Employer Vicarious Liability for Voluntary Relationships Between Supervisors and Employees

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I. INTRODUCTION

Two individuals working for the same employer voluntarily engage in a sexual relationship. One of the employees is the direct supervisor of the other. On a given occasion, the two individuals are working together when the supervisor suggests that the two of them go to dinner and a movie. At the end of the evening, when the two are about to part company, the supervisor tries to kiss the other employee good night. However, the employee tells the supervisor that this type of behavior is inappropriate and the supervisor apologizes and promises never to do it again.

Nonetheless, the two continue to spend time together, both on and off of company time. The employee visits the supervisor’s apartment and even accepts a key to the apartment. Notwithstanding the employee’s earlier refusal to submit to the supervisor’s advances, the two eventually engage in intimate relations. The relationship continues for a period of time and at no point does the employee report any of the supervisor’s conduct to the employer. However, after the situation in the work environment takes a turn for the worse, the employee makes a sexual harassment claim under Title VII of the Civil Rights Act of 1964.† The employee argues that the advances were unwelcome. The only reason the employee provides for submitting to the supervisor’s advances was that it was an effort to remain in good standing with the employer. In other

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words, the employee allegedly feared that termination would result unless the employee submitted to the supervisor’s advances.

This illustration provides just one example of the myriad ways that a voluntary sexual relationship can evolve between an employee and a supervisor. Only two circuit courts—the Second and the Ninth—have addressed whether an employer can be held vicariously liable in a situation such as that presented by this hypothetical. More specifically, the Second and Ninth Circuits are the only circuits to address whether an employee’s voluntary submission to a supervisor’s sexual advances constitutes a “tangible employment action,” thereby precluding use of the Faragher/Ellerth affirmative defense against the employee’s Title VII claim.

This Article argues that the employer should not be held vicariously liable for an employee’s voluntary submission to sexual advances simply because the alleged harasser is a supervisor. Instead, liability under these circumstances should be determined on a case-by-case basis using a negligence standard. Moreover, this Article argues that where voluntary submission is involved, the courts should impose individual liability instead of vicarious liability. This proposal is predicated on the assumption that responsibility for voluntary relationships should be vested primarily in the supervisors and subordinates, not (in most cases) in the employers. This does not mean, however, that an employee coerced into a sexual relationship with a supervisor should have no legal recourse.

It is somewhat radical to suggest that an employer should not be held vicariously liable for an employee’s voluntary submission to sexual advances where the alleged harasser is a supervisor, and this approach is a marked departure from existing assumptions regarding sexual harassment. Most decisions and writings on the topic have imposed—under a traditional agency theory—vicarious liability upon the employer for the sexually harassing conduct of its supervisors. Specifically, courts addressing this issue have held that “[t]here is no question that a ‘tangible employment action’ occurs when a supervisor abuses his authority to act on his employer’s behalf by threatening to fire a subordinate if she refuses to participate in sexual acts with him, and then actually fires her

2. The Second Circuit addressed the issue in Jin v. Metro. Life Ins. Co., 310 F.3d 84 (2d Cir. 2002); the Ninth Circuit addressed it in Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003).

3. The Faragher/Ellerth defense is an affirmative action defense synthesized from the Supreme Court’s decisions in both Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), both discussed in detail in Part II, infra.

when she continues to resist his demands." This Article goes against the grain of both the cases analyzed and the scholarly articles written to date, though the author nevertheless attempts balance by proposing that a supervisor be jointly and/or severally liable with his employer for the discriminatory or harassing conduct of the supervisor if the supervisor is found to have engaged in sexual harassment. This proposal is fully consistent with the Supreme Court's decisions defining the scope of tangible employment actions.  

Part II describes the historical background of sexual harassment claims against the backdrop of the Supreme Court's decisions in *Faragher v. City of Boca Raton* 7 and *Burlington Industries, Inc. v. Ellerth.* 8 Part III presents the Second and Ninth Circuits' analyses determining that voluntary submission to a supervisor's sexual advances constitutes a tangible employment action, thereby precluding use of the *Faragher/Ellerth* affirmative defense. Part IV analyzes the decisions of the Second and Ninth Circuits and argues that voluntary submission does not constitute a "tangible employment action." However, even if the courts determine that voluntary submission does constitute a "tangible employment action," this Article argues that the appropriate standard in determining employer liability is a negligence standard. As such, the employer should be entitled to assert the *Faragher/Ellerth* affirmative defense in cases involving voluntary submission to a supervisor's sexual advances. Ohio courts apply a negligence standard, and this Part argues that the Supreme Court should follow suit. Part V concludes the article, noting that the imposition of a liability standard is consistent with Supreme Court precedent.

II. BACKGROUND

A. History of Sexual Harassment Law

Title VII of the Civil Rights Act of 1964 9 is a remedial statute designed to protect employees from being subjected to discriminatory work

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5. *Holly D.*, 339 F.3d at 1167.
6. "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.
environments and discriminatory employment practices. It prohibits employers from discriminating against individuals with respect to compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. Courts have been willing to recognize a Title VII claim where harassment based on sex has created a hostile or abusive work environment, and when an employer conditions employment benefits on the provision of sexual favors.

In *Meritor Savings Bank, F.S.B. v. Vinson*, the Supreme Court distinguished two types of sexual harassment claims that may expose an employer to liability under Title VII: (1) harassment that creates an offensive or hostile work environment, and (2) harassment involving the exchange of employment benefits for sexual favors (*quid pro quo*). For an employee to succeed on a hostile environment claim, the court made clear that an employee had to establish that the harassment was severe or pervasive. The Supreme Court eventually rejected the distinction between *quid pro quo* claims and hostile environment claims in 1998 when, in two sexual harassment companion cases, it revisited the question of employer liability for the harassing conduct of supervisory employees.

