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## WHO'S THE BOSS? A DISTINCTION WITHOUT A DIFFERENCE

Lakisha A. Davis\*

### I. INTRODUCTION

In the late 1990s, the United States Supreme Court made two rulings<sup>1</sup> that substantially expanded the scope of an employer's vicarious liability for its supervisors' unlawful conduct under Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>2</sup> In both *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*,<sup>3</sup> the United States Supreme Court held that an employer is strictly liable under Title VII for a sexually hostile work environment created by its supervisors.<sup>4</sup> The Court further held that if a plaintiff failed to prove that the harasser was a supervisor, employer liability may still result if the plaintiff proved that the employer was negligent in handling his or her complaint.<sup>5</sup> Thus, the standard for determining employer liability rested upon whether the harasser was the victim's supervisor or merely a co-worker.

Congress did not define "supervisor" under Title VII.<sup>6</sup> Consequently, federal courts have applied conflicting definitions of the term "supervisor."<sup>7</sup> In *Vance v. Ball State University*, the United States Supreme Court addressed this conflict by deciding who qualifies as a "supervisor" for workplace harassment claims under Title VII.<sup>8</sup> Led by Justice Alito, the majority held "that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."<sup>9</sup>

The Court underestimated the deterrent effect of providing a broader definition of "supervisor" rather than a restrictive definition. The decision in *Vance* is a reminder of another occasion where the Supreme Court limited the availability of Title VII remedies for workplace discrimination claims.<sup>10</sup> The Court's ruling may

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1. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).
2. Title VII, *infra* note 38.
3. *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775.
4. *See Ellerth*, 524 U.S. at 745; *Faragher*, 524 U.S. at 780.
5. *See Ellerth*, 524 U.S. at 750-51; *Faragher*, 524 U.S. at 807.
6. *See* 42 U.S.C. § 2000e (1984) (definitions provided under Title VII).
7. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).
8. *Vance v. Ball State University*, 133 S. Ct. 2434, 2437 (2013).
9. *Id.*
10. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held that an employee cannot sue under Title VII for pay discrimination unless the employee filed a formal complaint with the Equal Employment Opportunity Commission within 180 days of the employer's pay decision. The Court ruled that the charging period runs from the date that the alleged discriminatory act occurs, not from the date that it affects the employee,

severely impact individual civil rights by failing to adequately consider the consequences of providing such a narrow definition of “supervisor” under Title VII.<sup>11</sup>

The body of this case note is divided into six parts. Part II provides the factual background of *Vance v. Ball State*. Part III briefly summarizes the legal precedent behind the decision in *Vance*. Part IV examines and provides an overview of the majority, concurring, and dissenting opinions. Part V analyzes the opinion of the Court, touching on the impact of the Court’s decision and the need for deference to the Equal Employment Opportunity Commission (“EEOC”). Part VI provides brief recommendations for the United States Supreme Court and Congress. Part VII offers some closing remarks and concludes the case note.

## II. FACTUAL BACKGROUND

In 1989, Ball State University (“BSU”) employed Maetta Vance, an African-American woman, as a substitute server in the University Banquet and Catering Division of Dining Services.<sup>12</sup> She became a part-time Catering Assistant in 1991 and was promoted to full-time Catering Assistant in 2007.<sup>13</sup> During most of Vance’s term of employment with BSU, she was the only African-American employee in her division.<sup>14</sup>

While employed with BSU, Vance made several internal discrimination complaints.<sup>15</sup> Many of the complaints pertained to Sandra Davis, a Caucasian woman employed as a Catering Specialist in the Banquet and Catering Division.<sup>16</sup> In 2005, Davis was given authority to oversee the work of Vance as well as other employees.<sup>17</sup>

Vance asserted, among other things, that Davis threatened her.<sup>18</sup> Davis used epithets such as “Buckwheat” and “Sambo” to refer to Vance, and did so around other employees.<sup>19</sup> Davis would also stare at Vance menacingly, slam pots and

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even if they had no idea about the discriminatory act when it occurred. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 618–19 (2007). Congress reacted promptly and overturned the decision in *Ledbetter* by introducing the Fair Pay Act. The Ledbetter Fair Pay Act essentially changes federal law to restart the charging period each time an employee is given a paycheck tainted by an allegedly discriminatory pay decision. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as 29 U.S.C. §§ 626, 794a; 42 U.S.C.S. §§ 2000e-5, 2000e-16). Additionally, in *University of Texas Southwestern Medical Center v. Nassar*, the Court made it more difficult for plaintiffs to prove retaliation claims by holding that Title VII retaliation claims must be proved according to the traditional principles of but-for causation, not the lessened motivating-factor test. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

11. Who is a Supervisor, 6 Emp’t Coordinator Emp’t Practices § 51:28.

12. Brief for Petitioner at 6, *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011) (No. 11-556).

13. *Id.*

14. *Id.*

15. *Id.* at 7.

