say. As the Supreme Court recognized in *Ellerth*, a tangible employment decision “may be subject to review by higher level supervisors.” As long as the individual’s recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor.

2. Circuit Court Split

The question, over the years, became whether an alleged harasser was a supervisor or merely a coworker. Who qualified as a supervisor has generated a good bit of caselaw and disagreement among the circuit courts of appeals. Problems occurred, for example, when it became unclear whether an individual was a supervisor or acting in a supervisory capacity. There was also the issue of nonsupervisory employees who were given an assignment as an acting supervisor. “Team leaders,” who were not technically supervisors, also created a question of whether they qualified as supervisors.

Drawing largely from the language in *Ellerth*, *supra*, and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), defining the term “tangible employment action,” some circuit courts held that only those employees who could effectuate a “significant change in employment status”—that is, the power to “hire, fire, demote, transfer, or discipline the victim”—could qualify as a supervisor. *Vance v. Ball State University*, 646 F.3d 461, 470 (7th Cir. 2011) (“[a] supervisor is someone with power to directly affect the terms and conditions of the plaintiff’s employment.”); see *Noviello v. Boston*, 398 F.3d 76, 96 (1st Cir. 2005) (same); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (to be considered a supervisor, “the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.”). Other circuit courts adopted the EEOC’s decidedly more liberal definition of the term “supervisor” as set forth in its enforcement guidance, i.e., that a supervisor is one who “has authority to undertake or recommend tangible employment decisions affecting the employee (even if the individual does not have the final say); or has authority to direct the employee’s daily work activities.” *Id.* at Sec. III.A. (Emphasis added.)

3. *Vance v. Ball State University*

In *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), the Supreme Court ended the division among the circuit courts. Though *Vance* involved the definition of a supervisor for purposes of applying liability rules in a hostile environment case, by adopting this standard, the Court also helped to further elucidate the meaning of a tangible employment action. Specifically rejecting application of the second prong of the Commission’s definition of a supervisor, i.e., those who have the “authority to direct the employee’s daily work activities,” the *Vance* Court held:

We hold that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect 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.” *Ellerth*, *supra*, at 761. We reject the nebulous definition of a “supervisor” advocated in the EEOC Guidance and substantially adopted by several courts of appeals. Petitioner’s reliance on colloquial uses of the term “supervisor” is misplaced, and her contention that our cases require the EEOC’s abstract definition is simply wrong.

[T]he framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers. Those decisions contemplate a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions. There is no hint in either decision that the Court had in mind two categories of supervisors: first, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker’s labor to some ill-defined degree. On the contrary, the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation. The approach recommended by the EEOC Guidance, by contrast, would make the determination of supervisor status depend on a highly case specific evaluation of numerous factors. The *Ellerth/Faragher* framework represents what the Court saw as a workable compromise between the aided-in-the-accomplishment theory of vicarious liability and the legitimate interests of employers. The Seventh Circuit’s understanding of the concept of a “supervisor,” with which we agree, is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial. The alternative, in many cases, would frustrate judges and confound jurors.

The Supreme Court also struck down as a “study in ambiguity” that portion of the Commission’s enforcement guidance stating that to qualify as a supervisor an individual’s “authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.”

Further defining the term “supervisor,” the *Vance* Court wrote:

Although our holdings in *Faragher* and *Ellerth* do not resolve the question now before us, we believe that the answer to that question [who qualifies as a “supervisor” in a case in which an employee asserts a Title VII claim for workplace harassment?] is implicit in the characteristics of the framework that we adopted. To begin, there is no hint in either *Ellerth* or *Faragher* that the Court contemplated anything other than a unitary category of supervisors, namely, those possessing the authority to effect a tangible change in a victim’s terms or conditions of employment. The *Ellerth/Faragher* framework draws a sharp line between co-workers and supervisors. Co-workers, the Court noted, “can inflict psychological injuries” by creating a hostile work environment, but they “cannot dock another’s pay, nor can one co-worker demote another.” *Ellerth*, 524 U.S., at 762. Only a supervisor has the power to cause “direct economic harm” by taking a tangible employment action. *Ibid.* “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... Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” *Ibid.* (emphasis added). The strong implication of this passage is that the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors.

Applying the facts to its definitional approach as to what makes a supervisor, the Court found the alleged harasser’s position description giving her “leadership responsibilities” did not qualify her as a supervisor, nor did the fact that she led or directed work at the plaintiff’s workplace.