**B. The Supreme Court's Decisions in Faragher and Ellerth**

In *Faragher* and *Ellerth*, the Supreme Court held that to properly analyze whether an employer should be liable for a supervisor's harassment, the cases should be divided into two categories: (1) cases involving a “tangible employment action,” and (2) cases involving no “tangible employment action.” Under *Faragher/Ellerth*, where the supervisor's harassment is accompanied by a tangible employment action, the employer is held vicariously liable for the acts of the supervisor. This is because the courts have reasoned that the employer has a greater opportunity and duty to guard against supervisor misconduct than that of the general worker. On the other hand, where the supervisor's harassment

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14. *Id.*
18. “The agency relationship affords contact with an employee subjected to a supervisor’s sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on
is not accompanied by a tangible employment action, the employer is entitled to the Faragher/Ellerth affirmative defense. The Faragher/Ellerth affirmative defense is comprised of two elements: (1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

For purposes of Title VII liability, the definition of the term “employer” includes “agents” of the employer. It was Congress’s intent that courts look to agency principles in determining employer liability in sexual harassment claims. In Ellerth, the Supreme Court stated that when an employee brings a claim seeking to impose vicarious liability upon an employer for the acts of an individual acting in a supervisory capacity, the “aided in agency relation” principle embodied in § 219(2)(d) of the Restatement (Second) of Agency provides the appropriate starting point for determining the employer’s liability. Section 219(2)(d) assigns vicarious liability to employers for intentional acts committed by supervisors if the employee was aided in the agency relation in accomplishing the tort.

Accordingly, pursuant to Ellerth, when an employee brings a claim seeking to impose vicarious liability upon an employer for the acts of a supervisor, the “aided in agency relation” rule is the appropriate analysis. However, the Supreme Court explained that this standard alone is not sufficient to give rise to employer liability for sexual harassment because most workplace harassers are aided by the employment relationship simply by virtue of the proximity and regular contact they have with

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a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose “power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.”


19. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
20. Ellerth, 524 U.S. at 765.
22. Ellerth, 524 U.S. at 754.
23. Id. at 755.
other employees.\textsuperscript{26} As such, something more is needed to impose vicarious liability upon the employer. That something must be a tangible employment action against the employee by a supervisor with immediate or successively higher authority over that employee.\textsuperscript{27} The Court’s reason for establishing this rule was that the supervisor’s authority invests a certain threatening character in the harassment.\textsuperscript{28} Thus, after \textit{Faragher/Ellerth}, whether an employee suffered a tangible employment action is a critical inquiry.

\textbf{C. Post-Faragher/Ellerth: Tangible Employment Actions}

After \textit{Faragher/Ellerth}, an employer cannot escape liability when harassment by a supervisor culminates in a tangible employment action.\textsuperscript{29} Under \textit{Ellerth}, a tangible employment action “is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”\textsuperscript{30} However, it appears that this list may not be exhaustive. Had the Supreme Court meant this list to be exhaustive, it would not have used the phrase “such as” before listing examples of significant changes in employment status.\textsuperscript{31}

Therefore, to establish a tangible employment action, the employee must show only that the supervisor made decisions affecting compensation, terms, conditions, or privileges of the employee’s job based on the employee’s submission to the sexual advances.\textsuperscript{32} In most instances, a tangible employment action inflicts direct economic harm,\textsuperscript{33} though economic harm is not required.\textsuperscript{34} For example, a tangible employment action was found where an employee received inadequate training to meet the demands of and retain her position.\textsuperscript{35} A tangible employment action was also found where an employer withheld choice assignments\textsuperscript{36} and where

\textsuperscript{26} \textit{Ellerth}, 524 U.S. at 760.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.} at 764.
\textsuperscript{30} \textit{Ellerth}, 524 U.S. at 761.
\textsuperscript{31} \textit{See} \textit{Jin v. Metro. Life Ins. Co.}, 310 F.3d 84, 93 (2d Cir. 2002) (finding that the use of the words “such as” suggests “the definition given by the Supreme Court is non-exclusive”). \textit{See also} \textit{Suders v. Easton}, 325 F.3d 432, 456 (3d Cir. 2003) (“The use of the qualifier ‘such as’ indicates that tangible employment actions are not limited to those that follow the qualifier.”).
\textsuperscript{32} \textit{Temores v. SG Cowen}, 289 F. Supp. 2d 996, 1000–01 (N.D. Ill. 2003).
\textsuperscript{33} \textit{Ellerth}, 524 U.S. at 762.
\textsuperscript{34} \textit{Speaks v. City of Lakeland}, 315 F. Supp. 2d 1217, 1225 (M.D. Fla. 2004).
\textsuperscript{35} \textit{Carrero v. N.Y. Housing Auth.}, 890 F.2d 569, 579 (2d Cir. 1989).
an employee was deprived of a fair evaluation of her job performance. Economic harm or not, however, the action must have substantial consequences; a temporary reduction in an employee’s pay one year after she reported a supervisor’s alleged sexual harassment, for example, was found not to constitute a tangible employment action. Additionally, although a transfer could constitute a tangible employment action, it does not when the employee requests the transfer.

Recently, the Second and Ninth Circuits have expanded this list of possible tangible employment actions by holding that a job benefit (such as continued employment) that results from an employee’s voluntary submission to a supervisor’s sexual advances constitutes a tangible employment action. Thus, the decisions by the Second and Ninth Circuits expand the definition of tangible employment actions to include not only actions resulting in adverse employment decisions, but also actions resulting in tangible job benefits.

III. THE SECOND AND NINTH CIRCUITS’ DECISIONS: “TANGIBLE EMPLOYMENT ACTION”

Only two circuit courts have directly addressed the issue of whether an employee’s voluntary submission to a supervisor’s sexual advances constitutes a tangible employment action, thereby precluding the employer’s use of the Faragher/Ellerth affirmative defense. Both the Second Circuit, in Jin v. Metropolitan Life Insurance Company, and the Ninth Circuit, in Holly D. v. California Institute of Technology, concluded that voluntary submission to a supervisor’s sexual advances constitutes a tangible employment action. This Part analyzes how the Second and Ninth Circuits arrived at this conclusion. Part IV will demonstrate why the analyses of the Second and Ninth Circuits are incorrect.

A. The Second Circuit’s Decision on Submission as a “Tangible Employment Action”

The Second Circuit, in Jin v. Metropolitan Life Insurance Company, was the first to address whether an employee’s voluntary submis-

41. Jin, 310 F.3d at 100; Holly D., 339 F.3d at 1173.
42. Jin, 310 F.3d 84.
43. Holly D., 339 F.3d 1158.
sion to a supervisor’s sexual advances constituted a tangible employment action.\textsuperscript{44} Min Jin sued her former employer, Metropolitan Life Insurance Company (Met Life), alleging that she had been forced to submit to her supervisor’s sexual advances in return for retaining her employment in violation of Title VII.\textsuperscript{45} Following a jury trial, the United States District Court for the Southern District of New York entered a verdict of no liability.\textsuperscript{46} On appeal, the Second Circuit held that the district court committed plain error when it did not include the supervisor’s conditioning of Jin’s employment on her submission to his sexual advances in the list of possible examples of tangible employment actions submitted to the jury at the trial court level.\textsuperscript{47}

