American University Law Review

Volume 54 | Issue 6 Article 4

2005

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AGENCY AND LIABILITY IN SEXUAL HARASSMENT LAW: TOWARD A BROADER DEFINITION OF TANGIBLE EMPLOYMENT ACTIONS

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* Note and Comment Editor, *American University Law Review*, volume 55. J.D. Candidate, May 2006, *American University, Washington College of Law*. B.A., 2001 *Gordon College*. Many thanks to Professor Susan D. Carle for her invaluable guidance throughout the process of writing this comment, my editor Jessica Salsbury for her careful editing advice, Professor Penelope J. Pether for her extremely helpful suggestions, and Professor Candace S. Kovacic-Fleischer for her insightful appraisal of my argument. Thanks also to the staff of the *American University Law Review* for their skilled editorial assistance. Finally, and most importantly, I want to thank my wife, Rachel, for her patience and support throughout this process.

INTRODUCTION

Sexual harassment in the workplace frequently occurs between supervisors and employees.[1] Enabled by the authority and power of their positions, supervisors are capable of harming employees in ways unavailable to mere co-workers.[2] Consequently, under Title VII, an employer may be held vicariously liable when a supervisor sexually harasses another employee.[3] However, determining the exact parameters of an employer's liability is a contentious area of sexual harassment law.[4] Recent Supreme Court cases have established a framework for employer liability under which an employer is vicariously liable when a supervisor's conduct culminates in a tangible employment action.[5] In the absence of a tangible employment action, however, the employer can raise an affirmative defense to liability, which, if met, effectively terminates the lawsuit.[6]

The term tangible employment action is defined as a significant change in employment status and most commonly describes acts such as "hiring,

1. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 798 (1998) (asserting that sexual harassment by supervisors is a "persistent problem" in the workplace and justifies legal developments that shift the burden of the "untoward" conduct to the employer as a cost of business); *see also* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 5-8 (2003) (commenting that four out of ten women are victims of sexual harassment).

2. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991) (emphasizing that a supervisor's unique position of authority in the workplace enables the supervisor to sexually harass other employees).

3. *See* David B. Oppenheimer, *Employer Liability for Sexual Harassment by Supervisors*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 272, 272 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing employer liability standards for workplace sexual harassment).

4. *Compare* B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1, 14-16 (1999) (postulating that *Ellerth* most likely narrowed the category of conduct for which an employer could be held automatically liable), *with* Angela Scott, Casenote, *Employers Beware! The United States Supreme Court Opens the Floodgates on Employer Liability Under Title VII.* Burlington Industries, Inc. v. Ellerth, *118 S.Ct. 2257 (1998)*, 24 S. ILL. U. L. J. 157, 172-74 (1999) (arguing that employers' vicarious liability for sexual harassment is limited only by a poorly defined affirmative defense).

5. *See Faragher*, 524 U.S. at 804 (establishing a liability framework which confers liability based on the presence of an agency relationship between the employer and the harassing supervisor).

6. *See* discussion *infra* Part I.C. (pointing out that few obstacles prevent an employer from successfully raising an affirmative defense).

firing, or failing to promote," through which the supervisor exercises company authority to inflict harm on another employee.[7] This term, which is the link that renders the employer automatically liable for the supervisor's conduct, is pivotal in sexual harassment law.[8] Many courts hold that the term tangible employment action is limited exclusively to a narrow category of conduct that constitutes direct economic loss.[9] In the context of sexual harassment, however, where the mistreatment an employee experiences may not be "tangible" in the traditional sense, the scope of this definition is less clear.[10] Many commentators suggest that an inordinately high number of Title VII violations are dismissed at summary judgment.[11] A narrow definition of the term tangible employment action would increase this number.[12] Accordingly, identifying the parameters of this term is crucial for victims of sexual harassment.[13] To encourage lower

7. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (defining a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

8. *See* Philip K. Lyon & Bruce H. Phillips, Faragher v. City of Boca Raton *and* Burlington Indus., Inc. v. Ellerth: *Sexual Harassment Under Title VII Reaches Adolescence*, 29 U. MEM. L. REV. 601, 633-34 (1999) (concluding that the presence of a tangible employment action is "the guidepost" for employer liability in sexual harassment cases).

9. *See, e.g.*, Barra v. Rose Tree Media Sch. Dist., 858 A.2d 206, 217 (Pa. Commw. Ct. 2004) (finding no tangible employment action despite the presence of conduct that could be considered substantial changes in employment status).

10. *See* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 311 (2004) (stressing that while the scope of the tangible employment action framework is a "seemingly small doctrinal issue," it often determines the outcome of many cases because, in the absence of a tangible employment action, employers are commonly able to successfully raise the affirmative defense). A narrow definition of the term tangible employment action will permit many employers to raise an affirmative defense to vicarious liability. *Id.* This will inevitably lead to an increase in the number of cases dismissed at summary judgment. *Id.* Chamallas' excellent work on constructive discharge proposes a causation-based model under which a constructive discharge would always constitute a tangible employment action. *Id.* at 391. Chamallas makes a powerful argument that supervisors utilize informal workplace structures to sexually harass subordinate employees as effectively as they utilize official power. *Id.*

11. *See* John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1405 (2002) (noting that the low threshold required for employers to satisfy the *Ellerth* and *Faragher* affirmative defense allows employers to easily meet the requirements for summary dismissal of many sexual harassment cases).

12. *See* Chamallas, *supra* note 10, at 325-26 (emphasizing that the absence of a tangible employment action increases the likelihood that the victim's claim will be dismissed and injuries from the sexual harassment will remain uncompensated).

13. *See* Lyon & Phillips, *supra* note 8, at 633-34 (asserting that because the presence of a tangible employment action is now the "guidepost" for sexual harassment claims, plaintiffs should develop whatever facts possible to demonstrate the presence of a tangible employment action); David F. McCann, *Issues in the Third Circuit: Supervisory Sexual Harassment and Employer Liability: The Third Circuit Sheds Light on Vicarious Liability and Affirmative Defenses*, 45 VILL. L. REV. 767, 783-84 (2000) (highlighting that the presence or absence of a tangible employment action "is of paramount importance" for victims of sexual harassment).

courts to establish a broad definition of the term tangible employment action, this Comment advocates a construction of this term to include two forms of supervisory conduct: (1) conduct that constitutes direct economic loss, and (2) conduct that leads to consequential economic loss.[14]

The Supreme Court's recent decision in *Pennsylvania State Police v. Suders*,[15] which raised important questions about the scope of employer liability, permits a broad definition of the term tangible employment action.[16] In holding that a constructive discharge is not a per se tangible employment action, the Court stated that cases involving supervisory-based sexual harassment should be divided based on the presence or absence of an official action.[17] In *Suders*, Ms. Suders' supervisors hid her computer skills exams, did not score the exams, told her that she failed the exams, and accused her of theft when she discovered the exams hidden in a file cabinet.[18] The Court stated that "[a]lthough most of the discriminatory behavior Ms. Suders alleged involved unofficial conduct, the events surrounding her computer-skills exams . . . were less obviously unofficial."[19] This observation suggests that the Court's definition of the term tangible employment action is not limited to a narrow category of supervisory conduct, but rather covers a broad range of such conduct.[20]

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14. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 110, at 766-67 (5th ed. 1984) (asserting that two forms of damages, direct and consequential, are available in tort actions involving misrepresentation and nondisclosure). The authors discuss the extent that the doctrines of misrepresentation and non-disclosure run throughout tort law. *Id.* § 105, at 725. Although the two categories of damages are discussed in relation to the tort of misrepresentation and nondisclosure, the principle can be transferred to a federally recognized tort such as sexual harassment where a supervisor uses a position of authority to inflict emotional distress on another employee. *Cf. id.* (recognizing that a fraudulent lie may give rise to a cause of action for the intentional infliction of mental suffering).

15. 542 U.S. 129 (2004).

16. *See* Joan M. Gilbride & Yael J. Erdheim, '*Suders' is a Small Victory for Plaintiffs*, N.Y. L. J., July 22, 2004, at 4 (noting that determining what conduct constitutes a tangible employment action under *Suders* is a question lower courts are left to resolve).

17. *See Suders*, 542 U.S. at 140-41 (concluding that hostile work environment constructive discharge qualifies as a tangible employment action *only* when precipitated by an official act); Gilbride & Erdheim, *supra* note 16, at 4 (appraising the Supreme Court's decision in *Suders* and predicting that the Supreme Court's failure to provide precise guidelines for the term "official" action will leave the question for lower courts to decide).

18. *Suders*, 542 U.S. at 136.

19. *Id.* at 152 n.11; *cf.* Shari M. Goldsmith, Casenote: *The Supreme Court's* Suders *Problem: Wrong Question, Wrong Facts Determining Whether a Constructive Discharge is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 844-45 (2004) (criticizing the Third Circuit's decision in Ms. Suders' case for avoiding the complicated issue of whether an official act lay at the root of the supervisors' discriminatory conduct).

20. *See Suders*, 542 U.S. at 152 n.11 (suggesting that a factfinder could find that the supervisors' actions regarding the computer skills exams constituted official conduct); *see, e.g.*, Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999) (positing that although direct economic harm is frequently present in a tangible employment action, it is not required and that if a supervisor's conduct decreases earning potential or causes a significant disruption in working conditions, a tangible employment action may be found).

To facilitate this argument, Part I provides a background of sexual harassment law under Title VII.[21] Part I examines the Supreme Court's recognition of hostile work environment sexual harassment as a form of gender discrimination under Title VII.[22] It discusses the Court's recent application of the term tangible employment action and addresses the Court's ambiguous definition of this term.[23] Part II of this Comment advocates a broad interpretation of the term tangible employment action[24] and argues that this interpretation is consistent with both the "aided by the agency" standard for employer liability[25] and the Court's decision in *Suders*.[26] Finally, Part II argues that a broad definition of the term tangible employment action facilitates Title VII's objective of deterrence and remediation.[27]

I. TANGIBLE EMPLOYMENT ACTIONS EMERGE AS THE "GUIDEPOST" FOR EMPLOYER LIABILITY

In an attempt to deter sexual harassment and provide a remedy for victims of sexual harassment, Title VII[28] holds employers vicariously liable when a supervisor sexually harasses another employee.[29] The scope of an employer's liability, however, is an enduring problem in sexual harassment law.[30] After several years of confusion among the lower courts, the Supreme Court finally established a uniform framework for employer

21. *See* discussion *infra* Parts I.A., I.B. (detailing the development of employer liability standards for supervisory-based sexual harassment).

22. *See* discussion *infra* Part I.A. (examining the doctrinal development of employer liability for sexual harassment perpetrated by a supervisory employee).

23. *See* discussion *infra* Part I.C. (appraising the problems associated with the affirmative defense framework established in *Ellerth* and *Faragher*).

24. *See* discussion *infra* Part II.A. (expounding a definition of the term tangible employment action that includes both direct and consequential economic loss).

25. *See* discussion *infra* Part II.B. (applying the "aided by the agency" standard to the definition of tangible employment actions advocated in this comment).

26. *See* discussion *infra* Part II.C. (contending that the Supreme Court's decision in *Suders* supports a broad definition of the term tangible employment action).

27. *See* discussion *infra* Part II.D. (ensuring that a broad definition of the term tangible employment action is consistent with Title VII's deterrent objective).

28. 42 U.S.C. § 2000e-2(a)(1) (2000) (stating "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any 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* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (explaining Congress' last-minute decision to include a prohibition against sexual discrimination as part of Title VII).

29. *See Meritor*, 477 U.S. at 70 (concluding that Title VII limits the extent to which an employer can be held liable when a supervisor sexually harasses an employee).

30. *See* B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 136-38, 142-43 (2001) (suggesting that the lower courts' struggle to interpret vague and unclear liability standards characterizes the history of employer liability for sexual harassment).

liability.[31] The presence or absence of a tangible employment action is central to this liability framework and remains the "guidepost"[32] for employer liability in sexual harassment law.[33] A tangible employment action, which occurs when a supervisor exercises official company authority to sexually harass the employee, signifies the category of conduct that connects the supervisor to the employer and renders the employer liable for the sexual harassment.[34] Although this framework has been criticized,[35] it continues to guide courts in determining the proper circumstances under which an employer can be held liable for a supervisor's sexual harassment of another employee.[36]

A. Hostile Work Environment Sexual Harassment

In *Meritor Savings Bank v. Vinson*,[37] the Supreme Court recognized

31. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (establishing a bright line framework for employer liability when a supervisor sexually harasses an employee); Lyon & Phillips, *supra* note 8, at 617 (suggesting that the Supreme Court's adoption of a bright line liability test in *Ellerth* and *Faragher* eliminated the cumbersome need under *Meritor* to determine whether a plaintiff's claim met the definition of quid pro quo sexual harassment).