As to instances where the working relationship between the alleged harasser and the victim is not readily discernible, *Vance* added:

The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser’s status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment. By contrast, under the approach advocated by petitioner and the EEOC, supervisor status would very often be murky—as this case well illustrates.

In the *Vance* Court’s final words: “We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.” See also “[Vance v. Ball State University/Definition of ‘Supervisor’](#)” in Chapter Nine.

Like the circuit courts, the *Vance* decision was deeply divided with Justice Alito joined by Roberts, Scalia, Kennedy and Thomas, delivering the opinion of the Court, and Justice Ginsburg, joined by Breyer, Sotomayor, and Kagan, dissenting. Justice Thomas also filed a concurring opinion. Ginsburg, *et al.*, supported EEOC Guidance on the matter, namely that those with the “authority to direct an employee’s daily activities” hold supervisory status under Title VII.

Even where the alleged discriminating official is undeniably not in the employee’s direct line of supervision, the *Vance* opinion does not preclude a determination based on the totality of the circumstances of actual or delegated authority. Though a hostile work environment case, the court in *Liquist v. Charleston Co. Parks and Recreation Comm.*, 2:11 3181 RMG (D.S.C. 2013), provides a good interpretation of the intended reach of the *Vance* Court’s holding. There, the defendant agency argued that the alleged discriminating official was not the employee’s direct supervisor, but rather an operations manager. The court denied the defendant’s motion for summary judgment based on that argument, reasoning:

During Plaintiff’s tenure as a Commission employee, Defendant Tanner allegedly blew her a kiss, hugged and kissed her multiple times, urinated in her presence frequently, called her at home, blocked her exit from a shed when the two were alone, and snuck up on Plaintiff and said Boo! (Dkt. No. 58 at 12). Given the totality of this alleged pattern of conduct, and particularly due to the incidents involving physical contact or intimidation, a factfinder viewing this evidence in a light most favorable to Plaintiff could reasonably conclude that an average person in Plaintiff’s position would have found the conduct sufficiently severe or pervasive as to alter the terms or conditions of her employment. *Cf. Scott v. Ameritex Yarn*, 72 F. Supp.2d 587, 590 (D.S.C. Nov. 19, 1999) (finding a genuine issue of material fact where the alleged harasser physically blocked the plaintiff’s way, called her at home on several occasions, and blew her a kiss once).

Defendants also argue that the Supreme Court’s recent decision in *Vance v. Ball State*, U.S. 133 S. Ct. 2434, 186 L. Ed.2d 565 (2013), should alter the Court’s conclusion about whether the alleged harassment is imputable to the Commission. In *Vance*, the majority held that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect 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.” *Vance*, 133 S. Ct. at 2443 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed.2d 633 (1998)). Based on that holding, Defendants argue that because Defendant Tanner was not Plaintiff’s direct supervisor under the Commission’s chain of command, the Commission cannot be held vicariously liable for Tanner’s alleged actions toward Plaintiff. Defendants overread *Vance*.

Though in *Vance* the Supreme Court did reject a more open-ended approach...which ties supervisor status to the ability to exercise significant direction over another’s daily work, it nonetheless recognized that supervisor status is not conferred solely by formal designations but, rather, can also come about where an alleged harasser amounts to a *de facto* supervisor based on the tangible actions that individual has in fact been empowered by the employer to take against the victim. *Id.*; see *id.* at 2448 ([T]he authority to take tangible employment actions is the defining characteristic of a supervisor....).

Indeed, the *Vance* majority went to great pains to make this point. For instance, the *Vance* majority confirmed that the alleged harassers in *Faragher*, an earlier Supreme Court case, were supervisors under Title VII, though they held the same lifeguard position that the plaintiff held. See *id.* at 2446 47 & 2446 n. 8; see also *Faragher*, 524 U.S. at 780 81. According to the Court, the individual defendants in *Faragher* were supervisors because their recommendations with respect to hiring, firing, discipline, raises and promotion were, in practice, often followed. See *id.* at 2446–47 & 2446 n. 8. The Court further suggested that one of those individual defendants was also likely a supervisor because his threat to the plaintiff Date me or clean toilets for a year might constitute a tangible employment action, given that the reassignment likely would have constituted significantly different responsibilities or alternatively could have had economic consequences, such as foreclosing eligibility for a promotion. *Id.* at 2446 n. 9.