

**WHO'S THE BOSS: THE DEFINITION OF A SUPERVISOR
IN WORKPLACE HARASSMENT UNDER
*VANCE v. BALL STATE UNIVERSITY***

INTRODUCTION

Yasharay Mack works as a mechanic for the Otis Elevator Company.¹ She is assigned to work at the Metropolitan Life building in New York City.² James Connolly, another employee of the company, holding the position of “mechanic in charge,” also works at this site.³ Connolly is the senior employee at the site and has the authority to direct Mack’s work activities, but does not have the power to hire, fire, demote, promote, transfer, or discipline her.⁴ While at work, Connolly frequently makes sexual comments to Mack, regularly changes out of his uniform in front of her, constantly boasts about his sexual exploits, and has even pulled her onto his lap while trying to kiss her.⁵ Mack decides she wants to sue, claiming sexual harassment; how likely is the company to be held liable?⁶

Before June 2013, the answer to this question mostly depended on which court heard the case.⁷ According to the Second Circuit in *Mack v. Otis Elevator*, it is very likely the company would have been held liable.⁸ The Second Circuit defines a “supervisor” as someone who not only has the ability to take or recommend tangible employment actions against an employee, but could also have the ability to control an employee’s daily activities.⁹ However, if this case were brought before the Seventh Circuit, the company likely would

1. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 120 (2d Cir. 2003).

2. *Id.*

3. *Id.*

4. *Id.* at 120, 126; see also Jodi R. Mandell, *Mack v. Otis Elevator: Creating More Supervisors and Vicarious Liability for Workplace Harassment*, 79 ST. JOHN’S L. REV. 521, 525 (2005).

5. *Mack*, 326 F.3d at 120.

6. *Id.* at 122.

7. See *infra* notes 8–10 and accompanying text.

8. Mandell, *supra* note 4, at 522. In *Mack v. Otis Elevator*, the case which the situation described above is based on, the Second Circuit broadly interpreted the term “supervisor” to apply to those who had the authority to create a hostile work environment. *Id.*

9. Keith Muse, *Seeking Supervision: An Analysis of Recent Trends in the Definition of ‘Supervisor’ Argument and a Recommendation for the Eleventh Circuit*, 22 GA. ST. U. L. REV. 491, 491–92 (2005).

not have been held liable because Connolly did not have the power to take tangible employment actions against Mack.¹⁰

The reason for the conflicting results for liability in the above situation was a direct result of the holdings from *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*.¹¹ In those cases, the Supreme Court held that an employer is presumptively liable when an employee's "supervisor" creates a sexually hostile work environment but failed to define what qualified someone as a "supervisor" or address liability standards for other kinds of workers.¹² Subsequently, when hearing hostile environment claims, the lower courts decided that when the alleged harasser was considered a co-worker, and not a supervisor, the aggrieved employee had to prove the employer was negligent in handling the situation for vicarious liability to attach.¹³ Therefore, by opting for a negligence standard, the courts incentivized employers to argue that the alleged harasser was not actually a supervisor, which was the decision the Supreme Court failed to provide guidance for, and made the determination of the alleged harasser's status paramount to the situation.¹⁴

Following *Ellerth* and *Faragher*, the circuits were undoubtedly split on deciding what should qualify someone as a "supervisor" under Title VII, with the Seventh and Eighth Circuits applying a rather "extreme position" and other circuits adopting the Equal Employment Opportunity Commission's position.¹⁵ Generally, the EEOC's broad position is that for Title VII purposes the definition of a "supervisor" includes those who have the limited authority to only direct another employee's daily tasks, workload, and activities, drawing the line well before the ability to take tangible actions.¹⁶ This circuit split

10. *Id.* This approach taken by the Seventh Circuit Court of Appeals is known as the "narrow view." *Id.* at 492.

11. *See, e.g., Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

12. Stephanie Ann Henning Blackman, *The Faragher and Ellerth Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor,"* 54 VAND. L. REV. 123, 124 (2001). Even though *Ellerth* and *Faragher* addressed sexual harassment issues, the courts have since applied these holdings to other types of hostile environment claims as well, including race-based claims. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 n.3 (2013).

13. *Vance*, 133 S. Ct. at 2440-41; *see, e.g., Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 (9th Cir. 2004); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004).

14. *See Vance*, 133 S. Ct. at 2437 ("Under Title VII, an employer's liability for workplace harassment may depend on the status of the harasser.").

15. Catherine L. Fisk, *Supervisors in a World of Flat Hierarchies*, 64 HASTINGS L.J. 1403, 1406-07 (2013).

16. *See* EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

would finally be resolved when the Supreme Court granted certiorari in *Vance v. Ball State University*.¹⁷

In *Vance v. Ball State University*, the Supreme Court addressed the question it had left open fifteen years prior in *Ellerth* and *Faragher* of who qualifies as a “supervisor” in cases where an employee asserts a Title VII claim for workplace harassment.¹⁸ Resolving the diverging views, the Supreme Court held in *Vance* that an employee is a “supervisor” for purposes of vicarious liability under Title VII if they are empowered by the employer to take “tangible employment actions” against the victim.¹⁹

Therefore, in *Vance*, the Court chose the restrictive “supervisor” definition, which ties supervisor liability to the ability to exercise significant control.²⁰ This Note argues that the difficulty the majority and dissenting opinions in *Vance v. Ball State University* had in defining who should qualify as a “supervisor” proves that the distinction between supervisors and co-workers is impracticable for Title VII purposes. This Note then proposes a unitary, alternative standard.

This Note initially provides an overview of employment discrimination law under Title VII and gives a background on important decisions prior to the judgment in *Vance*, highlighting the landmark holdings from *Ellerth* and *Faragher*. It continues by analyzing the procedural history of the *Vance* case, along with a recitation of the relevant facts. Additionally, a discussion concerning the majority opinion written by Justice Samuel Alito²¹ will be followed by a discussion regarding the vigorous dissent penned by Justice Ruth Bader Ginsburg.²² Culminating, this Note will propose an alternative solution to addressing hostile work environment claims under Title VII, setting forth a standard that discards the need to differentiate between supervisors and co-workers, and discuss the possible implications. Concluding, there will be a brief recapitulation of the issue and why the new proposal will prove to be a logical resolution.

I. DEVELOPMENT OF THE LAW

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national

17. *Vance*, 133 S. Ct. at 2443.

18. *Id.* at 2439.

19. *Id.*

20. *See id.* at 2443.

21. *Id.* at 2439.