32. *See* Lyon & Phillips, *supra* note 8, at 634 ("The presence of a tangible employment action is now the guidepost for liability in all cases involving sexual harassment by supervisors.").

33. *See* George, *supra* note 30, at 141 (emphasizing that where no tangible employment action is alleged the analysis of liability moves from a focus on the employer's vicarious liability to an analysis of the employer's negligence under the affirmative defense framework).

34. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998) (establishing employer liability standards for hostile work environment sexual harassment). Many courts have confused the term "tangible employment action," used for determining an employer's liability for supervisory-based sexual harassment, with the term "adverse employment action," used for determining whether a plaintiff has an actionable claim of gender discrimination or retaliation under Title VII. *See, e.g.*, Hillig v. Rumsfeld, 381 F.3d 1028, 1031 (10th Cir. 2004) (noting that the *Ellerth* and *Faragher* definition of tangible employment actions was not meant to provide a comprehensive definition of adverse employment actions for all employment discrimination claims); 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, 634-36 (2003) (contending that due to different policy concerns, the standard for defining a tangible employment action for purposes of liability differs significantly from the standard for defining an adverse employment action for purposes of establishing a prima facie case under Title VII). *But see, e.g.*, Knight v. Norton, No. 02-8628, 2004 U.S. Dist. LEXIS 9472, at *13 (E.D. Pa. May 19, 2004) (applying the definition of the term tangible employment action established in *Ellerth* to an analysis of whether a plaintiff has met the prima facie requirement of showing an adverse employment action).

35. *See* Brian C. Baldrate, Note, *Agency Law and the Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in* Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton, 31 CONN. L. REV. 1149, 1176-77 (1999) (contending that the Court's holdings in *Ellerth* and *Faragher* ultimately make the lower courts' task of assigning liability for supervisory based sexual harassment more difficult).

36. *See* Lyon & Phillips, *supra* note 8, at 626 (indicating that employer liability in light of *Ellerth* and *Faragher* hinges on whether or not the sexual harassment involved a tangible employment action).

37. *See* 477 U.S. 57, 72 (1986) (holding that hostile environment sexual harassment is

hostile work environment sexual harassment as a cause of action under Title VII and concluded that Title VII prohibits gender discrimination even if the discrimination results in purely psychological or emotional injuries.[38] Prior to *Meritor*, Title VII's prohibition was limited to conduct described as quid pro quo sexual harassment,[39] which exists when an employer conditions a promotion, employment status, or higher wages on the employee's submission to the supervisor's sexual advances.[40] A hostile work environment claim, in contrast, is not limited to employment status or promotion,[41] but rather involves "intimidating, hostile, or offensive"[42] conditions of employment.[43] *Meritor* thus provided a framework for two forms of sexual harassment: (1) hostile work environment, and (2) quid pro quo.[44] In recent decisions, however, the Supreme Court has effectively

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actionable under Title VII); *see also* Oppenheimer, *supra* note 3, at 278 (applauding the Supreme Court in *Meritor* for adopting the view that sexual harassment is a recognized form of sexual discrimination).

38. *See Meritor*, 477 U.S. at 64 (expanding Title VII's scope beyond merely economic injuries to include psychological and emotional injuries); *see also* Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981) (reasoning that Title VII's specific prohibition of discriminatory conduct affecting an employee's "conditions of employment" was not limited merely to economic job benefits but rather included psychological and emotional injuries arising out of a sexually hostile work environment).

39. *See* Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982) (noting that Title VII is not limited to conduct which results in tangible job consequences); *Bundy*, 641 F.2d at 945-46 (finding a Title VII violation when a supervisor sexually harasses an employee, regardless of economic injury, so long as the discrimination significantly alters the conditions of employment).

40. *See* Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (summarizing that quid pro quo sexual harassment occurs when a supervisor conditions a job benefit or detriment upon an employee's acceptance of the supervisor's sexual advances); Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1115 n.10 (N.D. Ill. 1996), *rev'd en banc per curiam sub nom.* Jansen v. Packaging Corp., 123 F.3d 490 (7th Cir. 1997), *aff'd sub nom.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (commenting that to prevail on a claim for quid pro quo sexual harassment the plaintiff would have to prove that the supervisor actually withheld benefits from the plaintiff as a result of the plaintiff's failure to submit to the supervisor's sexual demands).

41. *See Bundy*, 641 F.2d at 944 (interpreting the clause "conditions of employment" under Title VII to include psychological and emotional injuries); *see, e.g.*, Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002) (discussing the elements required for a hostile work environment claim).

42. *See Meritor*, 477 U.S. at 66 (recognizing a cause of action for hostile work environment sexual harassment, which unlike a quid pro quo claim, is unrelated to the economic nature of the victim's injuries).

43. *See* Andrews v. City of Phila., 895 F.2d 1469, 1485 (3d Cir. 1990) (holding that pervasive insults to women in general, and to female employees in particular, may be used as evidence of a hostile work environment); Ross v. Double Diamond, Inc., 672 F. Supp. 261, 271-73 (N.D. Tex. 1987) (stating that Title VII is not a shield to protect employees from discrimination, but rather provides remedies for those whose claim is sufficiently severe or pervasive to alter employment conditions or create a hostile work environment).

44. *See* Baldrate, *supra* note 35, at 1154-55 (emphasizing *Meritor*'s accomplishments in the field of sexual harassment law). *Meritor* had three significant accomplishments. *Id.* First, it was the first time the Supreme Court recognized hostile work environment sexual harassment. *Id.* Second, the Court refused to hold employers automatically liable for supervisory-based sexual harassment. *Id.* Third, the Court indicated that employer liability under Title VII should be governed by agency principles. *Id.*

abolished this distinction and reworked the framework of employer liability to focus on the presence or absence of a tangible employment action.[45]

1. Meritor's *liability framework failed to accommodate many claims of sexual harassment*

After *Meritor*, the development of ambiguous liability standards among the lower courts revealed the problem with the Court's distinction between quid pro quo and hostile work environment sexual harassment.[46] Guided by *Meritor*'s instruction to limit employer liability, lower courts turned to the common law agency principles summarized in the Restatement (Second) of Agency to establish standards for employer liability.[47] Frequently, lower courts applied the "scope of employment" standard, under which an employer is vicariously liable only if the supervisor's actions are within the scope of the supervisor's employment.[48] Courts,

45. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 801 (1998) (suggesting that the move toward a standard of liability that hinges on the presence of a tangible employment action is designed to ensure uniform liability standards among the various forms of sexual harassment claims).

46. *See Meritor*, 477 U.S. at 72 (declining the opportunity to declare a definitive rule on employer liability). In *Meritor*, rather than adopting a definitive rule of employer liability, the Supreme Court stated two general, and ultimately confusing, guidelines. *Id.*. First, the Court in *Meritor* stated that employers are not automatically liable for supervisory-based sexual harassment. *Id.* Second, the Court stated that the lack of notice to the employer does not necessarily shield the employer from liability. *Id.*; *see Faragher*, 524 U.S. at 785 (assessing the problems with establishing appropriate standards for employer liability for supervisory-based sexual harassment). After *Meritor*, the lower courts struggled to establish appropriate and uniform standards of employer liability. *Faragher*, 524 U.S. at 785; *see* Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464-65 (7th Cir. 1990) (asserting a negligence standard for employer liability under which an employer is liable only if the employer knew of the discriminatory conduct and did nothing to stop it); *cf.* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 360-63 (1992) (contending that the Supreme Court's decision in *Meritor* is inadequate because it conflates the common law doctrine of *respondeat superior* with employer liability under Title VII). *Compare Ross*, 672 F. Supp. at 274 (adopting the concurrence opinion in *Meritor* as a basis for imposing strict liability on an employer for a supervisor's discriminatory conduct), *with* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 n.1 (11th Cir. 1989) (observing that when a supervisor acts outside the scope of employment, the employer can be indirectly liable for the sexual harassment if the employer knew or should have known about the discrimination and did nothing to stop it).

47. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (noting that the Restatement (Second) of Agency is a useful foundation for establishing standards of employer liability under Title VII). Under Section 219 of the Restatement (Second) of Agency:

> (1) A master is subject to liability for the torts of his servants committed while acting outside the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or consequences; or (b) the master was negligent or reckless; or (c) the conduct violated a non-delagable duty of the master; or (4) (i) the servant purported to act or speak on behalf of the principle and there was reliance upon apparent authority, or (ii) he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

48. RESTATEMENT (SECOND) OF AGENCY § 219(1); *see Ellerth*, 524 U.S. at 756

however, rarely found sexual harassment, which is frequently framed as a "frolic and detour,"[49] to be within a supervisor's "scope of employment."[50] When the sexual harassment fell outside the scope of employment, as it usually does, courts applied the negligence standard,[51] under which an employer is liable *only* when the employer negligently fails to stop the sexual harassment.[52] These liability standards, which often posed an insurmountable barrier to plaintiffs' efforts to establish employer liability for hostile work environment sexual harassment,[53] forced many plaintiffs to frame their sexual harassment suits as quid pro quo claims, which carried more favorable liability standards.[54]

More importantly, these ambiguous liability standards disguised the fundamental problem that many victims were denied compensation under Title VII despite the fact that the sexual harassment culminated in a tangible employment action.[55] For example, a supervisor's sexual

(summarizing the "scope of employment" standard).

49. *See Faragher*, 524 U.S. at 794 (asserting that sexual harassment serves no employer purpose and is accordingly considered a "frolic and detour" under the "scope of employment" standard). *See generally* KEETON ET AL., *supra* note 14, § 70, at 503-05 (distinguishing an action within the scope of employment, for which the employer is liable, from a "frolic and detour," for which the employer is not liable).

50. *See, e.g.*, *Steele*, 867 F.2d at 1316 n.1 (stating that whenever sexual harassment is not within the supervisor's scope of authority the employer is liable only if the employer was negligent in failing to discover and remedy the sexual harassment).

51. *See, e.g.*, Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994) (applying a negligence standard to determine an employer's liability for a supervisor's actions outside the scope of employment (citing EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).

52. *See, e.g.*, *id.* (holding that under a negligence standard the employer is liable only if it knew or should have known about the hostile work environment).

53. *See* Baldrate, *supra* note 35, at 1155 (contending that *Meritor*'s practical consequence was to permit the development of significantly different and irreconcilable standards for employer liability). *Compare Steele*, 867 F.2d at 1316 (reasoning that employer liability after *Meritor* is governed by whether the supervisor's action was within the scope of the supervisor's authority to make employment decisions), *with* Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989) (asserting that in hostile work environment cases an employer is liable only when it had actual or constructive knowledge that the supervisor sexually harassed the employee and did nothing to stop the harassment), Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (applying the "aided by the agency" standard to employer liability under Title VII), *and* Ross v. Double Diamond, Inc., 672 F. Supp. 261, 274 (N.D. Tex. 1987) (concluding that general Title VII principles permit holding an employer strictly liable for a supervisor's discriminatory actions). *But cf.* Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464-65 (7th Cir. 1990) (asserting that the confusion regarding the proper standard of employer liability under Title VII merely reflects "a semantic" problem and that the proper standard is a negligence standard).

54. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998) (recognizing that *Meritor* encouraged plaintiffs to state claims in terms of quid pro quo harassment because it afforded the plaintiff a better chance of holding the employer vicariously liable). The availability of vicarious liability for quid pro quo sexual harassment compelled many plaintiffs to state their claim as one of quid pro quo harassment as opposed to hostile environment sexual harassment. *Id.* This development put "expansive pressure" on the term quid pro quo. *Id.*; *see, e.g.*, *Nichols*, 42 F.3d at 510-11 (providing that whenever a quid pro quo claim is established the employer is strictly liable).

