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. As of the last publication of this book, we had just come to the end of a long and hotly-contested presidential election with a female Democratic nominee. And, just last year, the Supreme Court acknowledged what the Commission has held since 2012. "An employer who fires an individual merely for being gay or transgender defies the law." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1754 (2020). 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."

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 divertissement, 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, a 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 the past 10 years or so, 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. In 2020, the Supreme Court acknowledged same in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020)

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. *See Damion M. v. Secretary of Homeland Security*, 2020001873 (2020) (finding no liability where the record was "devoid of evidence that S1 had authority to take tangible employment action against Complainant."). 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 *Linquist 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.

When applied to this case, the reasoning of *Vance* makes clear that summary judgment is not appropriate because questions of fact remain about Defendant Tanner's supervisory status. As the Magistrate Judge noted, when it came to hiring for the position ultimately filled by Plaintiff, it was Tanner who actively sought Plaintiff's name because he thought she might be a good fit for the job. The record also contains evidence, from multiple sources, that Tanner said he owned Plaintiff. This comment was interpreted by one listener as meaning that it would be [Tanner's] determination whether or not [Plaintiff] would go full time or not work out. The fact that Tanner was the most senior employee on-site, and could therefore at times direct Plaintiff's work activities even though she technically fell under the supervision of an off-site employee, may also heighten the import of these statements, it makes it reasonable to infer that Tanner would have had significant, possibly determinative, say over Plaintiffs performance reviews, hours, and potential for promotion.

To be sure, all this evidence is not conclusive as to Tanner's supervisory status. It does, however, render reasonable a finding that Tanner was delegated authority allowing him to make effectively determinative decisions with respect to Plaintiff's hiring, promotion and discipline, and firing. Thus, though the Court is mindful of the *Vance* majority's observation that the question of supervisor status, when contested, can very often be resolved as a matter of law before trial, *id*. at 2450, the Court concludes that the issue of Defendant Tanner's status cannot be resolved as a matter of law. After all, the contested factual issues relate directly to whether Tanner met the defining characteristic of a supervisor possessing, as a practical matter rather than a formal matter, authority to take tangible employment action. *See id*. at 2448; *see also id.* at 2450 (noting that the issue of supervisor status cannot be eliminated from the trial where there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions).

4. Acting Supervisors

Prior to *Vance*, the Commission in *Rhodes v. Postmaster General*, 01980284 (1999), held that an acting supervisor who engages in sexual harassment is considered a supervisor. That case is likely still good law given the Court's language in *Vance* that an employee qualifies as a supervisor "when the employer has empowered that employee to take tangible employment actions against the victim." *Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013).

5. Apparent Authority

As of the printing of this book, the authors are unaware of any post-*Vance* Commission decisions answering whether an individual with apparent authority could be considered a supervisor. While the *Vance* decision may seem to preclude a holding in the affirmative, and while it does not speak specifically to instances of apparent authority, the Court did note that supervisory authority can be delegated.

As an initial matter, an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment. And even if an employer concentrates all decision-making authority in a few individuals, it likely will not isolate itself from heightened liability under *Faragher* and *Ellerth*. If an employer does attempt to confine decision-making power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. *Cf*. *Rhodes v. Illinois Dept. of Transp*., 359 F. 3d 498, 509 (7th Cir. 2004) (Rovner, J., concurring in part and concurring in judgment) ("Although they did not have the power to take formal employment actions *vis-à-vis* [the victim], [the harassers] necessarily must have had substantial input into those decisions, as they would have been the people most familiar with her work—certainly more familiar with it than the off-site Department Administrative Services Manager"). Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies. *See Ellerth*, 524 U.S., at 762.

In a case prior to *Vance*, *Sowers v. Kemira, Inc*., 701 F. Supp. 809 (S.D. Ga. 1988), the court found that the manager of human resources, while not the employee's supervisor, and not in her chain of command, had sufficient apparent authority over her promotion to be considered a supervisor for purposes of sexual harassment. The *Sowers* decision is discussed more fully later in this chapter under the heading "Direct Evidence." In another pre-*Vance* case, the Commission also discussed the concept of apparent authority in *Diggs v. Secretary of Army*, 01A12480 (2003), where it determined that the complainant's immediate supervisor had, at the very least, apparent authority to influence her promotion. According to the Commission in *Diggs*, the defining question is whether the complainant had a reasonable belief that the supervisor had the authority to take the action.

