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A Revised Tangible Employment Action Analysis: Just What is an Undesirable Reassignment?

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A REVISED TANGIBLE EMPLOYMENT ACTION ANALYSIS: JUST WHAT *IS* AN UNDESIRABLE REASSIGNMENT?

CHRISTINE BRADSHAW *

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INTRODUCTION

In fiscal year 2004, the Equal Employment Opportunity Commission¹ (“EEOC”) reported 13,136 charges alleging sexual harassment discrimination.² Charges alleging sexual harassment represent 34.4 percent of all harassment charges coming into the EEOC.³

In two cases decided on the same day in 1998, *Burlington Industries v. Ellerth*⁴ and *Faragher v. City of Boca Raton*,⁵ the United States Supreme Court changed the way in which courts determine employer liability in sexual harassment cases.⁶ Prior to *Ellerth* and *Faragher*, the courts divided sexual harassment cases into either hostile environment sexual harassment or quid pro quo sexual harassment, the latter generally invoking strict liability on an employer.⁷ In the 1998 opinions, however, the Supreme Court

1. See Civil Rights Act of 1964 § 705, 42 U.S.C. § 2000e-4 (2000) (designating the EEOC as the agency responsible for receiving, investigating, and deciding all discrimination charges falling under Title VII of the Civil Rights Act of 1964). State Fair Employment Practice Agencies are responsible for claims falling under state discrimination statutes, and have a work share agreement with the EEOC. *Id.*

2. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION [hereinafter EEOC], *Sexual Harassment Charges, EEOC and FEPAs Combined: FY 1992 – FY 2004* (2004), available at <http://www.eeoc.gov/stats/harass.html> (describing sexual harassment charges filed with the EEOC and their outcomes, including “charges carried over from previous fiscal years, new charge receipts and charges transferred to EEOC from Fair Employment Practice Agencies”).

3. See EEOC, *Trends in Harassment Charges Filed with the EEOC* (2004), available at <http://www.eeoc.gov/stats/harassment.html> (showing that sexual harassment, along with racial harassment (43.3 percent), and national origin harassment (16.6 percent), account for 94.2 percent of all harassment claims coming into the EEOC).

4. See 524 U.S. 742, 747-49 (1998) (involving an employee who alleged that sexual advances by her supervisor compelled her to resign from her position, thus resulting in a constructive discharge).

5. See 524 U.S. 775, 780 (1998) (concerning a former city lifeguard who sued the city under Title VII for sexual harassment by her supervisors that created a hostile work environment).

6. See *Ellerth*, 524 U.S. at 753-54 (announcing a new standard for analyzing employer liability by dividing liability into two categories based on finding a hostile work environment and then determining whether a tangible employment action occurred). The presence of a tangible employment action invokes strict liability on the employer for a supervisor’s unlawful conduct; without a tangible employment action, the employer may assert an affirmative defense to liability or damages. *Id.* at 765.

7. See, e.g., TITUS E. AARON & JUDITH A. ISAKSEN, *SEXUAL HARASSMENT IN THE WORKPLACE: A GUIDE TO THE LAW AND A RESEARCH OVERVIEW FOR EMPLOYERS AND*

explained that courts should decide cases involving harassment by a supervisor based on the result instead of the behavior—namely, whether the supervisor effected a “tangible employment action, such as discharge, demotion, or undesirable reassignment.”⁸ If sexual harassment occurs but no “tangible employment action” results from the harassment, the employer may raise an affirmative defense to mitigate or avoid liability.⁹ The necessary question, then, is: What constitutes a tangible employment action?¹⁰

This Comment argues that courts’ current interpretation of an “undesirable reassignment” is inconsistent with the original definition of a tangible employment action as asserted by the Supreme Court in *Ellerth* and *Faragher*. Part I provides a general overview of sexual harassment law, along with past and current judicial interpretation of the law. Part II identifies the currently accepted definition of an undesirable reassignment, which courts use in determining employer liability for supervisor misconduct. Part III asserts that courts should analyze tangible employment actions, particularly undesirable reassignments and transfers, using an official act and reasonable person analysis. Finally, Part IV of this Comment justifies these changes, discussing the Court’s use of agency law to explain employer liability.

EMPLOYEES 64-67 (1993) (describing the two major theories of sexual harassment used in determining employer liability). Hostile work environment sexual harassment occurs when any employee subjects a fellow employee to harassment that is severe or pervasive enough to alter the terms or conditions of the victim’s employment. *Id.* at 66. The quid pro quo theory of sexual harassment arises when an employee receives a job benefit or faces adverse job consequences based on whether the employee submits to a superior’s request or demand for sexual favors. *Id.* at 64.

8. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808; see ANNE C. LEVY & MICHELLE A. PALUDI, *WORKPLACE SEXUAL HARASSMENT* 31-32 (2d ed. 2002) (purporting that the EEOC always has interpreted the law to look at the effect on the victim-employee and not the intent or motive of the supervisor and his harassing behavior).

9. See *Ellerth*, 524 U.S. at 765 (listing the two elements necessary in raising the affirmative defense: the employer exercised reasonable care to prevent and promptly correct any sexual harassment behavior and the plaintiff employee unreasonably neglected the opportunity to utilize any preventative or corrective opportunities the employer provided its employees); *Faragher*, 524 U.S. at 805-06 (justifying the affirmative defense by showing that it upholds the objectives of Title VII, namely that employers should try to avoid harm by adopting effective policies and to encourage employees to come forward when the harassing conduct begins).

10. See Michael C. Harper, *Answering the Title VII Agency Question: A Policy Basis for Faragher and Ellerth*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PROCEEDINGS OF NEW YORK UNIVERSITY 51ST ANNUAL CONFERENCE ON LABOR* 283, 291 (Samuel Estreicher ed., 1999) (maintaining that, while the Supreme Court in *Ellerth* and *Faragher* correctly interpreted “modern regulatory statutes,” the analysis used was too formulaic and that the Court must answer further questions, including the one posited here, in order to direct future courts’ decisions).

I. BACKGROUND

A. *The Emergence of Sexual Harassment in Employment Discrimination*

In 1986, the Supreme Court acknowledged sexual harassment as a form of sex discrimination.¹¹ On the national level, the federal government, acting under its Commerce Clause authority,¹² precluded employment discrimination in Title VII of the Civil Rights Act of 1964.¹³ The Civil Rights Act simultaneously created the EEOC to regulate and enforce the statute.¹⁴ However, it was not until 1980 that the EEOC issued regulations defining sexual harassment and officially categorized it as a form of sex discrimination prohibited by Title VII.¹⁵ Courts quickly began to follow and cite the EEOC's "Guidelines on Discrimination Because of Sex."¹⁶ Many states then

11. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (holding that where a supervisor harasses an employee because of the employee's sex, the supervisor discriminates on the basis of sex and violates Title VII of the Civil Rights Act of 1964); see also *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (announcing, as the first case to recognize sexual harassment as a form of employment discrimination on the basis of sex, that Title VII prohibits sexual harassment as a form of gender discrimination because sexual harassment creates conditions of employment that are applied differently to men and women).

12. See U.S. CONST. art. I, § 8, cl. 3 (stating that Congress has the power to regulate commerce among the States). See generally LEVY & PALUDI, *supra* note 8, at 6-7 (explaining that Congress has the power to regulate activities that have a substantial effect on interstate commerce). Further, Congress has determined that discrimination with regard to employment and accommodations would have a substantial effect on interstate commerce. *Id.*

13. See 42 U.S.C. § 2000e-2(a) (stating that an employer cannot base decisions on whether to hire, fire, or otherwise discriminate against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); see also *Barnes v. Costle*, 561 F.2d 983, 986-87 (D.C. Cir. 1977) (expressing disappointment that there is little to no legislative history to assist in defining the scope of Title VII as related to sex discrimination).

14. See 42 U.S.C. § 2000e-4 (describing the makeup of the EEOC and expounding a list of powers the EEOC has for investigating employment discrimination); see also WILLIAM PETROCELLI & BARBARA KATE REPA, *SEXUAL HARASSMENT ON THE JOB* 1/20 (1992) (asserting, however, that in the early years, the EEOC lacked the motivation to enforce the newly adopted Civil Rights Act of 1964).

15. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2004) (providing six directives—a seventh discussing vicarious employer liability was repealed when *Ellerth* and *Faragher* were decided—meant to advise and influence the inclusion of sexual harassment into employment discrimination as governed by Title VII). The EEOC looks at the totality of the circumstances on a case-by-case basis to determine whether conduct constitutes sexual harassment. *Id.*

16. See, e.g., *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (defining and describing sexual harassment and employer liability as set forth in the EEOC's Guidelines). The court then applied these principles to determine that the defendant employer should be required to affirmatively raise the subject of sexual harassment with his employees, explain that harassing conduct violates Title VII of the Civil Rights Act of 1964, establish and advertise the employer's harassment policies, and investigate and correct any harassment within the agency. *Id.*

began to enact their own laws forbidding sexual harassment in the workplace.¹⁷

B. Developing the Law of Sexual Harassment

In two cases in the early 1980s, two federal circuit courts set forth the basic classifications that courts would use for the next fifteen years in deciding sexual harassment cases, namely quid pro quo and hostile work environment sexual harassment.¹⁸ In 1986, the Supreme Court upheld sexual harassment as a form of sex discrimination in employment in *Meritor Savings Bank v. Vinson*.¹⁹ In this case, the Court recognized the right to be free from a hostile working environment, regardless of whether the harassment involves an economic loss or any “tangible discrimination.”²⁰ Although the Court

17. See, e.g., ALASKA STAT. § 18.80.220 (2004) (stating that an employer commits an unlawful employment practice if it discriminates against a person because of the person’s sex when the reasonable requirements of the position do not require distinction based on sex); ARIZ. REV. STAT. ANN. § 41-1463 (2003) (imitating closely the language used in Title VII to forbid employers from discriminating against an individual in the workplace); 21 VT. STAT. ANN. tit. 21, § 495 (2003) (informing employers that they must ensure a workplace free of sexual harassment, specifically by creating a policy against sexual harassment, displaying a poster noting the elements of the employer’s policy and providing all employees with a written copy of the policy). See generally PETROCELLI & REPA, *supra* note 14, at 1/22 (describing state Fair Employment Practice statutes and their varying levels of protection and enforcement).