55. *Ellerth*, 524 U.S. at 753 (emphasizing that the issue in Ms. Ellerth's case was not whether the plaintiff could state a claim for quid pro quo harassment but instead whether the

harassment of an employee could culminate in that employee's termination, demotion, or denial of a promotion.[56] If unable to demonstrate the presence of a quid pro quo demand for sex, however, the victimized employee was commonly left uncompensated for his or her injuries.[57] Consequently, *Meritor*'s classification of sexual harassment into the rigid categories of quid pro quo and hostile work environment overlooked the fact that sexual harassment often culminates in a tangible employment action despite the absence of a quid pro quo demand for sex.[58]

2. The Court's decisions in Ellerth *and* Faragher

The Supreme Court's decisions in the companion cases of *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* resolved this confusion and established a framework in which the presence or absence of a tangible employment action became the "guidepost"[59] of employer liability.[60] The Court, recognizing that the terms quid pro quo and hostile work environment had "limited utility,"[61] established a two-part liability

employer had vicarious liability for the supervisor's conduct).

56. *See* George, *supra* note 4, at 14 (postulating that the term tangible employment action replaced the term quid pro quo with the effect of distinguishing the nature of the harm from the imposition of liability). A victim's claim of sexual harassment need not allege a quid pro quo demand for sex in order to prove the existence of a tangible employment action. *See* Lyon & Phillips, *supra* note 8, at 626 (pointing out that the Court in *Ellerth* appeared to indicate that all sexual harassment cases are to be considered hostile work environment cases with some claims alleging a tangible employment action and others not alleging such an action).

57. *See* George, *supra* note 4, at 14 (explaining that plaintiffs often attempted to "pigeon-hole" the harassment as a quid pro quo claim). The rigid distinction between hostile work environment and quid pro quo sexual harassment was based on the flawed assumption that sexual harassment is solely about sex. *See* Richelle Wise Kidder, Comment, *A Conciliatory Approach to Workplace Harassment*: Burlington Industries, Inc., v. Ellerth *and* Faragher v. City of Boca Raton, 36 HOUS. L. REV. 1315, 1317-18 (1999) (noting that a fundamental misconception of sexual harassment is that it is purely about sex when in fact it is often about one individual asserting power over another individual); *see, e.g.*, *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80 (1998) (finding an actionable claim of sexual harassment even though sexual desire was not a motivating cause of the harassment).

58. *See, e.g.*, Robinson v. Sappington, 351 F.3d 317, 337 (7th Cir. 2003) (finding a tangible employment action where a supervisor reassigned an employee and suggested that she resign). In *Robinson*, while there was a quid pro quo allegation against the harassing supervisor, there was no such allegation against the supervisor who ultimately transferred Ms. Robinson and suggested that she resign. *Id.*

59. Lyon & Phillips, *supra* note 8, at 633.

60. *See* Kidder, *supra* note 57, at 1320-23 (summarizing the standards of employer liability established in *Ellerth* and *Faragher*); Lyon & Phillips, *supra* note 8, at 626 (postulating that all sexual harassment cases are now hostile work environment claims and are distinguishable based on the presence or absence of a tangible employment action). Several commentators laud the Court's decisions in *Ellerth* and *Faragher* for establishing a "bright-line test for determining when an employer is or is not automatically liable for the sexually harassing conduct of supervisors." *Id.* at 617. *But see* Pa. State Police v. Suders, 542 U.S. 129, 152 (2004) (Thomas, J., dissenting) (arguing that a negligence standard is the appropriate standard for employer liability under Title VII).

61. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (providing a cause of

standard for all sexual harassment claims.[62] Under the first category, sexual harassment that culminates in a tangible employment action renders the employer automatically liable.[63] Under the second category, the absence of a tangible employment action provides the employer with the opportunity to raise an affirmative defense,[64] which consists of two elements: (1) the employer must exercise reasonable care to prevent and correct promptly any sexually harassing behavior,[65] and (2) the employer must prove that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[66] Essentially, the Court designed the affirmative defense to encourage both employers and employees to take reasonable

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action for hostile environment sexual harassment). While the terms quid pro quo and hostile work environment are still recognized as a distinction between two types of sexual harassment, the terms have "limited utility" and are most useful for establishing parameters of the plaintiff's prima facie case. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998); *see* Paul E. Starkman, *Learning the New Rules of Sexual Harassment:* Faragher, Ellerth *and Beyond*, 66 DEF. COUNS. J. 317, 317-19 (1999) (articulating that the terms quid pro quo and hostile work environment lack any meaningful and substantive difference); *see also* Fisher v. Electronic Data Systems, 278 F. Supp. 2d 980, 987 (S.D. Iowa 2003) (discussing the similarity and difference between quid pro quo sex discrimination and hostile work environment sex discrimination); McCormick v. Kmart Distrib. Ctr., 163 F. Supp. 2d 807, 824 (N.D. Ohio 2001) (recognizing that while the terms quid pro quo and hostile work environment are still valid, they are of limited usefulness in determining employer liability for a supervisor's sexually discriminatory conduct).

62. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 804-05 (1998) (establishing a framework for employer liability that encourages proactive employer deterrence as well as requiring the victimized employee to use reasonable means to make use of any anti-harassment policy provided by the employer).

63. *See* Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999) (articulating that the Supreme Court's position in *Ellerth* and *Faragher* of limiting employer liability was consistent with the traditional "aided by the agency" standard and ensured that employer liability would not be absolute); *see also* Marc A. Hearron, Note, *Employment Discrimination—Sexual Harassment—First Circuit Holds That Constructive Discharge Is Generally Not a Tangible Employment Action, Thereby Not Precluding the* Ellerth/Faragher *Affirmative Defense*—Reed v. MBNA Marketing Systems, Inc., 57 SMU L. REV. 481, 485-86 (2004) (arguing that along with the "aided by the agency" standard, the Supreme Court in *Ellerth* also permitted the use of an intent and negligence standard to determine the liability of supervisors acting outside the scope of employment).

64. *See Faragher*, 524 U.S. at 804 (reconciling the principle of vicarious liability with Title VII's objective of deterring discrimination); *see also Ellerth*, 524 U.S. at 765 (reiterating that an employer is vicariously liable when a supervisor sexually harasses another employee but, in the absence of a tangible employment action, may raise an affirmative defense to the liability).

65. *See* Jackson v. Arkansas Dep't of Ed., 272 F.3d 1020, 1025-26 (8th Cir. 2001) (concluding that the employer's remedial response to the plaintiff's complaint of sexual harassment was prompt and thorough and thus satisfied the affirmative defense); Mockler v. Multnomah Co., 140 F.3d 808, 812 (9th Cir. 1998) (holding that the employer's corrective actions, while taken in response to the victim's reporting sexual harassment, were insufficient to satisfy the first element of the affirmative defense).

66. *See Faragher*, 524 U.S. at 806-07 (incorporating the avoidable consequence doctrine to employer liability under Title VII and concluding that where no tangible employment action is taken the employer may raise an affirmative defense to liability by proving that the employer instituted an adequate anti-harassment policy which the employee unreasonably failed to utilize).

steps to deter and correct incidents of sexual harassment.[67]

The Supreme Court based its reasoning on the common law "aided by the agency" standard for employer liability.[68] Under this standard, an employer is liable when the agency relationship aids the supervisor in sexually harassing the employee.[69] Under the Court's formulation of the "aided by the agency" standard, the agency relationship aids a supervisor in accomplishing the tort of sexual harassment whenever the supervisor takes a tangible employment action against the employee.[70] The Court recognized that, theoretically, the agency relationship almost always aids the supervisor in sexually harassing the employee.[71] The employee, for example, cannot walk away from a supervisor in the same way that the employee can walk away from a mere co-worker.[72] The Court reasoned, however, that traditional agency principles and Title VII's deterrent function mandate a limited application of the "aided by the agency" standard.[73] The term tangible employment action provided such a limit.[74] The Supreme Court recognized that when a tangible employment action occurs, it is "beyond question" that "more than the mere existence of the employment relation aids in commission of the harassment."[75] The

67. *See* Kidder, *supra* note 57, at 1345-48, 1350-53 (recognizing that *Ellerth* and *Faragher*'s "give-and-take spirit," which imposes an obligation on both employers and employees to take reasonable steps to prevent sexual harassment, aims to deter sexual harassment in the workplace).

68. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)(2) (1958) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment . . . unless he was aided in accomplishing the tort by the existence of the agency relation.").

69. *Id.*; *see Ellerth*, 524 U.S. at 760-61 (applying the "aided by the agency" standard to employer liability under Title VII); *Faragher*, 524 U.S. at 803 (discussing the theoretical problems with the "aided by the agency" standard applied to Title VII and establishing the affirmative defense as a limit to employer liability).

70. *See* Kidder, *supra* note 57, at 1321-22 (explaining that due to the requirement of an official act of the enterprise, a tangible employment action becomes, for purposes of liability, an act of the employer).

71. *See Faragher*, 524 U.S. at 803 (recognizing that the employment relationship, coupled with the supervisor's authority, enables the supervisor to sexually harass an employee in ways that are unavailable to mere co-workers).

72. *See id.* (detailing how a supervisor's unique position of authority in the workplace enables the supervisor to sexually harass an employee through both official and unofficial conduct).

73. *See id.* at 804 (establishing a rule for employer liability to both facilitate Title VII's deterrent objective and adhere to *Meritor*'s admonition to avoid a rule of automatic liability); *Ellerth*, 524 U.S. at 764 (emphasizing that Title VII is designed to encourage the creation of anti-harassment policies to avoid litigation and promote conciliation); *see also* Marks, *supra* note 11, at 1418 (explaining that the Supreme Court in *Ellerth* and *Faragher* used the affirmative defense to limit an employer's liability in order to avoid a liability standard that imposed strict liability on the employer).

74. *See* Scott, *supra* note 4, at 168 (explicating that the Court in *Ellerth*, in recognizing that the "aided by the agency" standard could be interpreted to cover all supervisory conduct, decided to limit the agency standard to a class of conduct that was clearly aided by the existence of an agency relationship).

75. *Ellerth*, 524 U.S. at 761 (importing the concept of a tangible employment actions

presence of a tangible employment action is the link that renders the employer liable for the supervisor's sexual harassment of an employee; absent a tangible employment action, no connection exists with which to hold the employer automatically liable.[76]

The Supreme Court's decisions in *Ellerth* and *Faragher* laid the groundwork for determining employer liability in the context of sexual harassment but left much of the application ambiguous.[77] For instance, by failing to identify the scope of the term tangible employment action, the Court left unanswered the question of whether a constructive discharge, which occurs when an employee's work environment becomes so intolerable that the employee is forced to resign,[78] was a per se tangible employment action.[79] This ambiguity led to divergent views among the lower federal courts and to contentious debate among legal scholars.[80]

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developed in lower courts to the resolution of the issue of vicarious liability for claims of hostile work environment sexual harassment); *accord* Suders v. Easton, 325 F.3d 432, 456 (3d Cir. 2003), *vacated by* 542 U.S. 129 (2004) (interpreting the Supreme Court's language in *Faragher* as providing a non-exhaustive list of cases that qualify as tangible employment actions).

76. *See* Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After* Faragher and Burlington Industries, 74 N.Y.U. L. REV. 1786, 1800 (1999) (articulating that the extent to which the agency relationship aided the supervisor is logically related to the extent the employer caused the sexual harassment).

77. *See* Sara Kagay, *Applying the* Ellerth *Defense to Constructive Discharge: An Affirmative Answer*, 85 IOWA L. REV. 1035, 1046-47 (2000) (explaining that the central unanswered question after the Court's decisions in *Ellerth* and *Faragher* related to how courts should classify an employee's constructive discharge for purposes of employer liability).

78. *See* Pa. State Police v. Suders, 542 U.S. 129, 146 (2004) (recognizing that to establish a claim for hostile work environment sexual harassment, an employee must demonstrate that the working conditions were so intolerable that a reasonable person would have felt compelled to resign). There is still minor disagreement among the circuit courts as to the appropriate standard to use in evaluating claims of constructive discharge. *See* Baker v. John Morrell & Co., 382 F.3d 816, 829 (8th Cir. 2004) (asserting that to establish a constructive discharge a plaintiff must prove that the employer's actions were taken with the specific intent of forcing the employee to quit); EEOC v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641, at *16 (W.D.N.Y. Sept. 30, 2004) (contending that the Supreme Court's decision in *Suders* did not alter the Second Circuit's requirement that an employee alleging a constructive discharge must prove deliberate employer action); Luciano v. Coca-Cola Enter., Inc., No. 02-10895-RGS, 2004 U.S. Dist. LEXIS 17186, at *6 (D. Mass. Aug. 30, 2004) (asserting the evidentiary standard a plaintiff must meet to establish a claim for hostile work environment constructive discharge).

