No. 01-7013

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MIN JIN,
Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF APPELLANT AND URGING REVERSAL

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STATEMENT OF INTEREST AND AUTHORITY TO FILE BRIEF

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. This brief is filed in response to a request from the Clerk of the Court to NWLC Co-President Marcia D. Greenberger by letter dated January 25, 2002.

The Court has asked NWLC to submit its views on the following issue:

> Should the following be considered a "tangible employment action" as defined in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998): infliction of sexual abuse by a supervisor upon a subordinate employee, who acceded to the abuse upon threat of termination or other detrimental alteration of employment conditions?

The Court also asked NWLC, if it cares to, to comment on the following issue:

> Assuming *arguendo* that the above is a "tangible employment action," what effect should that have on the outcome of this appeal?

The Center appreciates the opportunity to address both questions.

I. SUMMARY OF ARGUMENT

The conduct that gave rise to this lawsuit -- the imposition of a requirement on Plaintiff Min Jin by her supervisor that, to avoid being fired, she repeatedly engage in unwanted, repugnant sex acts with him -- is one of the most pernicious and damaging forms of sexual harassment that can occur in the workplace. The Supreme Court's seminal sexual harassment decision, *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986), involved an employee's submission to her supervisor's repeated sexual demands upon fear of losing her job, and while the Court declined to address the standards for vicarious employer liability in such a case, it has subsequently called the conduct in *Meritor* "appalling" and "especially egregious." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993).

The law is clear that this conduct constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1994), and, as shown herein, it also must be considered conduct involving a "tangible employment action" for which the employer is strictly liable. Before the Supreme Court's rulings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Second Circuit had held that when a supervisor demands sexual favors from a subordinate, the employer must be held liable whether the subordinate employee refuses the sexual demands of her supervisor and loses her job or, as happened here, she submits to the

demands in order to retain her job. *See, e.g., Karibian v. Columbia University,* 14 F.3d 773 (2d Cir.), *cert. denied* 512 U.S. 57 (1994). This remains the rule under *Ellerth* and *Faragher*.

In *Ellerth* and *Faragher*, the Court established that an employer is always liable for sexual harassment by a supervisor where the supervisor has taken a "tangible employment action" against his subordinate. In those circumstances, the Court held, the employer is automatically liable for the supervisor's conduct without recourse to a new affirmative defense articulated by the Court, which may be asserted in other sexual harassment cases. As shown below, although the Court in *Ellerth* nor *Faragher* did not directly rule on the question this Court has asked amici to address, a careful reading of the Court's opinions in those cases compels the conclusion that there is a "tangible employment action" when a supervisor requires a subordinate to submit to his sexual demands in order to avoid losing her job or otherwise being penalized. The Court's reasoning and language, as well as its express ratification of earlier lower court decisions holding employers strictly liable in these circumstances, make this clear.

This result is fully consistent with the rule of this Circuit prior to *Faragher* and *Ellerth*, holding employers strictly liable where a subordinate submits to a supervisor's sexual demands in order to avoid losing her job. *See Karibian,* 14 F.3d 773. Indeed, the "tangible employment action" framework of *Faragher* and

Ellerth closely resembles that of prior Second Circuit "submission" cases, and thus confirms their vitality. The post-*Faragher/Ellerth* guidance of the Equal Employment Opportunity Commission (EEOC) also concludes that a "tangible employment action" is presented in a submission case, and as a reasonable interpretation of Title VII by the agency charged with its enforcement, the EEOC's guidance should be given deference by this Court. Decisions in other jurisdictions support this interpretation of the law as well. Finally, this is the only rule that will give full effect to the policies and purposes underlying the sexual harassment jurisprudence that has developed under Title VII – to guarantee that no one is required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor,* 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)), or as this Court has put it, to ensure that employees like Jin are not forced to submit to "sexual blackmail" in order to work. *Karibian,* 14 F.3d at 778.

Because the jury instruction did not correctly reflect this rule, the decision below should be reversed and the case remanded for a new trial.