18. See *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) (outlining the elements that a plaintiff must prove to establish a case of quid pro quo sexual harassment: 1) the victim-employee belongs to a protected group; 2) he or she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; and 4) the employee’s reaction to the harassing behavior affected tangible aspects of the employee’s working conditions, terms, compensation or privileges of employment). To prove a hostile environment for sexual harassment the first three elements are the same, with two other elements added: 4) the harassment affected a term, condition or privilege of employment; and 5) the employer was aware or should have been aware of the harassment and failed to take proper remedial action. *Id.* at 903-05; see also *Katz v. Dole*, 709 F.2d 251, 254-56 (4th Cir. 1983) (following the *Henson* classification and purporting that once a plaintiff proves pervasive sexual harassment, the question of the case typically will turn to the employer’s responsibility for the harassing behavior).

19. See 477 U.S. 57, 64 (1986) (refusing to accept the defendant’s position that Congress intended “compensation, terms, conditions, or privileges” of employment to include only tangible losses or consequences of an economic nature, and instead holding that Congress intended to remove all disparate treatment of men and women in the workplace).

20. See *id.* at 67-68 (adopting the proposition that sexually harassing behavior “must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive work environment,” and that the “gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”) (internal quotations omitted); see also SEXUAL HARASSMENT, ISSUES AND ANSWERS 139-40 (Linda LeMoncheck & James P. Sterba eds., 2001) (outlining the Court’s six major holdings in *Meritor*, including that the employee’s consent to the behavior does not alleviate the employer’s liability and that courts may consider the employee’s behavior, such as provocative dress, in determining whether the harassing conduct was in fact unwelcome).

declined to rule whether an employer could be liable for harassment committed by one employee against another, it did state that courts should look to agency principles for guidance on the issue.²¹

C. Reviewing the Inconsistencies in Employer Liability for Supervisor Sexual Harassment

Before the Supreme Court issued its joint holding in *Ellerth* and *Faragher*, courts across the country divided on issues pertaining to employer liability in discrimination cases.²² Courts typically initiated their harassment analysis by determining whether the situation fell under hostile work environment or quid pro quo sexual harassment.²³ Each of the circuit courts consistently applied this bifurcated analysis.²⁴

If determined to fall within quid pro quo sexual harassment,²⁵ courts next would approach the issue of employer liability for supervisor harassment of a subordinate employee.²⁶ Most courts held

21. See *Meritor*, 477 U.S. at 72 (assuming that because Congress chose to define 'employer' in a manner that included any agent of an employer, it intended to place some limitations on employer liability). In illustrating its decision to avoid making a definitive rule on employer liability, the Court also added that an employer does not always escape liability if he or she lacked notice. *Id.*

22. See Justin P. Smith, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After Faragher and Burlington Industries*, 74 N.Y.U. L. REV. 1786, 1787 (1999) (asserting that the 1998 decisions did not remedy fully the "fundamental inconsistencies" that existed in the Court's approach to employer liability for workplace sexual harassment prior to *Ellerth* and *Faragher*).

23. See *Meritor*, 477 U.S. at 65-66 (enunciating "hostile environment" and quid pro quo sexual harassment as violations of Title VII and setting out the criteria for each category that courts would use in determining sexual harassment cases).

24. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994) (setting forth the theory that a plaintiff may seek relief for sexual harassment under either quid pro quo or hostile work environment sexual harassment).

25. See generally National Women's Law Center, *Sexual Harassment in the Workplace* (2000), available at <http://www.nwlc.org/details.cfm?id=459§ion=employment> (last visited Feb. 3, 2006) (defining both quid pro quo harassment and harassment resulting in a tangible employment action as an employee's submission to or rejection of sexually harassing conduct that an employer uses as the basis for employment decisions or makes a condition of employment). Because of their similarities, this Comment refers to quid pro quo sexual harassment cases decided before the 1998 *Ellerth* and *Faragher* decisions for tangible employment action analysis.

26. See, e.g., *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) (providing that the victim-employee must prove that her employer either offered no reasonable mechanism for complaint or knew of the harassing behavior but did nothing to stop it); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1560 (11th Cir. 1987) (responding to defendant's assertion by contending that Pilot Freight Carriers is not liable to a harassed employee because the employee did not complain or give notice of the harassment); see also Joanna Grossman, *When an Employee is Not Formally Fired, But Effectively Forced to Leave, Is Her Employer Automatically Liable for Sexual Harassment?*, FindLaw's Writ: Legal Commentary (2003), at <http://writ.findlaw.com/grossman/20030422.html> (questioning an employer's liability in pre-*Ellerth/Faragher* cases where a supervisor threatens his

that employers are always liable for supervisor sexual harassment of an employee.²⁷ Some courts, however, looked at employer liability similarly to hostile work environment sexual harassment and used a negligence standard to find that the court could not impute employers as wholly, or sometimes even partly, liable when they did not know nor had no reason to know about the harassing conduct of a supervisor.²⁸ Other courts felt that it was insufficient simply to find strict employer liability for a supervisor-inflicted adverse employment decision, and that instead, the harassed employee must show that the supervisor acted specifically using the authority his employer gave him in effectuating the adverse employment action.²⁹

D. Ellerth, Faragher and Suders, and the Tangible Employment Action Distinction

In 1998, the Supreme Court changed the way courts review and decide sexual harassment cases by announcing that the two categories of hostile work environment and quid pro quo sexual harassment, while useful, would not be controlling when courts determine the vicarious liability of an employer.³⁰ Both Justice Kennedy in *Ellerth* and Justice Souter in *Faragher* analyzed agency principles to confirm that employers can and should be liable for the employee-supervisors' unlawful actions.³¹ Under the "aided by the agency relationship"

subordinate with adverse consequences unless she submits to his sexual advances).

27. See, e.g., *Karibian*, 14 F.3d at 777 (holding that quid pro quo harassment inherently imposes strict liability on the employer, as it occurs when submission to or rejection of unwelcome sexual conduct by an employee becomes the basis for employment decisions, and the supervisor uses the employer's authority to alter the terms and conditions of the victim's employment); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994) (finding that where a supervisor both requests sexual favors and discusses potential job benefits or detriments with a subordinate employee, he commits quid pro quo sexual harassment and the employer is then automatically liable).

28. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (asserting that though employers are generally liable for a supervisor's discriminatory practices, if a supervisor ignores company policy and harasses a subordinate employee without the employer's knowledge, and the employer rectifies the situation when discovered, Title VII may relieve the employer of responsibility).

29. See, e.g., *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (suggesting that this condition must exist before the court could impose strict liability on an employer because otherwise the supervisor potentially could have been acting outside of his role as agent of the employer).

30. See *Ellerth*, 524 U.S. at 751, 759 (stating that the traditional classifications are "of limited utility" in determining employer liability, and turning to agency principles for guidance in determining employer liability). The Court specifically looked to scope of employment, apparent authority, and the "aided in the agency relation" standard to demonstrate that employers can be liable for harassing conduct of their employees. *Id.*

31. See *id.* at 755-64 (concluding that the general rule is that sexual harassment by a supervisor is outside of the scope of employment and that the apparent authority analysis does not apply, but that the agency relationship often aids in the commission

standard, a court will hold an employer liable for an employee's unlawful acts when the court finds that the employee used his position as an agent of his employer to effect a "tangible employment action" on another employee, typically a subordinate.³² Without this tangible act, the employer can raise an affirmative defense to liability.³³

In the years following *Ellerth* and *Faragher*, federal courts' decisions demonstrated that the employer liability rubric and accompanying affirmative defense remained open to interpretation, as courts across the country continued to show varying and diverse results in sexual harassment cases.³⁴ In June 2004, the Supreme Court revisited the issue of defining "tangible employment action" in *Pennsylvania State Police v. Suders*, where the Court discussed whether courts should consider a "constructive discharge" to be a tangible employment action for purposes of discerning employer liability.³⁵ Using agency principles, the Court explained that a tangible employment action necessarily must be "an official act of the enterprise, a company act."³⁶ The Court held that an employer is strictly liable for a constructive discharge, or any employment action, when it stems from a supervisor's official act.³⁷ Without this official

of the harassment); *Faragher*, 524 U.S. at 791-802 (agreeing with the findings in *Ellerth* and explaining that courts can hold an employer liable for an employee's misuse or abuse of his supervisory authority).