16. *Id.* at 6.

17. *Id.*

18. Brief for Petitioner, *Vance*, 646 F.3d 461 (No. 11-556).

19. *Id.*

pans, and intimidate her.<sup>20</sup> Vance asserted that she suffered from anxiety due to her work environment.<sup>21</sup>

Even after Vance complained to the Equal Employment Opportunity Commission (“EEOC”) and threatened lawsuit, Davis taunted and teased her.<sup>22</sup> On one occasion, even Davis’s daughter confronted Vance on the BSU campus and said, “You are a nigger, a fucking nigger.<sup>23</sup> You are trying to get my mother fired. What are you gonna do about it? I’ll kick your ass.”<sup>24</sup>

Despite the efforts taken by BSU to remedy the situation, Vance’s predicament continued.<sup>25</sup> Consequently, Vance filed a lawsuit against BSU in 2006 in the United States District Court for the Southern District of Indiana, claiming that Davis subjected her to a racially hostile work environment in violation of Title VII.<sup>26</sup> Vance alleged that Davis was her supervisor and that BSU was vicariously liable for Davis’s conduct.<sup>27</sup>

While there was contention over Davis’s supervisory status, neither party asserted that Davis had the ability to make tangible employment actions.<sup>28</sup> BSU and Vance filed motions for summary judgment.<sup>29</sup> The district court granted BSU’s Motion for Summary Judgment.<sup>30</sup> It held that Davis lacked what the Seventh Circuit centrally required under *Faragher* and *Ellerth*—“the ability to hire, fire, demote, promote, transfer, or discipline an employee.”<sup>31</sup> The court further held that Vance did not meet the negligence standard because BSU reasonably responded to Vance’s internal complaints.<sup>32</sup> The Seventh Circuit Court of Appeals affirmed the district court’s ruling.<sup>33</sup> The circuit court held that Vance’s claim failed because Davis was not Vance’s supervisor; Davis lacked the power to directly affect the terms and conditions of Vance’s employment.<sup>34</sup> The circuit court also held that Vance could not recover under the negligence standard.<sup>35</sup> Vance then filed a petition for certiorari<sup>36</sup> and it was granted by the United States Supreme Court.<sup>37</sup>

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20. *Id.* at 6, 8.

21. *Id.* at 6.

22. *Id.* at 9.

23. *Id.*

24. Brief for Petitioner, *Vance*, 646 F.3d 461 (No. 11-556).

25. *See generally* Brief for Respondent at 7–11, *Vance*, 646 F.3d 461 (No. 11-556) (describing investigatory actions and disciplinary measures taken in response to Vance’s complaints).

26. *Vance v. Ball State University*, No. 1:06-CV-1452-SEB-JMS, 2008 WL 4247836, at \*8 (S.D. Ind. Sept. 10, 2008).

27. *Id.* at 11.

28. Brief for Respondent, *supra* note 25, at 39; Brief for Petitioner, *supra* note 12, at 10 (describing Davis’s authority).

29. *Vance*, 2008 WL 4247836, at \*1.

30. *Id.* at \*21.

31. *Id.* at \*12.

32. *See* Brief for Petitioner, *supra* note 12, at 54.

33. *Vance*, 646 F.3d at 461.

34. *Id.* at 470 (concluding that Vance did not submit sufficient proof that Davis could make tangible employment actions).

35. *Id.* at 471.

36. Petition for Writ of Certiorari, *Vance v. Ball State University*, 2011 WL 5229301 (S.C. Oct. 31, 2011) (No. 11–556).

37. *See Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013).