II. ARGUMENT

A. Infliction of Sexual Abuse By a Supervisor Upon a Subordinate Employee, Who Acceded to the Abuse Upon Threat of Termination or Other Detrimental Alteration of Employment Conditions, Is a Tangible Employment Action Within the Meaning of *Ellerth* and *Faragher* and Leads to Strict Liability for the Employer

1. This Conduct Constitutes a "Tangible Employment Action" Under the Language and Rationale of *Ellerth* and *Faragher*

In *Ellerth* and *Faragher*, the Supreme Court established a new rule on employer liability for a supervisor's sexual harassment of his subordinate. Whenever the supervisor's harassment involves a "tangible employment action" against the subordinate, the employer's liability is established. When there is no tangible employment action, the employer may assert an affirmative defense that (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998). This framework does not rely on the distinction in prior case law between "quid pro quo" and "hostile environment" sexual harassment -- although, as shown *infra*, the "tangible employment action" framework is very similar to the analysis previously adopted in some Circuits, including the Second Circuit, imposing strict liability in

cases of quid pro quo harassment where the subordinate's response to a supervisor's sexual demands was used as the basis for decisions affecting the terms and conditions of her employment.

The rationale for the new framework, the Court explained, is that a supervisor can make a tangible employment decision only because of his role as an agent of the employer: "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." *See id.* at 761-62. The Court elaborated:

> Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.

Id. at 762. Thus, the touchstone of a "tangible employment action" is that it is an action that can be taken only by a supervisor, not, for example, by a coworker. *Id.* *See also* 1 LINDEMANN & GROSSMAN'S EMPLOYMENT DISCRIMINATION LAW 518 (Philip J. Pfeiffer et al. eds., Cumulative Supp. 2000)(a tangible employment action, under *Ellerth* and *Faragher*, "is the type of action a supervisor normally would take . . .").

In this case, the record shows that Jin's immediate supervisor, Greg Morabito, used his position as her supervisor to force her to submit to his sexual demands at weekly, evening meetings in his office, repeatedly threatening to fire

her if she refused. (A185-91). Morabito was able to force Jin to accede to his demands precisely because of the authority to fire her that resulted from his agency relation with Metropolitan Life. The factual paradigm presented here thus fits squarely within the reasoning the Supreme Court used in fashioning the "tangible employment action" doctrine of *Faragher* and *Ellerth*.

The Court's discussion of prior case law in *Faragher* also makes it plain that the facts of a sexual submission case like this one fall within the definition of a "tangible employment action." In *Faragher,* the Court noted that the circuits had previously held that claims against employers for discriminatory employment actions with "tangible results" resulted in strict employer liability, and cited authorities as follows:

> *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ('When a supervisor requires sexual favors as a quid pro quo for job benefits, the supervisor, by definition, acts as the company'); see also Lindemann & Grossman 776 (noting that courts hold employers 'automatically liable' in quid pro quo cases because the 'supervisor's actions, in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer').

Faragher, 524 U.S. at 790-91. The Court also cited *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), in which liability was imposed on an employer where the harassment victim had succumbed to the supervisor's threats. The Court expressly endorsed "[t]he soundness of the results in these cases (and their continuing vitality)." *Faragher*, 524 U.S. at 790-91. Thus, the Court ratified the earlier rule

that an employer is automatically liable where a supervisor requires sexual favors from a subordinate as a condition of retaining her job.

Nichols is particularly instructive. There, a deaf-mute postal employee was forced repeatedly to perform oral sex on her night-shift supervisor in order to continue her employment with the postal service. 42 F.3d at 509. The court held that once this conduct has been established, "the harasser's employer is, ipso facto, liable." *Id*. at 513. The court explained:

> The most oppressive and invidious type of workplace sexual harassment is quid pro quo sex. There can be no justification for requiring a worker to engage in sexual acts in order to obtain a job or job-related benefit, or to avoid a job-related detriment. Most workers subjected to sexual pressure in the workplace have little means of defense – other than the law. For economic reasons, most workers cannot simply abandon their employment – new jobs are hard to find.

Id. at 510. The facts of *Nichols* are strikingly similar to the facts in the instant case, where Jin was forced repeatedly to perform sex acts on her supervisor in the evening hours in order to avoid losing her job. That the Supreme Court in *Faragher* included *Nichols* among the cases it approved for "the soundness of [their] results" and their "continuing vitality" makes it resoundingly clear that, under the *Faragher* and *Ellerth* framework, the employer here – like the one in *Nichols* – "is, ipso facto, liable."