Jin began her employment with Met Life in 1989 as a full-time life insurance sales agent.\textsuperscript{48} Around May of 1993, Gregory Morabito, the alleged harasser, began acting as Jin’s manager and supervisor.\textsuperscript{49} From May 1993 until June 1994, Morabito subjected Jin to sexually offensive conduct.\textsuperscript{50} Morabito’s conduct included: (1) making numerous offensive sexual comments to Jin, both on and off of company time; (2) offensively touching Jin’s buttocks, breasts and legs; (3) requiring Jin to attend weekly evening meetings in his locked office during which he would physically threaten her, make sexual advances towards her, and expose himself to her; and (4) repeatedly threatening to fire Jin if she refused to submit to his sexual advances.\textsuperscript{51} After months of acceding to Morabito’s sexual abuse in order to maintain her employment, Jin altered her work schedule in order to avoid contact with him, and eventually refused to attend private meetings in his office.\textsuperscript{52} Met Life terminated Jin’s employment in October of 1995; she subsequently filed a claim for sexual harassment.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{44} 310 F.3d 84, 93 (2nd Cir. 2002).
\item \textsuperscript{45}  Id. at 87–88.
\item \textsuperscript{46}  Id. at 91.
\item \textsuperscript{47}  Id. at 94. The court of appeals also held: (1) failure to include the withholding of an employee’s checks in the list of possible “tangible employment actions” was prejudicial error; (2) use of the term “adverse” in “tangible employment action” instruction was plain error; and (3) denial of motion to amend complaint was not abuse of discretion. \textit{Id}. at 93–98. However, because this Article deals solely with the issue of whether voluntary submission to a supervisor’s sexual advances constitutes a “tangible employment action,” the Second Circuit’s evaluation of these issues will not be addressed.
\item \textsuperscript{48}  Id. at 88.
\item \textsuperscript{49}  Id.
\item \textsuperscript{50}  Id. at 88–89.
\item \textsuperscript{51}  Id.
\item \textsuperscript{52}  Id. at 89.
\item \textsuperscript{53}  Id. at 88–89.
\end{itemize}
Prior to trial on Jin's sexual harassment claim, both parties presented proposed jury instructions to the district court.\textsuperscript{54} Though Jin objected to several of Met Life's proposed jury instructions, the district court ruled in favor of Met Life.\textsuperscript{55} The district court entered a verdict of no liability: the jury found that Jin had been subjected to unlawful harassment by her supervisor, but concluded that the harassment did not result in a "tangible adverse action" affecting the terms or conditions of her employment.\textsuperscript{56}

Jin appealed,\textsuperscript{57} and the issue the court addressed was whether the case involved a tangible employment action.\textsuperscript{58} This issue was critical because, had the jury found that a tangible employment action occurred as a result of Morabito's harassment, Met Life would have been held vicariously liable for his conduct and would not have been entitled to the \textit{Faragher/Ellerth} affirmative defense.\textsuperscript{59}

In her appeal, Jin argued that the jury should have been instructed that submission to Morabito's sexual advances in order to maintain her employment was a possible tangible employment action.\textsuperscript{60} Jin argued that her employment status was significantly changed as a result of Morabito requiring her, under threat of termination, to submit to his sexual advances.\textsuperscript{61} The Second Circuit Court of Appeals agreed, holding that the district court committed plain error by omitting "submission to a supervisor's sexual advances" from the examples of tangible employment actions included in the jury instructions.\textsuperscript{62} The court specifically stated that the district court erred in narrowly defining tangible employment action

\textsuperscript{54} Id. at 89.

\textsuperscript{55} Id. at 89–90. The instructions eventually provided to the jury were as follows: "A 'tangible adverse action' is a significant change in employment status. Minor incidents that cause mere inconvenience and do not alter the actual amount of pay, benefits, duties or prestige, do not qualify as a 'tangible adverse action.'" Id. at 90.

\textsuperscript{56} Id. at 87. However, as addressed by the Second Circuit in its opinion, the district court erroneously used the phrase "tangible adverse action," as opposed to "tangible employment action" in the jury instructions. Id. at 87 n.1.

\textsuperscript{57} Id. at 87.

\textsuperscript{58} Id.

\textsuperscript{59} Id. at 91–93.

\textsuperscript{60} Id. at 93. The instructions received by the jury defined a "tangible employment action" to include the following: (1) "unjustifiably refusing to process policies sold by Jin"; (2) "unjustifiably causing [Jin's] disability claim to be denied"; or (3) "unjustifiably firing her." Id. Jin also argued that the jury instructions should have included the withholding of paychecks as a possible "tangible employment action." Id. However, because this Article addresses only whether voluntary submission to a supervisor's sexual advances constitutes a "tangible employment action," the court's holding with respect to that issue will not be addressed.

\textsuperscript{61} Id. at 94.

\textsuperscript{62} Id.
to only the three specific actions listed in the jury instructions. As such, it determined that Morabito’s explicit conditioning of Jin’s continued employment on her submission to his sexual advances should have been included in the jury instructions.

The court concluded that Morabito’s conduct “fit[] squarely within the definition of ‘tangible employment action’ that the Supreme Court announced in Faragher and Ellerth.” The court reasoned that it was Morabito’s authority, as an agent of Met Life, which enabled him to force Jin to submit to his sexual advances in order to maintain her employment. Moreover, the court reasoned that where the employee submits to a supervisor’s advances in order to continue in employment, this submission constitutes a tangible employment action because it is the basis for allowing the employee to maintain employment.

The Second Circuit reasoned that its holding was consistent with the Circuit’s pre-Faragher/Ellerth rule that “an employer is strictly liable when a supervisor ‘conditions any terms of employment upon the employee’s submitting to unwelcome sexual advances.’” In its pre-Faragher/Ellerth decisions, the Second Circuit determined that Title VII should not be read to punish victims of sexual harassment who surrender to unwelcome sexual advances, as such a rule would encourage increased persistence from harassers. Accordingly, the rule in the Second Circuit is that a significant change in employment status results when a supervisor uses his or her authority in order to make decisions affecting the terms and conditions of an employee’s employment based upon his or her submission to sexual advances. With this rule, the Second Circuit became the first circuit to hold that submission to a supervisor’s sexual advances constitutes a tangible employment action, thereby precluding the employer’s use of the Faragher/Ellerth affirmative defense in such situations.