32. See *Faragher*, 524 U.S. at 802-03 (asserting that the aided by the agency relationship principle from § 219(2)(d) of the Restatement of Agency (Second) provides a starting point for determining employer liability). However, to ensure that an employer is not automatically liable for any and all sexual harassment, the presence of a tangible employment action will make certain that the supervisor used the authority his employer granted to him in committing the harassing behavior. *Id.*

33. See *id.* at 804-05 (suggesting that without a tangible employment action, it is less clear whether the supervisor used his position of power to harass a fellow employee and that in these situations, consequently, employers should be able to attempt to avoid or lessen damages).

34. See, e.g., *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (finding no tangible employment action when an employer changed an employee's work schedule and job responsibilities); *Fisher v. Electronic Data Sys.*, 278 F. Supp. 2d 980, 987-88 (S.D. Iowa 2003) (holding that a promotion and other job benefits are not tangible employment actions).

35. See 124 S. Ct. 2342, 2350 (2004) (acknowledging that there is disagreement among the circuits as to whether the *Ellerth* and *Faragher* definitions of a tangible employment action include a constructive discharge, i.e., when an employee feels forced or coerced into resignation).

36. *Id.* at 2353 (citing *Ellerth*, 524 U.S. at 762) (distinguishing between injuries arising from co-worker harassment from those that only an employee with a supervisory position can inflict, specifically by looking at whether the supervisor used the company's internal processes to effectuate the result, whether the tangible employment decision is documented in official company records, and whether a superior reviewed the employment decision).

37. See *id.* at 2351 (reversing the Third Circuit's decision that a constructive discharge precludes the employer from asserting the affirmative defense for purposes of vicarious liability, even though it constitutes a significant change in employment status for the victim-employee and inflicts the same direct economic harm as do other

act by the supervisor, the case would fall into the hostile work environment classification and the employer would have the opportunity to assert the two-part affirmative defense.³⁸

Due to these changes in employer liability analysis, finding a working and consistent definition of “tangible employment action” is critical for both plaintiff-employees and defendant-employers in sexual harassment cases. While courts have used terms similar to “tangible employment action” for many years,³⁹ a wide range and variety of definitions for tangible employment actions often accompanied these terms.⁴⁰ In *Ellerth* and *Faragher*, the Supreme Court, in setting forth the new employer liability rubric, attempted to give definitive meaning to the term, announcing that a tangible employment action is 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.”⁴¹

II. DEFINING “TANGIBLE EMPLOYMENT ACTION”: LOOKING AT COURTS’ MISTAKEN INTERPRETATION OF “UNDESIRABLE REASSIGNMENT”

The Supreme Court has interpreted undesirable reassignment in an overly narrow, qualified sense.⁴² As a result, lower courts often

accepted tangible employment actions).

38. See *id.* at 2355 (asserting that, unlike an actual termination, an official company act will not always precede a constructive discharge, and without this act, the employer would have no reason to believe that a resignation falls outside of the ordinary course of business).

39. See, e.g., *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (describing a job transfer of the harassed employee as an “adverse employment decision”); *Karibian*, 14 F.3d at 778 (asserting that an employee who rejects a supervisor’s advances can expect to suffer a “job-related reprisal”); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 187 (6th Cir. 1992) (stating that strict liability exists for quid pro quo harassment when there is a “tangible job detriment”).

40. See, e.g., *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir. 1995) (stating that the “grant or denial of an economic quid pro quo in exchange for sexual favors” is one of the two ways to find sexual harassment to be an actionable discrimination case); *Kauffman*, 970 F.2d at 187 (defining a tangible employment action as one resulting in an economic or other job benefit).

41. See *Ellerth*, 524 U.S. at 751 (noting first that the law defining the relevant standards for courts to use in determining employer liability for sexual harassment cases is relatively bare); *Faragher*, 524 U.S. at 785 (agreeing that the courts of appeals have struggled to determine useful and reliable standards to govern employer liability in supervisor sexual harassment cases); see also Patricia Sachs Catapano, *Employer Liability for Sexual Harassment under Title VII: Karibian v. Columbia University*, in *SEXUAL HARASSMENT IN THE WORKPLACE* 331, 339 (Samuel Estreicher ed., 1999) (concluding that the *Ellerth* and *Faragher* Courts have provided employers with a “clear standard” for when and how they will be liable for a supervisor-employee’s sexual harassment).

42. See *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 803 (proffering the examples of setting work schedules and setting pay rates in addition to those offered in *Ellerth*).

erroneously hold that a reassignment is only “undesirable” when a significantly adverse or economic consequence accompanies it.⁴³

A. Courts Mistakenly Search for an “Adverse” Employment Action and Rely on Misleading Cases When Determining Whether an Employee Has Suffered a Tangible Employment Action

The Supreme Court’s use of “tangible” is an obvious diversion from the commonly used phrase “adverse employment action” for Title VII claims.⁴⁴ Prior to *Ellerth* and *Faragher*, courts commonly used a negative qualifier, such as “adverse” or “detrimental,” in determining the existence of quid pro quo sexual harassment.⁴⁵ In using the phrase “tangible employment action,” it appears that the Court made a conscious decision to use a phrase with neither a positive nor a negative connotation.⁴⁶ Curiously, the Court, in its joint *Ellerth/Faragher* holding, delineated “discharge, demotion, and undesirable reassignment” as examples of “tangible” employment acts, all negative or adverse consequences that a supervisor can effect.⁴⁷

43. See, e.g., *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996) (explaining that a reassignment must meet a certain “materially adverse” level to invoke strict liability for the employer); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (asserting that changes in employment that cause no “materially significant disadvantage” will be insufficient).

44. See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004) (asserting that the second element of a prima facie case of a Title VII retaliation claim is that the employee suffered an adverse employment action): see Kelly Collins Woodford & Harry A. Risetto, *Tangible Employment Action: What Did the Supreme Court Really Mean in Faragher and Ellerth?*, 19 LAB. LAW. 63, 70 (2003) (noting that, since *McDonnell Douglas Corp. v. Green*, courts have consistently used the phrase “adverse employment action” to describe the type of employment decision useful in Title VII claims, and questioning the significance of the Court’s substitution of “tangible” for “adverse”).

45. See, e.g., *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996) (looking for a “materially adverse employment action”); see *supra* note 39 (listing various terms used before *Ellerth* and *Faragher* to describe the employment decision necessary in quid pro quo harassment claims).

46. See *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (pointing out the critical question of whether an official act of the enterprise, which an employee in a supervisory position effected, created the change in employment status of the harassed employee, not whether the change in employment status was adverse or beneficial); *Ellerth*, 524 U.S. at 761 (using the term “significant” three times—“significant change in employment status,” “reassignment with significantly different responsibilities,” and “a decision causing a significant change in benefits”—where it would be just as simple to have written, for example, “adverse” change in employment status if the Court had wished to include only objectively detrimental tangible employment actions).

47. See *Ellerth*, 524 U.S. at 761, 765 (providing other examples, however, including those with non-adverse consequences, such as hirings or reassignments with significantly different responsibilities, which suggests that the Court did not intend to limit tangible employment actions to only those with negative consequences); *Faragher*, 524 U.S. at 790, 808 (offering other employment actions with tangible results, including promotion and extra or new compensation).

Though the Supreme Court, in its *Ellerth* and *Faragher* decisions, held that proving an “undesirable reassignment” would impose strict liability on an employer, the Court gave little direction as to the elements or criteria required to establish an undesirable reassignment or transfer successfully.⁴⁸ The Court in *Ellerth* did use “significant” in its discussion; however, this term was not used consistently throughout Justice Kennedy’s opinion and was not used at all in the *Faragher* opinion.⁴⁹ Lower courts, however, have relied on Justice Kennedy’s opinion where, after giving examples of tangible employment actions, he cites two cases in which courts upheld changes in employment status as unactionable.⁵⁰

However, the cases the Supreme Court used in limiting the scope of a tangible employment action are misleading.⁵¹ In *Kocsis v. Multi-Care Management, Inc.*, the plaintiff sued her employer under the Americans with Disabilities Act (“ADA”).⁵² The court explained that the second element of proving a prima facie case of employment discrimination based on disability is to show that the employee’s reassignment was a “materially adverse” change in the terms of her

48. See *Ellerth*, 514 U.S. at 761 (citing four appellate cases: *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993), holding that a termination, demotion with a decrease in pay, less distinguished title, material loss of benefits, or diminished material responsibilities could all indicate a “materially adverse change”; *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994), finding that a “bruised ego” is insufficient; *Kocsis*, 97 F.3d at 886-87, determining that a demotion without a change in pay, benefits, duties or prestige is not enough; and *Harlston*, 37 F.3d at 382, holding that a reassignment to a more inconvenient employment location is insufficient).

49. See *Ellerth*, 524 U.S. at 744, 765 (comparing the frequently quoted language from the case’s syllabus, “when a supervisor subjects a subordinate to a significant, tangible employment action,” to the holding of the case, “when the supervisor’s harassment culminates in a tangible employment action”). Throughout his opinion, Justice Kennedy uses only “tangible employment action,” except when he states that a “tangible employment action constitutes a significant change in employment status.” *Id.* at 760-62; *Faragher*, 524 U.S. at 804-05 (recognizing employer liability when misuse of supervisory authority “alters the terms and conditions of a victim’s employment” and for “harm caused by misuse of authority,” never suggesting courts will need to find “significant” changes in the terms or conditions of employment or “significant” harm to the victim-employee).