79. *See, e.g.*, *Suders*, 325 F.3d at 455 (determining that a constructive discharge falls within the *Ellerth* and *Faragher* definition of a tangible employment action).

80. *Compare* Kagay, *supra* note 77, at 1056 (declaring that the absence of the term constructive discharge from the list of tangible employment actions the Supreme Court enumerated in *Ellerth* and *Faragher* implied that the Court did not intend for a constructive discharge to be considered a tangible employment action), *with* Hearron, *supra* note 63, at 486-87 (arguing that allowing the affirmative defense for constructive discharge actually increases the likelihood of an employer being held liable for sexual harassment because in order for a plaintiff to prove a constructive discharge, the plaintiff must essentially disprove one element of the affirmative defense). Central to Hearron's argument is that a plaintiff bears the burden of proof for a constructive discharge while the employer bears the burden of proof for the affirmative defense. *Id.* Under this argument, employers would actually

B. Constructive Discharge within the Ellerth *and* Faragher *Framework—Lower Court Disagreement*

A constructive discharge occurs when an employee's working conditions become so intolerable that a reasonable person in the employee's position would feel compelled to resign.[81] The Court's holdings in *Ellerth* and *Faragher*, however, did not clarify whether a constructive discharge, by itself, constituted a tangible employment action—an omission that caused contentious disagreement among the circuit courts.[82]

For example, the Second Circuit in *Caridad v. Metro-North Commuter Railroad*, held that a hostile work environment constructive discharge does not constitute a tangible employment action and reasoned that a constructive discharge differs significantly from an actual discharge.[83] Ms. Caridad resigned from her employment with Metro-North after being sexually harassed[84] and argued that her constructive discharge was a tangible employment action under *Ellerth* and *Faragher*.[85] According to the Second Circuit, a constructive discharge, which does not necessarily involve an exercise of company authority, differs from an actual discharge, which is always a direct exercise of company authority.[86] Under this reasoning, therefore, a constructive discharge is not a per se tangible employment action.[87]

In *Suders v. Easton*, in contrast, the Third Circuit held that a constructive discharge constitutes a tangible employment action.[88] Here, three male

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benefit from a rule imposing automatic liability for claims of constructive discharge. *Id.*

81. *Suders*, 542 U.S. at 141.

82. *Id.* at 139-40.

83. *See* Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999) (clarifying that while a previous Second Circuit case stated that a constructive discharge is treated as if the employee had actually been fired, for purposes of employer liability, the two terms are not identical).

84. *See id.* at 290-91 (recounting the details of Ms. Caridad's experience as an employee of Metro-North).

85. *Id.* at 294.

86. *See id.* at 295 (contending that for purposes of employer liability, an actual discharge differs from a constructive discharge). *But see* Cathy Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELY J. EMP. & LAB. L. 401, 443-44 (2002) (asserting that the specific intent standard for proving a constructive discharge necessarily implies that the employer deliberately forced the employee to quit). Under the specific intent standard, a constructive discharge is essentially identical to an actual discharge: both require the employer's actual intent to force the employee to leave. *Id.* (noting that in Circuits following a specific intent standard for constructive discharge, a view of constructive discharge as different than an actual discharge is "particularly perverse").

87. *See Caridad*, 191 F.3d at 294 (summarizing the "aided by the agency" standard for employer liability under Title VII); Kagay, *supra* note 77, at 1057 (explaining that *Caridad*'s holding was based on a view of the "aided by the agency" standard in which a tangible employment action occurs only when the employer is implicated in the supervisor's sexual harassment of the employee).

88. *See* Chamallas, *supra* note 10, at 338 (asserting that while *Caridad* emphasized the "constructive" aspect of a constructive discharge, *Suders v. Easton* emphasized the

supervisors sexually harassed Ms. Suders, a secretary at a state police barracks in Pennsylvania.[89] The supervisors performed obscene gestures in front of Ms. Suders, made vulgar remarks about sexuality, and mocked her because of her age and gender.[90] As part of her job, Ms. Suders was required to pass a computer skills exam.[91] Each time Ms. Suders took the exam, however, her supervisors falsely informed her that she failed.[92] Shortly after taking the exam a third time, Ms. Suders discovered her previous exams hidden in a file cabinet and concluded that the exams had never been submitted for review.[93] The supervisors, realizing that Ms. Suders had found the hidden exams, accused her of theft, placed handcuffs on her, and took her photograph as if she had been arrested.[94] In response, Ms. Suders resigned.[95]

The Third Circuit held that a constructive discharge, which is the legal equivalent of an actual discharge, is a tangible employment action under the Supreme Court's decisions in *Ellerth* and *Faragher*.[96] According to the Third Circuit, the lack of official documentation is irrelevant because in creating working conditions so intolerable that an employee is forced to resign, the harassing supervisor effectively exercises company authority.[97] For the Third Circuit, therefore, a constructive discharge is, for purposes of employer liability, a tangible employment action.[98]

"discharge" aspect of a constructive discharge). *Compare* Suders v. Easton, 325 F.3d 432, 460 (3d Cir. 2003), *vacated by* 542 U.S. 129 (2004) (stressing that when a plaintiff bears the burden of proving a constructive discharge, the resignation is the functional equivalent of an actual discharge), *with Caridad*, 191 F.3d at 294 (contending that a constructive discharge can arise out of entirely unofficial conduct and thus bears little indicia of a tangible employment action).

89. *Suders*, 325 F.3d at 436.

90. *Id.* at 436-37.

91. *See id.* at 439 (summarizing the requirements for passing the computer skills exam).

92. *See id.* (noting that Ms. Suders believed her supervisors were lying when they told her about her test results).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.* at 458 (stating that a constructive discharge is a tangible employment action because it is fundamentally the functional equivalent of an actual discharge); *see also* Goldsmith, *supra* note 19, at 844-45 (claiming that the Third Circuit's approach to Ms. Suders' case did not address the paramount problem as to whether the actions underlying Ms. Suders' allegations of sexual harassment constituted official employer conduct).

97. *See Suders*, 325 F.3d at 459 (declaring that the proper inquiry focuses on the supervisor's actions to determine if the supervisor is exercising the official power of the company). *But see* Kagay, *supra* note 77, at 1056-58 (contending that a supervisor does not exercise company authority when the supervisor creates a hostile work environment, even if the supervisor's actions result in a constructive discharge).

98. *See Suders*, 325 F.3d at 450, 458 (asserting that the *Ellerth* and *Faragher* application of traditional agency principles to employer liability under Title VII compels the conclusion that a constructive discharge, even though it does not bear the company's approval as an actual discharge would, must still be considered a tangible employment action for purposes of holding the employer strictly liable); Hearron, *supra* note 63, at 483-85 (summarizing the Supreme Court's application of the "aided by the agency" standard to

The Supreme Court granted certiorari in *Suders* to resolve the issue of whether a constructive discharge brought about by supervisor harassment is a per se tangible employment action.[99] According to the Supreme Court, the fundamental difference between an actual discharge and a constructive discharge is that a constructive discharge does not necessarily require an official act of the company.[100] The Supreme Court reasoned that in most cases a tangible employment action "'is documented in official company records, and may be subject to review by higher level supervisors.'"[101] A purely hostile work environment, in contrast, entails no official documentation.[102] Accordingly, for purposes of employer liability, a constructive discharge, if not precipitated by an official act, differs significantly from an actual discharge.[103]

To illustrate its definition of a tangible employment action, the Court pointed to *Reed v. MBNA Marketing Systems, Inc.*,[104] and *Robinson v. Sappington*,[105] where the courts held that a constructive discharge is not a tangible employment action unless accompanied by an official act. In *Reed*, the court held that the supervisor's unfulfilled threats to the employee were not based on the supervisor's official power within the

employer liability under Title VII and arguing that because a constructive discharge is a significant change in employment status it is the equivalent of an actual discharge under *Ellerth* and *Faragher*).

99. *See* Pa. State Police v. Suders, 542 U.S. 129, 150-51 (2004) (determining that a constructive discharge is not, per se, a tangible employment action).

100. *See id.* at 145 (championing the view that a tangible employment action does not occur, nor is the "aided by the agency" standard triggered, in the absence of an official company act). *But see* Suders v. Easton, 325 F.3d at 460 (positing that when a plaintiff satisfies the burden of proving a constructive discharge the constructive discharge should be treated as if it were an actual discharge and thus meets the requirements of a tangible employment action under *Ellerth* and *Faragher* because it "constitutes a significant change in employment status"); Goldsmith, *supra* note 19, at 845-46 (articulating a uniform standard for constructive discharge claims to ensure that a cognizable constructive discharge claim implicates the employer in the plaintiff's resignation).

101. *Suders*, 542 U.S. at 144-45 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998)); *see id.* at 149 (noting that the Third Circuit's definition of constructive discharge as a tangible employment action is anomalous because the Third Circuit's holding "would make the *graver* claim of hostile-environment constructive discharge *easier* to prove than its lesser included component, hostile work environment."); *see also* Kagay, *supra* note 77, at 1055-56 (contending that a constructive discharge is not a tangible employment action and that the use of the affirmative defense in constructive discharge cases advances Title VII's policy objectives of deterrence, conciliation between employers and employees, and the development of anti-harassment policies).

102. *See Suders*, 542 U.S. at 144-45 (differentiating between an official act and merely unofficial conduct which any employee could inflict on another employee).

103. *See id.* at 148 (asserting that while an official company act always precipitates an actual discharge, an official act does not necessarily cause a constructive discharge); *cf.* Kagay, *supra* note 77, at 1055-57 (recognizing that a purely hostile work environment constructive discharge does not fit within the same category as a tangible employment action).

104. 333 F.3d 27 (1st Cir. 2003).

105. 351 F.3d 317 (7th Cir. 2003).

company.[106] Thus, the supervisor's actions were entirely unofficial and did not constitute a tangible employment action.[107] In contrast, the *Robinson* court held that the supervisor's decision to transfer the employee and the threat that the new position would be "hell" was an official act that rendered the constructive discharge a tangible employment action.[108]

The Supreme Court suggested that *Reed* and *Robinson* indicate the path that lower courts should take in determining the presence or absence of a tangible employment action.[109] Thus, under *Suders*, a constructive discharge is a tangible employment action only when an official act causes the plaintiff's resignation.[110] In the absence of an official act, the employer may assert an affirmative defense to vicarious liability.[111]

C. The Affirmative Defense Framework as a Powerful Tool to Avoid Liability

A broad definition of the term tangible employment action is crucial for victims of sexual harassment. A narrow definition of this term permits employers to raise the affirmative defense and avoid liability even in cases where the agency relationship aided the supervisor in carrying out the sexual harassment.[112] To successfully raise the affirmative defense, the employer must merely demonstrate the presence of an adequate internal complaint procedure that the employee unreasonably failed to use.[113] The

106. 333 F.3d at 33.

107. *See id.* ("[The supervisor's] behavior is exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed."). *But see* Recent Cases, *Employment Law—Vicarious Liability—First Circuit Holds That Classification of Constructive Discharge as a Tangible Employment Action Should Be Left to Case-by-Case Determination*—Reed v. MBNA Marketing Systems, Inc., *333 F.3d 27 (1st Cir. 2003)*, 117 HARV. L. REV. 1004, 1010 (2004) [hereinafter Recent Cases] (criticizing *Reed* for failing to recognize that a constructive discharge actually makes official an otherwise unofficial action).

108. *See* 351 F.3d at 336-39 (emphasizing that the decision had been made by the presiding judge acting in his official capacity, and thus, the presence of an official act rendered the decision a tangible employment action).

109. *See* Pa. State Police v. Suders, 542 U.S. 129, 149 (2004) (highlighting that *Ellerth* and *Faragher* divided constructive discharge claims based on the presence or absence of an official act). The Court cited to *Reed* and *Robinson* to "indicate how the 'official act' (or 'tangible employment action') criterion should play out when constructive discharge is alleged." *Id.*

110. *Id.* at 148.