63. Id. at 93. The Second Circuit also agreed that the district court erred by instructing the jury that a “tangible employment action” must be adverse, as such instruction directly contradicts the plain language of Faragher and Ellerth. Id.
64. Id. at 94.
65. Id.
66. Id.
67. Id.
68. Id. at 95 (quoting Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir. 1994), cert. denied, 512 U.S. 1213 (1994)).
69. Id. at 96.
70. Id.
71. Id. at 93–99.
B. The Ninth Circuit's Decision on Submission as a Tangible Employment Action

Shortly after the Second Circuit's holding in *Jin* that an employee's voluntary submission to a supervisor's sexual advances constitutes a tangible employment action, the Ninth Circuit addressed the same issue in *Holly D. v. California Institute of Technology*. The Ninth Circuit ruled that an employee's voluntary submission to a supervisor's sexual advances does constitute a tangible employment action. However, the Ninth Circuit ultimately ruled in favor of Cal Tech on the issue. The court's decision was based on Holly D.'s failure to present sufficient evidence to raise a genuine issue of material fact on either of two issues: (1) whether her supervisor threatened to terminate her employment if she failed to submit to his sexual advances, or (2) whether she conditioned her continued employment on her submission to such advances.

Holly D. began her employment at Cal Tech in 1992 as an administrative secretary. She was promoted to Senior Division Assistant for Professor Stephen Wiggins in 1996. Holly D. alleged that within one year of her promotion, she commenced a sexual relationship with Wiggins.

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72. 339 F.3d 1158, 1166–67 (9th Cir. 2003).
73. *Id.* at 1165. The sexual harassment claim was brought under Title VII and California's Fair Employment and Housing Act. *Id.*
74. *Id.* at 1165–66.
75. *Id.* at 1173. The court of appeals also held that: (1) the employer exercised reasonable care to prevent and correct sexual harassment and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm, supporting the employer's affirmative defense of reasonable care; and (2) remand to the state court was required for the state Fair Employment and Housing Act sexual assault and sexual battery claims. *Id.* at 1181–82. However, because this Article deals solely with the issue of whether voluntary submission to a supervisor's sexual advances constitutes a "tangible employment action," the Ninth Circuit's evaluation of these issues will not be addressed.
76. *Id.* at 1173. 
77. *Id.*
78. *Id.* at 1162.
79. *Id.* As a condition of her promotion and transfer to a new department, Holly D. was placed on a six-month probationary period, time during which she alleged that Wiggins occasionally looked at her buttocks and breasts, made sexual comments towards her, and occasionally showed her pornographic websites. *Id.* at 1162–63. Additionally, Holly D. alleged that Wiggins criticized her work and threatened to extend her probationary period. *Id.* at 1163.
gins because she felt it was necessary to submit to his sexual advances to maintain her employment with Cal Tech. The sexual relationship between Wiggins and Holly D. continued for approximately one year. Holly D. based her Title VII claim upon Wiggins’ conduct leading up to her submission to his advances.

Holly D. did not allege that Wiggins used physical force to coerce sex, or that he explicitly threatened her job if she did not submit to his advances. Nevertheless, in stating her claim, Holly D. relied upon what she considered indications that her continued employment depended on her submission to Wiggins’ advances. Holly D. contended that she was forced to submit to Wiggins’ sexual advances because doing so enabled her to limit the effects of his “job-threatening criticisms.” The district court ultimately found that Holly D. had not suffered a tangible employment action because she had remained employed in her current position, received regular salary increases, and was not denied any tangible job benefit.

However, in addressing Holly D.’s Title VII claim on appeal, the Ninth Circuit stated that “there is no question that a ‘tangible employment action’ occurs when a supervisor abuses his authority to act on his employer’s behalf by threatening to fire a subordinate if she refuses to participate in sexual acts with him, and then actually fires her when she continues to resist his demands.” With this reasoning, the Ninth Circuit joined the Second Circuit in holding that a tangible employment action also occurs where a supervisor threatens the employee with discharge and, in order to maintain employment, the employee submits to the supervisor’s sexual demands. As such, the Ninth Circuit concluded that an employer may not assert the Faragher/Ellerth defense when the supervisor coerces an employee to submit to sexual advances under threats of discharge, or discharges the employee for refusing to submit to such advances. The court reasoned that in either case, the supervisor has

80. Id. at 1163.
81. Id. at 1164. During this time, Holly D. and Wiggins engaged in various sexual activities including both sexual intercourse and oral sex during office hours. Id.
82. Id. at 1165.
83. Id. at 1163.
84. Id. Holly D. alleged that Wiggins became more critical during those periods when she rebuffed his advances and that she could neutralize his criticisms by submitting to his advances.
85. Id. at 1163–64.
86. Id. at 1165.
87. Id. at 1167.
88. Id.
89. Id. at 1173.
abused his authority in taking a tangible employment action against the employee, which results in a significant injury to the employee.90

The Ninth Circuit explained that employees who submit to supervisors’ sexual harassment are subjected to the same abuse of authority as are non-submissive employees. Thus, because discharge constitutes a tangible employment action, so too should submission to sexual advances.91 This is because in a submission case, as in a discharge case, the supervisor successfully utilizes his authority in order to accomplish the unlawful purpose of sexually harassing the employee.92 In exercising this authority in a submission case, the supervisor conditions the employee’s continued employment upon her willingness to submit to his sexual advances.93 Thus, participation in unwelcome sexual activities becomes a condition of the employee’s employment, which constitutes a substantial change in the terms of that employment.94 As such, the substantial change in the terms of employment constitutes a tangible employment action.95

The Second and Ninth Circuits are the only two circuits to squarely address whether voluntary submission to a supervisor’s sexual advances constitutes a tangible employment action.96 Both the Second Circuit, in Jin,97 and the Ninth Circuit, in Holly D.,98 held that voluntary submission to a supervisor’s sexual advances does constitute a tangible employment action, though the holdings do have their limitations. While the Ninth Circuit held that a tangible employment action occurs where the employee voluntarily submits to the supervisor’s sexual advances, it clearly stressed that the employee must either present evidence that she was threatened with termination if she failed to submit or must establish a link between the submission to the supervisor’s advances and an employment benefit, such as continued employment.99 Thus, while the Jin and Holly D. decisions may have an impact on an employer’s ability to assert the Faragher/Ellerth affirmative defense in voluntary submission cases, the burden remains on the employee to present sufficient evidence

90. Id. The court reasoned that the injury in submission cases is the physical and emotional damage that results from the employee’s submission to unwelcome sexual advances as a condition of continued employment. Id. at 1171.
91. Id. at 1168–69.
92. Id. at 1169.
93. Id.
94. Id.
95. Id.
98. Holly D., 339 F.3d at 1181.
99. Id. at 1173.
that either her employment was threatened if she refused to submit or that her continued employment was conditioned upon the submission.