22. *Vance*, 133 S. Ct. at 2454.

origin.”²³ Employees who suffer discrimination are able to recover damages or other remedies from their employers.²⁴ Moreover, Title VII clearly prohibits discrimination in regards to employment actions that have direct economic consequences, such as discharges, demotions, and pay cuts, but there was confusion regarding whether it reached discrimination that did not directly result in economic misfortune.²⁵ Shortly after the enactment of Title VII, some of the lower federal courts addressed this confusion and held Title VII to reach the “creation or perpetuation of a discriminatory work environment.”²⁶

A. *Rogers Lays the Groundwork*

Legal scholars regularly cite *Rogers v. EEOC* as the first case to recognize a hostile work environment as a form of illegal employment discrimination, particularly for racial discrimination.²⁷ In that case, a Hispanic employee alleged that her employers, two optometrists, segregated their patients by color-coding their office forms by race, using red ink for Black customers and blue ink for non-Black customers.²⁸ The EEOC, on behalf of the plaintiff, argued that even though the actions were not directed at the plaintiff, they “could ‘create an atmosphere that would adversely affect the terms and conditions of her employment.’”²⁹ In the holding, the Fifth Circuit believed that it must be “acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.”³⁰ Exercising this “liberal interpretation,” the court went on to say that “the phrase ‘terms, conditions, or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”³¹ However, the Fifth Circuit was quick to establish that this holding did not apply to an employer’s “mere utterance of an ethnic or racial epithet” that may offend an employee or group of employees.³² But by the same token, the *Rogers* court explained that a discriminatory atmosphere under certain circumstances could constitute an

23. 42 U.S.C. § 2000e-2(a)(1) (2006).

24. *Id.* § 2000e-5(g).

25. *Vance*, 133 S. Ct. at 2440.

26. *Id.*; see also *infra* notes 27–34 and accompanying text.

27. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971); see also Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 50–51 (2006).

28. Chew & Kelley, *supra* note 27, at 55.

29. *Id.*

30. *Rogers*, 454 F.2d at 238.

31. *Id.*

32. *Id.*

unlawful employment practice.³³ Specifically, the Fifth Circuit held that “[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and [we] think Section 703 of Title VII was aimed at the eradication of such noxious practices.”³⁴

B. The Supreme Court Recognizes a Hostile Work Environment

In light of the *Rogers* decision, lower courts began holding that, in a charge of a racially hostile work environment, the employer is liable only if the injured party can prove that the employer was negligent, i.e., that the employer knew or should have known about the harassment and failed to take remedial action.³⁵ This issue of vicarious employer liability ultimately reached the Supreme Court in 1986, in the case of *Meritor Savings Bank, FSB v. Vinson*, but the Court declined to decide it.³⁶ Instead, the Court focused their holding on finding that a claim of “hostile environment” sex discrimination is actionable under Title VII.³⁷

The Supreme Court in *Meritor* gave credit to the Fifth Circuit for first recognizing a cause of action based on a discriminatory work environment in *Rogers*.³⁸ On an interesting side note, the Court incorrectly recalled *Rogers* as involving a Hispanic employee complaining that her employers discriminated against their “Hispanic clientele,”³⁹ when in fact, the case involved a Hispanic employee complaining about discrimination towards the *Black* clientele.⁴⁰ Regardless of this oversight, the Court readily applied the established principle for racial harassment to sexual harassment, noting that “[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited.”⁴¹ However, the Court failed to articulate exactly what factors it considered in deciding whether the alleged harassment actually constituted a hostile work environment.⁴² The Supreme Court

33. *Id.*

34. *Id.*

35. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 767–69 (1998) (Thomas, J., dissenting) (citing to a string of cases in support of this proposition).

36. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). The issue in *Meritor* was raised not in the context of racial discrimination, but rather sexual harassment, which has subsequently become the focus of discriminatory harassment jurisprudence. *Id.* at 65–66; *see also infra* notes 46–48 and accompanying text.

37. *Meritor*, 477 U.S. at 73.

38. *Id.* at 65.

39. *Id.* at 65–66.

40. *Chew & Kelley*, *supra* note 27, at 55.

41. *Meritor*, 477 U.S. at 66.

42. Shannon Murphy, Note, *Meritor Savings Bank v. Vinson: What Makes a Work Environment “Hostile”?*, 40 ARK. L. REV. 857, 864 (1987).

provided some clarity, but not much more, in regard to what specifically constituted a hostile work environment in *Harris v. Forklift Systems, Inc.*⁴³ In that case, the Court held that the workplace needed to be permeated with such severe or pervasive discrimination that it altered the conditions of the victim's employment and created an abusive working environment.⁴⁴ Explaining this standard, the Court stated that it took a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."⁴⁵

II. THE LANDMARK DECISIONS

First and perhaps foremost, the *Meritor* decision is additionally critical for what the Supreme Court declined to decide. The parties in that case wanted a definitive ruling on vicarious employer liability, but the Court refused to do so, expressly declining to create a general standard for employer liability in Title VII sexual harassment cases.⁴⁶ In coming to this conclusion, the Court felt the record was too bare for such an impactful ruling, as the district court did not resolve the conflicting testimony about the true existence of a sexual relationship between the employee and her supervisor.⁴⁷ More specifically, the Court did not know "whether [the supervisor] made any sexual advances toward respondent at all," let alone how pervasive or serious they potentially were.⁴⁸ In light of the bare factual record, the Court still discussed in dicta the employer's potential liability, just as the district and appellate courts had done before.⁴⁹ In doing so, the Court agreed with the EEOC and Congress and wanted courts to look at agency principles for guidance in these situations.⁵⁰ Moreover, and perhaps most importantly, the Court endorsed the idea that employers are not always automatically liable for sexual harassment by their supervisors.⁵¹

43. See, e.g., *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

44. *Id.* at 21.

45. *Id.* ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.")

46. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

47. *Id.* at 61, 72.

48. *Id.* at 72.

49. *Id.* at 69–70.

50. *Id.* at 72. The EEOC's argument was presented by an amicus brief and highlighted that Congress has focused on directing courts to be guided by agency principles when hearing issues of employer liability. Ronald Turner, *Employer Liability Under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of Meritor Savings Bank*, 33 *HOW. L.J.* 1, 29 (1990).

51. *Meritor*, 477 U.S. at 72.

A. Ellerth and Faragher: *The Framework*

Twelve years later, on the last day of the 1997–1998 term, the Supreme Court further developed this area, fashioning an intelligible vicarious liability rule for employers when their supervisors harass their employees.⁵² The holding was first articulated in *Burlington Industries, Inc. v. Ellerth* and was subsequently adopted later that same day in *Faragher v. City of Boca Raton*.⁵³

1. Crafting an Affirmative Defense

The Court explained that when no tangible employment action is taken, the employer is presumptively liable for a supervisor's harassment that results in a hostile work environment.⁵⁴ The defending employer, nonetheless, may raise an affirmative defense to liability or damages, and must prove that the employer took reasonable measures to prevent and remedy the harassment and that the employee unreasonably failed to take advantage of those measures.⁵⁵ However, when the supervisor's harassment culminates in a discharge, demotion, or undesirable assignment—basically any tangible employment action—no affirmative defense is available, and the employer is automatically vicariously liable.⁵⁶

The Court believed that by limiting liability for employers who implemented anti-harassment procedures, Title VII's “primary objective” of preventing workplace discrimination was being satisfied.⁵⁷ Conceivably, this limited liability was thought to incentivize the development of effective sexual harassment policies, and, thus, would have an ultimate positive effect on preventing workplace discrimination.⁵⁸

2. Applying Agency Principles

In coming to a conclusion, the Court looked to agency principles as the *Meritor* decision previously instructed.⁵⁹ First, the Court alluded to section 219(1) of the Restatement of Agency that defines the principle of agency law as “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”⁶⁰ In essence, an employer may

52. Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 41 (1999).

53. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998).

54. *Ellerth*, 524 U.S. at 765, 767 (Thomas, J., dissenting).