111. *Id.*; *see id.* at 137-38 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)) (summarizing the affirmative defense available to the employer if the plaintiff is unable to prove the existence of a tangible employment action).

112. *See* Dedner v. Oklahoma, 42 F. Supp. 2d 1254, 1259-60 (E.D. Okla. 1999) (providing an example of the relative ease of raising the affirmative defense to vicarious liability).

113. The affirmative defense framework, however, has been criticized for a number of reasons. *See* Chamallas, *supra* note 10, at 354 (noting that the affirmative defense framework for employer liability has provided a rich source of legal principles with which to successfully fend off liability). One prominent criticism of the affirmative defense is that

affirmative defense, which is based on the notion of contributory negligence,[114] routinely results in summary judgment victories for employers.[115] The relative ease of successfully raising the affirmative

the requirement that the victim report the sexual harassment ignores statistical evidence indicating that several factors contribute to harassment victims' unwillingness or inability to report sexual harassment. *See* Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. OF WOMEN & L. 273, 323-24 (2001) (contending that the affirmative defense articulated in *Ellerth* and *Faragher* places an undue burden on the victim of sexual harassment to explain any failure to report the sexual harassment). According to social science research, very few victims report sexual harassment. *Id.* at 306-07, 312. In a study of federal workers, only twelve percent of victims of sexual harassment actually reported the incident. *Id.* at 312; *see* Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 209 (2004) (contending that *Ellerth* and *Faragher* is in discord with empirical studies showing that it is actually "reasonable" for victims not to report sexual harassment). Additionally, the affirmative defense is criticized for creating a technical loophole through which employers can avoid all liability. Marks, *supra* note 11, at 1422-28. The author identifies two lines of cases. *Id.* at 1423. The first line of cases treats an employer's diligence in establishing an anti-harassment policy as an independent defense to liability. *Id.*; *see, e.g.*, Watkins v. Prof'l Bureau, Ltd., No. 98-2555, 1999 WL 1032614, at *5 (4th Cir. Nov. 15, 1999) (concluding that a plaintiff's failure to utilize an employer's adequate anti-harassment policy will, in most circumstances, satisfy the employer's burden of proving that the employee unreasonably failed to use an internal complaint procedure). The second line of cases treats any failure on the plaintiff's part to report the harassment as a complete bar to recovery for injuries arising out of the sexual harassment. *See* Marks, *supra* note 11, at 1428-29 (identifying a trend among lower courts in which any failure of the plaintiff to report the harassment is deemed contributory negligence, and thus a complete bar to recovery); *e.g.*, Jackson v. Arkansas Dep't of Ed., 272 F.3d 1020, 1026 (8th Cir. 2001) (concluding that because the plaintiff waited nine months to report the sexual harassment, the employer met the second element of the affirmative defense); Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1300 (11th Cir. 2000) (concluding that complaints to anyone other than the person designated in the company's anti-harassment policy does not satisfy the reasonable complaint requirement and allows the employer to satisfy the second element of the affirmative defense); *Dedner*, 42 F. Supp. 2d at 1260 (finding that the employee unreasonably failed to use the employer's anti-harassment complaint procedure even though the employee believed, based on observations of other employees' experiences, that the procedure was futile).

114. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (noting that Title VII borrows from tort law the avoidable consequences doctrine which encourages employees to report sexual harassment before it becomes severe); Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982) (recognizing that a Title VII claimant has the duty to mitigate damages). *See generally* KEETON ET AL., *supra* note 14, § 65, at 458 (summarizing the avoidable consequences doctrine as one which requires a plaintiff to avoid damages after the wrong has occurred).

115. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806-07 (1998) (reinforcing, through the establishment of an affirmative defense, Title VII's duel objectives of "encouraging forethought by employers" and providing redress for injured employees). Title VII's primary goal is to end discrimination. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in [Title VII] as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination." (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975))). Title VII's secondary purpose is to compensate victims for their injuries when unlawful discrimination does occur. *Id.*; *see* Ford Motor Co., 458 U.S. at 230 (stating that the victims of job discrimination "want jobs, not lawsuits"); *see also* Grossman, *supra* note 1, at 27 (noting that the affirmative defense and related liability rules established in *Ellerth* and *Faragher* are designed to contribute to Title VII's goals of deterrence and compensation).

defense effectively means that in the absence of a tangible employment action many claims will be dismissed at summary judgment.[116] A narrow construction of this term will enable employers to avoid liability even when the victim's injuries arose out of the supervisor's exercise of company authority.[117] A situation permitting employers to avoid liability when the agency relationship implicates them in the sexual harassment is contrary to the Supreme Court's definition of the "aided by the agency" standard as well as Title VII's goal of compensating victims of sexual harassment.[118]

II. INTRODUCING CONSEQUENTIAL ECONOMIC LOSS TO SEXUAL HARASSMENT LAW

Given the liability framework for sexual harassment that currently affords employers sufficient protection against liability, the term tangible employment action should not be construed to eviscerate the agency standards the Court designed to govern an employer's liability for supervisory-based sexual harassment.[119] To meaningfully appreciate the

116. *See* George, *supra* note 30, at 156 (underscoring that since *Ellerth* and *Faragher*, summary judgment is often granted for the defendant on the issue of employer liability without any inquiry into the respective proof burdens the parties bear). George is concerned that many courts ignore the high burden of proof on defendants moving for summary judgment, thus increasing the number of cases dismissed at summary judgment. *Id.*

117. *See* Chamallas, *supra* note 10, at 325-26 (underscoring that the affirmative defense is not difficult to raise in the absence of a tangible employment action).

118. *See Faragher*, 524 U.S. at 806-07 (summarizing how the affirmative defense framework accomplishes the objective of preventing and deterring discrimination). *But see* Lawton, *supra* note 113, at 210 (positing that lower courts have interpreted the Supreme Court's *Ellerth* and *Faragher* decisions as requiring only that the employer promulgate an anti-harassment policy). The affirmative defense framework reveals that *Ellerth* and *Faragher* have done "little to reduce employer incentives to reduce the incidence of sexual harassment by supervisors in the workplace." *Id.*; *see* OPPENHEIMER, *supra* note 3, at 282 (contending that to view *Ellerth* and *Faragher* as a perfect reflection of agency principles is to risk permitting courts to shift the burden of proving sexual harassment to employees).

119. *See* McCann, *supra* note 13, at 782 (emphasizing that the presence of a tangible employment action is of "paramount" importance to victims of sexual harassment). If the term tangible employment action is defined narrowly, the employer will most likely be able to successfully raise an affirmative defense to vicarious liability. *See* Grossman, *supra* note 1, at 21, 24-25 (concluding, based on empirical evidence, that the low reporting rate among victims of sexual harassment permits employers to easily satisfy the second prong of the affirmative defense); Marks, *supra* note 11, at 1435-36 (positing that the *Ellerth* and *Faragher* affirmative defense has significantly increased the likelihood that employers will be able to avoid liability). *Ellerth* and *Faragher*'s practical effect is a "guaranteed safe harbor against claims of supervisory harassment." *Id.*; *see, e.g.*, Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (holding that being assigned to extra work does not constitute a tangible employment action). In *Reinhold*, the court determined that, in light of *Ellerth* and *Faragher*, the supervisor's actions did not constitute a tangible employment action. 151 F.3d at 175. The Fourth Circuit Court of Appeals had previously denied the defendant employer's motion for judgment as a matter of law and held that the supervisor's actions constituted a tangible job detriment sufficient to support a quid pro quo claim of sexual harassment. Reinhold v. Virginia, 135 F.3d 920, 933-34 (4th Cir. 1998), *vacated by* 151 F.3d 172 (4th Cir. 1998). But in light of the Supreme Court's decisions in *Ellerth* and *Faragher*, the Fourth Circuit, upon defendant's appeal from the denial of defendant's motion for judgment as a matter of law, held that the supervisor's actions did not constitute

agency principles underlying the Supreme Court's liability framework, this Comment argues that the term tangible employment action should be broadly construed to include two categories of supervisory conduct: (1) conduct that causes a direct economic loss,[120] and (2) a more controversial category that includes conduct that results in consequential economic loss.[121] This Comment will demonstrate that the Supreme Court's recent decision in *Suders*, as well as the "aided by the agency" standard and Title VII's deterrent and remedial objectives, can be read to support this definition.[122]

A. Direct and Consequential Economic Loss

When the supervisor's actions constitute direct economic loss, a tangible employment action clearly occurs.[123] In the context of tort law, direct damages constitute those damages that are the immediate result of the tortfeasor's negligent conduct and may be calculated based on the depreciation to the plaintiff's assets.[124] When a plaintiff's car is damaged, for example, the car's market-value depreciation constitutes the direct damage.[125] In *Ellerth*, the Supreme Court stated that "[a] tangible employment action in most cases inflicts direct economic harm."[126] The *Ellerth* Court's use of the phrase direct economic harm, therefore, refers to official conduct that, by itself, results in immediate and inevitable economic loss.[127] The Court explained that where the supervisor's conduct, such as firing or failing to promote, constitutes direct economic loss, the

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a tangible employment action. *Reinhold*, 151 F.3d at 174-75.

120. *See, e.g.*, Dinkins v. Charoen Pokphand U.S.A., Inc., 133 F. Supp. 2d 1254, 1263 (M.D. Ala. 2001) (concluding that without question, a tangible employment action may be found when an employee is terminated because a termination is an ultimate employment decision with a significant change in employment benefits).

121. *See* Starkman, *supra* note 61, at 323 (contending that future injuries such as decreased opportunities for career advancement may qualify as a tangible employment action).

122. *See infra* Part III.C. (contending that *Suders* supports a broad definition of the term tangible employment action).

123. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761-62 (1998) (providing examples of conduct that constitutes direct economic loss, such as firing or demotion, in which the supervisor is aided, beyond question, by the presence of the agency relationship); *see, e.g.*, *Dinkins*, 133 F. Supp. 2d at 1263 (setting out that terminations are clearly tangible employment actions because they involve direct economic loss).

124. *See* DAN B. DOBBS, LAW OF REMEDIES § 3.3(3) (2d ed. 1993) (explaining that one method of determining general damages is to calculate the loss in market value to the property as a result of the tort).

125. *Id.*

126. *Ellerth*, 524 U.S. at 762.

127. *See Dinkins*, 133 F. Supp. 2d at 1263 (stating that the plaintiffs' terminations were beyond question tangible employment actions because the termination was an official act of the company that constituted a direct economic loss); Kagay, *supra* note 77, at 1056-57 (highlighting that the presence of direct economic loss manifests many of the key indicators of a tangible employment action).

presence of the agency relationship is obvious.[128]

Similarly, courts should also recognize the presence of a tangible employment action when a supervisor's conduct leads to consequential economic loss.[129] Consequential economic loss, a term drawn from tort law,[130] is defined as loss that may arise from the harm to the plaintiff but which is not the direct and immediate result of the original "harm to the plaintiff's entitlement."[131] Consequential economic loss, in contrast to direct economic loss, is harm, such as lost wages, which is the "natural, but not the necessary" or immediate result of the harmful act.[132] This category of economic loss generally entails two elements: (1) the loss must be established with reasonable certainty, and (2) the loss must be proximately caused by the unlawful conduct.[133]

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128. *See* Suders v. Easton, 325 F.3d 432, 456 (3d Cir. 2003), *vacated by* 542 U.S. 129 (2004) (commenting that the Supreme Court's use of the clause "such as" in *Ellerth* to describe the actions constituting a tangible employment action evinced the Supreme Court's recognition that official conduct is often not easily categorized as a discharge, demotion, or transfer); Jin v. Metro. Life Ins. Co., 310 F.3d 84, 93 (2d Cir. 2002) (contending that the list of conduct that constitutes a tangible employment action is not limited to the actions listed in *Ellerth*). While conduct that results in direct economic loss is commonly an ultimate hiring decision, not all tangible employment actions need to be ultimate hiring decisions. *See* Durham Life Ins. Co., v. Evans, 166 F.3d 139, 153 (3d Cir. 1999) (finding a tangible employment action where the plaintiff was given assignments that resulted in lower pay).