50. See, e.g., *Ricci v. Applebee’s Northeast, Inc.*, 297 F. Supp. 2d 311, 318 (D. Me. 2003) (quoting *Ellerth* directly to present *Kocsis* and *Harlston* as *Ellerth*’s “illustrative case law”); *Fisher*, 278 F. Supp. 2d at 990 (citing *Ellerth* to cite *Kocsis* as holding that “demotion without change in pay not a tangible employment action”); *Smith v. Chrysler Fin. Corp.*, 101 F. Supp. 2d 534, 544 (E.D. Mich. 2000) (describing a “materially adverse” employment action and citing to *Kocsis*, which cites to *Ellerth*).

51. See *Ellerth*, 524 U.S. at 761 (citing *Kocsis* and *Harlston*, after Justice Kennedy’s definition of a tangible employment action, to demonstrate when a tangible employment action will and will not be a “significant change in employment status” sufficient to invoke strict liability on a harassing supervisor’s employer).

52. See 97 F.3d at 878 (involving a nurse who brought suit under the ADA alleging that her employer failed to promote her and instead demoted and reassigned her). The plaintiff then resigned her position and claimed that her employer constructively discharged her. *Id.* at 880.

employment.⁵³ The court held that, with respect to her reassignment claim, she failed to show that the reassignment was a “materially adverse employment action.”⁵⁴

Kocsis, however, is not closely analogous to a tangible employment action sexual harassment case.⁵⁵ Consequently, courts should not use it as a guide in determining whether a supervisor caused an undesirable reassignment or transfer on a subordinate employee. First, while courts and scholars can make comparisons between Title VII and the ADA,⁵⁶ the relevant prima facie element in an ADA case is not equivalent to the employer liability tangible employment action standard for sexual harassment cases.⁵⁷ While the plaintiff in *Kocsis* could not prove her prima facie case, an employee hoping to hold her employer liable for a supervisor’s sexually harassing behavior already has succeeded in proving her prima facie case and now strives to prove that her supervisor subjected her to a tangible employment action.⁵⁸

53. See *id.* at 885 (citing “materially adverse” to the *Ellerth* opinion’s second example case, *Harlston*, explaining that the injured employee must show that her reassignment was a materially adverse change in the terms of her employment).

54. See *id.* at 885-87 (discussing the evolution of the “materially adverse” standard for disability cases, and finding that the plaintiff’s reassignment was insufficient to hold her employer liable because her pay and benefits did not decrease, her duties were not altered materially, and she did not show any loss of prestige in her new position).

55. See Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 825 (2002) (suggesting that courts unjustifiably follow and rely on developments in other areas of Title VII when analyzing harassment cases). Courts also take the *Ellerth* and *Faragher* language out of context and narrow the tangible employment action definition beyond the scope of its definition as articulated in those cases. *Id.*

56. See, e.g., *Ellerth*, 524 U.S. at 761 (reasoning that because the phrase “tangible employment action” appears in appellate cases concerning sex, race, age and national origin discrimination, the Court found it “prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue” in deciding *Ellerth*); *Kocsis*, 97 F.3d at 885 (expounding that the Age Discrimination in Employment Act and Title VII are instructive in cases concerning the ADA).

57. Compare AMERICANS WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL § 7:253 (2005) (proving a prima facie case of disability discrimination under the ADA requires four elements: 1) the employee is disabled; 2) the employee is qualified to perform the essential function of the job; 3) the employee suffered an adverse employment decision; and 4) there might be an inferred causal relationship between the employee’s disability and the employment decision), with *Ellerth*, 524 U.S. at 765 (analyzing the employer liability standard for sexual harassment cases, only discussed after [element one] determining that the employee satisfied her burden of proving discrimination on the basis of sex, then she must show [element two] that a supervisor caused the harassment, and [element three] that the supervisor effected a tangible employment action).

58. See EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), available at www.eeoc.gov/policy/docs/harassment.html (offering typical characteristics of tangible employment actions for use in determining employer liability, including the presence of an official act, documentation and an economic harm).

Second, the Court sporadically used “significant” to describe the changes in the terms or conditions of one’s employment that are necessary to satisfy the tangible employment action standard.⁵⁹ However, the phrase “materially adverse” as used in *Kocsis*, the ADA case, is a standard that far surpasses “significant.”⁶⁰ The *Kocsis* court relies on two cases where employees who were transferred to new positions were not subject to “materially adverse” employment actions.⁶¹ However, the Supreme Court in *Suders* relied on a case where a transferred employee was able to preclude her employer’s use of the affirmative defense because of her supervisor’s official act that resulted in a sufficient change in her employment status.⁶²

A second case that *Ellerth* cites also confuses the tangible employment action standard.⁶³ In *Harlston v. McDonnell Douglas Corporation*, an age and race discrimination case under Title VII, the Eighth Circuit stated that the plaintiff failed to establish that her supervisor treated her “adversely” when he reassigned her because she suffered no diminution in her title, salary or benefits as a consequence.⁶⁴ The court concluded that changes in duties or

59. See *Ellerth*, 524 U.S. at 760-65 (listing factors courts should consider in determining whether something should constitute a tangible employment action, including whether official company records document the act, whether higher level supervisors reviewed the action, whether it inflicted an economic harm, and whether it was something that only a supervisor could do); *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004) (emphasizing that a constructive discharge cannot count as a tangible employment action to preclude the employer’s affirmative defense without an official company act, but never mentioning that this official act must have “significant” consequences, repercussions or effects for the employee).

60. See Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer’s Action was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 347-48 (1999) (analyzing employment discrimination cases using the “adverse employment action” and “materially adverse” employment decision language, suggesting that courts added these adjectives carelessly and arbitrarily). The terms started as a “shorthand device” courts used to mean that the plaintiff must show that she suffered disparate treatment in regard to the terms or conditions of employment, and quickly transformed into a new substantive requirement for Title VII claims. *Id.* at 348.

61. See *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (finding that the transferred employee could not show an adverse change in responsibilities and therefore could not prove a “materially adverse employment action”); *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 886 (7th Cir. 1989) (refusing to accept plaintiff’s argument that her transfer was “materially adverse” when her job became easier).

62. See *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003) (holding that the plaintiff resigned at least partly based on her transfer, and that this official act would deny her employer the right to raise the affirmative defense).

63. See *Harlston*, 37 F.3d at 382 (involving a plaintiff who suggested that her race was the motivating factor behind a negative evaluation her new supervisor wrote, and that her age led to her supervisor’s comment that she was “too slow”).

64. See *id.* (refusing to accept *Harlston*’s reassignment, which gave her fewer secretarial duties and a more stressful level of responsibilities, as sufficiently “adverse” because these “stressful duties” amounted to nothing more than an inconvenience or a change in job responsibilities).

working conditions that cause no “materially significant disadvantage” are insufficient to hold an employer liable.⁶⁵

The problems with using *Harlston* as a guide for tangible employment action inquiries are similar to those present in *Kocsis*.⁶⁶ The *Harlston* court used language based on the third element necessary to establish a prima facie case of race discrimination, which is identical to the language in the ADA and requires that the employee must suffer an adverse employment action.⁶⁷ Again, employer liability analysis in sexual harassment cases occurs only after a court determines that the harassed employee has proven her prima facie case of discrimination based on sex.⁶⁸

Similarly, it is noteworthy that the Court, in *Ellerth* and *Faragher*, chose “tangible” instead of the commonly accepted “adverse,” particularly as applied in retaliation cases.⁶⁹ Courts are not justified in substituting the language used to define a prima facie case of retaliation for the language used to define and interpret an undesirable reassignment.⁷⁰ Whereas Title VII proscribes retaliation in a separate subsection and is a claim unto itself, tangible employment action analysis pertains to sexual harassment cases where

65. See *id.* (noting that, although *Harlston* believed that her supervisor reassigned her to remove her from her position, she offered no evidence to support this belief, which the court impliedly suggested could have furthered the finding of an adverse employment action).

66. See 97 F.3d at 885 (referring to the *Harlston* “materially adverse” standard at the beginning of its analysis and then again citing to *Harlston*’s requirement of finding a materially significant disadvantage to the employee’s change in working conditions).

67. See 37 F.3d at 382 (listing the elements of a prima facie case of race discrimination: 1) the employee was a member of a protected class; 2) she was meeting the expectations of her employer; 3) she suffered an adverse employment action; and 4) her employer replaced her with a younger, white person).

68. See *Faragher*, 524 U.S. at 780 (beginning the opinion by stating that the issue is whether a court can hold an employer liable under Title VII for the acts of a supervisor whose sexual harassment of a subordinate employee has created a hostile working environment amounting to employment discrimination, thus explaining that the question of liability only comes into play after a court has found unlawful conduct on the part of the supervisory employee).

69. See, e.g., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (addressing the three elements necessary to prove a prima facie retaliation claim: 1) the employee acted to protect her Title VII rights; 2) she suffered an adverse employment action; and 3) there exists a causal link between the two events); see Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2000) (providing that an employer participates in unlawful activity if it discriminates against an employee because that employee brought a charge under Title VII against her employer).