55. *Id.* at 765.

56. *Id.*

57. Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 206–07 (2004).

58. *Id.* at 207.

59. *Ellerth*, 524 U.S. at 755.

60. *Id.* at 755–56 (internal quotation marks omitted).

be held liable for both the negligent and intentional torts committed by employees within the scope of their employment.⁶¹ Intentional torts can fall under the “scope of employment” umbrella when the conduct is “‘actuated, at least in part, by a purpose to serve the [employer],’ even if [the conduct] is forbidden by the employer.”⁶² However, as it has been commonly recognized, the general rule is that sexual harassment by a supervisor does not qualify as conduct within the scope of employment.⁶³

Even though sexual harassment is found to fall outside of the scope of employment, the Court noted there are other agency principles that could define the basis for employer liability.⁶⁴ In these situations, where the conduct falls outside of the scope of employment, the Court turned to section 219(2) of the Restatement of Agency, and particularly subsections (b) and (d).⁶⁵ Under subsection (b) an employer is liable when the tort is traceable to the employer’s own negligence, and thus, even though the harassment was outside of the scope of employment, the employer can be liable.⁶⁶ Under subsection (d), the concern is vicarious liability for torts committed by an employee when the employee was aided in accomplishing the tort by the existence of the agency relationship.⁶⁷ However, the Court realized that, in a sense, most workplace tortfeasors are aided in their tortious activity by the existence of the agency relationship.⁶⁸ The Court found this to be too broad and decided that the “agency in relation” standard required the existence of something more than simply the relationship itself.⁶⁹

Initially, the Court determined a class of cases where more than the existence of an employment relationship aided in the harassment—when a supervisor’s harassment results in tangible employment actions.⁷⁰ To recap, 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.”⁷¹ Therefore, it logically follows that when a supervisor makes a tangible employment decision, it is axiomatic that the injury could not

61. *Id.* at 756. The Court provided the example that when a salesperson lies to a customer in order to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer’s policies. *Id.*

62. *Id.*

63. *Id.* at 756–57.

64. *Ellerth*, 524 U.S. at 758.

65. *Id.*

66. *Id.* at 758–59.

67. *Id.*

68. *Id.* at 760.

69. *Ellerth*, 524 U.S. at 760.

70. *Id.*

71. *Id.* at 761.

have resulted absent the agency relationship, and thus the decision vicariously becomes the act of the employer.⁷²

What is far more difficult to determine is whether the agency relationship aids in the supervisor's harassing activities that do not result in a tangible employment action.⁷³ The Court looked to accommodate both the principles of vicarious liability for harm caused by the inappropriate use of supervisory authority and Title VII's underlying policies of encouraging employer's to create policies that help prevent this type of conduct.⁷⁴ Thus, the Court came to its final conclusion, holding that employers are strictly liable for their supervisor's harassing conduct that results in tangible employment actions and are presumptively liable when the acts result in a hostile work environment.⁷⁵ However, an employer can raise an affirmative defense that the employer took reasonable measures to prevent and remedy the harassment and the employee unreasonably failed to take advantage of those measures to rebut said presumption.⁷⁶ Later that same day, the Court applied this new framework in *Faragher v. City of Boca Raton*.⁷⁷ As a result of this new framework, it is critical whether the harasser is a "supervisor or simply a co-worker."⁷⁸ Accordingly, in a hostile work environment case, whether the alleged harasser is a supervisor or not has a determinative impact on the elements that the plaintiff must prove and the defenses available to the defendant.⁷⁹

3. Leaving the Door Open

Even though the distinction between a supervisor and a co-worker is vital in applying the *Ellerth* and *Faragher* standard, those holdings still left open the question of who exactly qualifies as a supervisor.⁸⁰ Looking at the facts of each case, it becomes apparent why the Court left this question open—the status of the alleged harassers was never in dispute.⁸¹ In *Ellerth*, the alleged harasser, Ted Slowik, was a supervisor "under any definition of the term."⁸² Slowik, a

72. *See id.* at 762.

73. *Id.* at 763.

74. *Ellerth*, 524 U.S. at 764.

75. *Id.*

76. *Id.*

77. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

78. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

79. *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 910 (E.D. Tenn. 2003). Furthermore, the court stated that it was "of great benefit to defendants for the harasser to be a co-employee rather than a supervisor." *Id.* at 910 n.2.

80. *Vance*, 133 S. Ct. at 2439.

81. *Id.* at 2446. In the *Vance* dissent, however, Justice Ginsburg believed that one of the harassers in *Faragher*, David Silverman, should not have qualified as a supervisor, as he did not wield enough authority. *Id.* at 2458 (Ginsburg, J., dissenting).

82. *Id.* at 2446 (majority opinion); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

midlevel manager, had the authority to make hiring and promotion decisions.⁸³ In *Faragher*, the plaintiff, a lifeguard, accused two fellow employees of harassment.⁸⁴ It was fundamentally certain that Bill Terry qualified as the plaintiff's supervisor, as he served as the Chief of the Marine Safety Division and had the authority to hire new lifeguards, supervise all aspects of the lifeguards' work assignments, and discipline the staff, among other duties.⁸⁵ David Silverman provided a more curious case, as he was only responsible for making the lifeguards' daily assignments and supervising their work and fitness training.⁸⁶ Even though Silverman's status was debatable, the employer never argued against the plaintiff's characterization of both men as "supervisors," and, thus, the Court did not address that aspect.⁸⁷

Ultimately, the Supreme Court successfully resolved the issue regarding the correct standard of vicarious liability in hostile environment cases, but due to the nature of the cases, the Court potentially created a different, more troubling problem by failing to define who qualifies as a "supervisor" under the new framework.

B. *Trouble with Defining a "Supervisor"*

Quickly following the holdings in *Ellerth* and *Faragher*, the importance of recognizing who qualified as a "supervisor" for Title VII purposes became readily apparent, and the lower courts were tasked with shutting the door left open by the Supreme Court.⁸⁸

1. The Narrow Approach

In 1998, shortly after the twin *Ellerth-Faragher* holdings, the Seventh Circuit faced a case dealing with a hostile work environment claim allegedly involving the victim's supervisors.⁸⁹ In *Parkins v. Civil Constructors of Illinois, Inc.*, the parties disagreed over whether the alleged harassers qualified as supervisors.⁹⁰ The court noted that, unfortunately, Title VII did not provide a definition for the term "supervisor," as that was a term used by courts in developing liability standards.⁹¹ Accordingly, without any statutory guidance, the *Parkins* court recognized that it needed to define the "essential attributes of

83. *Ellerth*, 524 U.S. at 747.

84. *Faragher*, 524 U.S. at 780.

85. *Id.* at 781.

86. *Id.*

87. *Id.* at 783.

88. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013).

89. *See Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998).