The Court's description of a tangible employment action as involving "a significant change in employment status," in its discussion in *Ellerth*, further

supports the conclusion that a submission case presents a tangible employment action. 524 U.S. at 761. In a very real sense, Jin's employment status suffered a significant, tangible change: as an added requirement of her job, she was compelled to submit to unwanted, demeaning sex acts with her supervisor at his Thursday night meetings. The actions of her supervisor consequently had a direct economic impact on her: to retain her job and income, she had to submit to these new, unpalatable requirements.[1] Moreover, in the same sentence in which the Court speaks of a "significant change," it includes "failing to promote" as an example. In a "failure to promote" situation, the employee's job status has changed similarly to the way Jin's changed here: in both a "failure to promote" and a "failure to terminate," the employee's pay, benefits, etc. remain the same, but a tangible employment action has occurred nonetheless if the decision was based on

[1] In any event, the infliction of direct economic harm is not a prerequisite to finding a tangible employment action: "A tangible employment action *in most cases* inflicts direct economic harm." *Ellerth*, 524 U.S. at 762 (emphasis added). And both *Ellerth* and *Faragher* include examples of tangible employment actions that do not involve "pocketbook" harm, such as "work assignment" and "reassignment with significantly different responsibilities." *Id.* at 761; *Faragher*, 524 U.S. at 790. *See also Durham Life Insurance Co. v. Evans,* 166 F.3d 139, 153 (3d Cir. 1999) (economic harm is not the "sine qua non" of a tangible employment action). Moreover, to the extent that *Ellerth* distinguished between cases where the employees who refused sexual advances suffered job changes such as termination, demotion, or decrease in wages and benefits, on the one hand, and cases where they suffered only "bruised egos" or demotions without change in pay or benefits, on the other, it was simply clarifying that in refusal cases, the ensuing job detriments must be more than *de minimus* to constitute a tangible employment action. *Ellerth*, 524 U.S. at 761. It was not addressing -- and therefore not excluding -- cases like the one here in which the change consisted of the addition of repugnant sex acts to the subordinate's job duties as a condition of retaining her employment.

the employee's response to a supervisor's sexual demands (not promoting because of her rejection of the demands, or not firing because of her submission to them).[2]

For these reasons, the Plaintiff here was clearly subjected to a tangible employment action within the meaning of *Faragher* and *Ellerth* – leading to automatic liability for her employer – when her supervisor required her to submit to unwanted sex acts with him in order to avoid being fired.

2. The Reasoning of *Faragher* and *Ellerth* Echoes That of Prior Second Circuit Decisions Holding Employers Strictly Liable in Submission Cases, and Confirms the Soundness of Those Decisions

Faragher and *Ellerth* did not create from thin air the tangible employment action concept as the basis for employer liability. *See Ellerth*, 524 U.S. at 761 ("The concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving . . . sex discrimination . . . . [W]e

[2] The omission of a sexual submission scenario from the Court's discussion of what constitutes a "tangible employment action" is of no significance. First, both opinions make it clear that the examples of tangible employment actions listed are not exhaustive. *See Faragher*, 524 U.S. at 808 ("*such as* discharge, demotion . . . ."); *Ellerth,* 524 U.S. at 761 ("*such as* hiring, firing, failing to promote"). Second, the "submission" issue was not before the Court in either *Faragher* or *Ellerth*. Indeed, *Ellerth* expressly noted that the question it was reviewing was "[w]hether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has *neither submitted to the sexual advances of the alleged harasser* nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?" 524 U.S. at 753 (emphasis added). For that reason, the Court's holding in *Ellerth* regarding unfulfilled threats -- that there is no tangible employment action leading to strict liability where a subordinate refuses to accede to the supervisor's sexual demands but the supervisor's threat to take tangible action is unfulfilled -- is not relevant here, where the subordinate *did* accede to the supervisor's demands.

think it prudent to import the concept of a tangible employment action for the resolution of the vicarious liability issue we consider here"). Although the Court provided new terminology -- tangible employment actions -- for describing the circumstances in which employers are automatically liable for supervisor harassment, its analysis of the liability issue adopted existing lower court rationales.

