CHAPTER FIVE
HARASSMENT CASES

The theory of harassment can be divided into two categories: (1) harassment resulting in a tangible employment action, and (2) hostile environment harassment. In tangible employment sexual harassment cases, the complainant is alleging that a manager or supervisor is demanding sexual favors in exchange for continued employment or some other concrete job benefit. Until recently, the category now called "tangible employment action" cases was referred to as *quid pro quo* harassment. The change to "tangible employment action" came about as the result of two 1998 Supreme Court cases, *Burlington Industries, Inc., v. Ellerth,* 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The term *quid pro quo* is still used 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.

In cases premised on a basis other than sexual harassment, the allegation is that a harassing work environment has culminated in a tangible employment action. Harassment resulting in a tangible employment action is no different from any other type of intentional discrimination, and is analyzed as such. Alternatively, hostile environment harassment, involves a unique analysis that focuses on the overall environment instead of any particular personnel action.

In order to properly understand harassment cases, it is necessary to separately address the matter of the employer's liability for discrimination. In discrimination cases involving personnel actions, the employer, who in federal sector cases is a federal agency, acts through the supervisors and managers in whom it has vested specific authority to act. As a result, these supervisors and managers are acting within the scope of their employment. When a supervisor vested with the authority to hire fails to hire someone because of his or her race or sex, the agency is liable for that action because a principal is liable for torts committed by its agents when they are acting within the scope of their employment. As a result, when a finding of discrimination is entered rarely is there any question of whether the agency should be liable for that discrimination. The problem is that supervisors, managers and coworkers are not acting within the scope of their employment when they engage in discriminatory harassment. In fact, every federal agency has written policies that expressly prohibit such harassment. The specific rules for an agency's liability for harassment are discussed below. That there are separate rules for liability in cases involving discriminatory harassment is mentioned here because they may provide an independent basis for summary judgment, regardless of whether the acts complained of constitute harassment. Too often, agencies attempt to mount a defense to a harassment claim by focusing exclusively on whether the alleged conduct occurred and whether it rises to the level of discriminatory harassment. Those issues are moot if the alleged harassment occurred in circumstances that would exempt the agency from liability.

This chapter is not intended to cover all substantive aspects of harassment cases, but rather is focused on pointing out areas in the law of harassment that lend themselves to summary judgment. For a comprehensive analysis of harassment law, the reader is referred to *Federal Sector Sexual Harassment*, Ernest Hadley and Eleanor Laws (Dewey Publications 2008).

I. SUBSTANTIVE HARASSMENT ANALYSIS

As noted above, there are two types of harassment claims, those involving tangible employment actions and those involving allegations of a hostile environment. It is possible for both types of harassment to be present in the same case. A complainant may allege a course of conduct on the part of a supervisor or manager that results in a hostile environment and ultimately culminates in a tangible employment action. But even when both types of harassment are present in a claim, each must be analyzed separately.

A. TANGIBLE EMPLOYMENT ACTION CASES

The EEOC's regulations, at 29 CFR § 1604.11(a), provide an explanation of what constitutes tangible employment action sexual harassment:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when…submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

Cases involving tangible employment actions are analyzed the same as other cases of intentional discrimination. One difference between sexual harassment cases involving tangible employment actions and other intentional discrimination cases is that direct evidence of discrimination is not as rare. Often in cases where the complainant alleges the agency has taken an employment action because of the submission to or rejection of sexual advances, the complainant provides testimony that specifically links the sexual advances to the employment action. If the alleged harasser denies making the sexual demands or denies linking those demands to an employment action, this is a question of material fact that precludes summary judgment. Although summary judgment would be unusual in such cases, the analysis of direct evidence proceeds as follows:

> If there is direct evidence linking the demand for sexual favors to the employment action, the employee prevails if:
>
> - He or she demonstrates by a preponderance of the evidence that the employment action was based on sex.
>
> The employer may partially avoid liability if it can demonstrate by a preponderance of the evidence that:
>
> - It would have taken the same action even absent prohibited discrimination.

If the employer makes such a demonstration, the employee is not entitled to personal relief, i.e., damages, reinstatement, hiring, promotion, or back pay, but may be entitled to declaratory relief, injunctive relief, attorney fees or costs.

See Walker v. Social Security Administrator, 05980504 (1999); 42 USC § 2000e-5(g)(2)(B).

If the complainant does not present direct evidence that a tangible employment action has been taken because of the submission to or rejection of sexual advances or the direct evidence, standing alone, is insufficient to meet the complainant's burden of proof, the case is analyzed as a circumstantial evidence case. In circumstantial evidence cases:

1) The employee must present a *prima facie* case of discrimination;
2) The employer must articulate a legitimate, nondiscriminatory reason for taking the employment action; and
3) The employee is required to show the employer's reasons are a pretext for prohibited discrimination.

The methods for analyzing intentional discrimination cases under the *McDonnell Douglas* standard in cases involving circumstantial evidence, and the *Price Waterhouse* standard in cases involving direct evidence, are discussed in Chapter Four.