90. *Id.* at 1032–33. The defendant claimed the harassers were supervisors, while the plaintiff claimed they were only midlevel employees. *Id.*

91. *Id.* at 1033.

a supervisor for purposes of determining employer liability.”⁹² The Seventh Circuit concluded that supervisor authority consisted of the ability “to hire, fire, demote, transfer, or discipline an employee.”⁹³ In other words, supervisory status hinges on tangible employment action authority—the power “to affect the terms and conditions” of the subordinate’s employment.⁹⁴

In subsequent opinions, the Seventh Circuit continued to apply the *Parkins* definition of a supervisor.⁹⁵ In *Hall v. Bodine Electric Co.*, the court applied the *Parkins* rule and found that although Lopez, the alleged harasser, “provided input into [the plaintiff’s] performance evaluations, and [] was charged with training [the plaintiff] and other less experienced employees . . . none of [this] is enough to bring Lopez within the definition of a Title VII supervisor.”⁹⁶

In *Joens v. John Morrell & Co.*, the Eighth Circuit first applied the Seventh Circuit’s “narrow” supervisor standard.⁹⁷ About one month later, the Eighth Circuit encountered the issue of supervisor status again in *Weyers v. Lear Operations Corp.* and reinforced its previous decision from *Joens* by once again upholding the strict definition.⁹⁸ In *Weyers*, the alleged harasser recommended the defendant’s termination, but the court found that because the alleged harasser himself did not have the requisite authority to make the final decision to terminate the defendant, he was not a supervisor.⁹⁹

2. The Broad Approach

Nevertheless, while the Eighth Circuit decided to follow the Seventh Circuit’s narrow approach, the Second Circuit chose a broader approach, formally creating a split among the circuits.¹⁰⁰ As discussed in the introduction, in *Mack v. Otis Elevator Co.*, the Second Circuit concluded that supervisory authority is more encompassing than reflected in the *Parkins* approach.¹⁰¹ The court believed those who applied the narrow approach misunderstood the real question to be determined and analyzed whether the employee’s authority enabled or augmented their ability to create a hostile work environment, rather than whether they had the authority to make economic decisions.¹⁰² In coming

92. *Id.*

93. *Parkins*, 163 F.3d at 1034.

94. *Id.*

95. *See* *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002).

96. *Id.* Even though the alleged harasser had an array of responsibilities, she did not have the power to make tangible employment decisions, and therefore did not qualify as a supervisor. *Id.*

97. *See* *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004).

98. *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056–57 (8th Cir. 2004).

99. *Id.* at 1057.

100. *Id.* at 1056; *see also* *Muse*, *supra* note 9, at 503.

101. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir. 2003); *see also supra* notes 1–9 and accompanying text.

102. *Mack*, 326 F.3d at 126.

to this conclusion, the Second Circuit adopted the EEOC's definition of a supervisor, which stated that "[a]n individual qualifies as an employee's 'supervisor' if: (a) the individual has the authority to undertake or recommend tangible employment decisions affecting the employee; or (b) [t]he individual has authority to direct the employee's daily work activities."¹⁰³

The Fourth Circuit embraced the broad approach set forth in *Mack*, adding another circuit to the split.¹⁰⁴ It was not until *Vance v. Ball State University* that the Supreme Court would finally answer the question of who qualifies as a supervisor for vicarious liability purposes under Title VII.¹⁰⁵

III. THE SUPREME COURT DEFINES A SUPERVISOR

A. *Background*

In 1989, Maetta Vance, an African American female, began working for Ball State University as a substitute server in the University Banquet and Catering division of Dining Services.¹⁰⁶ Two years later, Vance was promoted to a part-time catering position, and, as her career progressed, she became a full-time catering assistant in 2007.¹⁰⁷

However, between promotions, Vance had issues with a fellow Ball State University employee, Sandra Davis.¹⁰⁸ Sandra Davis, a white catering specialist, served in the same Banquet and Catering division as Vance.¹⁰⁹ A catering specialist has more authority within the Banquet and Catering division than part-time catering employees, but does not possess the power to "hire, fire, demote, promote, transfer, or discipline [part-time catering employees]."¹¹⁰ In 2001, Davis struck Vance on the back of the head after the two were discussing work-related matters.¹¹¹ During this discussion, Davis became aggressive, began shouting, and slapped Vance as she turned to leave.¹¹² Vance orally complained about this incident, but because Davis had been transferred to another department for other reasons, Vance did not file any formal complaints about Davis's behavior.¹¹³

103. *Id.* at 127.

104. *Whitten v. Fred's, Inc.*, 601 F.3d 231, 245 (4th Cir. 2010).

105. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013).

106. *Id.* at 2439.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Vance*, 133 S. Ct at 2439.

111. *Vance v. Ball State Univ.*, 646 F.3d 461, 465 (7th Cir. 2011).

112. *Id.*

113. *Id.*

Nevertheless, four years later, Davis returned to Vance's department, and controversy returned as well.¹¹⁴ On September 23, 2005, Davis blocked Vance from exiting an elevator, and said to her, "I'll do it again," seemingly referring to the 2001 incident.¹¹⁵ Vance took action, and on October 17, 2005, she requested a complaint form from University Compliance, orally complaining about the slap from four years prior, and in early November, she filed her complaint about the recent elevator incident with Davis.¹¹⁶ In response, Ball State investigated the complaint, which revealed contradictory stories of what happened.¹¹⁷ The University decided the best way to resolve this issue would be to subject both employees to counseling about respect in the workplace, and no one was formally disciplined.¹¹⁸ Specifically, Vance was lectured regarding communicating respectfully in the workplace, but it is unclear whether a similar conversation ever took place with Davis.¹¹⁹ Shortly thereafter, Vance overheard Davis using the terms "Sambo" and "Buckwheat" while conversing with a fellow employee, and Vance believed these words were "be[ing] used in a racially derogatory way."¹²⁰

Apparently having reached a boiling point, Vance filed charges with the EEOC in late 2005 and early 2006, alleging various forms of discrimination.¹²¹ These complaints accused Davis of "glaring at her, slamming pots and pans around her, and [generally] intimidating her," especially during the elevator incident.¹²² Ball State investigated the incidents Vance alleged but did not find sufficient evidence to take any disciplinary action.¹²³

After Ball State decided against disciplining any of the parties, Vance filed a lawsuit in 2006 in the United States District Court for the Southern District of Indiana, claiming, among other things, that she had been "subjected to a racially hostile work environment in violation of Title VII."¹²⁴ Specifically, in her complaint, Vance identified Davis as her "supervisor," and alleged that Ball State University was liable for Davis's racially discriminatory actions.¹²⁵ After both parties filed motions for summary judgment, the court ruled in favor

114. *Id.* at 466.

115. *Id.*

116. *Vance*, 646 F.3d at 466.

117. *Id.* at 467.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Vance*, 646 F.3d at 467. Vance's EEOC complaint contained allegations of not only race discrimination, but also age and gender discrimination. *Id.*

122. *Id.*

123. *Id.*

124. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2440 (2013).