70. See Margery Corbin Eddy, Note, *Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms*, 63 ALB. L. REV. 361, 362 (1999) (explaining that Title VII intentionally creates a separate cause of action for an employee who successfully can prove her retaliation claim, and therefore can recover against her employer, but cannot prove her sexual harassment claim).

a plaintiff is attempting to hold her employer strictly liable.⁷¹

Most recently, when asked to clarify tangible employment action standards, the Supreme Court in *Suders* opted to use “official act of the enterprise” to explain its intended interpretation.⁷² The Court correctly chose not to place any further restrictions on the employment action necessary to invoke strict liability on an employer, allowing lower courts to concentrate on finding a tangible employment action based on an “official act” of the employer.⁷³ In retaining the *Ellerth/Faragher* terminology, along with the “official act” addition, courts now should have a better sense of what does and does not rise to the level of a tangible employment action, and will find that reassignments and transfers typically will preclude the affirmative defense.

B. Though the Supreme Court Has Directed Otherwise, Courts Still Concentrate on Finding an Economic Harm

Courts find the only other available directive for recognizing an undesirable reassignment or transfer in the 1986 *Meritor* opinion, where the Court stated that plaintiffs in Title VII claims do not have to prove discrimination with economic consequences.⁷⁴ Many appellate courts determining employer liability have recognized this declaration.⁷⁵ Even acknowledging the Supreme Court’s Title VII interpretation, however, a majority of federal courts incorrectly have held that absent an adverse economic outcome, a harassed employee

71. See *id.* at 363 (maintaining that while the Supreme Court has attempted to direct lower courts in their analyses of employer liability for sexual harassment, the Court has not resolved a standard for employer liability in retaliation cases, demonstrating that the claims each have their own standards and courts should analyze each one separately).

72. See 124 S. Ct. at 2355 (emphasizing that for any employment action to be “tangible,” an official company act must accompany it, something that only a supervisor can effect, never mentioning that it must have “significant” consequences, repercussions, or effects for the employee).

73. See *id.* at 2347 (reaffirming the Court’s holding in *Ellerth* and *Faragher*, but then stating that the objective question, at least for a constructive discharge claim, is whether the plaintiff quits “in reasonable response to an employer-sanctioned adverse action” that officially changes her employment status).

74. See 477 U.S. at 67-68 (reversing the lower court’s holding that a sexual harassment claim will not lie without a showing of an economic effect on the victim-employee); see also *Ellerth*, 524 U.S. at 762 (affirming that an economic harm does not have to accompany a tangible employment action).

75. See, e.g., *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002) (finding that the district court defined tangible employment action too narrowly when it listed only economic-based harms to determine whether a tangible employment action occurred); *Green v. Adm’r of Tulane Educ. Fund*, 284 F.3d 642, 654-55 (5th Cir. 2002) (reversing the district court’s holding that, because a tangible employment action usually inflicts direct economic harm, a demotion without economic consequences would not constitute a tangible employment action).

will not be able to impute strict liability on her employer for an undesirable reassignment or transfer.⁷⁶

This interpretation of an economically harmful undesirable reassignment, however, is misguided.⁷⁷ In *Ellerth/Faragher*, the Supreme Court accepted that courts should not require economic harm to a plaintiff who seeks to establish a tangible employment action.⁷⁸ While it is useful to consider economic harm as a factor in determining whether a supervisor did, in fact, inflict a tangible employment action on a subordinate employee, it is certainly not the defining element of the standard.⁷⁹

Most of the Supreme Court's examples of tangible employment actions will result in some direct economic harm.⁸⁰ However, an "undesirable reassignment" may not result in any kind of economic detriment.⁸¹ It is in these cases that courts should reevaluate their requirements for finding an undesirable reassignment sufficient to

76. See, e.g., *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 886 (7th Cir. 1989) (finding that under the Age Discrimination in Employment Act, reassignment from an elementary school principal position to a dual principalship of two elementary schools with a farther travel distance from the employee's home to work was not "materially adverse").

77. See, e.g., *Lidge*, *supra* note 60, at 398-99 (describing a situation where a court concentrating on an economic consequence could allow an employer to avoid liability). For example, if the employer disguised its discriminatory employment actions by transferring a harassed employee to a position that she hates, but where the reassignment involves no change in job title or compensation, liability could be avoided. *Id.*

78. See *Ellerth*, 524 U.S. at 762 (stating that a tangible employment action often results in some direct economic harm, and providing examples to show that when a supervisor, as opposed to a coworker, uses the authority given to him by his employer to injure another employee, the consequences of that injury often will have an economic component); *Faragher*, 524 U.S. at 786 (emphasizing that "although the [Civil Rights Act of 1964] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to economic . . . discrimination") (internal quotations omitted).

79. See, e.g., *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999) (announcing that while direct economic harm can be an important indicator of a tangible employment action, "it is not the *sine qua non*[,] and finding that the employer subjected the harassed employee to a tangible employment action when her files "went missing").

80. See *Ellerth*, 524 U.S. at 761, 765 (describing a tangible employment action using terms including hiring, firing, failing to promote and a decision causing a significant change in benefits, all of which likely would have direct economic repercussions on the victim-employee); *Faragher*, 524 U.S. at 803, 805, 808 (incorporating discharge, demotion and setting pay rates, all resulting in adverse economic consequences, into the phrases used to define tangible employment actions).

81. See *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002) (maintaining that while both the *Ellerth* and *Faragher* opinions give examples of tangible employment actions that involve economic detriments, like demotion and firing, and economic benefits, such as hiring and promotion, the opinions also include actions with no economic consequences, such as undesirable reassignment and reassignment with significantly different responsibilities (citing *Ellerth*, 524 U.S. at 761, and *Faragher*, 524 U.S. at 790)).

hold an employer liable for taking a tangible employment action against an employee.

III. CHANGING THE WAY COURTS INTERPRET “UNDESIRABLE REASSIGNMENT” IN DETERMINING EMPLOYER LIABILITY

A. *The Supreme Court’s Main Objective: Finding an Official Act of the Enterprise*

The Justices in both *Ellerth* and *Faragher* spent a substantial portion of their opinions discussing how courts could determine whether an employment decision was in fact the product of a supervisor acting with the authority his employer gave him.⁸² The *Ellerth* opinion suggested that courts should look for various factors that could prove a tangible employment action: an economic harm, a change in employment status, location, or responsibilities documented in official company records or a decision that is subject to review by higher-level supervisors.⁸³ The Court concluded that “[w]hatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.”⁸⁴

Although the 2004 *Suders* opinion does not clarify or even directly address undesirable reassignments, it is very instructive for courts investigating tangible employment actions.⁸⁵ The plaintiff worked as a police communications operator, her supervisors subjected her to continuous harassment, and she complained within the department.⁸⁶

82. See *Ellerth*, 524 U.S. at 754-64 (reasoning through the Restatement of Agency (Second) § 219 to determine that courts can find employers liable when an employee, specifically a supervisory employee, used the authority given to him based on the agency relationship—the “aided in the agency relationship standard”—to effect a tangible employment action on a subordinate employee); *Faragher*, 524 U.S. at 793-804 (emphasizing the difference between a supervisor who can use his actual authority to alter a subordinate employee’s terms or conditions of employment and a coworker who can “walk away or tell the offender where to go”).

83. See 524 U.S. at 762 (purporting that any of these factors, if fulfilled, would necessitate the agency relationship and therefore would imply a tangible employment action).

84. *Id.* at 763-64 (suggesting further that even without fully defining the mechanisms of the aided in the agency relation standard, it “would be implausible to interpret agency principles to allow an employer to escape liability” when a supervisor takes a tangible employment action against a subordinate employee).

85. See 124 S. Ct. at 2349-50 (considering a constructive discharge claim under Title VII for which the district court granted summary judgment to the plaintiff’s employer). The Third Circuit held that a constructive discharge, when proven, always would constitute a tangible employment action and, thus, invokes strict liability on an employer. *Id.*

86. See *id.* at 2347-48 (finding that her three supervisors would make overtly sexual comments, regularly make obscene sexual gestures, and remark on her dress and physical appearance, and that they falsified her skills test results and then devised

She eventually resigned and subsequently sued the Pennsylvania State Police for sexual harassment and constructive discharge on the part of her supervisors.⁸⁷ The Supreme Court reversed the Third Circuit's decision, finding that courts could not automatically categorize a constructive discharge as a tangible employment action.⁸⁸ The Court held, in effect, that whether a constructive discharge occurred is a moot point, and that the question remains whether the supervisor inflicted a tangible employment action on a subordinate.⁸⁹

Here, the Court correctly reached the defining factor in determining employer liability: whether or not the employment action came from an "official act of the enterprise."⁹⁰ The opinion used "official act of the enterprise" as both an equivalent and substitute for "tangible employment action."⁹¹ In doing this, the Court made clear that the employer, likely through the harassed employee's supervisor, must effectuate the tangible job change.⁹² This is where courts make the crucial distinction between coworker harassment and supervisor harassment, and where agency principles of liability are in accord with the Supreme Court's holdings in *Meritor* and *Ellerth/Faragher*.⁹³

a plan to set her up and arrest her for theft).

87. See *id.* at 2348 (stating that the employee tendered her resignation soon after her supervisors detained her for the contrived theft, though the Pennsylvania State Police never brought actual theft charges against the plaintiff).