B. HOSTILE ENVIRONMENT CASES

Hostile environment harassment cases can involve any basis of discrimination. In hostile environment cases, the complainant is alleging that his or her work environment is being adversely affected based on some protected characteristic, i.e., race, color, sex, national origin, religion, age, disability, or having engaged in protected activity. Workplace conduct rises to the level of hostile environment when it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (*citing Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

The essential elements of a hostile environment harassment claim are:

1) The complainant belongs to a protected category;
2) The complainant was subjected to unwelcome verbal or physical conduct;
3) The conduct was based on the complainant's protected status;
4) The conduct was sufficiently severe or pervasive that it created a hostile, abusive or offensive work environment or unreasonably interfered with the complainant's work performance; and

5) There is a basis for imputing liability to the employer.

The first four elements of the claim are used to determine whether a hostile environment existed. The last element invokes the liability rules mentioned earlier and discussed in more detail below and determines whether the agency should be liable for the resulting hostile environment if the complainant meets the first four elements of the claim.

II. RULES OF AGENCY LIABILITY

The rules of employer liability for hostile environment harassment can be confusing, though they have been greatly simplified by recent Supreme Court decisions. The rules can be even more confusing in the federal sector because of the dual meaning of the term "agency." When the courts, or the Commission for that matter, invoke the rules of "agency" to determine liability, they are not speaking of any particular rules that are applicable to federal government agencies. Instead, they are speaking of the general law of agency; that is, the rules that govern relationships between a principal and his or her agents. Those rules originate in the English common law and, with refinement, are still relied upon by courts today to determine if a principal is legally responsible for the acts of his or her agents.

Some of the earliest cases rejected the notion that an employer, i.e., a principal, could be held liable for sexually harassing conduct committed by one employee, i.e., an agent, directed at another employee. One such decision, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975). *rev'd on other grounds*, 562 F.2d 55 (9th Cir. 1977), after reviewing several cases where discrimination on the basis of sex was found, succinctly explained:

> In all of the above-mentioned cases the discriminatory conduct complained of, arose out of company policies. There was apparently some advantage to, or gain by, the employer from such practices. Always such discriminatory practices were employer designed and oriented. In the present case, [the supervisor's] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [the supervisor] was satisfying a personal urge. Certainly no employer policy is here involved; rather than the company being benefitted in any way by the conduct…, it is obvious it can only be damaged by the very nature of the acts complained of.

Later, courts came to universally agree that sexual harassment was prohibited by Title VII and that employers should be liable for such harassment. The courts could not agree on why the employer was liable and several theories of agency liability were advanced. Fortunately, for the current-day practitioner, the Supreme Court has resolved the conflicts in the courts over the basis of liability in harassment cases and the rules end up being surprisingly simple.

A. TANGIBLE EMPLOYMENT ACTION CASES

When a harassment case involves the taking or failure to take a tangible employment action, the rule of liability is simple and straightforward:

> The employer is strictly liable for tangible employment action harassment. Because tangible employment actions can only be taken by supervisors, there is no need to separately analyze the issue of liability and if tangible employment action harassment occurred, there is no defense to the employer's liability.

An employer is subject to vicarious, or strict, liability for harassment when it is "created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, supra; Faragher, supra*. If the agency can prove that it would have taken the same action even absent a discriminatory motive for the tangible employment action, it can avoid some liability, as discussed fully in Chapter Four in the section, "Mixed Motive Cases."

B. HOSTILE ENVIRONMENT CASES

The Supreme Court, in the late 1990s, set forth an alternative basis for holding a principal liable for the acts of its agent in cases of hostile environment harassment. As noted above, it cannot truly be said that a supervisor or manager who engages in harassing conduct without a tangible employment action is acting within the scope of his or her employment, or within any express or apparent authority. Moreover, as more courts found that employers could be held liable for a hostile environment created by coworkers, it became clear that the rules for establishing liability were different depending on the status of the alleged harasser.

Under the *Restatement (2d) of Agency*, Section 219(2)(d), a principal is liable for the intentional torts of its agent when the agent is aided in accomplishing the tort by the existence of the agency relationship. The Supreme Court determined that the "aided in the agency relation" standard provides the proper basis for employer liability for hostile environment harassment involving supervisors and managers. *See Ellerth,* 524 U.S. at 760 (1998); *Faragher, supra.*

The rules of employer liability in hostile environment harassment cases can be summarized as follows:

1) If the hostile environment is created by a supervisor or manager the employer is liable unless, as an affirmative defense, the employer can show that:

   a) The employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

   b) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

2) If the hostile environment is created by a coworker, the employer is liable if the employee can show that:

   a) The employer knew or should have known of the harassment; and

   b) The employer failed to take prompt and effective corrective action.