6. Team Leaders

Consistent with its enforcement guidance, the Commission had long held that team leaders who direct daily work assignments may be considered supervisors. In *San Diego v. Secretary of Veterans Affairs*, 0720060014 (2007), the Commission held that a determination of whether an individual has supervisory authority is fact driven and will turn on his or her job function rather than job title. After *Vance*, directing daily work assignments without more will no longer suffice to prove an individual's supervisory status, but a "team leader" with "supervisory authority" may be considered a supervisor provided he or she is empowered by the agency to take a tangible employment action.

Who may qualify as a supervisor is also discussed in Chapter Nine.

7. Cat's Paw and Tangible Employment Actions

In determining discriminatory intent, in most cases, the focus is on the official who actually made the employment decision. There is, however, a subset of cases in which the deciding official lacks discriminatory intent but is influenced in his or her decision by someone whose motivation is discriminatory. In that case, agencies cannot escape liability by pointing only to the deciding official's lack of discriminatory intent if the complainant can show that the alleged discriminatory action or inaction was substantially influenced by someone else with discriminatory intent. Judge Posner in *Shager v. Upjohn Co*., 913 F.2d 398 (7th Cir. 1990), coined this the "cat's paw" theory, whereby discriminatory intent can be imputed to a decision made by an official who otherwise did not knowingly discriminate. The Supreme Court approved of the theory in *Staub v. Proctor Hospital*, 131 S. Ct. 1136 (2011), and the Commission adopted it in *Brown v. Attorney General*, 01200451211 (2006). *Reveles v. Secretary of Homeland Security*, 01201105759 (2012), clarifies the cat's paw theory:

The term "cat's paw" seeks to describe an instance where the discriminatory animus of one employee is transferred through another, who acts as a conduit. This prevents the escape of liability where discrimination is happening, but the deciding official did not knowingly take

part. To show that this is occurring it is necessary that "the employee can demonstrate that others had influence or leverage over the official decision-maker, and thus were not ordinary coworkers" to be able to "impute the discriminatory attitudes to the formal decision-maker." *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000); *citing Long v. Eastfield College*, 88 F.3d 300, 307, 308–309 (5th Cir. 1996). This requires more than the fact that a coworker of the deciding official exhibited discriminatory attitudes. There must be some use of influence or persuasion.…

It follows, then, that tangible employment actions can also be committed by agency officials other than the ultimate decision-makers. In *Johnson v. Attorney General*, 4:10-1222-JMC-TER (D.S.C. 2013), the plaintiff alleged that she was subjected to *quid pro quo* sexual harassment when she was not selected for two positions for which she applied. According to Johnson, her supervisor threatened to give her a poor employment reference if she did not sleep with him. She refused his advances and did not get either of the jobs. Johnson alleged that a separate agency official, who reported that her performance was "average" rather than "fully satisfactory" or "exceeds" as reflected in her performance appraisals, was unduly influenced by her supervisor to provide false information concerning her performance, which ultimately impacted the deciding official's selections. Even though it was obvious that the alleged harasser was not the deciding official, the court reviewed the facts looking for evidence that the harasser had some meaningful input into the plaintiff's nonselection to determine whether the agency's action rose to a tangible employment action:

> Plaintiff testified that Hawkins told her that he would help her get the New York position she was interested in if she slept with him. Plaintiff applied for two positions in New York and failed to receive either of them. As set forth above, the record reveals that the applicants who were deemed to be qualified for the positions, including Plaintiff, were interviewed by Candace Johnson, the Supervisor of Education at the Metropolitan Correctional Center in New York (MCC-New York), who recommended Martinez and John for the two positions. Candace Johnson testified that she recommended Martinez over Plaintiff because he was bi-lingual and she recommended Ms. John because she had a better interview, she was highly recommended, and she rated above average on all her skills and abilities.
>
> Ultimately, the Warden at MCC-New York was the selecting official, and thus, AW Rocky Dowd of MCC-New York, contacted AW Meeks (his counterpart at Williamsburg) for a reference (vouchering). Meeks told Dowd that Plaintiff performed at a fully satisfactory to an exceeds satisfactory level and that she was capable of performing the job she applied for. AW Dowd testified that the voucher he received from AW Meeks was in line with what he had been told by Candace Johnson, that Plaintiff "overall was an average employee. I don't believe she received any below average ratings." However, "average" is not good enough for a transfer to New York: "while average is okay, in the vouchering process we're looking for people who are consistently above average."
>
> Plaintiff argues that she was not an average employee, but rather, her evaluations rated her at exceeds, outstanding or fully satisfactory. She further argues that misinformation was provided to New York regarding her actual performance as well as her proficiency in Spanish. However, she fails to present evidence that Hawkins ever communicated with Candace Johnson or AW Dowd in New York or with anyone else regarding the positions in New York. In sum, although Hawkins was Plaintiff's supervisor and he told her he would help her get a position in New York if she slept with him, Hawkins held no decision-making authority with respect to the New York positions for which Plaintiff was denied and, further, there is no evidence that Hawkins had any input in the decisions not to hire Plaintiff for those positions. Accordingly, Plaintiff fails to present evidence of a tangible employment action caused by her refusal of Hawkins' sexual advances. Therefore, summary judgment is appropriate on Plaintiff's *quid pro quo* claim.

See also discussion in this chapter under "Different Decision-Maker."

C. SPECIFIC EMPLOYMENT ACTIONS

It would be virtually impossible to compile exhaustive list of possible tangible employment actions, particularly since the courts and the Commission are continuing to develop the law of tangible employment actions. The following is a discussion of actions the Commission and courts have analyzed in making the threshold determination of whether a tangible employment action has occurred. As a general rule, an employer's action or inaction will rise to the level of a tangible employment action where results in a financial detriment to the employee. However, actions that significantly change an employee's responsibilities can rise to the level of a tangible employment action even without a financial detriment.

On a few occasions, the Commission has applied a slightly higher standard to what constitutes a tangible employment action for purposes of a sexual harassment claim than it does to its consideration of what renders an employee aggrieved for purposes of stating a claim of intentional discrimination. For example, in separate cases, the Commission analyzed denial of overtime and a downgraded performance appraisal as part of an overall hostile work environment claim rather than under a tangible employment action analysis. Each of these actions has been held to state a cognizable claim of discrimination, standing alone. *See Hall v. Secretary of Defense*, 01832057 (1984) (denial of overtime); *Shintaku v. Secretary of Navy*, 01921250 (1992) (downgraded performance appraisal). In all likelihood, the Commission simply misanalysed those actions in the sexual harassment cases.

Readers should be aware that "adverse employment actions" and "tangible employment actions" are two phrases describing the same thing. Courts, in particular, tend to use the phrases interchangeably. The Court in *Burlington Industries* used the phrase tangible employment action but made clear that the action must have an adverse impact on the individual to be actionable. Because *Burlington* was a sexual harassment case, readers will tend to see the term tangible employment action more often in those cases, and adverse employment action in harassment cases involving other protected bases.

1. Threatened Tangible Employment Action

A threatened tangible employment action is not included within the meaning of tangible employment action. Prior to the Supreme Court's decision in *Ellerth*, 524 U.S. 742, the courts were split on whether an unfulfilled threat to take an adverse personnel action for refusing to submit to sexual advances, standing alone, stated a *quid pro quo* harassment claim. The Commission's caselaw was likewise muddled. The Supreme Court cleared this up by stating, unequivocally, that where a "claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." *Ellerth*, 524 U.S. at 754. In other words, unfulfilled threats are not considered tangible employment actions. Instead, they may be included in a claim of hostile work environment harassment. *See also Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) ("If a challenged employment action is not 'tangible,' it may