In these earlier decisions -- including in the Second Circuit -- the courts had developed the rules governing employer liability in quid pro quo harassment cases to include a requirement that the plaintiff prove, as an element of her quid pro quo claim, that her response to a supervisor's sexual demands was used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment. This analysis is functionally equivalent to the "tangible employment action" framework adopted in *Faragher* and *Ellerth*.[3] *Faragher* and *Ellerth* therefore confirm the soundness of those earlier decisions, including the ones finding employers strictly liable in submission cases.[4] These earlier decisions,

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[3] *See Johnson v. Booker T. Washington Broadcast Co.*, 234 F.3d 501, 508 (11th Cir. 2000)(equating "harassment that does result in a tangible employment action" to conduct "traditionally referred to as 'quid pro quo' harassment"); EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors § IV(B)(June 18, 1999), *available at* http://www.eeoc.gov/docs/harassment.html (noting that submission to and rejection of supervisor sexual demands, if resulting in tangible employment action, "previously would have been characterized as '*quid pro quo*.'")(herinafter 1999 EEOC Enforcement Guidance).

[4] *See, e.g., Nichols,* 42 F.3d 503; *Karibian v. Columbia University,* 14 F.3d 773 (2d Cir. 1994); *Giordano v. William Paterson College,* 804 F. Supp. 637 (D. N.J. 1992); *Showalter v. Allison Reed Group, Inc.,* 767 F. Supp. 1205 (D. R.I.), *aff'd sub nom. Phetosomphone v. Allison Reed Group, Inc.*, 984 F.2d 4 (1st Cir. 1993).

therefore, provide further support for the conclusion that an employer is strictly liable in a submission case under the *Faragher/Ellerth* framework.

A decision of this Circuit is directly on point. Four years before the Supreme Court decided *Faragher* and *Ellerth*, the Second Circuit ruled that an employer must be held liable where an employee submits to her supervisor's sexual demands in order to keep her job. *Karibian* v. *Columbia University*, 14 F.3d 773 (2d Cir.), *cert. denied* 512 U.S. 1213 (1994). In *Karibian*, the plaintiff alleged that her supervisor had coerced her into a "prolonged, violent and demeaning sexual relationship," by telling her that she "owed him" for all he was doing as her supervisor, by conditioning the terms of her employment on her responsiveness to his sexual demands, and by implicitly threatening to fire her if she did not give in to his demands. *Id.* at 776-80. The district court granted summary judgment for the defendant on the ground that these facts did not constitute quid pro quo harassment because the plaintiff had suffered no "economic detriment" as a result of the harassment. This Court reversed and remanded.

The Court of Appeals began its analysis by outlining the rules governing quid pro quo claims in the Second Circuit at that time:

> [Q]uid pro quo harassment occurs when 'submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual.' Accordingly, . . . a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting her compensation, terms, conditions

> or privileges of her employment. Because the quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment . . . the law imposes strict liability. . . .

Id. at 777-78. The Court then reasoned that a supervisor's conditioning of the terms and conditions of a subordinate's job on her response to his sexual demands is just as unlawful under Title VII if she *submits* to those demands as it is if she *rejects* them, even though in the submission case the same kinds of economic detriments (such as job loss) are unlikely to be available to support the claim. The Court explained:

> True, in a typical quid pro quo case, the employee who refuses to submit to her supervisor's advances can expect to suffer some job-related reprisal. Accordingly, in such 'refusal' cases, evidence of some job-related penalty will often be available to prove quid pro quo harassment. But that is not to say that such evidence is always essential to the claim. In the nature of things, evidence of economic harm will not be available to support the claim of the employee who submits to the supervisor's demands. . . . *The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not.* Under the district court's rationale, only the employee who successfully resisted the threat of sexual blackmail could state a quid pro quo claim. We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.

Id. at 778 (citations omitted, emphasis added). The Court continued:

> The relevant inquiry in a quid pro quo case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances. It is enough to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job.

Id. The Court concluded that the plaintiff, by alleging that the terms and privileges of her job depended on her continued sexual responsiveness to her supervisor and that her supervisor had "implicitly threatened to fire her and damage her career if she did not comply," had alleged sufficient facts to allow her case to go to trial. *Id*. [5] Significantly, in reaching this conclusion the Court cited *Showalter v. Allison Reed*, 767 F. Supp. at 1212, for the proposition that "[t]he obvious tangible job benefit the plaintiffs received for succumbing to the harassment was the retention of their employment." *Karibian* at 778. In that case the only tangible effect of the sexual harassment was the "new condition" the harassment imposed on the plaintiffs: "if they wanted to keep their jobs, they needed to comply with the condition of sexual harassment." *Showalter*, 767 F. Supp. at 1212.