88. See *Suders v. Easton*, 325 F.3d 432, 445-47 (3d Cir. 2003) (finding that when a victim-employee proves a constructive discharge, she also proves the infliction of a tangible employment action, and in effect, precludes her employer from asserting the two-part affirmative defense); see also *Suders*, 542 U.S. at 134 (holding that after the victim-employee proves the first criterion of a constructive discharge, specifically that she suffered harassment so intolerable that she felt compelled to resign, an employer may assert the affirmative defense, unless the harassed employee resigned in "reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation").

89. See *Suders*, 542 U.S. at 134 (avoiding the term "tangible employment action," but explaining that to invoke strict liability, the victim-employee will have to prove that she suffered a "humiliating demotion" (equivalent to a firing), an "extreme cut in pay" (similar to "a significant change in benefits") or a transfer to a position with unbearable working conditions (along the lines of an undesirable reassignment)). The terms in parentheses are taken directly from the "tangible employment action" definition as set forth in *Ellerth*, 524 U.S. at 761, and *Faragher*, 524 U.S. at 808.

90. See *Grover*, *supra* note 55, at 839 (stressing that the key to employer liability is the source of the power the supervisor uses to take the employment action, and not the actual action that the supervisor takes against the harassed employee).

91. See *Suders*, 542 U.S. at 148-49 (stating that without an official act of the enterprise acting to alter the employment status of the harassed employee, the employer would have no reason to suspect anything out of the ordinary and the agency relationship is less likely to have aided in the supervisor's misconduct).

92. See *id.* (clarifying that when an official act does not underlie a change in employment status, as here, where no official act underlies the plaintiff's constructive discharge, the employer may assert the affirmative defense).

93. See *id.* at 144-45 (recognizing that there are injuries that both a coworker and a supervisor could inflict upon another employee, and that these injuries would not

The Supreme Court determined that agency principles allow courts to hold an employer liable for the misconduct of its employees and used the official tangible employment action to ensure that employers would not face automatic liability.⁹⁴ Thus, holding an employer liable is about finding a consequence of discriminatory conduct that only someone using “official” power could effect.⁹⁵ Courts readily see this power when they can find an official act of the enterprise, or a tangible employment action.⁹⁶ In stressing the “official act of the enterprise” terminology, the Court correctly implied that the employment decision will be something that, in essence, proved that the agency relationship aided the supervisor in his misconduct.⁹⁷ This is the Court’s critical distinction, reminding lower courts to hold the employer liable when the supervisory employee is able to effect a tangible employment action because of his position and the power he uses.⁹⁸

Courts should use this standard—whether the tangible employment action operates as an official act of the employer—in deciding if an employer will be strictly liable for the unlawful acts of supervisory employees.⁹⁹ This official act should be the dividing line and courts

require an official act of the enterprise); Grover, *supra* note 55, at 838 (noting that the agency standard that focuses on the relationship between the supervisor and his employer to hold the employer liable—the “aided by the agency relationship” standard—is one that best accommodates the critical distinction between supervisor and co-worker harassment).

94. See Woodford & Risetto, *supra* note 44, at 68 (recognizing that the agency relationship aids most workplace torts). In order to avoid *de facto* liability, as *Meritor* proscribed, the Court turned to the official act of the enterprise standard to create automatic employer liability. *Id.*

95. See Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998) (suggesting that the agency principles found in the Restatement of Agency (Second) may in fact require some “affirmative misuse of power” for employer liability to attach).

96. See, e.g., Robinson v. Sappington, 351 F.3d 317, 337 (7th Cir. 2003) (finding that the court would consider the constructive discharge at issue a tangible employment action because the supervisor used his official power to transfer the employee and suggest to her that she resign, both actions having an effect only because the supervisor held an official, supervisory position).

97. See *Suders*, 542 U.S. at 144 (proffering that a tangible employment action establishes the use of the agency relationship because when a supervisor “brings the official power of the enterprise to bear on subordinates,” it proves that the supervisor committed an official company act in discriminating against the victim-employee) (internal citations omitted).

98. See Marc A. Hearron, Casenote, Reed v. MBNA Marketing Systems, Inc., 57 SMU L. REV. 481, 484 (2004) (recalling that the Court’s analysis in both *Ellerth* and *Faragher* centers on agency principles and that the purpose of the tangible employment action analysis is for courts to determine if they can find the requisite agency relationship, providing the supervisor with “official power,” necessary for strict employer liability).

99. See, e.g., *Robinson*, 351 F.3d at 337 (holding that transferring the harassed employee is an official act when the transfer was possible only because the employee’s supervisor used the power given to him by his employer to make decisions affecting subordinate employees’ employment statuses); see Reed v. MBNA Mktg. Sys., Inc.,

should find employers liable for any such action.¹⁰⁰ This is a straightforward rule, one that the circuits could apply evenly with minimal variance in interpretations.¹⁰¹ The first question in addressing employer liability would be whether the action complained of came from the “official” power of a supervisor.¹⁰² Using this standard, courts would know to hold employers liable for any reassignment, transfer, change in benefits or alteration in work schedule, as well as the traditional tangible employment actions, such as firings and demotions.¹⁰³ In a situation where courts do not find an official act of the enterprise, it will be less obvious whether, or in what capacity, the agency relationship actually aided the supervisor’s unlawful behavior.¹⁰⁴ Such a situation constitutes those contemplated in *Ellerth* and *Faragher* where courts would permit the employer to attempt to avoid liability by asserting the affirmative defense.¹⁰⁵

B. Employing an Objective Standard: What Would the Reasonable Person Do?

After determining that the employment decision stemmed from the supervisor’s authority to use the official power of the employer, the

333 F.3d 27, 33 (1st Cir. 2003) (recognizing that the Supreme Court’s rationale for finding that the existence of a tangible employment action would prohibit the employer from asserting the affirmative defense, is that a supervisor who “takes official action against an employee should be treated as acting for the employer”) (emphasis in original).

100. Cf. Harper, *supra* note 10, at 315 (taking this dividing line even a step further, suggesting that courts should find a tangible employment action only when the supervisory employee reported the employment decision and the employer in some capacity recorded the change).

101. See LEVY & PALUDI, *supra* note 8, at 20 (assessing the various tangible employment actions as courts currently view them and categorizing these changes in employment as either obvious, such as firing and denial of promotion, or less obvious, including assigning an employee to an undesirable workspace or denying leave time, which courts likely would not consider official acts of the enterprise, and instead would view them as adding to an increasingly hostile work environment).

102. See, e.g., *Robinson*, 351 F.3d at 337 (turning directly to an “official act” analysis, whether the actions taken could only have their suggested effect if they came from a supervisor-employee wielding the power of the employer, after determining that a jury could find that the employee’s resignation could be considered a constructive discharge).

103. See *Pa. State Police v. Suders*, 542 U.S. 129, 144 (2004) (implying that results or harms that a coworker could not cause are likely those that require the power of the enterprise, typically in the hands of a supervisory employee, for the harms to actually occur); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765-66 (1998) (finding that an unfulfilled threat to take a tangible employment action, which could come from either a supervisor or a coworker alike, does not invoke strict liability on an employer, and holds true using this “official act of the enterprise” standard).

104. See, e.g., *Suders*, 542 U.S. at 145.

105. See *id.* (acknowledging that “a supervisor always is aided by the agency relation[ship]” in using his power over a subordinate, but noting that there are circumstances where the supervisor’s status would have little impact on the situation, as the acts equally could be those of a co-employee) (internal citations omitted).

court then turns to whether the reassignment or transfer was in fact “tangible.”¹⁰⁶ Although “tangible” appears to be purposefully value-neutral, “undesirable” is a value-laden word.¹⁰⁷ The use of “undesirable” preceding reassignment in the definition of a tangible employment action suggests that courts could use an objective standard and consider whether a reasonable person in the plaintiff’s position would find the employment action “undesirable.”¹⁰⁸

An objective standard is not unheard of in employment discrimination cases.¹⁰⁹ Courts have employed such objective standards in analyzing sexual harassment cases.¹¹⁰ For example, the EEOC has guided courts to find an employer responsible for a constructive discharge just as the employer is responsible for the outright discriminatory discharge of an employee.¹¹¹ For constructive

106. See *Ellerth*, 524 U.S. at 760 (reasoning first that the agency relation standard directs courts to hold an employer liable for the acts of its supervisory employees and, second, that finding a tangible employment action proves that the supervisor in fact used the agency relationship in furthering his harassing conduct).

107. See Rosalie Berger Levinson, *Parsing the Meaning of “Adverse Employment Action” in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 657-58 (2003) (proposing that when “disadvantageous,” a word demanding similar value analysis, transfers or other employment decisions are made based on illicit criteria, the employer should be strictly liable).

108. See, e.g., *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (holding that a plaintiff who is transferred laterally can show an actionable injury by demonstrating that a “reasonable trier of fact” could find that the plaintiff had suffered objectively tangible harm, but that “[m]ere idiosyncracies [sic] of personal preference” are insufficient to prove a tangible employment action); see Levinson, *supra* note 107, at 657 (explaining that “all transfers and demotions are official acts of the employer,” and that “provided a reasonable person would view the transfer as disadvantageous,” the employer should be liable).

