

THE “OFFICIAL ACT CRITERION”

GIVING *PENNSYLVANIA STATE POLICE v. SUDERS TEETH* TO PRECLUDE THE AFFIRMATIVE DEFENSE IN HOSTILE ENVIRONMENT CASES

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The Tangible Employment Action

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the U.S. Supreme Court designed an objectively neutral standard focusing on whether the employer undertook an official act (the “tangible employment action,” a new term of art adopted by the Court therein), as a threshold question to determine whether the employer is entitled to assert the affirmative defense to vicarious liability in hostile environment cases. In *Faragher*, the Court concluded that:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defendant employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.

Faragher, 524 U.S. at 807.

Since *Faragher* and *Ellerth*, however, when deciding whether a defendant may assert the affirmative defense, courts have imported case law and analysis from disparate treatment cases, subjectively weighing what “level” of behavior constitutes an “adverse action” for purposes of determining whether a plaintiff has an actionable injury. Courts that have done so, loosely interchanging the terms “adverse action” and “tangible employment action,” or, worse, “adverse employment action,” have incorrectly ignored the objective nature of the Court’s “official act criterion.”

In *Faragher*, the Supreme Court specifically explained that it intended to avoid judgment calls by the courts and parties, where we would have to try to glean “how far from the course of ostensible supervisory behavior would a company officer have to step before his orders would not be seen as actively using company authority?” *Faragher*, 524 U.S. at 805. The Court concluded that both plaintiffs and defendants would be poorly served by an “active use rule.” *Id.* The alternative adopted by the Court was to allow an employer the opportunity to assert an affirmative defense.

The Court has clarified that *Faragher* and *Ellerth* “divided the universe of supervisor harassment claims according to the presence or absence of an official act.” *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 2356 (2004). For Title VII purposes, when a supervisor uses his managerial or controlling position to take some official action to the employee’s disadvantage – where he brings the official power of the enterprise to bear on the employee, where he exercises the authority delegated to him by the company, the employer is complicit in the hostile work environment and cannot assert the affirmative defense. However, when a supervisor engages in behavior that creates a hostile work environment, and there is no connection to the employer other than the fact that the conduct took place in the workplace, the employer may assert the affirmative defense.

A supervisor’s misuse of delegated authority becomes the act of the employer and gives rise to employer liability. The Court explained, “beyond question,” there is a class of cases where “more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate.” *Suders*, 124 S.Ct. at 2353 (quoting *Ellerth*, 524 U.S. at 760). Therefore, an employer is strictly liable for supervisor harassment that “culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” *Suders*, 124 S.Ct. at 2349 (quoting *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808).

In *Ellerth*, pointing to a non-exclusive list of examples, the Court explained that:

A tangible employment action constitutes a significant change in employment status, *such as* hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761 (emphasis added).

Ratification of official act by higher officials helpful but not required.

The Court explained that a tangible employment action is “the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” *Ellerth*, 524 U.S. at 762. It is “an official act of the enterprise, a company act,” and “[t]he decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.” *Id.* A supervisor’s action or inaction may be seen as employer’s adoption of the offending conduct

as if it had been authorized affirmatively by the employer. *Faragher*, 524 U.S. at 789.

Proof of economic harm arising from the official action not required.

Although the Court recognized that “[a] tangible employment action in most cases inflicts direct economic harm,” the Court did not require proof of economic harm in *all* cases. *Ellerth*, 524 at 762 (emphasis added). Indeed, the Court reiterated the bedrock principles underlying Title VII’s prohibition against discrimination with respect to compensation, terms, conditions, or privileges of employment, reminding us that:

We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition “is not limited to “economic” or “tangible discrimination.” *Harris Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)(quoting *Meritor Savings Bank, FSB v. Vinson*, [477 U.S. 57], 64 (1986)).

Faragher, 524 U.S. at 786.

Furthermore, in *Suders*, the Supreme Court explicitly endorsed the view that “the ‘official act’ (or ‘tangible employment action’) criterion” does not require proof of an economic harm in order to preclude the affirmative defense. *Suders*, 124 S.Ct. at 2356.

The view that proof of economic harm is not required to preclude the affirmative defense is reinforced by the very notable fact that Justices Thomas and Scalia dissented from the majority opinions in *Faragher* and *Ellerth*, explicitly because they believed the Court should have required “an adverse employment consequence.” *Faragher*, 524 U.S. at 810. The majority opinions plainly rejected the dissenting view, and did not require proof of an adverse employment consequence, nor proof of the effect of the employer’s action on the employee.

Survey of cases identifying tangible employment actions.

Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003). After the plaintiff complained that she was sexually harassed by the judge for whom she worked, the presiding judge took the official action of deciding to transfer her to the same position working for another judge. Employer was precluded from asserting the affirmative defense to a constructive discharge claim because the plaintiff’s resignation ““resulted, at least in part, from [the presiding judge’s] official actio[n] in transferring’ her to a judge who resisted placing her on his staff.” *Suders*, 124 S.Ct. at 2356 (quoting *Robinson*, 351 F.3d at 337)(brackets in original).

Molnar v. Booth, 229 F.3d 593 (7th Cir. 2000). Tangible employment action includes action by supervisors that interferes with employee’s ability to do her job. The court concluded that the confiscation of the plaintiff art teacher’s art supplies necessary to perform her assigned job amounted to “the clearest evidence” of a tangible employment action. *Id.* at 600. Similarly, the

court reasoned that a negative job evaluation, even though ultimately reversed, was a tangible employment action, and that the short duration of the effect of the negative evaluation “is naturally relevant to the degree of damage” the plaintiff suffered, but did not change the character of the action itself – a tangible employment action. *Id.* at 600-601.

Jin v. Metropolitan Life Insurance Co., 310 F.3d 84 (2d Cir. 2002). The court explained that post-*Faragher* and *Ellerth*, “liability analysis focuses on the supervisor’s conduct, not the victim’s reaction.” *Id.* at 97. The court declined to impose a requirement that the plaintiff prove actual economic loss as a basis for determining whether the employer may assert the affirmative defense. *Id.*

Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir. 2001). The court reasoned that locking an employee out of the workplace following his complaint of a hostile work environment based on race may constitute a tangible employment action. *Id.* at 188. Defendant failed to sustain its burden on summary judgment to show that it was entitled to affirmative defense as a matter of law.

Green v. Administrators of Tulane Educational Fund, 284 F.3d 642 (5th Cir. 2002). The court noted that the “Supreme Court did not state that loss of an economic benefit was required in all cases,” although finding economic harm in the case. *Id.* at 654.

Holly D. v. California Inst. of Technology, 339 F.3d 1158 (9th Cir. 2003), the court observed that a tangible employment action need not cause economic harm to the employee. *Id.* at 1170. The court specifically construed the Supreme Court’s “*Ellerth* list,” which includes “reassignment with significantly different responsibilities” not to implicate any consideration of the economic impact on the employee. *Id.* (quoting *Ellerth*, 524 U.S. at 761.) The court reasoned that “the most relevant factor in apportioning liability is the conduct of the ostensible agent.” *Id.* at 1172. The court rejected the notion of a contrary rule, which would allow an employer to avoid liability depending on the employee’s reaction to the agent’s misconduct. *Id.*