The rule in the Second Circuit, as articulated in *Karibian*, is thus clear: where the evidence establishes that an employer has conditioned an employee's terms of employment -- including her retention of her job -- upon her submission to unwelcome sexual advances, a harassment claim has been made out and the inquiry into the employer's liability ends. As this Court explained, courts

[5] *Karibian* expressly rejected the contention that a plaintiff must show "actual, rather than threatened economic loss," reasoning that that requirement was appropriate only in "refusal" cases where such evidence would necessarily be available and that such a rule placed undue emphasis on the victim's response to sexual harassment. *Karibian,* 14 F.3d at 778-79. The

universally hold employers liable for this conduct because the supervisor is deemed to be acting on behalf of the employer. *Id.* at 780-81. *See also Tomka v. Seiler Corp*., 66 F.3d 1295 (2d Cir. 1995) (employer liable for sexual assaults by supervisors on a business trip so long as the plaintiff can show sufficient nexus between the business meeting convened by her supervisor and the rapes that occurred after it).

Like the plaintiff in *Karibian*, Jin was threatened with termination if she did not comply with her supervisor's sexual demands (indeed, Jin was threatened explicitly, not implicitly as Karibian was). Subjected to the same "sexual blackmail" as the plaintiff in *Karibian*, Jin too submitted.[6] And, as in both *Karibian* and *Tomka*, Jin's supervisor used the authority delegated to him to accomplish his sexual assaults. On these facts, Metropolitan Life must be held liable under Second Circuit precedents. And as shown above, because the reasoning of the Second Circuit in these cases is fully consistent with – indeed, functionally equivalent to – the approach adopted by the Supreme Court in *Faragher* and *Ellerth*, this Court's precedents remain sound law.

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reference to pocketbook-type "adverse consequences" in prior Second Circuit cases was simply "descriptive of the facts before the Court" in refusal cases. *Id.* at 778.

[6] In addition, just as the working conditions of the plaintiff in *Karibian* were altered as a result of the sexual conditions established by her supervisor, Jin began working only nights and weekends to avoid encountering Morabito (A196-97, 225, 267-68), and Morabito also interfered with her compensation by refusing to hand over her paychecks. (A292, 294, 317).

3. The EEOC Has Concluded That a Submission Case Presents a Tangible Employment Action, and Case Law Since *Faragher* and *Ellerth* Supports This Conclusion As Well

Following the Supreme Court's decisions in *Faragher* and *Ellerth*, the EEOC issued new guidance on the issue of employer liability for harassment by supervisors. *See generally* 1999 EEOC Enforcement Guidance. In this guidance, the EEOC says the following about submission cases:

> If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the [*Ellerth/Faragher*] affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. [Footnote:] See *Nichols v. Frank,* 42 F.3d 503, 512-13 (9th Cir. 1994). Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis.

Id. at §IV(B). In short, the EEOC draws the link between the old "quid pro quo" analysis and the current "tangible employment action" framework, and answers the question presented by this Court in the affirmative.

As a well-reasoned interpretation of Title VII by the agency charged with enforcing it, the EEOC's guidance is entitled to deference by this Court. *See, e.g.,*

Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986); *EEOC v. Comm. Office Prods.*, 486 U.S. 107, 115 (1988); *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001); *Karibian*, 14 F.3d at 777. The Supreme Court has explained the rationale for this deference as follows:

> As an administrative interpretation of the Act by the enforcing agency, these Guidelines, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance.

Meritor, 477 U.S. at 65 (citations omitted).