IV. ANALYSIS

This Part will focus first on the potential impact that the Jin and Holly D. decisions will have on employers. Second, it will analyze the problems presented by these decisions including: their inconsistency with Supreme Court precedent and, how these decisions undermine the doctrine of avoidable consequences. Third, it will address the appropriate standard for determining employer liability in submission cases. This Part will conclude by discussing imposition of individual liability in submission cases.

A. The Impact of Jin and Holly D. on Employers

Employers may be liable for a supervisor’s harassment that creates a hostile work environment, subject to the affirmative defense established by the Supreme Court in Faragher and Ellerth. However, where the supervisor’s actions culminate in a tangible employment action, the employer may not assert the affirmative defense. The Second and Ninth Circuits’ decisions in Jin and Holly D. indicate the courts’ willingness to broaden the scope of those actions that may properly constitute a tangible employment action for purposes of Title VII liability. As such, these recent decisions will have a significant impact on employers because these decisions greatly expand the number of situations in which an employer may be held vicariously liable for a supervisor’s sexual harassment.

102. Ellerth, 524 U.S. at 761–63; Faragher, 524 U.S. at 777–78.
103. Additionally, a recent Second Circuit decision indicates a willingness to broaden the definition of the term “supervisor” for purposes of Title VII liability. Mack v. Otis Elevator Co., 326 F.3d 116, 126-27 (2d Cir. 2003). The courts’ willingness to broaden the definition of “supervisor” means that many more employees will qualify as supervisors, and employers without sexual harassment policies in place will be held vicariously liable for the acts of these employees.
104. Title VII does not define “supervisor.” 42 U.S.C. § 2000e is the “definitions” section for Title VII; subsection (b) defines the term “employer.” However, in most cases decided in recent years—prior to the Second Circuit’s decision in Mack—the term “supervisor” has been narrowly defined as an individual having “significant control over the [employee’s] hiring, firing, or conditions of employment.” Parkins v. Civil Constr. of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998) (emphasis added). The Supreme Court’s failure in Faragher and Ellerth to establish a test for courts to use in determining whether a particular employee qualifies as a “supervisor,” as well as Title VII’s lack of a definition of that term, has resulted in confusion as to who qualifies as a supervisor for purposes of Title VII liability. In April 2003, the Second Circuit, in applying the holdings in Faragher and Ellerth, arrived at a new standard for determining who qualifies as a supervisor for
The decisions in *Jin* and *Holly D.* have made periodic harassment training of all employees essential. The courts’ willingness to expand those actions necessarily expands the realm of potential liability exposure for the employer, thus limiting the situations where an employer may assert the *Faragher/Ellerth* affirmative defense to employee sexual harassment claims brought under Title VII.

B. The Second and Ninth Circuits’ Decisions are Problematic

The decisions of the Second Circuit in *Jin* and the Ninth Circuit in *Holly D.* present several problems. First, they are inconsistent with prior Supreme Court decisions regarding the scope of tangible employment actions. Second, the decisions undermine the concept of an employee having a parallel duty to avoid injury in situations involving the employee’s voluntary submission to a supervisor’s sexual advances.

1. The Second and Ninth Circuits’ Decisions are Inconsistent with the Supreme Court’s Definition of Tangible Employment Action

The Second and Ninth Circuits’ decisions are inconsistent with the Supreme Court’s prior definition of tangible employment action because historically, the Supreme Court has limited a tangible employment action to situations where “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” occurs. While the Court’s list is not exhaustive, the actions in both *Jin* and *Holly D.* fall outside of the scope of its definition.

Maintenance of the status quo is insufficient to automatically subject an employer to vicarious liability under *Faragher* and *Ellerth,* even when employees maintained their employment by submitting to the advances of their supervisors, as was claimed in *Jin* and *Holly D.* Under

### Footnotes

105. See *Ellerth,* 524 U.S. at 761 (defining “tangible employment action”).

106. *Id.* (emphasis added).


108. The circumstances in *Jin* and *Holly D.* may appear to be analogous to what the Court found actionable in *Meritor.* *Meritor Sav. Bank,* F.S.B. v. Vinson, 477 U.S. 57, 72–73 (1986). Importantly, however, *Meritor* was decided prior to the Supreme Court’s decisions in *Faragher* and *Ellerth.* This Article does not necessarily argue that the decision in *Meritor* was incorrect, but rather advocates that an employer should have an opportunity to assert the *Faragher/Ellerth* affirmative
Ellerth, a "significant change in status" is required for a tangible employment action.\textsuperscript{109} Continuing to work the same job, receive the same pay and benefits, and undertake the same responsibilities is not a change in status, and thus is not analogous to any of the examples of tangible employment action provided by the Court in either Ellerth or Faragher.\textsuperscript{110} Moreover, no detrimental employment effects arise from the submission when the status quo is maintained, and therefore there is no tangible employment action taken by the employer.\textsuperscript{111} The Supreme Court has clearly stated that if the supervisor takes no specific job action, then the employer will not be strictly liable for the supervisor's conduct.\textsuperscript{112} In both Jin and Holly D., the supervisor took no specific job action.

Furthermore, voluntary submission to a supervisor's sexual advances does not constitute a tangible employment action because a tangible employment action requires "an official act of the enterprise, a company act."\textsuperscript{113} A supervisor often acts on behalf of the company in the course of his professional duties. However, the harassing supervisor is acting on personal motives unrelated to, and often antithetical to, the objectives of the employer. Accordingly, such acts should not be found to be within the scope of the supervisor's employment and should not be imputed to the employer.\textsuperscript{114} Where an employer has no knowledge of the harassment, a court cannot logically deem the supervisor's actions to be an official act of the employer. The Second and Ninth Circuits, however,