129. *See* Pa. State Police v. Suders, 542 U.S. 129, 152 n.11 (2004) (remanding the case for a fact-finder to decide whether the events surrounding Ms. Suders' computer skills exam were sufficient to constitute a tangible employment action); *Durham Life*, 166 F.3d at 153-54 (holding that the loss of important files, an office, and secretarial staff constitute a tangible employment action). *But see* Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (finding no tangible employment action where the supervisor assigned the employee extra work, gave her inappropriate work assignments, and denied her the opportunity to attend a professional conference and thus permitting the employer to raise the affirmative defense to vicarious liability).

130. *See* DOBBS, *supra* note 124, § 3.3(4) (providing that the term "consequential damages" refers to damages that arise out of the tort but are not the necessary or immediate result of that tort). Courts apply the terms "direct" and "consequential" damages in a variety of ways. *See* 25 C.J.S. *Damages* § 3 (2002) (summarizing the differences between several categories of damages). The various methods courts use to calculate damages are outside the scope of this article and the numerous variations do not affect the substance of this argument.

131. DOBBS, *supra* note 124, § 3.3(4); *see* 22 AM. JUR. 2D § 40 (2004) ("Special damages are the natural, but not the necessary, result of an injury."); *see also* District of Columbia v. Beretta U.S.A. Corp., No. Civ.A. 0428-00, 2002 WL 31811717, at *41 (D.C. Super. Dec. 16, 2002) ("Classically, the term 'consequential damages' means those losses or injuries 'which are a result of an act but are not direct and immediate.'" (quoting BLACK'S LAW DICTIONARY 352 (5th ed. 1979))); *cf.* Chamallas, *supra* note 10, at 341 (arguing that discussions of liability hinge on normative judgments of who is ultimately responsible for causing injuries arising out of sexual harassment).

132. 22 AM. JUR. 2d § 40; *see* Bogen v. Green, 239 A.2d 154, 156 (D.C. App. 1968) (recognizing that consequential damages could be found when a plaintiff was unable to work and lost income as a result of her injury).

133. *See* KEETON ET AL., *supra* note 14, § 110, at 766-67 (summarizing the difference between direct and consequential damages in the context of fraud and misrepresentation). Direct damages occur when something of value is lost. *Id.* § 110, at 766. Consequential damages, in contrast, do not involve the direct transfer or transaction in something of value. *Id.* § 110, at 766-67. Consequential damages require two elements: (1) they must be

As with direct economic loss, the concept of consequential economic loss can be applied to sexual harassment law where victims often suffer economic loss that arises from the harassment even though it is not the direct and immediate result of the supervisor's original discriminatory conduct. While the presence of a tangible employment action may be less clear in cases involving consequential economic loss, this construction is consistent with workplace reality, which is far more complex than a narrow category of tangible employment actions.[134] If, for example, a supervisor, due to discriminatory animus, prevents an employee from attending several professional conferences, this action does not result in immediate or direct economic harm such as wage or job loss.[135] Yet the supervisor's conduct can result in consequential economic harm which arises from the discrimination.[136] The supervisor's actions, for example, may deprive the employee of networking opportunities, professional training, and career development.[137] As a result, the plaintiff may be denied a promotion,

established with reasonable certainty and may include loss that is reasonably certain to occur in the future; and (2) they must be proximately caused by the unlawful conduct. *Id.* § 110, at 767. *See also* Maryland use of Pumphrey v. Manor Real Estate & Trust Co., 83 F. Supp. 91, 102 (D. Md. 1949) ("Direct damages include all such injurious consequences as proceed from or have direct causal connection with such consequences. Consequential damages are those which the cause in question naturally but indirectly produces.").

134. *See* Chamallas, *supra* note 10, at 347-48 (noting that a formalist approach emphasizes a supervisor's formal decisions and policies rather than the supervisor's specific actions taken while acting as an agent of the company).

135. *Compare* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999) (suggesting a broad interpretation of the term tangible employment actions), *with* Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (providing, in light of the Court's decision in *Ellerth*, a narrow construction of the term tangible employment actions that precludes conduct that has the potential of resulting in a significant change in employment status).

136. *See* McCann, *supra* note 13, at 782-83 (acknowledging the possibility that tangible employment actions include conduct that is equivalent to a demotion or reassignment). Although the agency relationship may be less clear, conduct that does not constitute direct economic loss remains a tangible employment action if the conduct results in consequential economic loss. *See, e.g.*, *Durham Life*, 166 F.3d at 153 (finding a tangible employment action where the supervisor's conduct, while not itself constituting direct economic loss, had an extremely high probability of causing the plaintiff substantial economic loss); Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 U.S. Dist. LEXIS 727, at *36-37 (E.D. Pa. Jan. 26, 1999) (analyzing the term tangible employment action and concluding that a supervisor's conduct is tangible when it substantially decreases an employee's earning potential); *see also* Thompson v. Naphcare, Inc., No. 04-60028, 2004 U.S. App. LEXIS 23697, at *14-15 (5th Cir. Nov. 11, 2004) (finding that a supervisor's conduct was not a tangible employment action where the supervisor merely scrutinized the employee's work, extended her probationary period an extra forty-five days, and gave her a verbal and written reprimand for a mistake); Watts v. Kroger, 170 F.3d 505, 510 (5th Cir. 1999) (concluding that a change in work schedule, different job assignments, and requiring an employee to check with a supervisor before breaks does not qualify as a tangible employment action because the actions are merely minor employment changes and not significant changes in employment status).

137. *See* Starkman, *supra* note 61, at 323 (suggesting that while the precise definition of a tangible employment action remains amorphous, the term may include future injuries and diminished career opportunities). *But see Reinhold*, 151 F.3d at 175 (finding no tangible employment action where the plaintiff was denied the opportunity to attend a professional

forced to look elsewhere for a job, or prevented from lateral career advancement.[138] In this situation, economic loss that is a reasonably foreseeable consequence of the supervisor's official conduct constitutes a tangible employment action despite the absence of direct economic harm to the plaintiff.

B. The "Aided by the Agency" Standard

1. Agency and consequential economic loss

Under the "aided by the agency" standard, which supports a broad construction of the term "tangible employment action," an employer is liable when the agency relationship aids the supervisor in carrying out the sexual harassment.[139] Cases of direct economic loss, where the supervisor's conduct constitutes immediate and identifiable economic loss, clearly invoke the agency relationship.[140] In the absence of direct economic loss, however, courts must determine if the economic loss arose out of official conduct and was a reasonably foreseeable consequence of that conduct.[141] If so, a tangible employment action should be found.[142] Under this interpretation, the official conduct for which the employer is liable is not limited to an exhaustive list of actions that constitute direct economic loss; rather, the supervisor's official conduct is a tangible employment action whenever it results in direct *or* consequential economic loss.[143]

This construction is consistent with the "aided by the agency" standard because it retains the characteristics of official conduct essential to the

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conference and was assigned extra and inappropriate work assignments); George, *supra* note 4, at 14-15 (suggesting that *Ellerth*, with its use of the term "tangible employment action", provided a more stringent liability standard).

138. *See Durham Life*, 166 F.3d at 153 (finding a tangible employment action where the supervisor's conduct, even though not itself economic loss, is reasonably likely to lead to economic loss).

139. *See* Scott, *supra* note 4, at 168 (noting that the Court recognized that the "aided by the agency" standard could either limit or expand the scope of employer liability).

140. David Monassebian, Note, *Current Developments in the Law: A Survey of Federal Cases Involving Employer Vicarious Liability for Sexual Harassment:* Burlington Industries, Inc. v. Ellerth, *188 S.Ct. 2257 (1998)*, 8 B.U. PUB. INT. L.J. 175, 177-78 (1998) (articulating that a supervisor is better equipped than other employees to inflict direct economic harm on a victim of sexual harassment).

141. *See* Smith, *supra* note 76, at 1800 (asserting that the "aided by the agency" standard essentially looks toward the degree to which the employer caused the sexual harassment through the supervisor's exercise of official company authority).

142. *See, e.g.*, Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 U.S. Dist. LEXIS 727, at *36-37 (E.D. Pa. Jan. 26, 1999) (underscoring that the supervisor's exercise of company authority in taking specific actions against the plaintiff was sufficient to create an issue of material fact as to whether the plaintiff suffered a tangible employment action).

143. *Cf.* Chamallas, *supra* note 10, at 347-48 (maintaining that the presence of a tangible employment action should be evaluated according to a supervisor's actions and decision-making process rather than the company's formal decisions).

imposition of automatic employer liability.[144] Indeed, the presence of an official act remains the link between the employer and the injured employee.[145] This approach, therefore, merely modifies the analysis of how a supervisor's conduct manifests company authority and inflicts economic loss on victims of sexual harassment.[146]

To satisfy the Supreme Court's standard for determining employer liability, courts must closely scrutinize the context of a supervisor's discriminatory conduct to determine whether the supervisor exercised company authority and whether such conduct is reasonably certain to proximately cause consequential economic loss.[147] The Court's definition of a tangible employment action as a "significant change in employment status," does not imply that a court's inquiry ceases upon a finding that the conduct lacks direct economic loss.[148] Rather, the "aided by the agency" standard requires courts to evaluate the possible economic consequences that are likely to flow from official conduct, such as diminished career opportunities and future wage loss.[149] These economic consequences, while possibly less direct than a firing or a demotion, nonetheless represent significant changes in the victim's employment status.[150] This approach ensures that victims of sexual harassment who have suffered a significant change in employment status as a result of a supervisor's exercise of official company power are justly compensated for their loss.[151] The "aided by the agency" standard requires courts to abandon an approach that limits tangible employment actions only to those acts that clearly manifest

144. *See* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999) (ruling that because the supervisor deprived the plaintiff of important business files, the conduct was properly characterized as a tangible employment action).

145. *See id.* at 152 (stressing that a supervisor must be authorized to take a specific action for that action to be considered a tangible employment action).

146. *See id.* at 153 (stating that direct economic harm is not essential to establishing a tangible employment action); *see also* Pa. State Police v. Suders, 542 U.S. 129, 152 n.11 (2004) (concluding that Ms. Suder's supervisors' actions regarding her computer skills exam could possibly be considered official conduct).

147. *Cf.* Chamallas, *supra* note 10, at 348-49 (pushing courts to develop an approach to employer liability that looks to the effects of supervisory conduct when defining tangible employment actions). Chamallas' argument examines the term tangible employment action in the context of constructive discharge prior to the Supreme Court's decision in *Suders*. *Id.* In the post-*Suders* legal framework, however, Chamallas' argument retains its analytic vitality and points the way toward defining tangible employment actions.

148. *See* McCann, *supra* note 13, at 782-83 (recognizing that the term tangible employment action is not limited exclusively to conduct that constitutes an economic loss).

149. *Cf.* Starkman, *supra* note 61, at 323 ("Although still amorphous, most 'tangible employment actions' will involve some kind of economic injury and may include future injuries, such as decreased opportunities for advancement.").

150. *See Durham Life*, 166 F.3d at 153 (explaining the economic consequences that can arise out of official conduct, even though the conduct does not result in direct and immediate economic loss).

151. *See* Chamallas, *supra* note 10, at 341 (arguing that the question of liability is inextricably linked to the question of who actually caused the harm to the employee and that the presence of economic harm implicates the employer's liability).

the agency relationship, such as firing or failing to promote, and adopt an approach that looks to the economic consequences that flow from a supervisor's exercise of company authority regardless of whether the economic loss is direct.[152]

2. Lower court decisions reflecting this construction

Several lower court decisions, including the Third Circuit's decision in *Durham Life Insurance Co. v. Evans*, support this construction of the term tangible employment action.[153] In *Durham Life*, Ms. Evans was a successful life insurance agent whose workplace conditions were altered as a result of her supervisors' exercise of company authority.[154] Ms. Evans' problems culminated when management moved her out of a private office, denied her use of a secretary, and intentionally misplaced her essential business files.[155] As a result, Ms. Evans was unable to successfully conduct her work and maintain her previous earning level.[156] The court noted that Ms. Evans' private office and her secretary were negotiated conditions of her employment.[157] Additionally, and more importantly, the court held that the loss of Ms. Evans' files constituted a tangible employment action because she was unable to work successfully without these files.[158]

The court's holding in *Durham Life*, which was based on the "aided by the agency" standard, recognized that direct economic harm is an important, but not essential, indicator of a tangible employment action.[159]

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152. *Cf. id.* (providing a framework for examining sexual harassment claims that does not constrain the analysis of employer liability to an exclusive and narrow category of overt acts resulting directly in economic harm to the plaintiff).