Rejection of EEOC guidelines has occurred only in limited circumstances: where the EEOC has wavered between inconsistent positions, where the EEOC's interpretation is contrary to the plain meaning of a statute, or where the EEOC's interpretation is unreasonable. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (inconsistent positions; contrary to plain meaning of statute); *EEOC v. Comm. Office Prods.*, 486 U.S. 107, 115 (1988) (EEOC interpretation "need only be reasonable to be entitled to deference"). None of these circumstances is present here.[7] Accordingly, this Court should give deference to the EEOC's interpretation and conclude that an employer has no resort to the

[7] The EEOC's interpretation, as demonstrated herein, is eminently reasonable and is not contrary to the plain meaning of Title VII. Moreover, the EEOC has been consistent in its view that an employer is strictly liable where a supervisor demands and receives sexual favors from an employee in return for continued employment or a job benefit. *See, e.g.,* EEOC 1980 Guidelines, 29 C.F.R. §1604.11(a)(2)&(c).

Ellerth/Faragher affirmative defense where an employee submits to a supervisor's sexual demands under threat of job loss or denial of a job benefit.

Moreover, in the wake of *Ellerth* and *Faragher,* the courts have interpreted "tangible employment action" liberally. *Durham Life Insurance Co. v. Evans* is one example. 166 F.3d 139, 144 (3d Cir. 1999). In *Durham,* the plaintiff's supervisors had "stripped her of the support she needed to do her job" by firing her secretary, taking away her office, assigning her "lapsed accounts" and "misplacing" some of her files. *Id.* at 144, 153. In concluding that each of these actions independently constituted a tangible employment action, the court explained that "[t]he concept of a tangible adverse employment action is not limited to changes in compensation . . . 'Tangible adverse employment action' includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job." *Id.* at 144. The court also disclaimed the necessity of showing an "economic" harm, explaining "[a]lthough direct economic harm is an important indicator of a tangible adverse employment action, it is not the sine qua non." Accordingly, the employer was held strictly liable because "[a] supervisor can only take [these actions] because of the authority delegated by the employer, see *Ellerth*, 118 S.Ct. at 2269, and thus the employer is properly charged with the consequences of that behavior." *Id.* at 152.

The Seventh Circuit in *Molnar v. Booth*, 229 F.3d 593, 597-98, 600 (7th Cir. 2000), found that a school principal took a tangible employment action by confiscating a student teacher's art class supplies after she spurned his sexual advances. The court also concluded that a negative performance evaluation, although later rescinded, constituted a tangible employment action. *Id.* The Eleventh Circuit has held that the transfer of a radio disc jockey to a different shift may constitute a tangible employment action even absent loss of compensation or other job benefits. *Johnson v. Booker T. Washington Broad. Serv.*, 234 F.3d 501, 512 (11th Cir. 2000). Another federal court concluded that the assignment of extra and less desirable work "may be considered a tangible employment action akin to a demotion or a reassignment entailing significantly different job responsibilities." *Glickstein v. Neshaminy School Dist.*, 80 Fair Emp. Prac. Cases (BNA) 67, 1999 WL 58578, *14 (E.D. Pa. 1999).

The interpretations of "tangible employment action" by the EEOC and the courts thus provide further support for the conclusion that a tangible employment action has occurred on the facts presented here.[8]

[8] *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999), *cert. denied* 529 U.S. 1107 (2000), is not to the contrary. In *Caridad*, a hostile environment case, the court held that a constructive discharge is not a tangible employment action within the meaning of *Faragher* and *Ellerth* for several reasons, including that co-workers, as well as supervisors, can cause a constructive discharge, and that although the plaintiff in *Ellerth* had alleged she had been constructively discharged, the Supreme Court concluded she had *not* alleged a tangible employment action. *Id.* at 294. The instant case, by contrast, does not involve any allegation of constructive discharge, and does involve conduct available only to a supervisor (conditioning a

4. Strict Liability in Submission Cases Is the Only Rule That Will Effectuate the Purposes of Title VII and Avoid Punishing Employees Who Submit To Their Supervisors' Sexual Demands

The sexual harassment jurisprudence that has evolved under Title VII is intended to ensure that no one is required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living" and thereby to "eliminate the arbitrary barrier to sexual equality at the workplace" that sexual harassment creates. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)(quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). It would be impossible to square with this objective a rule that allowed an employer to escape liability where an employee has been forced to submit to unwanted sex with her supervisor in order to keep her job.