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\textit{defense not only because defining voluntary submission as a "tangible employment action" is inconsistent with the definition set forth by the Supreme Court in Faragher and Ellerth, but also because when the employee submits to the advances, the employee thereby implies that the advances were not unwelcome. As previously acknowledged, this proposal presents a radical departure from existing legal assumptions about sexual harassment law. However, this proposal is fully consistent with the Supreme Court's decisions defining the scope of "tangible employment actions." See Ellerth, 524 U.S. at 761. Importantly, under the standard proposed in this Article, Meritor may have been decided differently. This proposal would have required the employee in Meritor to report the sexually harassing conduct or overcome the burden of the Faragher/Ellerth affirmative defense. As such, the employee in Meritor would have had to prove that the bank failed to exercise reasonable care to promptly prevent and correct any sexually harassing behavior, and that the plaintiff had a reasonable explanation for failing to take advantage of the preventative and corrective opportunities provided by the bank. See id. at 765. Regardless, under this standard, the bank would have been entitled to the opportunity to assert the affirmative defense, which may have allowed it to prove that the supervisor's advances were not truly unwelcome by the employee.}

\textsuperscript{109} Ellerth, 524 U.S. at 761.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 765.
\textsuperscript{113} Id. at 762.
\textsuperscript{114} See RESTATEMENT (SECOND) OF AGENCY § 235, illus. 2 (1958) (stating that a tort committed while acting purely from personal ill will is not within the scope of employment).
have concluded that the tangible employment action in submission cases is the retention of employment.\textsuperscript{115} The conclusion of these courts is flawed.

In those instances where a tangible employment action has occurred, the decision usually will be documented in official company records and may be subject to review by higher-level supervisors.\textsuperscript{116} Additionally, as the Ellerth court held, "the supervisor often must obtain the imprimatur of the enterprise and use its internal processes."\textsuperscript{117} This clearly distinguishes a submission case from those actions typically found to constitute a tangible employment action. As stated by the Ninth Circuit:

[[It is rare that a supervisor's demands for sexual liberties, and the corresponding threat of adverse consequences for failure to submit, will be documented anywhere in company records. Therefore, a rule requiring a victimized employee who submits to a supervisor's indecent demand for sexual favors to prove an official company act in order to establish a tangible employment action strains common sense.\textsuperscript{118}]

This is precisely why the employer should not be precluded from use of the Faragher/Ellerth affirmative defense. In the typical "tangible employment action"—actions found to constitute tangible employment actions prior to the decisions in Jin and Holly D.—there is typically documentation for the action taken by the employer, and this documentation puts the mark of the employer on the supervisor's actions. Conversely, there is no documentation in a submission case; at least on this point, submission cases are thus more similar to hostile environment claims, where the affirmative defense is available to the employer, than they are similar to instances of hiring, firing, demoting, or transferring an employee who fails to submit, where the affirmative defense is not available.

In Ellerth, the Supreme Court stated that a threat of a job detriment without an actual job detriment imposed by the supervisor is more precisely a claim for hostile work environment.\textsuperscript{119} That is precisely the situation in a submission case prior to the employee's decision to submit.

\textsuperscript{116} Ellerth, 524 U.S. at 762.
\textsuperscript{117} Id.
\textsuperscript{118} Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003) (quoting Suders v. Easton, 325 F.3d 432, 458–59 (3d Cir. 2003)).
\textsuperscript{119} Ellerth, 524 U.S. at 743.
Thus, submission cases are more similar to unfulfilled threat cases (i.e., hostile environment claims) and as such should be subjected to the Faragher/Ellerth affirmative defense.

An employee faced with a threat that her employment may be affected if she does not submit to the supervisor’s sexual advances is in a situation more appropriate for a hostile work environment claim, as no tangible employment action has been taken against the employee. On the other hand, the Second and Ninth Circuits found that, in submission cases, once the employee submits to the supervisor’s sexual advances, the situation changes and a tangible employment action has occurred.\footnote{120}

This is contradictory. Not only is it pure speculation as to whether the supervisor would actually follow through with any alleged threats, it is the action of the employee in deciding to submit to the advances that results in what the Second and Ninth Circuits have found to be the tangible employment action, not the decision of the employer. This conclusion is inconsistent with the Supreme Court’s definition of a tangible employment action.\footnote{121}

A simple illustration will demonstrate this anomalous result. A supervisor makes sexual advances toward an employee and the employee refuses these advances. Nonetheless, the supervisor continues to make advances toward the employee. If the employee brings a Title VII claim at this point, the claim would be subject to the Faragher/Ellerth affirmative defense because no tangible employment action has yet been taken. However, if, instead of filing a Title VII claim, the employee submits to the supervisor’s advances and then subsequently files a claim, the employer is precluded from asserting the affirmative defense. Under the decisions of the Second and Ninth Circuits, once the employee submits, a tangible employment action has occurred. It is counterintuitive to allow the employee to preclude the employer from asserting the affirmative defense by submitting to the advances instead of reporting the conduct to the employer. As such, submission cases should be treated similarly to unfulfilled threat or hostile environment claims, as that is exactly what this situation would be before the employee makes the decision to submit to the advances.\footnote{122}

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\footnote{120}{See Holly D., 339 F.3d at 1173.}

\footnote{121}{While the counter-argument may be that the requisite employer action is within the employer’s grant of coercive power to the supervisor, thus enabling the supervisor to then misuse that power to harass the employee, the employer has also granted a power to the employee by which to eliminate the harassment. The power granted to the employee is set forth in the employer’s policies and procedures to encourage the employee to inform it that a problem exists.}

\footnote{122}{Again, this argument may appear to be similar to the argument made by the employer and rejected by the Court in Meritor that, because the employee voluntarily submitted to the supervisor’s...}
It is unreasonable for the court to hold the employer liable for the employee’s decision to submit to the advances rather than to follow the policies and procedures the employer has put into place to safeguard against liability if an employee believes she is being sexually harassed. While the harassing conduct may be an act of the supervisor, the decision to submit is an act of the employee for which the employer should not be held vicariously liable. Up until the point where the employee decides to submit, the employer is entitled to the Faragher/Ellerth affirmative defense. The same should hold true after the employee decides to submit. A contrary decision allows the law to change based upon the decision of the employee. Importantly, the decisions set forth by the Second and Ninth Circuits allow the employee to control the decision and outcome of the case. Not only do these decisions allow the employer’s fate to hinge on the employee’s decision, they also affect the employer’s ability to defend itself by precluding the use of the Faragher/Ellerth affirmative defense.

The Ninth Circuit reasoned that in a submission case, the threat is not unfulfilled or inchoate, but is implemented when the supervisor actually coerces sex by abusing the employer’s authority, thus making the condition of employment he has imposed concrete. The court determined that the threat culminates in a “tangible employment action,” because the employee maintains her employment as a result of submitting to her supervisor’s advances. In fact, this is not true. The threat is unfulfilled or inchoate until the employee determines that it would be more beneficial to submit to the advances than to follow the procedures set forth by the employer to eliminate any such harassing conduct.