153. *See Durham Life*, 166 F.3d at 153-54 (holding that where a supervisor's act decreases an employee's earning potential and significantly disrupts the employee's working conditions, a tangible employment action may be found even though the conduct did not constitute direct economic loss); *see also* An v. Regents of the Univ. of California, No. 01-2223, 2004 U.S. App. LEXIS 1509, at *13 (9th Cir. Feb. 2, 2004) (holding that a claim that a supervisor's conduct created job insecurity is insufficient to constitute a tangible employment action); Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 U.S. Dist. LEXIS 727, at *36-37 (E.D. Pa. Jan. 26, 1999) (concluding that a decision to reassign an employee to extra and less desirable work is sufficient to constitute a tangible employment action); *cf.* Booker v. Budget Rent-A-Car Sys., 17 F. Supp. 2d 735, 747 (M.D. Tenn. 1998) (holding that a demotion and a reassignment constituted a tangible employment action).

154. *Durham Life*, 166 F.3d at 145-46.

155. *See id.* at 153 (speculating that it could reasonably be inferred from the "suspicious" disappearance of Ms. Evans' files that the supervisors had intentionally misplaced those files).

156. *Id.* at 153-54.

157. *Id.* at 153.

158. *Id.*

159. *See id.* (recognizing that "the concept of a tangible employment action is not limited to changes in compensation"); *see also* Lyon & Phillips, *supra* note 8, at 635 (highlighting that the Third Circuit's decision in *Durham Life* suggests a definition of the term tangible employment action that includes conduct that substantially prevents the plaintiff's ability to

The court reasoned that "[i]f an employer's act substantially decreases an employee's earning potential and causes significant disruption in his or her work conditions, a tangible adverse employment action may be found."[160] The court in *Durham Life* found that the supervisors' official conduct would lead to a decrease in Ms. Evans' earning potential and would acutely disrupt her work conditions.[161] Accordingly, the supervisors' official actions could result in an economic loss and qualify as a tangible employment action.[162] While misplaced files and an office move do not constitute direct economic loss, the supervisors' conduct was reasonably certain to proximately cause consequential economic loss and thus qualified as a tangible employment action.[163]

Other courts reflect this broader view of the "aided by the agency" standard.[164] In the related field of race discrimination, a supervisor is "aided by the agency" when the supervisor acts within his or her official capacity.[165] For example, in *LaRoche v. Denny's, Inc.*, the plaintiffs, all members of minority groups, were turned away from a Denny's Restaurant.[166] The manager at the Denny's Restaurant refused to serve the plaintiffs, demanded that they leave, and locked the doors behind them.[167] The court reasoned that the "aided by the agency" standard is satisfied when a supervisor uses his or her authority as a manager to inflict harm.[168] Further, the court noted that the supervisor's position empowered him to refuse to serve the plaintiffs and force them to leave.[169] Accordingly, the court held that it was possible that the supervisor had been "aided by the

work effectively); Kagay, *supra* note 77, at 1052 (noting that in *Durham Life*, although the court labeled the plaintiff's claim as a constructive discharge, the court essentially conducted an analysis of whether the supervisor's conduct constituted a tangible employment action).

160. *Durham Life*, 166 F.3d at 153.

161. *Id.*

162. *See id.* (emphasizing the likely effect of the supervisors' conduct on Ms. Evans' future earning potential).

163. *Id.*; *see* McCann, *supra* note 13, at 783-84 (positing that the Third Circuit has effectively done away with the requirement of direct economic loss as the basis of a tangible employment action).

164. *See* LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1366, 1374 (S.D. Fla. 1999) (applying the "aided by the agency" standard to a claim of race discrimination). *LaRoche*, a case which deals with race discrimination under 42 U.S.C. § 1981, is used here as an example of the "aided by the agency" standard applied outside of Title VII sexual harassment. *Id*. at 1373.

165. *See id.* at 1372-73 (explaining the application of the "aided by the agency" standard to cases of race discrimination).

166. *Id.* at 1368-69.

167. *See id.* (recounting that white customers were allowed to enter the restaurant after the plaintiffs had been told to leave).

168. *See id.* at 1374 (asserting that the supervisor exerted his managerial authority to force the plaintiffs to leave the restaurant).

169. *Id.*

agency" in accomplishing the tort.[170]

3. The Danger of A Narrow Construction of the term "Tangible Employment Action"

Lower courts often mistakenly limit the term tangible employment action solely to official conduct that constitute direct economic loss.[171] As these cases demonstrate, workplace reality is far more complex than a narrow category of such acts.[172] These courts, relying on a narrow definition of the term tangible employment action, exclude conduct that falls outside of a narrow list of actions, even if the agency relationship aided the supervisor in accomplishing the sexual harassment.[173] A narrow construction of this

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170. *See id.* (denying the defendant's motion for summary judgment on the grounds that the supervisor's actions were aided by the agency relationship and thus implicated the employer in the supervisor's commission of the tort of race discrimination).

171. *See* Dinkins v. Charoen Pokphand, USA, Inc., 133 F. Supp. 2d 1254, 1263 (M.D. Ala. 2001) (limiting the definition of tangible employment actions exclusively to ultimate employment decisions involving a significant change in benefits, privileges, opportunities, or employment status). *Dinkins* mischaracterizes the term "tangible employment action" by restricting the definition exclusively to ultimate employment decisions constituting direct economic loss. *See also* Gilbride & Erdheim, *supra* note 16, at 4 (predicting that lower courts after *Suders* will be left to define what conduct does and does not constitute an official act).

172. *See* Starkman, *supra* note 61, at 317-21 (postulating that there is no clear category to define actionable conduct in the workplace). Lower court approaches to the question reveal that no clear line demarcates official and unofficial conduct. *Compare* Barra v. Rose Tree Media Sch. Dist., 858 A.2d 206, 217 (Pa. Commw. Ct. 2004) (concluding that the plaintiff failed to establish a tangible employment action even though the plaintiff had been given a heavier workload than other employees and excluded from company meetings), *with* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152-53 (3d Cir. 1999) (holding that a tangible employment action may exist where a supervisor's actions significantly decrease an employee's earning potential). Much of the debate over the proper classification of the term "tangible employment action", and the problem of whether or not a constructive discharge qualified as a tangible employment action, can be summarized as a distinction between a formalist approach and a realist approach. Chamallas, *supra* note 10, at 347-48. A realist approach, as opposed to a formalist approach, evaluates the presence of an official act based on whether the supervisor's exercise of company authority resulted in consequential economic loss. *See id.* (emphasizing the importance of evaluating the effects of a supervisor's decision and not just the formal categories into which the decision falls). This distinction is very important. *Id.* An emphasis on the supervisor's decision-making process, rather than the decision's formal classification, permits courts to move away from a strict reliance on formal categories to define supervisory conduct. *Id.* Courts relying on formal categories often fail to recognize what is, in reality, a tangible employment action. *Id.*; *see, e.g.*, Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (refusing to find a tangible employment action absent an overt invocation of company authority and direct economic loss).

173. *See* Gilbride & Erdheim, *supra* note 16, at 4 (recognizing that the term "official act" lacks a precise definition); *see also* McCann, *supra* note 13, at 782-83 (advocating a restrictive view of the term "tangible employment action" which limits the term exclusively to conduct that constitutes a direct economic loss). *Compare* Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 U.S. Dist. LEXIS 727, at *37 (E.D. Pa. Jan. 26, 1999) (concluding that a reasonable jury could find that being assigned extra and less desirable work constitutes a tangible employment action), *with Reinhold*, 151 F.3d at 175 (holding that merely being assigned extra work is not sufficient to constitute a tangible employment action).

term not only contradicts the "aided by the agency" standard as well as the Court's holding in *Suders*, it also threatens to deprive plaintiffs of just compensation under Title VII.[174]

For example, in *Barra v. Rose Tree*,[175] the court, in holding that no tangible employment action occurred, refused to look to the economic consequences of the supervisor's official conduct[176] and did not acknowledge the official authority the supervisor exercised in making the decisions that altered Ms. Barra's work environment.[177] Ms. Barra was given a heavier workload than other employees without increased compensation, was not invited to meetings with vendors, was not given performance evaluations, and was deprived of her office keys without cause.[178] While the supervisor had the exclusive authority to make each of these decisions, the court held that this conduct did not constitute a tangible employment action.[179] The court's narrow definition of this term overlooked the economic consequences that were reasonably certain to occur in the future as a proximate cause of the supervisor's official conduct.[180] Had the *Barra* court adopted the approach advocated in this Comment, the court likely would have held that the supervisor's official conduct was reasonably certain to proximately cause economic loss and thus constituted a tangible employment action for which the employer

174. *See* Gilbride & Erdheim, *supra* note 16, at 4 (speculating that the Supreme Court provided little guidance on the definition of the term "official act"). *Compare* McCann, *supra* note 13, at 784 (postulating that plaintiffs may be able to prove the existence of a tangible employment action by showing non-economic actions the supervisor took to sexually harass the employee), *with* Chamallas, *supra* note 10, at 336-37 (stating that the classic definition of a tangible employment action is when economic harm flows from an official action).

175. 858 A.2d 206 (Pa. Commw. Ct. 2004).

176. *See id.* at 217 (concluding that the supervisor's actions were not official conduct). The court, however, merely looked to whether the supervisor's conduct constituted an economic loss, but failed to evaluate the future consequences of the supervisor's conduct. *Id.*; *see* Starkman, *supra* note 61, at 323 (observing that future economic loss may be sufficient to render a supervisor's conduct a tangible employment action).

177. *Compare Barra*, 858 A.2d at 217 (disregarding the supervisor's exercise of authority in concluding that the supervisor's conduct was not official), *with Durham Life*, 166 F.3d at 153-54 (evaluating the presence of an official action based on whether the supervisors were authorized to make the decisions).

178. *Barra*, 858 A.2d at 209.

179. *See id.* at 217 (recognizing that Ms. Barra's specific allegations of adverse employment actions were decisions within the ambit of her supervisor's authority, but holding that the actions were not "official" under the Supreme Court's decision in *Suders*).

180. *Compare* Booker v. Budget Rent-A-Car Sys., 17 F. Supp. 2d 735, 747 (M.D. Tenn. 1998) (asserting that the plaintiff suffered a tangible employment action because the action, while not actually reducing the plaintiff's salary, reduced his maximum salary grade and diminished his authority in the workplace), *with* Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (concluding that under *Ellerth* and *Faragher*, the plaintiff was unable to prove that she suffered a tangible employment action), *and* Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 U.S. Dist. LEXIS 727, at *36 (E.D. Pa. Jan. 26, 1999) (finding that the plaintiff suffered a tangible employment action because the supervisor exercised company authority in assigning her extra and less desirable work).

could be held automatically liable.

C. Consequential Economic Loss and the Court's Decision in Suders

The Supreme Court's recent decision in *Suders*, which suggested that direct economic harm is not a prerequisite to a tangible employment action, supports a construction of this term that includes consequential economic loss.[181] The Court recognized that a tangible employment action does not always inflict direct economic harm.[182] Consistent with this observation, the Court stated that the supervisors' conduct regarding Ms. Suders' computer skills exam could potentially be considered a tangible employment action even though the conduct did not constitute direct economic loss.[183]

Moreover, the Court's unwillingness to hold that a constructive discharge is a per se tangible employment action does not prevent a broad interpretation of the term.[184] Nor does the Court's holding suggest that lower courts should adhere to a narrow category of supervisory conduct when determining the presence of an official act.[185] Rather, *Suders* merely established a uniform framework with which to evaluate hostile work environment claims.[186] The Court's holding asserts that entirely unofficial

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181. *See* Pa. State Police v. Suders, 542 U.S. 129, 152 n.11 (2004) (speculating that some of the supervisors' conduct could possibly be considered official, thus constituting a tangible employment action).

182. *See id.* at 149-50 (providing a framework through which lower courts evaluate the presence or absence of a tangible employment action). In an attempt to clarify the definition of a tangible employment action, the Supreme Court discussed two lower court cases, *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003), and *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), that "indicate how the 'official act' (or 'tangible employment action') criterion should play out when constructive discharge is alleged." *Id.*; *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761-62 (1998) (noting that a tangible employment action will, in most cases, but not always, involve direct economic harm).