125. Complaint at 5–6, *Vance v. Ball State University*, No. 1:06-CV-01452-SEB-TAB (S.D. Ind. Oct. 3, 2006).

of Ball State University.¹²⁶ The court believed that because Davis did not have the power to “hire, fire, demote, promote, transfer, or discipline” Vance, Ball State University could not justly be held vicariously liable for her actions.¹²⁷ Indeed, the court applied well-established Seventh Circuit precedent.¹²⁸

Vance pursued her hostile work environment claim on appeal.¹²⁹ In affirming the district court’s decision, the Seventh Circuit disagreed with Vance that there was at a minimum a dispute over facts regarding whether Davis qualified as a “supervisor.”¹³⁰ The appellate court referred to previous holdings from inside the circuit, stating that a supervisor is “someone with power to *directly* affect the terms and conditions of the plaintiff’s employment,” and this authority “primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.”¹³¹ The Seventh Circuit acknowledged how other circuits have held that only “the authority to direct an employee’s daily activities” is sufficient to find supervisory status under Title VII but declined to agree.¹³² In conclusion, the court found that Vance’s assertions that Davis had the authority to direct her activities or that Davis did not have to clock-in like other employees was not enough to qualify her as a supervisor.¹³³ Therefore, Vance could not recover from Ball State University unless she could prove negligence, and the court found that she did not meet that burden.¹³⁴

Vance appealed the decision of whether Davis qualified as a “supervisor” to the Supreme Court, and for the first time the United States’ highest judicial authority would have a chance to answer the question left unanswered by both *Ellerth* and *Faragher*: who qualifies as a “supervisor” for vicarious liability purposes in Title VII workplace harassment claims?¹³⁵

B. *The Majority Opinion*

The Supreme Court affirmed the Seventh Circuit’s decision in a majority opinion written by Justice Alito in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined.¹³⁶ The majority opinion began by calling

126. *Vance*, 133 S. Ct. at 2440.

127. *Id.* (internal quotation marks omitted).

128. *Id.*; *see also supra* notes 88–95 and accompanying text.

129. *Vance v. Ball State Univ.*, 646 F.3d 461, 465 (7th Cir. 2011).

130. *Id.* at 470.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2440 (2013).

135. *Id.* at 2439.

136. *Id.* at 2438. Justice Thomas wrote a brief concurring opinion, in which he stated that while he believed that *Ellerth* and *Faragher* were decided incorrectly, he joined in the current

Vance's argument "misguided" and "incorrect" and said her definition of a "supervisor" was not supported by general usage of the term, contrary to her claims.¹³⁷ In noting that Vance correctly pointed out that the term "supervisor" could refer to someone who had the "authority to direct another's work," the Court pointed to a competing dictionary that defined the word in terms of the ability to take "'tangible employment actions.'"¹³⁸ After an extensive discussion about how the term "supervisor" has many different meanings across business dictionaries, statutes, and legal authorities,¹³⁹ the Court came to the conclusion that "the term 'supervisor' has varying meanings both in colloquial usage and in the law."¹⁴⁰ As a result of this conclusion, the Court believed it would be incorrect to approach "supervisor" as if it were a statutory term; instead, the proper way to understand the term would be to "consider the interpretation that best fits within the highly structured framework" that *Ellerth* and *Faragher* adopted.¹⁴¹

1. Reviewing Previous Decisions

In the opinion, the Court reviewed the applicable agency principles for vicarious liability, reiterating that racial and sexual harassment likely fall outside the scope of employment, which would normally preclude the employer from liability.¹⁴² However, in *Ellerth* and *Faragher*, the Court held section 219(2)(d) to be an exception for situations when the harasser was aided in accomplishing the actions by the existence of the agency relationship.¹⁴³ This exception was found to apply in two situations: (1) when the harassment by the supervisor resulted in tangible employment actions, and (2) when it did not result in tangible employment actions, but only a hostile work environment, the employer could be vicariously liable if it failed to establish an affirmative defense.¹⁴⁴ The Court believed it would be too extreme to make employers strictly liable whenever a supervisor engaged in harassment that did

opinion because it provided the "narrowest and most workable rule" for employer vicarious liability in harassment cases. *Id.* at 2454 (Thomas, J., concurring).

137. *Id.* at 2444 (majority opinion).

138. *Id.*

139. *Vance*, 133 S. Ct. at 2444–45.

140. *Id.* at 2446.

141. *Id.*

142. *Id.* at 2441.

143. *Id.*

144. *Vance*, 133 S. Ct. at 2441–42. The affirmative defense the employer must prove is (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided. *Id.* at 2442.

not result in tangible employment action and therefore decided to sanction the affirmative defense.¹⁴⁵

Continuing, the Court reviewed the supervisor characterizations from both *Ellerth* and *Faragher* but noted that because these characterizations were not disputed in those cases the Court had not been charged with deciding what degree of authority one must wield in order to achieve supervisory status.¹⁴⁶ Agreeing with the dissent, the majority reiterated that employees who had the ability to control their subordinates' daily work were certainly capable of creating "intolerable work environments" but other co-workers were capable of doing so as well.¹⁴⁷ As a result of this observation, the Court found that a negligence framework provided a better evaluation in situations when the harasser lacked the power to take tangible employment action.¹⁴⁸

After acknowledging that the *Ellerth* and *Faragher* holdings failed to squarely define a supervisor, the Court believed the answer was implicit in the adopted framework.¹⁴⁹ The Court referred to language from *Ellerth*, and stated that "[o]nly a supervisor has the power to cause 'direct economic harm' by taking a tangible employment action," and this authority falls "within the special province of the supervisor."¹⁵⁰ Elaborating further, the majority recalled the Court previously found supervisors to be "empowered . . . as a distinct class of agent[s] to make economic decisions affecting other employees," and it could be strongly implied that the power to take tangible employment action is not simply a characteristic of a subset of supervisors but is rather the defining characteristic of the entire class.¹⁵¹

2. Rationalizing the Narrow Holding

The Court rationalized its holding as a concept that could be "readily applied" and would allow the parties, in most cases, to know if the alleged harasser was a supervisor before any litigation began.¹⁵² This could lead to settlement of the dispute, and, at the most, the issue would be ripe for summary judgment.¹⁵³ Under the approach set forth by the petitioner and the EEOC, the Court believed that finding supervisor status would often be "murky."¹⁵⁴ Indeed, it cannot be ignored that the current case is illustrative to the vagueness

145. *Id.*

146. *Id.* at 2446–47.

147. *Id.* 2447–48.

148. *Id.* at 2448.

149. *Vance*, 133 S. Ct. at 2448.

150. *Id.*

151. *Id.*

152. *Id.* at 2449. Justice Alito stated that if the status of the alleged harasser is not known before litigation begins, it can at least get flushed out in discovery. *Id.*

153. *Id.*

154. *Vance*, 133 S. Ct. at 2449.

of the EEOC definition, as both Vance and the United States, in its amicus brief, applied the same “open-ended” test for analyzing Davis’s employment status but came to different conclusions.¹⁵⁵ Finding this discrepancy predictable, the Court noted that Vance believed since Davis sometimes led or directed employees in the kitchen, she qualified as a supervisor, while the United States believed the same facts not to be dispositive on the issue.¹⁵⁶

The EEOC definition of a supervisor was articulated in an Enforcement Guidance,¹⁵⁷ which the Court referred to as a “study in ambiguity.”¹⁵⁸ Specifically, the majority opinion found that certain terms and phrases used by the EEOC—“‘sufficient’ authority, authority to assign more than a ‘limited number of tasks,’ and authority that is exercised more than ‘occasionally’”—had no clear interpretation and would prove to be troublesome for courts attempting to apply the definition.¹⁵⁹ The Court believed this ambiguity would force trials to devote ample time to determining the status of the alleged harasser and, perhaps most troubling, would be far more complex and confusing for juries to analyze.¹⁶⁰ Failing to be persuaded by the argument that the EEOC’s approach is better equipped to resolve cases in which an alleged harasser only has the authority to assign unpleasant tasks (inflicting psychological damage), the Court said victims could still prevail by proving the employer was negligent in handling the harassment.¹⁶¹ Moreover, juries would be instructed to consider the degree of authority given as an indicator of negligence.¹⁶² More simply put, the Court believed the standard adopted by the majority, supplemented by sufficient jury instructions, could be equally effective in cases where the alleged harasser had certain authority over the victim but not enough authority to qualify as a supervisor.¹⁶³

The Court then began responding to certain claims made by the dissent and started by arguing that the “hierarchical management structure,” which the dissent assumed to be widely used, was outdated and replaced by an “overlapping authority” structure.¹⁶⁴ Furthermore, the Court rejected the

155. *Id.*

156. *Id.* The Government believed that it would not be enough to impugn supervisory status on Davis since she only “occasionally took the lead in the kitchen.” Brief for the United States as Amicus Curiae in Support of Neither Party at 31, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 3864279.