Nor could such a rule be harmonized with the rule that a tangible employment action, leading to strict liability, has occurred where a supervisor fires a subordinate who refuses to submit to his sexual demands, or conveys a job-related benefit (to which the employee is not otherwise entitled) on a subordinate who does submit. It is beyond dispute that in these situations there is a tangible

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subordinate's retention of her job on her submission to sexual demands.) And while the court also noted that a constructive discharge is not ratified or approved by the employer, it did not say that express ratification or approval by the employer is a sine qua non of a tangible employment action. Nor is there any authority in *Faragher* or *Ellerth* to support that proposition; on the contrary, the Court used qualifying language, stating that "[t]he decision in *most* cases is documented in official company records, and *may* be subject to review by higher level supervisors. The supervisor *often* must obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762 (emphasis added).

employment action. It would be an absurd result if the law treated differently the situation where a supervisor allows a woman to keep her job only because she submitted to his sexual demands. In all of these scenarios, the supervisor has used the power of his position in an attempt to extort sexual favors from an unwilling subordinate – either in an unsuccessful attempt, where she refuses and then suffers a loss of her job or other penalties, or in a successful attempt, where she submits to his demands and either obtains job benefits she otherwise would be denied or (as here) keeps a job she otherwise would lose.[9] In all of these scenarios, sexual blackmail is working in precisely the same way to erect an arbitrary barrier to sexual equality in the workplace. In all of them, the law must consider the employer equally responsible.

This Court made clear that it agreed when, in *Karibian*, it concluded that "the supervisor's conduct is equally unlawful under Title VII whether the employee submits or not." 14 F.3d at 778. As the Court noted, under the contrary rule adopted by the court below in that case (holding that there is no quid pro quo sexual harassment in a submission case because there is no economic detriment), an employee who is unable to resist the sexual advances of her supervisor would,

[9] An employee who submits may do so because, for example, she desperately needs her job to make her family's house payments, *Nichols*, 42 F.3d at 507, or because a sick spouse or child depends on her health benefits, *Showalter*, 767 F. Supp. at 1209. "For economic reasons, most workers cannot simply abandon their employment -- new jobs are hard to find." *Nichols*, 42 F.3d at 510. An employee in this situation cannot know whether her supervisor is bluffing and she cannot afford to take the risk that he is not.

in effect, be punished for surrendering. Such a rule, the Court correctly observed, "would only encourage harassers to increase their persistence." *Id.* *See also* *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997)("Like the Second Circuit, we 'do not read Title VII to punish victims of sexual harassment who surrender to unwelcome sexual encounters. . . . The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not.'"); *Bouton v. BMW*, 29 F.3d 103, 106-07 (3d Cir. 1994)(following Second Circuit approach); *Bowerman v. Industrial Towel Supply, Inc.*, 1996 U.S. Dist. LEXIS 4662, *11-12 (W.D. Va. 1996)(same). *See also* 1999 EEOC Enforcement Guidance at § IV(B) ("It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands.")

Moreover, a legal rule that placed a larger burden on a plaintiff in a submission case would be particularly illogical and perverse in light of the fact that the employee who is unable to resist her supervisor's sexual demands actually suffers a *greater* injury, in some respects, than the employee who resists.[10] The woman who submits to unwanted sex acts with her supervisor suffers a unique

[10] "[W]omen who are forced to submit to sex must be understood as harmed not less, but as much more, than those who are able to make their refusals effective." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 110 (1987).

form of physical violation and emotional trauma. As the court noted in *Nichols v. Frank*, a submission case discussed above, "Nothing is more destructive of human dignity than being forced to perform sexual acts against one's will." 42 F.3d at 510. Indeed, while being subjected to Morabito's repugnant sexual demands, Jin suffered harms such as anxiety and fear (A179, 229), migraine headaches (A189, 199), and disruptions in her menstrual cycle (A189). Jin was so disturbed by these events that she sought psychiatric help (A218) despite the stigma attached to such counseling in her native country of China and her fear of how other native Chinese might perceive this treatment. (A218).

Plainly, a legal rule that disadvantages an employee like Jin, who submitted to her supervisor's sexual demands and suffered all of the attendant consequences, would be anomalous, unjust, and inconsistent with the purposes of Title VII and the sexual harassment principles that flow from it.