109. See, e.g., *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1448-49 (11th Cir. 1998) (adopting an objective standard after finding no precedent or guidance from the EEOC on whether an objective or subjective standard should be used in employment discrimination cases); *Cullom v. Brown*, 209 F.3d 1035, 1041 (7th Cir. 2000) (stating that the “adversity” of a retaliation claim is judged objectively, based on whether a reasonable person would describe the particular employment actions as “adverse,” and, therefore, actionable); *Ledergerber v. Stangler*, 122 F.3d 1142, 1145 (8th Cir. 1997) (Beam, C.J., dissenting) (disagreeing with the court’s majority opinion that the plaintiff failed to establish that she suffered an adverse employment action, an element of a prima facie race discrimination claim). Judge Beam suggested that whether or not the plaintiff suffered an adverse employment action should be determined objectively as a question of fact for the jury. *Id.*

110. See, e.g., *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 37 (1st Cir. 2003) (analyzing the second step of the *Ellerth/Faragher* affirmative defense using a reasonableness standard, namely whether the employee subjectively felt afraid to report the harassment, and whether it objectively was reasonable for her not to report her supervisor’s behavior); *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (finding that the sexual conduct was both objectively and subjectively offensive “such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so,” both questions the fact-finder should answer).

111. See EEOC, COMPLIANCE MANUAL § 612.9(a) (2002) (indicating that a constructive discharge occurs when an employee resigns because she has experienced unlawful employment practices, and the resignation is related directly to these

discharge cases like *Suders*, courts use an objective standard, specifically whether the harassed employee's working conditions became so intolerable that a reasonable person in the employee's position would feel compelled to quit or resign.¹¹² Similarly, in determining hostile environment sexual harassment cases, courts use both objective and subjective standards to determine whether a reasonable person in the plaintiff's position would find the conduct to be sufficiently hostile, and whether the plaintiff actually did find her harasser's behavior hostile or abusive.¹¹³

Analogous to these examples, courts could judge objectively the "undesirability" of a particular tangible employment action claim as whether a reasonable person would find the specific employment decision to be "undesirable."¹¹⁴ However, courts generally have not used an objective analysis in determining whether a tangible employment action took place.¹¹⁵ Applying this objective standard would give a jury the power to make a factual determination of whether or not a supervisory employee effected a tangible employment action on a subordinate employee.¹¹⁶ For example, just

practices).

112. See, e.g., *Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1282 (11th Cir. 2003) (applying the objective constructive discharge standard, and holding that the plaintiff did not try to prove that a reasonable person in the same or similar circumstances would have felt compelled to resign and instead only offered evidence of her subjective reaction to the alleged sexual harassment); see also *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (explaining that a court may consider an employee's reasonable decision to resign as a constructive discharge and can view such discharges as aggravated cases of sexual harassment).

113. See, e.g., *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 695 (7th Cir. 2001) (finding that the plaintiff believed the environment was subjectively hostile since she had problems with sleep, depression and weight gain, and then turning to whether her feeling of hostility was reasonable using a totality of the circumstances analysis); see *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (holding that a plaintiff in a hostile work environment sexual harassment claim must show the resulting environment felt both subjectively and objectively offensive).

114. See, e.g., *Reed*, 333 F.3d at 33-34 (noting that the circuits were split on whether a constructive discharge can be a tangible employment action). The court chose to analyze whether a constructive discharge fit into the tangible employment action rubric by first determining if the employee's resignation stemmed from an official act and then by looking at the objective reasonableness of her resignation. *Id.*

115. See, e.g., *Stutler v. Ill. Dept. of Corr.*, 263 F.3d 698, 702-03 (7th Cir. 2001) (using an objective standard to determine whether a reasonable jury could find that the transfer occurred as retaliation, but not in determining whether a lateral transfer unwanted by the plaintiff, but without a loss of benefits, could be an adverse employment action); *Watts v. Kroger Co.*, 170 F.3d 505, 510, 512 (5th Cir. 1999) (reasoning that employment actions are not adverse "where pay, benefits, and level of responsibility remain the same" and looking solely at whether the alterations in the plaintiff's job significantly change her employment status).

116. See, e.g., *Haugerud*, 259 F.3d at 696 (reversing summary judgment for the defendant-employer in a hostile work environment case because the court found that the case is a "close call" and that it should be for a fact-finder to determine whether the plaintiff was both subjectively and objectively harassed); *Reed*, 333 F.3d at 34 (recognizing that summary judgment for the employer, here pertaining to the

as the court in *Holtz v. Rockefeller & Company, Inc.* found, a jury should determine whether it was objectively reasonable for the plaintiff to view the behavior of her supervisor as offensive, hostile or abusive, a jury should also be responsible for determining whether a plaintiff could view a particular reassignment or transfer as undesirable.¹¹⁷

Using this standard would be fair and practical to both the victim-employee and the defendant-employer.¹¹⁸ An objective standard analysis would be particularly useful in determining tangible employment actions in cases that are less facially obvious.¹¹⁹ For example, courts can agree that when a supervisor fires an employee outright because the subordinate refuses to succumb to her supervisor's sexual demands, the employee has suffered a tangible employment action, both subjectively and objectively.¹²⁰ However, in a case like *Boone v. Goldin*, where the court affirmed summary judgment for the defendant-employer, the result could have been different had the district court employed an objective standard.¹²¹

viability of the affirmative defense, is only applicable when the facts are undisputed, but even then, the reasonableness issue should be for a jury unless no reasonable jury could find for the plaintiff). The court also acknowledges that juries are highly capable of evaluating reasonableness in a person's behavior. *Id.* at 37.

117. See 258 F.3d 62, 75 (2d Cir. 2001) (noting that judges should not evaluate harassing acts and that summary judgment is only appropriate when no rational juror could view the supervisor's behavior as creating a hostile work environment).

118. See *LePique v. Hove*, 217 F.3d 1012, 1014 (8th Cir. 2000) (Heaney, J., concurring) (asserting, in an adverse employment action analysis, that a person's salary and benefits are often important, but where the individual lives and works are often more important, thereby suggesting that an objective analysis of undesirability in reviewing a transfer or reassignment should be left to the jury); Levinson, *supra* note 107, at 659-60 (arguing that an employee will have to show that a transfer or reassignment is both discriminatory and undesirable, and that employers should not fear frivolous litigation because these issues can be difficult to establish).

119. See, e.g., *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 512-13 (11th Cir. 2000) (accepting the employee's second transfer as clearly fitting the tangible employment action mold because it resulted in a large pay decrease, but questioning whether her first transfer could be considered a tangible employment action as it did not alter her compensation or benefits); see *Lidge*, *supra* note 60, at 387-88 (asserting that courts are not equipped to make decisions about the material adversity of any given employment action because some people may believe that a particular transfer or reassignment is nothing more than an inconvenience while others might reasonably feel that the new position will be much less rewarding or challenging).

120. See, e.g., *Hulsey v. Pride Rest., LLC*, 367 F.3d 1238, 1247 (11th Cir. 2004) (reprimanding the district court for granting summary judgment for the defendant employer, explaining that if a jury finds that the victim-employee reasonably establishes that the supervisor fired the employee because the employee refused the supervisor's advances, the plaintiff will have established a "paradigm case" of employer liability for sexual harassment for the supervisor's tangible employment action).

121. See 178 F.3d 253, 255 (4th Cir. 1999) (involving a NASA employee who alleged that the undesirable working conditions in her job reassignment created a material change in working condition sufficient to be considered an adverse

The court in *Boone* held that though the plaintiff's new position might be unfamiliar and more stressful than her previous position, she did not allege any discharge, demotion, decrease in pay or benefits, change in job title or supervisory responsibility or decrease in opportunity for advancement or promotion, and consequently could not show an adverse employment action.¹²² But, on those same facts, it is possible that a perceptible jury could find that the plaintiff had suffered an objectively undesirable reassignment because she was forced to take a new position which was, for reasons she may have been able to articulate in court, unpleasant and undesired. Hence, a court in this situation should submit the tangible employment action determination to the jury.¹²³ Courts could easily use this objective analysis to determine whether an official action is tangible or a reassignment is undesirable, particularly because they already use objective analyses in many other areas of employment discrimination law. Further, the objective standard is justified easily by returning to agency liability theory.

IV. FOLLOWING AGENCY PRINCIPLES TO JUSTIFY THE OBJECTIVE, OFFICIAL UNDESIRABLE REASSIGNMENT

The Supreme Court, Congress and the EEOC all agree that agency principles should guide court determinations of employer liability.¹²⁴ While courts now analyze employer liability by concentrating on whether an employment action is "adverse," "material" or

employment action).

122. See *id.* at 255-56 (discussing the fact that Boone did not suffer any change in compensation or benefits, failed to offer evidence that her new position would decrease her opportunities for promotions, and did not present substantial evidence of poor working conditions).

123. See, e.g., *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002) (suggesting three categories of tangible employment actions: 1) those that directly cause an economic harm, like termination; 2) those that indirectly have economic consequences, such as a transfer that lessens the possibility for future promotion; and 3) those where the conditions of an individual's job are changed and the alterations could be characterized as objectively creating a hardship). In the third category, similar to *Boone*, the analysis should be whether a reasonable person in the position of the employee would feel that the changes to the employee's position are sufficiently severe to substantially worsen the conditions of employment. *Id.* at 745.

124. See 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2000) (making it unlawful for an employer to discriminate on the basis of sex, and defining "employer" to include any agent of the employer); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998) (reasoning that when an employee's supervisory authority makes the harassing conduct possible, it is logical to look to agency principles to find an employer liable); EEOC, *Policy Guidance on Current Issues in Sexual Harassment* (Mar. 19, 1990), available at www.eeoc.gov/policy/docs/currentissues.html (describing changes to the interpretation of the law, but approving the Court's *Meritor* opinion that relied on EEOC guidance in suggesting that agency principles should guide discussions of employer liability).