In each situation, unlike tangible employment action cases, the question of the agency's liability must be analyzed separately from the question of whether a hostile environment was created by the alleged conduct. Because this separate analysis is required, agencies may seek summary judgment on the question of their liability even while conceding that there are genuine issues of material fact regarding whether the alleged conduct took place and/or was sufficiently severe or pervasive to create a hostile environment.

III. SUMMARY JUDGMENT IN TANGIBLE EMPLOYMENT ACTION CASES

The above discussion is more than just academic, particularly as it relates to summary judgment motions. Once again, it is worth stressing that the general law that applies to summary judgment—there are no material facts in dispute and the moving party is entitled to judgment as a matter of law—only has meaning insofar as it is applied to the specific facts and law of the case at hand. Failing to take into account the specific law of the case, the summary judgment standard merely becomes a mantra to be chanted by lawyers and would-be lawyers. In the sections below, the authors relate the academic discussion of harassment to the summary judgment standard.

Summary judgment for the agency in a tangible employment action case will be appropriate when the agency can show that, as a matter of law, no tangible employment action took place or that the individual linked to the tangible employment action was not a supervisor. Agencies should be mindful that even if there is no tangible employment action, the complainant may still rely on the agency's actions to support a claim of hostile environment. Particularly if the complainant alleges that the agency has taken a series of actions, it may be necessary for the agency to also move for summary judgment on any hostile environment claim. Such a motion will be evaluated under the criteria discussed below. In any event, if there has been no tangible employment action, the agency should at least consider a motion for partial summary judgment on that issue in order to resolve that part of the claim and avoid the imposition of strict liability, as discussed above.

A. EMPLOYMENT ACTIONS

Not all actions taken by an agency rise to the level of a tangible employment action. For those who also practice before the Merit Systems Protection Board (MSPB), it is worth noting that a tangible employment action can be far less significant that an adverse action for purposes of Board jurisdiction. The Commission's *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002, (June 18, 1999), defines the term "tangible employment action":

> A tangible employment action is "a significant change in employment status." Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:
>
> 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:

- it requires an official act of the enterprise;
- it usually is documented in official company records;
- it may be subject to review by higher level supervisors; and
- 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.

Examples of tangible employment actions include:

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

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.

On the other hand, an employment action does not reach the threshold of "tangible" if it results in only an insignificant change in the complainant's employment status. For example, altering an individual's job title does not qualify as a tangible employment action if there is no change in salary, benefits, duties, or prestige, and the only effect is a bruised ego. However, if there is a significant change in the status of the position because the new title is less prestigious and thereby effectively constitutes a demotion, a tangible employment action would be found.

…

If a challenged employment action is not "tangible," it may still be considered, along with other evidence, as part of a hostile environment claim that is subject to the affirmative defense. In *Ellerth*, the Court concluded that there was no tangible employment action because the supervisor never carried out his threats of job harm. Ellerth could still proceed with her claim of harassment, but the claim was properly "categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." 118 S. Ct. at 2265.

(Footnotes omitted.)

B. SUPERVISORY AUTHORITY

Even if the complainant can establish that a tangible employment action has been taken, summary judgment is appropriate if the complainant cannot create at least a triable issue of fact that the action is linked to a supervisor. A tangible employment action can only be taken by a supervisor or other person of authority. According to the Commission's *Guidance on Vicarious Liability*, an individual is an employee's 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.

The Guidance provides some further definition regarding what it means to have the authority to undertake "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.)

The Commission's caselaw has shed some light on what it considers to be supervisory authority sufficient to deem an individual to have acted as a supervisor. The Commission has held that an acting supervisor who engages in sexual harassment is considered a supervisor. *Rhodes v. Postmaster General*, 01980284 (1999). In *San Diego v. Secretary of Veterans Affairs*, 070060014 (2007), the Commission found that a Lead Respiratory Technician was considered a supervisor for purposes of assessing liability where he had extensive day-to-day control over the complainant's work activities.

Even if an individual has no actual authority over an employee, he or she can still be considered a supervisor for purposes of sexual harassment if he or she has apparent authority over the employee. In *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 below. The Commission 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.

IV. SAMPLE AGENCY MOTION—TANGIBLE EMPLOYMENT ACTION

The following sample motion seeks summary judgment in a tangible employment action harassment case. Note that the motion also goes on to address the case from the perspective of a hostile environment claim.

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WHATEVER DISTRICT OFFICE

JANE DOE, Complainant,	)	EEOC No. 100-97-000X Agency No. 6-0-000
v.	)	
FRANK SMITH, Secretary, Department of Labor, Respondent	)	

AGENCY'S MOTION FOR DECISION WITHOUT HEARING

The Department of Labor (Agency), by and through the undersigned counsel, hereby moves for a decision without a hearing on all claims presented by Jane Doe (Complainant), in the above-captioned matter pursuant to 29 CFR § 1614.109(g) on the basis that there are no material facts in genuine dispute in the case and that the Agency is entitled to judgment as a matter of law. Specifically, the Agency contends that the Complainant has presented no evidence to show that her lateral transfer constituted a tangible