

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.

Just as the prohibition against discrimination based on 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 concept of a hostile work environment—that it could actually impact 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. The district court overturned summary judgment on a claim that the plaintiff was subjected to sexual advances and eventually her job was 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 regarding 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, 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.

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 mores of the last 50 or so years. The impact of the last factor simply cannot be underestimated. As of the first edition of this book, we had just come to the end of a long and hotly-contested presidential election with a female Democratic nominee. 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). In 2020, 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). In 2021, the EEOC issued a “technical assistance” document (“2021 Guidance”) outlining the EEOC’s stance on Title VII discrimination. *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, U.S. Equal Employment Opportunity Commission (Jun. 15, 2021), <https://perma.cc/9VUBZK2P>. Further, OPM and the Commission issued guidance that the pronoun with which an employee identifies should always be observed. Failure to do so could rise to the level of actionable harassment. See OPM, *Personnel Management Guidance Regarding Gender Identity and Inclusion in the Federal Workplace* (2023); *Roxanna B. v. Secretary of Treasury*, 2020004142 (2024) (agency use of a person’s “deadname” or “misgendering” during the processing of the EEO complaint can rise to the level of harassment); *Rashad W. v. Secretary of Defense*, 2023004399 (2024) (“Intentional misgendering, which has previously been recognized as a form of harassment, has the potential to be so ‘highly offensive’ as to state a claim.”). The Commission’s long-awaited *Enforcement Guidance on Harassment in the Workplace*, No. 915.064 (April 29, 2024), then published in April 2024 by a 3-2 vote, which defined “sex” as “‘pregnancy, childbirth, and related medical conditions’ and sexual orientation and gender identity.” Other notable guidance acknowledged that “repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity (misgendering) or the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity” could rise to the level of actionable harassment.

In a sharp turn from that momentum, in 2025, President Trump issued a sweeping executive order recognizing only two sexes—male and female. “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” EO 14168 (January 20, 2025). As a consequence, federal agencies are ordered to “remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages.” *Id.* You can no longer find the above OPM guidance online. And, the Commission issued a press release entitled “Removing Gender Ideology and Restoring the EEOC’s Role of Protecting Women in the Workplace” (January 28, 2025), announcing various steps the Commission would take to implement the instruction of EO 14168. It further notes that, while Acting Chair Lucas voted against certain enforcement guidance principles related to this topic, she cannot act alone to rescind them. Enter the US District Court for the *Northern District of Texas with State of Texas and The Heritage Foundation v. EEOC*, Case 2:24-cv-00173-Z (5/25/25), wherein the court held, *inter alia*, that the EEOC’s enforcement guidance “contravenes Title VII’s plain text by expanding the scope of ‘sex’ beyond the biological binary: male and female.” That ruling, according to the EEOC, “declared unlawful” and vacated the portions of the Commission’s guidance that are in conflict with the EO 14168.

It is notable that gender identity, not sexual orientation, appears to be the focus of this EO. “‘Sex’ is not a synonym for and does not include the concept of ‘gender identity.’” *Id.* More on this and other EOs in later chapters.

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. Not all conduct based on gender, then, is inherently unwelcome and, in the proper context, can serve a socially useful purpose. A 2024 study conducted by Forbes found that 60% of adults have engaged in a workplace romance. A remarkable 43% led to marriage. However, 57% reported that a workplace romance “impacted their work performance.” Forbes, *Workplace Romance Statistics: Survey Shows Employees Engage Regularly In Office Relationships* (April 30, 2024). <https://www.forbes.com/advisor/business/workplace-romance-statistics/>. Still, in a 2025 survey by Resume Genius, 43% of women reported having “experienced unwanted advances from coworkers.” Compare that to the 28% of men who reported the same. Eva Chan, Resume Genius: *2025 Workplace Romance Survey: Who’s Finding Love During the 9 to 5?* (January 23, 2025): <https://resumegenius.com/blog/career-advice/workplace-romance-survey#>. We’ve come a long way, but not far enough in this writer’s opinion.

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 or 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 because they refused 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, 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 on Harassment in the Workplace*, No. 915.064 (April 29, 2024) (hereinafter 2024 *Harassment Guidance*), sets out the basics:

A “tangible employment action” means a “significant change in employment status” that requires an “official act” of the employer. Examples of tangible employment actions include hiring and firing, failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits. In some cases, a decision may constitute a tangible employment action even though it does not have immediate direct or economic consequences, such as a demotion with a substantial reduction in job responsibilities but without a loss in pay.