“detrimental,”¹²⁵ they should begin their analysis by remembering that the “aided by the agency relationship” theory is the basis for employer liability.

Courts tend to bypass the concrete stepwise liability framework set forth in the *Ellerth* and *Faragher* decisions.¹²⁶ After determining that employers could be liable for supervisor sexual harassment under the agency relationship theory, the Supreme Court noted that this could lead to automatic employer liability in many situations, as supervisors and coworkers alike could participate in harassing behavior at the workplace.¹²⁷ Because this automatic liability is exactly what *Meritor* proscribed, the Court needed an avenue to limit liability and decided on the tangible employment action standard.¹²⁸

Recognizing the Supreme Court’s process, lower courts should note that there must be something to prove that the supervisor’s authority as an agent of the employer made the discriminatory conduct possible, instead of searching solely for a tangible employment action.¹²⁹ Keeping this point in mind, courts should find that

125. See, e.g., *Smith v. Chrysler Fin. Corp.*, 101 F. Supp. 2d 534, 544 (E.D. Mich. 2000) (searching for a “materially adverse” employment action to hold the employer strictly liable).

126. See *Ellerth*, 524 U.S. at 754 (asserting that because the quid pro quo and hostile work environment categories should not determine employer liability, the Court must decide whether an employer is liable for a supervisor’s unfulfilled threats when they create a hostile work environment); *Faragher*, 524 U.S. at 792 (noting that, while common-law agency principles may not be completely applicable or transferable, they are very useful in analyzing when and in what capacity employers should be held liable for supervisor sexual harassment).

127. See *Ellerth*, 524 U.S. at 758-60 (recognizing that supervisors use the actual authority given to them by their employers, described in the “aided by the agency relation” standard, to commit sexual harassment). However, to avoid automatic liability, the Court notes that this employment relationship alone is not enough, and that “something more” than solely the employment relationship is needed to impose strict liability. *Id.* at 760.

128. See 477 U.S. at 72 (pronouncing that Congress’ definition of “employer” in Title VII to include any “agent” of an employer “surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible”); *Ellerth*, 524 U.S. at 760-61 (holding that a tangible employment action serves to assure that the changes in the harassed employee’s job could not have been inflicted without the power of the employer bestowed upon the harassing supervisor); *Faragher*, 524 U.S. at 803 (reasoning that a victim-coworker can walk away or talk back to a harassing coworker, whereas the employee does not have the same options towards a supervisor who has the power to alter the terms or conditions of the subordinate’s employment by effecting a “tangible employment action”).

129. See, e.g., *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003) (holding that the existence of a tangible employment action affects the availability of the *Ellerth/Faragher* affirmative defense, but that the employer liability depends on whether the power of the supervisor enabled him to create or maintain the hostile work environment); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002) (noting that the supervisor’s ability to force subordinates to submit to his sexual demands came from the supervisor’s relationship to the employer, and that the principle point remains that a coworker would not have the same authority to require submission or change the harassed employee’s job).

transferring an employee to another building, reassigning an employee to a different shift, or creating new and unwanted responsibilities for an employee are all “official acts” of the employer, and are thus tangible employment actions.¹³⁰

If courts use agency principles in this way when analyzing employer liability objectively, the outcome of sexual harassment cases involving transfers or reassignments will be more consistent across federal jurisdictions.¹³¹ This in turn will help employers make the changes necessary to avoid liability or stop the sexual harassment before it becomes a situation that could create liability.¹³²

If the employer knew from precedent or EEOC policy guidance that all transfers or reassignments that change an employee’s position would result in strict employer liability, the employer could take appropriate precautions.¹³³ For example, the employer could make it clear through postings and email reminders that the employer has a “zero tolerance” policy, under which the employer would terminate any supervisor who transfers or reassigns a subordinate employee for discriminatory reasons.¹³⁴

Following this “official act” analysis, and remembering that the purpose is to hold employers liable for employment actions made

130. See, e.g., *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 512 (11th Cir. 2000) (assessing a transfer from the morning shift to a midday shift that did not alter the employee’s compensation, and holding that the transfer may or may not fit within the definition of a tangible employment action).

131. See, e.g., Lidge, *supra* note 60, at 398 (explaining how concentrating on the adversity standard for employment actions will lead to employers avoiding liability in cases where a supervisor transfers the victim but where she retains her title and compensation level). This scenario, which is avoidable using the objective analysis, allows the employer to discriminate on the basis of sex, going directly against Title VII. *Id.*

132. See Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After Ellerth and Faragher*, 6 DUKE J. GENDER L. & POL’Y 3, 14 (1999) (expounding that the courts’ interpretation of a tangible employment action is crucial to an employer’s ability accurately to calculate its risks and knowledgeably determine what changes to enact in its policies and procedures).

133. See, e.g., 29 C.F.R. § 1604.11 (asserting that prevention is the ideal mechanism for avoiding sexual harassment at the workplace, and suggesting that employers “take all steps necessary” to prevent harassment, including raising the subject to its employees, developing and advertising aggressive sanctions, informing employees of their right to report harassment, and sensitizing all employees to the issue).

134. See, e.g., *Int’l Bhd. of Teamsters v. United Parcel Serv., Inc.*, 335 F.3d 497, 508 (6th Cir. 2003) (referring to the employer’s zero-tolerance policy for harassment in the workplace, which applied to all employees, and explained that any conduct covered by the policy “will result in disciplinary action up to and including dismissal”) (quoted from the employer’s policy; emphasis in court opinion); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 973-74 (7th Cir. 2004) (finding that the employer received a complaint and, pursuant to its zero-tolerance sexual harassment policy, asked the harassed employee to write a report, gave her the night off with pay, called the alleged harasser in for an investigation, monitored his phone calls, and interviewed others who were present at the time of the incident).

possibly by a supervisor's relation to the employer, courts that analyze employer liability based on finding an adverse employment action will no longer face inconsistent, arbitrary outcomes.¹³⁵ Once the court finds that the employee used his position as an agent of his employer, and the power that attaches, to change some aspect of the subordinate employee's job, the jury will decide whether or not the employment decision objectively affected the subordinate's employment status.¹³⁶ The emphasis in using the official employment action analysis correctly centers on the supervisor's role as an agent of his employer. The standard uses the particular action he took against his subordinate as a way to be sure of the essential "official act" requirement.¹³⁷

CONCLUSION

Courts are incorrectly analyzing reassignments and transfers, typically insisting on an adverse employment decision or an economic harm to hold an employer liable.¹³⁸ This Comment proposes that courts should determine employer liability for supervisor sexual harassment by first establishing whether the supervisor acted within his or her official power granted by the employer in committing the harassment. Once courts find an official act, they should allow a jury to determine whether the resulting reassignment or transfer was in fact "undesirable."¹³⁹ Courts should advise the jury to use an

135. Compare *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002) (holding that the supervisor's demands that she submit to sexual acts and his threats to fire her if she refused constituted a tangible employment action inasmuch that the supervisor changed her employment status by adding the term or condition of weekly sexual abuse to her employment), with *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 698 (7th Cir. 2001) (announcing that a tangible employment action, as used in analyzing employer liability, is akin to a materially adverse employment action, as discussed in establishing a prima facie case of discrimination).

136. See *Robinson v. Sappington*, 351 F.3d 317, 337 (7th Cir. 2003) (determining that the harassed employee's resignation, effectively a constructive discharge, was her only option in avoiding an intolerable working situation, and finding that her supervisor used the official power entrusted in him by his employer to cause the constructive discharge, making it a tangible employment action).

137. See *Ellerth*, 524 U.S. at 760-62 (finding that an employer is liable for the unlawful acts of his employees, made possible because of their employment relationship, and that to ensure that automatic liability does not result, courts should look for a tangible employment action to prove that the supervisor did in fact use the "official power" of the employer).

138. See, e.g., *Smith v. Chrysler Fin. Corp.*, 101 F. Supp. 2d 534, 544 (E.D. Mich. 2000) (following *Ellerth's* misguidance and searching for a "materially adverse" employment action); *Green v. Adm'r of Tulane Educ. Fund*, 284 F.3d 642, 654-55 (5th Cir. 2002) (finding that a demotion not accompanied by an economic harm would not constitute a tangible employment action).

139. See, e.g., *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 34 (1st Cir. 2003) (recognizing that a judge should only grant summary judgment for the defendant-employer when the facts of the case are wholly undisputed).

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objective analysis, specifically whether a reasonable person in the plaintiff's position would find the change in her job status undesirable.¹⁴⁰ Using this official tangible employment action standard, courts would return to the core of the employer liability scheme and find employers liable when their agents, acting through the guise of their employers, effect tangible employment actions on subordinate employees.¹⁴¹

140. See, e.g., *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 75 (2d Cir. 2001) (asserting that a jury should determine through an objective analysis whether the plaintiff reasonably held her subjective belief that her supervisor's conduct was offensive and abusive).

141. See *Ellerth*, 524 U.S. at 760-61 (reasoning that when a court finds that a tangible employment action occurred, based on a supervisor's misuse of the official power granted to him by his employer, the court is assured that the supervisor is acting as the employer's agent and can hold the employer liable for the supervisor's discriminatory conduct).