Moreover, the Ninth Circuit stated that, “if a supervisor commits a ‘tangible employment action’ by ‘firing’ an employee because she refuses to enter into a sexual relationship, a ‘tangible employment action’ must also occur when he determines not to fire her because she has performed the sexual acts he demanded.” This inquiry is too fact intensive to simply assume, thereby imposing vicarious liability on the employer, that the supervisor would have actually acted upon the threats. This is a question of fact which should be determined on a case-by-case basis and subject to the Faragher/Ellerth affirmative defense. While there is al-

sexual advances, the employer should not be held liable. However, the fact that the employee makes the decision to submit to the advances, thereby foregoing the policies and procedures implemented by the employer to discourage sexually harassing conduct, implies that the employee consents to the relationship. Therefore, if the relationship is consensual, it is welcome and thus not actionable.

123. Holly D., 339 F.3d at 1170.
124. Id.
125. Id.
ways a question of fact about the consensual nature of the relationship, where an employer has a policy in place to stop the alleged harassment, then it should be presumed that the employee entered into the relationship consensually. It further defies common sense to assume that the employee might feel comfortable making a claim of sexual harassment for not receiving a promotion while being uncomfortable making a claim of forced participation in unwanted sexual acts with a supervisor.

The Second and Ninth Circuits’ holdings that voluntary submission to a supervisor’s sexual advances constitutes a tangible employment action are incorrect, as a decision by an employee clearly does not fall within the realm of “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits” as set forth by the Supreme Court in Ellerth.126 Accordingly, these decisions are inconsistent with Supreme Court precedent.

2. These Decisions Undermine the Avoidable Consequences Doctrine

The Supreme Court’s stated goal in Faragher and Ellerth was to balance agency principles of vicarious liability with Title VII’s basic policy of encouraging employers to promulgate and enforce effective antidiscrimination/harassment policies and encouraging employees to avoid the harm caused by harassment and discrimination by quickly reporting such misconduct.127 A victim of harassment has a duty to “use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute.”128 The approach of the Second and Ninth Circuits discourages employees from avoiding or ending harassment and discrimination.

Under the approach taken by the Second and Ninth Circuits, an employee who is faced with the sexual advances of her supervisor fares better by submitting to the sexual advances than by refusing the advances and immediately reporting the harassment. This result seems contrary to the balance enunciated by the Supreme Court in Faragher and Ellerth. Thus, an employee’s continued employment after submitting to a supervisor’s sexual advances should not be found to constitute a tangible employment action. More importantly, submission to a supervisor’s sexual advances should not preclude the employer’s use of the Faragher/Ellerth affirmative defense.

127. Id. at 764.
Part of the Ninth Circuit’s decision was based upon the reasoning that participation in unwanted sexual acts becomes a condition of the employee’s employment—“a critical condition that effects a substantial change in the terms of that [employee’s] employment.” However, this cannot be true, as harassment would be eliminated if the employee were to follow the proper course of procedures as set forth by company policies. Following the holdings of Jin and Holly D. would allow employees to bypass procedures that the employer has put in place specifically to address these very issues. Individuals must be held accountable for their actions. The decisions of the Second and Ninth Circuits fail to hold the individual employees accountable for their actions, and this is a step in the wrong direction.

Furthermore, under the approaches of the Second and Ninth Circuits, an employer’s sexual harassment policies would be rendered nullities, and employees would be discouraged from sanctioning a supervisor’s inappropriate conduct because only voluntary submission constitutes a tangible employment action. Sexual harassment policies encourage employees to report instances of harassment immediately to deter future occurrences. Such policies also provide employers with notice of inappropriate conduct. The approaches of the Second and Ninth Circuits discourage employees from reporting a supervisor’s inappropriate behavior. To keep the balance and promote timely reporting, an employer should be entitled to the Faragher/Ellerth affirmative defense when a harassment claim involves an employee’s voluntary submission to a supervisor’s sexual advances.

The Second and Ninth Circuits accept the argument that in a submission case, the employee voluntarily submits to a supervisor’s sexual advances in order to avoid the threat of being discharged for refusal to submit. However, submitting to a supervisor’s sexual advances out of threat of discharge is not an argument that should expose an employer to vicarious liability. It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted

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129. Holly D., 339 F.3d at 1169.
131. Id.
133. Of course, when a supervisor threatens termination, an employee may reasonably fear retaliation. To be sure, harassing supervisors often threaten termination in order to intimidate and manipulate their victims. Effective complaint procedures are designed to protect against precisely such retaliatory conduct. They are intended to divest a harassing supervisor of any power he has over the victimized employee.
for her protection. To hold otherwise would render the affirmative defense meaningless. A more logical conclusion would be that the employee should be required to report the harassment in order to prevent the threat.\footnote{134. See Mandray v. Publix Supermarkets, Inc., 30 F. Supp. 2d 1371, 1376 (S.D. Fla. 1998), (stating that "[t]o permit an employee to disregard a policy of which she was admittedly aware based on generalized fears would require an employer to be automatically liable for harassment committed by a supervisor. This is a result which the Supreme Court expressly sought to avoid.")} Requiring the employee to report the harassment is consistent with Title VII’s policy of deterring sexual harassment and implementing proper workplace safeguards.

Title VII was specifically designed to encourage harassed employees to report their harassers on the belief that doing so benefits everybody. Reporting the alleged harassment benefits the victim by allowing the company to eliminate the threat of future harassment. Reporting also benefits others who might be harassed by the same individual, and it benefits the company by alerting it to the disruptive and unlawful conduct of the supervisor. Thus, to require an employee who feels threatened by a supervisor’s sexual advances to report the conduct serves the primary objective of Title VII, which “is not to provide redress but to avoid harm.”\footnote{135. Faragher, 524 U.S. at 806 (1998).}

An employee’s subjective belief in the futility of reporting a harasser’s behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer.\footnote{136. Barret, 240 F.3d at 268.} Title VII expressly prohibits any retaliation against an employee for reporting harassment.\footnote{137. See 42 U.S.C. § 2000e-3(a) (2000).} Allowing subjective fears to vitiate an employee’s reporting requirement would completely undermine Title VII’s basic policy of encouraging forethought by employers.\footnote{138. Faragther, 524 U.S. at 807; see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).} The law against sexual harassment is not self-enforcing; an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists. In Ellerth, the Supreme Court said that an employee has a duty to alert the employer to any harassing conduct occurring in the workplace.\footnote{139. Ellerth, 524 U.S. at 764.} The courts cannot allow an employee to subvert this duty by submitting to, instead of reporting, a supervisor’s sexual advances.
C. The Appropriate Standard in Determining Employer Liability

A negligence standard, rather than vicarious liability, is the appropriate standard in a submission case. Although a supervisor’s status might facilitate the harassment for which an employer may be held vicariously liable, this is no reason for precluding the employer from asserting the Faragher/Ellerth affirmative defense.\(^{140}\) an employee should not be entitled to hold an employer responsible for the hostile workplace environment unless the employee can show that the employer knew or should have known of the harassment and nonetheless failed to take prompt remedial action. Liability in submission cases should be determined using the same negligence standard used in other hostile environment claims, thereby entitling the employer to the opportunity to assert and prove the affirmative defense to liability.