B. The District Court's Erroneous Jury Instruction on "Tangible Employment Action" Requires Reversal

This Court has set forth the relevant standard as follows:

> In addressing a claim of error in the court's instructions to the jury, we must decide whether the entire charge, viewed in light of all the evidence, would tend to confuse or mislead the jury as to the principles of law that apply to the facts . . . . As a general rule, we will reverse the judgment of a trial court and grant a new trial because of an error in the jury instructions only if, based on a review of the record as a whole, we are persuaded that the error was prejudicial.

National Railroad Passenger Corp. v. One 25,900 Square Foot, 766 F.2d 685, 688 (2d Cir. 1985) (citations omitted). Accordingly, the analysis must proceed with a determination of whether the jury instruction was erroneous, and then of whether, in the context of the whole record, the error was prejudicial. *Id*. Both requirements for reversal are met here.

The trial court's jury instruction limited the jury to considering only three actions as possible "tangible employment actions." In Question 4, the trial court stated:

> But any of the following could be enough to constitute a tangible adverse action if you find that Mr. Morabito played a role in causing the decision on any of the following:
> One, unjustifiably refusing to process policies sold by her, or two, unjustifiably causing her disability claim to be denied, or three, unjustifiably firing her.

(A312).

The trial court therefore erred by not instructing the jury that a tangible employment action occurs where a supervisor obtains sexual favors from a subordinate upon threats that the subordinate will be terminated or suffer some other job-related detriment absent compliance. A jury charge should not limit a jury to considering particular incidents of actionable conduct while excluding other actionable conduct supported by the evidence. *Girden v. Sandals Int'l*, 262 F.3d

195, 203-04 (2d Cir. 2001) (jury charge erroneously implied that only rape of plaintiff was actionable; unwanted kissing could also constitute assault).[11]

This error was clearly prejudicial to Jin, because the jury was prevented from considering conduct that would have allowed it to find that Morabito's conduct constituted a "tangible employment action." *Cf. id.*, at 204-05.[12]

Accordingly, this Court must reverse and remand for a new trial.

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[11] Question 4 and the accompanying commentary by the trial court contains other errors as well. The charge uses the term "tangible adverse action" instead of "tangible employment action." Tangible employment action need not be adverse. *See* 1999 EEOC Enforcement Guidance at § IV(B) ("The Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible."). The court's charge also erroneously implies that economic harm – i.e., loss of wages or disability pay – was required to constitute a "tangible employment action." Tangible employment action does not require economic harm. *See supra* at pp 11-12, 17-18, n. 1, & n. 5. The trial court effectively added a new element of proof to Jin's case. *Hudson v. New York City*, 271 F.3d 62, 69 (2d Cir. 2001)(charge erroneously implied that intent to commit constitutional violation was required in unlawful search case). At the very least, the commentary accompanying Question 4 should have included examples of non-economic tangible employment actions offered by Jin, such as deprivation of a safe workplace (A396-397) and deprivation of office use and support (A395-396). *Durham Life*, 166 F.3d at 153.

[12] Moreover, the error was properly preserved as required by Fed. R. Civ. P. 51. Jin's counsel pointed out that Morabito's use of his authority to obtain sexual favors constituted an abuse of supervisory authority that would preclude the defendant from asserting the *Ellerth/Faragher* affirmative defense. (A398-399). As a result, this court reviews the district court's instructions de novo. *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 521 (2d Cir. 1998), *cert. denied* 525 U.S. 1055. Additionally, it is of no consequence that Plaintiff's original submission to this Court did not make the argument that the jury instructions were erroneous for failing to include sexual abuse as a tangible employment action. The larger *issue* of whether there was error in the charge regarding tangible employment actions was raised and this Court can and should decide the issue in accordance with the law, based on any evidence that is fairly presented in the record. Further, because both parties have had ample opportunity to brief this issue, neither party would be prejudiced by the failure to raise the argument in the initial briefs on appeal.

III. CONCLUSION

Under *Faragher* and *Ellerth* and other relevant authority, the infliction of sexual abuse by a supervisor upon a subordinate employee, who acceded to the abuse upon threat of termination or other detrimental alteration of employment conditions, constitutes a tangible employment action for which the employer is strictly liable. Because the trial court's jury instruction prevented the jury from considering whether such conduct constituted a tangible employment action, the decision below must be reversed and remanded.

Respectfully submitted,

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