

# CHAPTER TWO

## TANGIBLE EMPLOYMENT ACTIONS

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The focus of this chapter is on sexual harassment that culminates in a so-called “tangible employment action.” This type of case is commonly referred to as *quid pro quo* harassment. The Supreme Court changed the vernacular in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed.2d 633 (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 determination of whether a sexual harassment case 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 3 through 7.

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 these 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 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 8. 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. Theoretically, 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. The question is whether these cases are a distinct variety of cases or nothing more than intentional discrimination cases; cases that are not the focus of this book. For a thorough discussion of the theory of intentional discrimination, the reader is referred to *A Guide to Federal Sector Equal Employment Law & Practice*, by Ernest C. Hadley (hereinafter *EEO Guide*). 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. A problem does arise in dealing with retaliation cases because the standard of injury to state a claim is different than under Title VII provision barring discrimination on the bases of race, color, national origin, religion or sex. That problem is discussed in the section on Retaliation.

Although the intention of this book is to discuss sexual harassment in the federal sector, the fact of the matter is there is very little case law from the Commission's Office of Federal Operations (OFO) on tangible employment action sexual harassment. For this reason, the authors rely more heavily on cases from the federal district courts and federal appeals courts in this chapter.

## **I. TANGIBLE EMPLOYMENT ACTION DEFINITION**

Of course, the first thing an employee must show to prevail on a claim of tangible employment action sexual 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, 118 S. Ct. 2257.

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 v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), 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 dealing with such what constitutes a tangible employment action, focusing on the OFO's 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.*

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. If an employment action only results in an insignificant change in an employee’s status, it is not considered tangible. 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 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.”)

## **1. Committed by Supervisor**

One characteristic of tangible employment action harassment is that it must be committed by a supervisor. This is generally a straightforward notion: only a supervisor has the ability to effectuate employment actions, so only a supervisor is empowered to commit tangible employment action sexual harassment. Problems may occur when it becomes unclear whether an individual is a supervisor or is acting in a supervisory capacity. What about a non-supervisory employee who is given an assignment as an acting supervisor? Or a team leader,

who is not technically a supervisor? As the Commission's guidance and caselaw shows, formal title is not everything.

In its *Enforcement Guidance: Vicarious Liability*, the Commission states that an individual is an employee's supervisor if:

- a. the individual has the authority to undertake or recommend tangible employment decisions affecting the employee; or
- b. the individual has the authority to direct the employee's daily work activities.

The Commission's *Enforcement Guidance: Vicarious Liability* elaborates on both of these qualifiers, starting with what constitutes 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."

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.

(Footnotes omitted).

With regard to the authority to direct an employee's work activities, the *Enforcement Guidance* provides:

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and