Even if an individual is not the final decision maker as to tangible employment actions affecting the complainant, the individual would still be considered a supervisor if the individual has the “power to *recommend* or otherwise substantially influence tangible employment actions.”

Finally, an employee who does not have actual authority to take a tangible employment action with respect to the complainant can still be considered a supervisor if, based on the employer’s actions, the harassed employee reasonably believes that the harasser has such power. The complainant might have such a reasonable belief where, for example, the chain of command is unclear or the harasser has broad delegated powers. In these circumstances, the harasser is said to have “apparent authority.”

Id. at IV.B.2.

Commission guidance continues:

The tangible employment action may occur at any time during the course of the hostile work environment, and need not occur at the end of employment or serve as the culmination of the harassing conduct. For example, if a supervisor subjects an employee to a hostile work environment by making frequent sexual comments and denying pay increases because the employee rejects the sexual advances, then the employer is liable for the hostile work environment created by the supervisor and there is no defense. This is true even though the supervisor's tangible employment action, here denial of pay increases, did not occur at the end of the employee's employment.

An unfulfilled threat to take a tangible employment action does not itself constitute a tangible employment action, but it may contribute to a hostile work environment. By contrast, fulfilling a threat of a tangible employment action because a complainant rejects sexual demands (e.g., denying a promotion) constitutes a tangible employment action. Finally, fulfilling a promise to provide a benefit because the complainant submits to sexual demands (e.g., granting a promotion or not terminating the complainant after the complainant submits to sexual demands) constitutes a tangible employment action.

Id. at IV.C.2.a.; see also *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. *Id.* at Sec. IV.B.

B. LINK TO HARASSMENT

"When harassment culminates in a tangible employment action,...and it is determined that the tangible action was based on a discriminatory or retaliatory reason linked to the preceding harassment, relief could be sought for the entire pattern of misconduct culminating in the tangible employment action, and no affirmative defense is available." *Stella K. v. Secretary of Commerce*, 2022002059 (2023). In that case, the complainant alleged that the agency subjected her to race-based harassment for months leading up to her removal. Reversing the agency's final decision, the Commission in *Stella* wrote:

Here the record clearly demonstrates that the conditions of Complainant's employment were altered, not only as a result of her termination, but also as a result of the actions that occurred between February and August of 2020 which led to her being fired. In February 2020, the ACO Manager and the Regional Technician had publicly humiliated Complainant to such an extent that it brought her to tears in the presence of her colleagues, three of whom attested to having witnessed the bullying. On March 12, 2020, the ACO Manager issued Complainant a disciplinary memorandum for leaving work after assuring Complainant that she would not, and this was witnessed by both the IT Manager and CFM3. CFM3 characterized the ACO Manager as a chronic liar. The next day, the ACO Manager casually dismissed Complainant's concerns in order to persuade her not to file an EEO complaint which she, Complainant, ultimately did. On July 19, 2020, the ACO Manager reprimanded Complainant for arriving late but let Administrative Manager I slide despite her frequent tardiness. On July 30, 2020, the ACO Manager at the direction of the Regional Technician issued Complainant a written reprimand for essentially carrying out instructions from the ACO Manager to cancel the training classes in question, an act that would make any reasonable person feel harassed. On August 10, 2020, Complainant was bullied by the ACO Manager and given a notice of termination, effective immediately. Two of the charges cited in support of the termination were the March written reprimand for leaving work, which the ACO Manager promised she would not issue, and the July written reprimand for cancelling training classes which, as bears repeating, Complainant had done on the order of the ACO Manager. Contrary to the Area Manager's affidavit testimony, there is no evidence of any act of insubordination by Complainant.

On the basis of the foregoing, we find that Complainant's firing in August 2020 was a tangible employment action, and that the conduct against Complainant by the ACO Manager and the Regional Technician which led to the termination, as witnessed by the Administrative Specialist, the IT Manager, CFM2 and CFM3, was severe and pervasive enough to alter the conditions of her employment.