157. *See supra* notes 15–16 and accompanying text.

158. *Vance*, 133 S. Ct. at 2449–50.

159. *Id.* at 2450.

160. *See id.*

161. *Id.* at 2451.

162. *Id.*

163. *See Vance*, 133 S. Ct. at 2451.

164. *Id.* at 2452. Justice Alito gave the example that members of a team may each be responsible for different aspects of a task and can direct each other regarding them, thus, essentially making everyone each other’s supervisors under the EEOC definition. *Id.*

contention that the adopted standard would cause employers to insulate themselves by scaling back authority given to certain positions.¹⁶⁵ Lastly, the Court addressed the dissent's analysis of previous Title VII cases that would have been decided differently under the adopted standard, but the Court countered that it was not clear that any of those cases hinged on the definition of the "supervisor."¹⁶⁶ Once again, the Court ensured the plaintiffs in those cases could have argued their employers were negligent in allowing the harassment to occur.¹⁶⁷

3. Application to the Case at Bar

Finally, the Court addressed the facts of the current case, and held that Davis did not qualify as a supervisor under the majority view, and likely would not even qualify as a supervisor under the dissent's more expansive approach, as there was "simply no evidence that Davis directed petitioner's day-to-day activities," let alone that she had the authority to make tangible employment decisions.¹⁶⁸

C. *The Dissenting Opinion*

The dissenting opinion, articulated by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan, advocated for the use of the EEOC Enforcement Guidance and believed that merely "the authority to direct an employee's daily activities establishes supervisory status under Title VII."¹⁶⁹ In coming to this conclusion, the dissent attacked the majority opinion for being too restrictive in its limitation of both *Faragher* and *Ellerth*, ignoring the realities of the present-day workforce, and disserving the "objective of Title VII to prevent discrimination from infecting the Nation's workplaces" in its discarding of the EEOC definition.¹⁷⁰

1. The Modern Workplace

The dissent, like the majority, recalled *Faragher* and noted how one of the alleged harassers, David Silverman, who was found to be a supervisor, likely would not have qualified as a supervisor under the definition adopted by the

165. *Id.*

166. *Id.*

167. *Id.* at 2453. Possible evidence that plaintiffs could admit would be "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed"

Id.

168. *Vance*, 133 S. Ct. at 2454.

169. *Id.* at 2454–55 (Ginsburg, J., dissenting).

170. *Id.* at 2455. Justice Ginsburg stated that in a common workplace, one who is exposed to co-worker harassment can "walk away or tell the offender to 'buzz off.'" However, they cannot say such a thing to a supervisor. *Vance*, 133 S. Ct. at 2456.

majority opinion in the present case.¹⁷¹ Generally, Silverman had the ability to “punish lifeguards who would not date him [by assigning them] full-time toilet-cleaning duty;” but, as the dissent pointed out, there was no evidence that he had the power to take tangible employment action against anyone.¹⁷² Providing another example, the dissent cited a Supreme Court case from 2004 where the Court referred to the harasser as a “supervisor” when he only had the authority to oversee day-to-day activities but nothing more.¹⁷³ Acknowledging that these previous cases did not squarely resolve the definition of a supervisor but still provided guidance, the dissent believed the majority was blind to an “all-too-plain reality: A supervisor with authority to control subordinates’ daily work is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer.”¹⁷⁴ Nevertheless, the dissent argued that the cases referenced still showed the Court had previously held that “in-charge superiors” assisted by the agency relationship could create a hostile working environment.¹⁷⁵

In addressing the argument over modern-day workplace realities, the dissent fortified its conclusion by continuing to pull from real-life examples involving hostile work environments perpetuated by individuals who were arguably supervisors.¹⁷⁶ After discussing the situations, the dissent highlighted that the commonality among them was that in each case a “person vested with authority to control the conditions of a subordinate’s daily work life used his position to aid his harassment.”¹⁷⁷ Interesting enough, none of the harassers in the examples given would have qualified as a supervisor under the majority’s strict approach.¹⁷⁸

2. Explaining the EEOC Approach

The dissent then provided a more in-depth analysis of the EEOC definition, noting how the agency, being charged with enforcing Title VII, had

171. *Id.* at 2458.

172. *Id.*

173. *Vance*, 133 S. Ct. at 2458. The case Justice Ginsburg briefly alluded to was *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140 (2004).

174. *Id.*

175. *Id.* at 2459. Justice Ginsburg found that what mattered in *Faragher* is that both men took advantage of the power vested in them as agents of their employer to create the hostile working environment. *Id.* at 2458–59.

176. *Id.* at 2459–60. Justice Ginsburg analyzed the circumstances from *Mack v. Otis Elevator*, 326 F.3d 116 (2d Cir. 2003); *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004); *Whitten v. Fred’s, Inc.*, 601 F.3d 231 (4th Cir. 2010); and *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012). *Id.*

177. *Vance*, 133 S. Ct. at 2458.

178. *Id.*

applied the definition for fourteen years.¹⁷⁹ Perhaps wanting to clear up any confusion on the leniency of the definition it supported, the dissent reiterated that an employee “who direct[ed] only a *limited number* of tasks or assignments” likely would not qualify as a supervisor, as the harassing behavior is unlikely to have been a product of the agency relationship with the employer.¹⁸⁰ On the other hand, someone with the authority of such “sufficient magnitude so as to assist the harasser . . . in carrying out the harassment,” likely would be considered a supervisor, and the employer would be vicariously liable because the authority it delegated to said supervisor likely enabled the harassment to occur.¹⁸¹

3. Analyzing the Majority Opinion

Turning then to an analysis of the majority’s standard, the dissent accused the majority of ignoring the “robust protection against workplace discrimination Congress intended Title VII to secure” by adopting such a restrictive standard.¹⁸² Indeed, the dissent argued the “workable” definition set forth by the majority was rather unworkable.¹⁸³ In support, it noted someone who had the power to reassign another employee with “significantly different responsibilities” falls under the majority definition, but it questioned what might really count as “significantly different responsibilities.”¹⁸⁴ This was just one of the deficiencies the dissent alluded to in concluding there is no “crisp definition” of a supervisor that could provide the “unwavering” bright-line rule the Court desired.¹⁸⁵ The dissent buttressed this observation by showing the difficulty in applying such a strict standard in certain situations, such as in a pitching coach and pitcher relationship or the relationship between a law firm associate and a paralegal.¹⁸⁶ In both instances, the former obviously has power over the latter but is unlikely to be able to take tangible employment action against them.¹⁸⁷

The dissent predicted that the adopted standard would undermine Title VII’s ability to deter workplace discrimination.¹⁸⁸ According to the majority’s standard, harassment victims would be tasked with the burden of proving negligence on behalf of the employer in a case where the alleged harasser did

179. *Id.* at 2461.