183. *Suders*, 542 U.S. at 152 n.11.

184. *See id.* at 149 (asserting that because a hostile work environment claim and a hostile work environment constructive discharge claim differ only in the severity of the claim, they should not be treated differently merely because one of the claims results in the employee's resignation). *But see* Recent Cases, *supra* note 107, at 1008-10 (contending that viewing constructive discharge as not constituting a per se tangible employment action is a narrow interpretation of *Ellerth* and *Faragher*).

185. *See Suders*, 542 U.S. at 152 n.11 (highlighting the potentially official characteristics of some of the supervisors' conduct).

186. *See id.* at 149 (underscoring that the Court's holding merely ensures "categorical clarity" among the various sexual harassment claims). The Court's affirmation of "categorical clarity" for sexual harassment claims does not imply that a formalist understanding of the term "official act" guided the Court's approach to the definition of tangible employment actions. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 801-02 (1998) (dispensing with a "scope of employment" analysis of vicarious liability and affirming the "aided by the agency" standard in order to avoid confusing and unpredictable liability standards). Similarly, the Supreme Court's decision in *Suders* applies the "virtue of categorical clarity" to the analysis of the proper classification of constructive discharge claims. *Suders*, 542 U.S. at 149 (noting the procedural difficulty that would ensue if the liability standard applied to hostile work environment constructive discharge claims differed

conduct does not constitute a tangible employment action, regardless of whether it results in a constructive discharge.[187] Yet this holding does not imply that the Court intended to create a narrow category by which to classify official acts.[188]

Rather than creating formal categories of official conduct, *Suders* can be read to support a definition of the term tangible employment action that includes both direct and consequential economic loss.[189] In *Suders*, the Court, while recognizing that the supervisors' verbal abuse and crude behavior was clearly unofficial, observed that the events surrounding the computer skills exam "were less obviously unofficial."[190] This suggests that these actions could be interpreted as a tangible employment action.[191] Ms. Suders was required, for example, to pass the computer skills exam.[192] Her failure to pass the exam, while not constituting direct economic loss, was reasonably certain to cause economic loss as a consequence of the supervisor's conduct.[193] Ms. Suders could be reassigned, she could be asked to complete computer training, or she could be asked to take time out from work to finish her computer training.[194] As a result, Ms. Suders may have been denied promotion or prevented from lateral career advancement.[195] Additionally, the supervisors' accusation that Ms. Suders stole the exams and their act of arresting Ms. Suders was reasonably certain

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from the liability standard applied to mere hostile work environment claims). The Court pointed out that if all constructive discharges were considered tangible employment actions, it would actually be easier to prove a constructive discharge, which carries a heavier burden of proof, than to prove a simple hostile work environment claim, which carries a lighter burden of proof. *Id.*

187. *See Suders*, 542 U.S. at 149-50 (emphasizing that an official act must underlie a constructive discharge for that discharge to be considered a tangible employment action). For example, the First Circuit's decision in *Reed* reflects the view that because a constructive discharge will sometimes arise out of entirely unofficial conduct, there should not be a per se rule defining all constructive discharges as tangible employment actions. *Reed*, 333 F.3d at 33.

188. *See Suders*, 542 U.S. at 149-50 (articulating that the Court's holding is an efficient approach toward establishing clarity and uniformity among Title VII liability standards).

189. *See, e.g.*, *Suders*, 542 U.S. at 152 n.11 (suggesting that conduct that is not a direct economic loss could be considered a tangible employment action); Starkman, *supra* note 61, at 323 (recognizing the potentially broad scope of the term tangible employment action).

190. *Suders*, 542 U.S. at 152 n.11.

191. *See id.* (leaving open the possibility that the actions taken in response to the computer skills exams were official).

192. *See id.* at 136 (highlighting that the computer skills exam is a job requirement for officers of the Pennsylvania State Police and that the exams are sent to the Department of Officer Education to be evaluated).

193. *See* Starkman, *supra* note 61, at 323 (concluding that in light of the Supreme Court's decisions in *Ellerth* and *Faragher*, a tangible employment action will be based on a form of economic injury that could include "future injuries, such as decreased opportunities for advancement").

194. *Suders*, 542 U.S. at 136.

195. *See supra* notes 129-138 and accompanying text (providing a framework for evaluating the presence of consequential economic loss).

to proximately cause economic loss.[196] Accordingly, the Supreme Court's reasoning suggests that the term tangible employment action is not limited exclusively to conduct that constitutes direct economic loss but also includes conduct that results in consequential economic loss.[197]

D. A Broad View of the Tangible Employment Action Framework Facilitates Title VII's Objective of Deterrence and Remediation

A broad definition of the term tangible employment action is consistent with Title VII's policy objectives of deterring workplace discrimination and compensating individual victims of sexual harassment.[198] A narrow definition of this term, in contrast, would not only contravene Title VII's goal of deterrence but would also obstruct Title VII's equally important remedial function.[199] A broad definition of tangible employment actions benefits employers who identify and reprimand supervisors who use official power as an aid to sexually harass other employees and thus facilitates Title VII's goal of deterrence.[200] Moreover, this definition deters sexual harassment by providing employers and industries a market-motivated incentive to prevent discrimination carried out through

196. *See Suders*, 542 U.S. at 136 (describing the supervisors' plan to arrest Ms. Suders).

197. *See, e.g.*, Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 U.S. Dist. LEXIS 727, at *36-37 (E.D. Pa. Jan. 26, 1999) (finding that the plaintiff suffered a tangible employment action because the supervisor's conduct put the plaintiff in a position which would likely result in decreased earning potential); Dedner v. Oklahoma, 42 F. Supp. 2d 1254, 1258 (E.D. Okla. 1999) (finding no tangible employment action where the supervisor merely refused to allow the plaintiff to take specified days off of work).

198. *See* Chamallas, *supra* note 10, at 381-83 (advocating an approach to Title VII that both deters harassment and compensates victims of sexual harassment).

199. *See id.* at 378-79 (discussing the various reasons why internal complaint procedures often fail to detect or deter sexual harassment). "The irony of the current trend toward steering sexual harassment victims to use internal grievance procedures is that we may subtly be moving back to the approach of the 1970s when sexual harassment was considered to be a personal problem for individual women, rather than a systemic injury." *Id.* at 380. A strict view of the term "tangible employment action" is inconsistent with the actual experience of victims of sexual harassment. *Id. But see* Jackson v. Arkansas Dep't of Educ., 272 F.3d 1020, 1025 (8th Cir. 2001) (noting that Title VII's main objective is not to provide a remedy for harassment but to deter future harassment).

200. *See* Chamallas, *supra* note 10, at 382-83 (noting that more frequent compensation, which offers an incentive for employer's to reduce harassment, furthers the objective of deterrence). This broad definition does not contravene the requirement of notice to the employer. *See* Jones v. U.S.A. Petroleum Corp., 20 F. Supp. 2d 1379, 1385 (S.D. Ga. 1998) (underscoring that notice is the "keystone" for imposing liability for a supervisor's sexual harassment). The notice requirement is intended to ensure not only that the employer is aware of the harassment, but also that the employer can take steps to deter the harassment. *Id.* at 1384-85. An employer has notice of conduct resulting in consequential economic loss in the same way the employer has notice of conduct constituting direct economic loss. In both instances, the supervisor has taken an official act of the company for which the employer is presumed to be aware. *Cf.* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153-54 (3d Cir. 1999) (deeming as official the supervisors' conduct which resulted in consequential economic loss).

supervisors' use of official power.[201] Lastly, because official acts involve company authority, the employer is presumptively on notice.[202]

A broad definition of this term also facilitates Title VII's remedial objectives.[203] If tangible employment actions are limited exclusively to official conduct manifesting as a direct economic loss, employees harassed by means of conduct which does not result in direct economic loss will most likely be unable to survive summary judgment, thus discouraging victims to come forward and complain about abuses of official power.[204] Such a limitation would undermine Title VII's remedial objective.[205] Many victims do not report sexual harassment out of a fear of reprisal, ridicule, or damage to their careers.[206] The overwhelming evidence suggests that victims are unlikely to report the harassment, even if a company has an internal reporting procedure.[207] A narrow definition of a tangible employment action would further discourage victims from reporting

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201. *See* Chamallas, *supra* note 10, at 382 (noting that legal liability itself creates an incentive to deter workplace discrimination); Faragher v. City of Boca Raton, 524 U.S. 775, 803-04 (1998) (reconciling the Supreme Court's decision in *Meritor* with traditional agency principles under a risk-allocation model of employer liability and concluding that the appropriate standard is one of vicarious liability for supervisor sexual harassment with the availability of an affirmative defense when the supervisory conduct does not culminate in a tangible employment action).

202. *See* Chamallas, *supra* note 10, at 382 (emphasizing the importance of combining both deterrence and remediation in constructing standards for employer liability).

203. *See* Grossman, *supra* note 1, at 27 (articulating that rules for employer liability under Title VII should contribute to Title VII's goal of deterrence and remediation).

204. *See* Marks, *supra* note 11, at 1429-31 (pointing out that the affirmative defense framework has established a rule of contributory negligence under which any failure on the plaintiff's part to report the sexual harassment becomes a complete bar to liability).

205. *See* Chamallas, *supra* note 10, at 379-80 (describing the hesitancy of women to report sexual harassment in the workplace and the deficiency of most internal complaint procedures, thus leading to Title VII's inability to "dismantle entrenched gender hierarchies in the workplace"); *see also* Beiner, *supra* note 113, at 307-08 (discussing empirical evidence indicating that placing the burden on women to report sexual harassment is inconsistent with workplace responses to sexual harassment).

> In some cases, adopting these coping strategies may be wiser than reporting a single incident of harassment. They may allow women to minimize the impact of harassment by seeming to ignore it or taking steps to avoid harassers. Studies show that job loss and demotion are potential outcomes for sexually harassed employees. If some form of retaliation is possible, the choice not to report the harassment is rational.

Id. at 312-13; *see* Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why* Ellerth *Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 315-16 (1999) (contending that the reporting requirement thwarts Title VII's remedial objective by preventing many victims of sexual harassment from receiving any compensation for their injuries).

206. *See* Beiner, *supra* note 113, at 313 (discussing some of the common reasons victims do not report harassment).

207. *See* Chamallas, *supra* note 10, at 373-74 (critiquing the second prong of the affirmative defense that requires employees to report harassment). Chamallas points out that the second prong of the affirmative defense, which envisions a reasonable individual, is flawed. *Id.* Due to the reasonable person standard under the second prong, the analysis hinges on the question of why the person did not report the sexual harassment. *Id.* The consequence of this is to provide a complete defense against liability. *Id.* at 373.

harassment.[208] Accordingly, to facilitate Title VII's purpose of remedying sexual harassment and deterring future harassment, the category of conduct that qualifies as a tangible employment action should be construed broadly.

CONCLUSION

Despite the doctrinal clarity *Suders* provides for sexual harassment claims, defining the term tangible employment action remains a contentious issue. The affirmative defense framework established in *Ellerth* and *Faragher* currently gives employers sufficient protection against liability for sexual harassment. Given employers' broad protection under the affirmative defense framework, a narrow definition of the term tangible employment action would render meaningless the agency principles the Court designed to govern liability for supervisory-based sexual harassment. To prevent the development of case law that narrows *Suders*' discussion of the official act requirement, this Comment proposes a definition of the term tangible employment action that includes not only conduct constituting direct economic loss but also a supervisor's conduct resulting in consequential economic loss. While the second category is potentially controversial, it is an important component of the framework of employer liability established in *Ellerth* and *Faragher* and reaffirmed in *Suders*. The second category is consistent with the "aided by the agency" standard and facilitates Title VII's deterrent function by providing an incentive for the employer to deter sexual harassment and enforce appropriate workplace behavior. Most importantly, in an effort to deter future instances of sexual harassment, many courts have forgotten the actual victims of sexual harassment. This Comment advocates an approach to employer liability that returns some of the focus to those victims.

208. *See* Lawton, *supra* note 113, at 209-10 (arguing that the affirmative defense to vicarious liability in *Ellerth* and *Faragher* fails to deter sexual harassment).