Complainant must also prove that those who acted against her were motivated by unlawful considerations of her race or her EEO activity. *Angela Y. v. Dep't of Defense*, EEOC Appeal No. 2022000413 (Aug. 31, 2023). As to race, when asked whether she knew of any other similarly situated employees who were treated differently than her, Complainant identified Administrative Manager I as the sole comparator. But Administrative Manager I also identified herself as African-American. Therefore, Complainant cannot rely on direct comparisons with Administrative Manager I as a way to establish the existence of a discriminatory motivation on the part of the ACO Manager or the Regional Technician based on race. Nevertheless, this does not prevent Complainant from establishing the existence of a discriminatory or retaliatory motive on the part of any of the officials she named in her complaint.

In the first place, an investigation of an EEO complaint must include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any; and any policies and/or practices that may constitute or appear to constitute discrimination, *even though they have not been expressly cited by the complainant*. (Emphasis supplied.) EEO MD-110, Chapt. 6, § (IV)(C). Second, it is not even necessary for Complainant to rely on comparative evidence to establish the motive element. *Mary R. v. U.S. Postal Serv.*, EEOC Appeal No. 2020004032 (Sept. 30, 2020) *citing O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312–13 (1996). *See also Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.*, EEOC Notice No. 915.002, n.4 (Sept. 18, 1996). In the absence of comparative evidence, all Complainant need do is present some other evidentiary link between membership in her protected class and the adverse actions to which she was subjected. *Sadie M. v. Dep't of the Treasury*, EEOC Appeal No. 2022002454 (July 20, 2023). Indicators of a discriminatory or retaliatory motive include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, unequal application of Agency policy, deviations from standard procedures without explanation or justification and inadequately explained inconsistencies in the evidentiary record. *Tammy S. v. Dep't of the Army*, EEOC Appeal No. 2021000578 (May 5, 2022). Such indicators are rife throughout the record.

As to the existence of protected EEO activity, we note at the outset that there is insufficient evidence to establish that the Administrative Specialist ever made the ACO Manager or the Regional Technician aware of his EEO-related conversations with Complainant in March and July of 2020. However, the conversation between Complainant and the ACO Manager that occurred on March 13, 2020 clearly was related to Complainant's EEO concerns and therefore constitutes protected activity. Complainant herself averred that the ACO Manager and the Regional Technician did not get along with any of the African American staff in the office, with the exception of Administrative Manager I and repeatedly emphasized that she was bullied because she was African American and because she had expressed an intent or desire to file an EEO complaint naming the ACO Manager and the Regional Technician. The Administrative Specialist stated that he believed that her race and EEO activity, as well as her relative youth, played a role in the various incidents, particularly the termination. The IT Manager, herself Caucasian, averred that Complainant's race and EEO activity were factors in all of the incidents. IR 147, 150–52, 154. CFM2 and CFM3 averred that the ACO Manager and the Regional Technician had problems with young black female managers and were only targeting those individuals. In particular, CFM 3 averred that the ACO Manager gave the most advantages to the white males in the office and found ways to punish the Black female managers through constant reprimands, and that the ACO Manager never wrote up any White males and overlooked all their mistakes while openly reprimanding Black females. As to why the ACO Manager treated Administrative Manager I more favorably than Complainant, CFM3 averred, in essence, that Administrative Manager I made herself useful to the ACO Manager. We also find that the Area Manager's assertions that Complainant was fired for insubordination and that he could not recall discussing the incident with the Administrative Specialist were inconsistent with other evidence, leading us to conclude that he was less than truthful in his affidavit testimony.

When harassment culminates in a tangible employment action, as it clearly did here, and it is determined that the tangible action was based on a discriminatory or retaliatory reason linked to the preceding harassment, relief could be sought for the entire pattern of misconduct culminating in the tangible employment action, and no affirmative defense is available. *Enforcement Guidance on Vicarious Liability*, § IV(C). Since neither the ACO Manager nor the Regional Technician had provided a statement to the Investigator, the Commission can only evaluate the facts based on the weight of the evidentiary record before us. *Nancy S. v. Evt'l Prot. Agency*, EEOC Appeal No. 2022002014 (Aug. 15, 2023).

And after reviewing that record in its entirety, we find that Complainant has established both of the elements needed to sustain a finding of discriminatory harassment, and consequently, that the question of Agency liability