180. *Id.* (emphasis added).

181. *Id.*

182. *Vance*, 133 S. Ct. at 2458.

183. *Id.*

184. *Id.*

185. *Id.* at 2463.

186. *Id.*

187. *See Vance*, 133 S. Ct. at 2463.

188. *Id.*

not have the authority to make tangible decisions.¹⁸⁹ This is contrary to *Ellerth* and *Faragher*, which placed the burden on the employer to prove affirmative defenses, a reasonable task given the heightened ability of the employer to gather evidence.¹⁹⁰

4. Applying the Dissent to the Case at Bar

Nevertheless, the dissent conceded that in the particular case of Maetta Vance, Davis would be unlikely to qualify as a supervisor under the EEOC's broad definition due to the "slim evidence" put forth by Vance.¹⁹¹ The dissent concluded its critical approach by calling on Congress to "correct the error into which this Court has fallen," and to restore the protections previously afforded in workplace harassment situations.¹⁹²

IV. ALTERNATIVE PROPOSAL

The majority and dissent both made strong arguments, but which theory is best? The majority approach claims to have adopted an approach that can be resolved before trial.¹⁹³ On the contrary, the dissent believes the question of supervisory status is on par with the question of whether retaliation or harassment has actually occurred and "depends on a constellation of surrounding circumstances, expectations, and relationships."¹⁹⁴ Both sides make a logical argument, which perhaps makes it illogical to deem one "better." Therefore, this Note proposes an alternative theory applicable to hostile work environment cases.

A. *Support for Discarding the Distinction*

An alternative approach would be to abolish the need to distinguish between supervisors and non-supervisors when it comes to employer liability. Judge Richard Posner of the Seventh Circuit, one of the more influential voices in the legal profession, proposed the idea of discarding the need to distinguish between supervisors and co-workers in employment discrimination cases in dicta in *Doe v. Oberweis Dairy*.¹⁹⁵ In that case, the alleged harasser, a "shift supervisor" at an ice cream parlor, was responsible for directing the scoopers and was authorized to issue disciplinary write-ups.¹⁹⁶ However, he did not have

189. *Id.* at 2464.

190. *Id.*

191. *Id.* at 2465.

192. *Vance*, 133 S. Ct. at 2466.

193. *Id.* at 2449 (majority opinion).

194. *Id.* at 2463 (Ginsburg, J., dissenting).

195. *Doe v. Oberweis Dairy*, 456 F.3d 704, 716–19 (7th Cir. 2006).

196. *Id.* at 717.

power to take tangible employment action against the scoopers.¹⁹⁷ He was often the only authority figure who worked alongside the scoopers, and Judge Posner described him as “either an elevated coworker or a diminished supervisor.”¹⁹⁸ Recognizing the support for classifying the alleged harasser as either a supervisor or a co-worker, Judge Posner stated that there was “no compelling need to make a dichotomous choice.”¹⁹⁹

Fast-forward seven years, and Judge Posner was again addressing the topic, this time while writing an article reviewing the holding in *Vance*.²⁰⁰ Judge Posner found both the majority and dissent definitions to be “vague” and once more declared labeling the harasser as a supervisor or co-worker a needless task.²⁰¹ Specifically, he stated:

Cases of employer liability for workplace harassment of one employee by another can be handled satisfactorily without attempts at classifying the harasser—attempts further confused by dividing supervisors into those whose supervisory responsibilities make them “supervisors” for purposes of their employer’s liability and those whose responsibilities fall short: They are called supervisors and have supervisory duties, but not the right duties.²⁰²

Furthermore, Judge Posner proposed a “sliding scale” to determine employer liability, which would hinge on the specific context of each case, such as the victim’s youth relative to the alleged harasser’s, among other factors.²⁰³

1. A Hypothetical to Consider

Judge Posner was correct when he stated there was not a “compelling” need to distinguish between supervisors and co-workers.²⁰⁴ Ridding cases of this distinction will be more favorable to the victims, especially in situations where the harasser may appear to be a supervisor, but does not qualify under the strict standard adopted by the *Vance* majority. A uniform standard would also provide more benefits than the standard set forth by the dissent in *Vance*.

197. *Id.*

198. *Id.* Justice Ginsburg referred to this passage in a footnote in her dissenting opinion. *Vance*, 133 S. Ct. at 2463 n.5 (Ginsburg, J., dissenting).

199. *Oberweis Dairy*, 456 F.3d at 717.

200. Richard Posner, *A Disappointing Supreme Court Decision on Sexual Harassment*, SLATE.COM (June 25, 2013, 12:09 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/sexual_harassment_at_the_supreme_court_lessons_from_the_ice_cream_store.single.html?print.

201. *Id.*

202. *Id.*

203. *Id.* Judge Posner stated, “Our opinion suggested a sliding scale (now superseded by *Vance*), whereby the employer’s liability would depend on the contextually significant practical authority that the employer conferred on the employee who turned out to harass another employee.” *Id.*

204. *See supra* note 195 and accompanying text.

Consider the following hypothetical situation: Two lower-level employees, Abe and Bev, hold the same position at their place of work—a major corporation; however, Abe has been working there five years longer than Bev. This seniority gives the impression that Abe possesses power and entitlement over Bev, even though there is no technical differentiation between their job duties. Abe starts behaving in a way towards Bev that creates a hostile work environment, but does nothing that tangibly affects Bev's employment. Under both the majority and dissenting approaches, Abe would not qualify as a supervisor, so the burden would be on Bev to prove the employer's negligence in order to pin liability on it. This could prove to be a very difficult burden for Bev to overcome, as she will be pitted against the unlimited resources of the major corporation.

B. The Proposal

The current framework, simply stated, provides that employers are strictly liable if any tangible employment action results.²⁰⁵ Furthermore, employers are presumed liable if a hostile environment is created by a supervisor and presumed not liable if a hostile work environment is created by someone without power to take tangible employment actions upon the employee, as this person would not be considered a supervisor, but merely a co-worker.²⁰⁶

1. The New Framework

Under the proposed approach, an employer would continue to be strictly liable if any tangible employment actions resulted. However, if a hostile work environment is found to exist, regardless of whether the alleged harasser is a supervisor or co-worker, the employer would be presumptively negligent in allowing the hostile work environment to exist. The employer, nevertheless, can rebut this presumption by showing that it exercised reasonable care to prevent and correct any harassing behavior, and the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. Essentially, the employer still has the *Ellerth* and *Faragher* affirmative defense at its disposal—proving it was not negligent in failing to initially prevent the harassment or provide a remedy once it became privy to the situation. As previously stated, this proposed standard will apply in all situations, and does not hinge on what kind of authority is possessed by the individual responsible for creating the hostile work environment.