An employer should be allowed to prove that it did not implicitly or explicitly aid the supervisor’s misconduct. If a supervisor imposes a job detriment, then under any theory of agency law, an employer would be liable because the employer has implicitly given its imprimatur to the supervisor’s conduct. On the other hand, when a supervisor’s conduct does not result in a tangible action, like in the case of submission, the employer’s approval or acquiescence is not easily determined. Conditioning employer liability at least in part on its own action or inaction should encourage employers to adopt effective anti-harassment policies.

The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment.\(^ {141}\) When an employer has promulgated a sexual harassment policy specifying the steps a victimized employee should take to alert the employer of the harassment, the employer is deemed to have notice of the harassment sufficient to oblige it or its agents to take prompt and appropriate remedial measures when the employee who alleges harassment makes “reasonably sufficient use of the channels created by the policy.”\(^ {142}\)

The more appropriate standard in determining employer liability in a submission case is a negligence standard, subject to the Faragher/Ellerth affirmative defense. Title VII was designed to encourage the creation of anti-harassment policies and effective grievance mechanisms. To the extent limiting employer liability could encourage

\(^{140}\) Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003).

\(^{141}\) Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).

\(^{142}\) Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364 (11th Cir. 1999).
employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.

D. Imposition of Individual Liability in Submission Cases

Title VII does not afford monetary relief against a supervisor, even when the supervisor is the person who engaged in the underlying, wrongful conduct. However, because one of the primary purposes of Title VII is to prevent discrimination, it is anomalous to encourage the prevention of discrimination while at the same time allowing the individual who is guilty of inflicting the discriminatory or harassing conduct to escape liability. Therefore, the better approach is to hold a supervisor jointly and/or severally liable with the employer for the harassing conduct. Ohio courts assign liability this way, so the approach is not novel. The legislature should amend Title VII to incorporate this same approach in all cases involving discriminatory or harassing conduct by a supervisor.

This proposal of joint and/or several liability is predicated on the assumption that responsibility for voluntary relationships should be vested primarily in the supervisors and subordinates who form them, and not (in most cases) in employers. This does not mean, however, that an employee coerced into a sexual relationship with a supervisor should have no legal recourse. Title VII should be amended to permit individual liability in sexual harassment cases, so that such an employee may sue the supervisor directly. Liability should follow responsibility.

In Genaro v. Central Transport, Inc., the Ohio Supreme Court held that under chapter 4112 of the Ohio Revised Code, Ohio’s antidiscrimination statute, a supervisor may be jointly and/or severally liable with his or her employer for the discriminatory or harassing conduct of the supervisor. The Ohio Supreme Court held so even though federal case law interpreting and applying Title VII is generally applicable to cases involving chapter 4112. Chapter 4112, section 02 of the Ohio Revised Code, phrased similarly to Title VII, provides in pertinent part:

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin,

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145. Although this approach is used in Ohio courts, this is not the view followed by the Sixth Circuit, of which Ohio is a part. E.g., Wathen v. Gen. Elec. Co., 115 F.3d 400 (6th Cir. 1997) (holding that an individual employee/supervisor may not be held personally liable under Title VII).
146. 703 N.E.2d at 787–88.
147. Id. at 784. See also Ohio Civil Rights Comm’n v. Ingram, 630 N.E.2d 669, 672 (Ohio 1994).
handicap, age, or ancestry, . . . of a person to discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment or any matter directly related to employment.148

Under the statute, "employer" is defined as "any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer."149 Furthermore, the term "person" is defined as including "one or more individuals . . . agent, and employee."150 The Ohio Supreme Court determined that, by its very language, the statute encompasses individual supervisors whose conduct violates the provisions of chapter 4112.151

Moreover, the court reasoned that holding supervisors individually liable for their discriminatory actions facilitates the anti-discriminatory purposes of chapter 4112, thereby furthering the public policy goals regarding workplace discrimination.152 Because the purposes behind chapter 4112—purposes of avoiding discrimination—are similar to those of Title VII, legislators should follow the example set by the Ohio Supreme Court and draft legislation incorporating individual liability provisions for supervisors to ensure that the purposes of Title VII are fulfilled. The approach followed by the Ohio Supreme Court more effectively serves Title VII's deterrent purpose than does the approach currently followed in the federal court system of limiting liability solely to the employer.

V. CONCLUSION

This Article does not argue that an employer should not be held liable for the acts of its supervisors. This Article simply argues that in submission cases, the employer should be entitled to assert the Faragher/Ellerth affirmative defense. An employer should not be held vicariously liable for an employee's voluntary submission to sexual advances simply because the alleged harasser is a supervisor. Instead, liability under these circumstances should be determined on a case-by-case basis using a negligence standard. Additionally, where voluntary submission is involved, the courts should impose individual liability instead of vicarious liability.

The proposals in this Article are somewhat radical, as they present a marked departure from existing assumptions regarding sexual harass-

148. OHIO REV. CODE ANN. § 4112.02 (West 2005).
149. Id. § 4112.01(A)(2) (emphasis added).
150. Id. § 4112.01(A)(1).
151. Genaro, 703 N.E.2d at 785.
152. Id.
ment. Nonetheless, while this proposal goes against the grain of the cases analyzed and takes a stance different from most scholarly articles on this topic, the departure is balanced by imposing joint and/or several liability on the supervisor for his discriminatory or harassing conduct.

Importantly, this proposal is fully consistent with the Supreme Court's decisions defining the scope of "tangible employment actions."153 The imposition of individual liability against a negligence standard, rather than a blanket denial of affirmative defenses, should be and indeed may very well be how the Supreme Court would ultimately rule if it were directly faced with the question of whether an employee's voluntary submission to a supervisor's sexual advances constitutes a tangible employment action.