According to this proposal, the employer will bear the burden of overcoming the presumption that it was negligent in allowing a hostile work environment to foster. This may seem like a rather harsh rule for employers to

205. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

206. *See id.*

cope with, and while that argument is not without merit, it is not entirely true. Employees still have to satisfy the steep burden of establishing that the harassment complained of was so severe and pervasive that it created an actionable hostile environment.²⁰⁷ Therefore, it logically follows that if the harassing conduct was so severe and pervasive, then the employer likely knew or should have known about it, and should have made an effort to stop or prevent it. The employers are fairly tasked with explaining the hostile environment and whether or not it properly handled the situation.

a. Presumptions Generally

Since this proposal is framed as a rebuttable presumption, it is important to understand how “presumptions” work in grasping this standard. A presumption is a “court-made device that says that if a party can prove certain . . . facts, the court will conclude that an additional fact exists.”²⁰⁸ Here, the “certain facts” proven would be the plaintiff’s prima facie case showing a hostile work environment, and the presumed “additional existing fact” would be that the employer was negligent in allowing the hostile environment. Fundamentally, a presumption is a “legally mandated conclusion which follows from certain specific facts.”²⁰⁹ A classic example follows:

[I]f A is proved then B is presumed to be true. Once B is presumed to be true, and if the presumption is rebuttable, the opposing party must now produce evidence that B is not true, even though the party who produced evidence of A produced no evidence of B.²¹⁰

Therefore, referring back to the hypothetical about Abe and Bev, after Bev proves her prima facie case, regardless of the fact that Abe is only a co-worker, the employer would be presumptively negligent, and the burden would fall on it to prove otherwise, instead of saddling Bev with the task.²¹¹

C. *Implications of Adopting the Proposal*

There are practical reasons for this proposal, as the employer is truly in “the best position to know what remedial procedures it offers to employees and how those procedures operate.”²¹² Allocating the burden of proof is extremely important in the United States legal system, and often can have a significant

207. Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

208. Candace S. Kovacic-Fleisher, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance*, 39 AM. U. L. REV. 615, 625 (1990).

209. *Id.*

210. *Id.* In the above example, applied to the current situation, “A” is the hostile work environment, and “B” is the employer’s negligence.

211. *See supra* Part IV.A.1.

212. Pa. State Police v. Suders, 542 U.S. 129, 146 n.7 (2004).

impact on the outcome of cases.²¹³ Factual disputes are at the heart of a plethora of discrimination cases,²¹⁴ and under the proposed approach, there will likely still be disputes regarding whether or not the employer was negligent. Fortunately, however, there will not be the added factual disputes over whether the alleged harasser was a supervisor or co-worker. As multiple authorities have previously identified, there is not a single dominant principle when it comes to deciding how to allocate the burden of proof.²¹⁵ However, some important factors include “issues of policy, convenience, fairness, and probability.”²¹⁶ It is undoubtedly more convenient and fair for the employer to prove that it was not negligent in the handling of the hostile work environment than it would be for the employee to prove the opposite.

Forcing a presumption of negligence on the employer could exponentially benefit the modern workplace. As Justice Ginsburg has understood, “[w]hen employers know they will be answerable for the injuries a harassing jobsite boss inflicts, their incentive to provide preventative instruction is heightened.”²¹⁷ However, under the proposed standard, Justice Ginsburg’s observation not only applies to jobsite bosses but to regular employees as well. This will encourage employers to be extremely careful in hiring practices, remedial procedures, and general overseeing of the entire staff. Employers will make sure to do everything in their power to be able to produce a solid argument in response to potentially being found presumptively negligent when any type of hostile environment exists at their workplace. While this may be somewhat of a harsh standard, the benefits largely outweigh the negatives.

D. *Applying the Proposal to the Case at Bar*

Applying the proposed standard to the *Vance* fact-pattern, Ball State University would likely be successful in rebutting the presumption of negligence. Ball State investigated the complaints made by Vance, and although it decided against discipline, the University still did its due diligence in addressing the situation.²¹⁸ It is important to note that the burden would rest with Ball State in providing the evidence of its investigations and remedial procedures, as Maetta Vance would only need to prove her prima facie case. Under this standard, the parties would need not spend time and money arguing over whether or not Davis qualified as a supervisor and could devote their

213. Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward A Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1206–07 (1981).

214. *Id.* at 1207.

215. Kovacic-Fleisher, *supra* note 208, at 622.

216. *Id.* Some things to consider in regards to convenience and fairness are which party has better knowledge and access to the information. *Id.* at 623.

217. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2464 (Ginsburg, J., dissenting).

218. *See supra* notes 116–117, 122 and accompanying text.

resources to litigating the actual merits of the case. Thus, this case is illustrative of the notion that the proposed standard is fair to both sides—even though it appears rather strict for employers at first impression, it will provide justice in all situations.

CONCLUSION

Vicarious liability for the actions of supervisors has been a very fluid area of law for the past quarter-century. In the landmark decisions of *Ellerth* and *Faragher*, the Supreme Court held that agency principles apply in attaching vicarious liability, but due to the broad-sweeping nature of the “aided by the agency relationship” concept, which would attach vicarious liability to employers in virtually all scenarios, the Court created an affirmative defense to serve as a limitation to employer liability. However, what the Court failed to hold—the requirements to qualify as a supervisor—proved to cause shockwaves through the lower courts who tried to apply the standard from *Ellerth* and *Faragher*. Attempting to define who qualified as a supervisor, the circuits became split on whether an individual needed to have the authority to take tangible employment actions against another to be considered a supervisor or rather only needed the ability to direct the day-to-day activities of others. These conflicting views are what led to the decision in *Vance*, where the Supreme Court was finally able to address the circuit split.

It is as curious as it is troubling for exactly why the Supreme Court in *Ellerth* and *Faragher* did not address the issue of who definitively qualifies as a supervisor, as a simple reading of those opinions reveals that the status of the harasser is essentially a cornerstone to the whole standard. The logical reason appears to be that because the parties did not dispute the status of the harassers, the Court was not required to address the topic. However, the Supreme Court seems to have developed a pattern of leaving important questions open, perhaps waiting until a “perfect” record arises to firmly establish certain standards. While this could be considered a practical strategy, it has proven to cause much difficulty to the lower courts in trying to apply the Supreme Court’s holdings.

The alternative proposal set forth by this Note will do away with any uncertainty in regards to whether or not the standard for vicarious liability would apply. Eliminating the need to distinguish between who qualifies as a supervisor or co-worker will prove to be much more workable for the lower courts. Even though, technically, there should not be any more confusion in the wake of the *Vance* definition, it is still doubtful whether the *Vance* definition is truly the best avenue. This doubt is especially present in light of the very legitimate arguments set forth in the dissenting opinion. When two sides of an argument can both give compelling reasons in support of their stance, and when an alternative solution exists to eliminate the need to decide between the two sides, the alternative solution should be implemented.

Additionally, the proposed standard will result in employers being much more careful and diligent in hiring practices and workplace procedures, which can only result in a better workplace for everyone involved. Therefore, using the alternative solution proposed here, of eliminating the status of the alleged harasser as a dispositive factor, is one step in satisfying the goals of Title VII in creating a more equal and safer workplace, free of discrimination and harassment.

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