### III. LEGAL BACKGROUND

Title VII prohibits employers from discriminating against employees on the basis of their race, color, religion, national origin, or sex.<sup>38</sup> Title VII applies to employers who employ “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”<sup>39</sup> Initially, the doctrine of workplace harassment, in the context of racial, ethnic, and religious discrimination, did not exist under Title VII.<sup>40</sup>

#### A. Evolution of the Workplace Harassment Doctrine

Under Title VII, workplace harassment, in the legal context of racial and ethnic discrimination, originated in the early 1970s.<sup>41</sup> In *Rogers v. EEOC*, the Fifth Circuit Court of Appeals recognized a claim of action for a discriminatory work environment.<sup>42</sup> The *Rogers* court held that a complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by segregating patients based on their national origin.<sup>43</sup> The court explained that an employee’s protection under Title VII extends beyond the economic aspects of employment:

[T]he 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. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.<sup>44</sup>

The hostile work environment doctrine continued to evolve from the EEOC’s Guidelines on Discrimination Because of Sex,<sup>45</sup> and judicial interpretation of Title VII.<sup>46</sup> By the late 1970s and into the 1980s, many federal courts began to recognize that hostile work environment claims could result in liability under Title VII.<sup>47</sup>

38. 42 U.S.C. § 2000e-2(a)(1) (1988).

39. *Id.* at § 2000e(b).

40. See, e.g., Sandra M. Tomkowicz, *Hostile Work Environments: It’s About the Discrimination, Not “The Sex”*, 55 LAB. L.J. 2 (2004); Robert E. Wone, *How Free Is Harassment Free? Employer Liability for Third-Party Racial Harassment*, 2 U. PA. J. LAB. & EMP. L. 179, 183 (1999).

41. Wone, *supra* note 40, at 185.

42. *Rogers*, 454 F.2d 234 (a case involving a Hispanic woman who complained that her employer created a hostile work environment in violation of Title VII).

43. *Id.* at 240–41.

44. *Id.* at 238.

45. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1988).

46. *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 716–23 (1978) (explaining that Title VII of the Civil Rights Act of 1964 made it unlawful for an employer to discriminate against an employee based on their sex); *Banta v. United States*, 434 U.S. 819 (1977) (denying cert.); *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981); *Calcote v. Texas Educ. Found., Inc.*, 458 F. Supp. 231, 237 (W.D. Tex. 1976) (a supervisor’s racial harassment of white employee creates intolerable working conditions in violation of Title VII); *Compston v.*

The issue of workplace harassment under Title VII reached the United States Supreme Court in the late 1900s. In *Meritor Savings Bank, FSB v. Vinson*, the Court pronounced that employers could be held liable for the creation of a hostile work environment under Title VII.<sup>48</sup> It held that Title VII is violated when the workplace is permeated by discriminatory intimidation, ridicule, and insults that are “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>49</sup> However, the *Meritor* Court failed to articulate any definitive rules to guide lower courts in determining the circumstances under which an employer is liable for workplace harassment under Title VII.<sup>50</sup> The Court merely directed the lower courts to utilize common law agency principles as set forth in the Restatement of Agency<sup>51</sup> to guide their decisions.<sup>52</sup> As a result, federal courts and the EEOC applied different standards when determining employers’ vicarious liability.

Some courts held employers liable for their supervisors’ sexual harassment only if the employers knew or should have known of the harassment; some courts held employers strictly liable for their supervisors’ sexual harassment; other courts based employer liability on whether the supervisor was acting within the scope of employment.<sup>53</sup> The EEOC’s standard held employers liable for supervisory harassment “regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”<sup>54</sup>

### B. *Faragher and Ellerth*

The conflicting approaches among the appellate courts and the EEOC influenced the United States Supreme Court’s decision to review two cases—*Ellerth* and *Faragher*.<sup>55</sup> In *Faragher and Ellerth*, the Court held that the applicable rules depend on whether the harassing employee is the plaintiff’s supervisor or

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Borden, Inc., 424 F. Supp. 157, 160–61 (S.D. Ohio 1976) (a supervisor’s constant harassment and ridicule of a Jewish employee because of his ancestry and religious views violates Title VII); *United States v. Buffalo*, 457 F. Supp. 612, 632–35 (W.D.N.Y. 1978) (a pattern of racial harassment in city’s police and fire departments violates Title VII). See *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

47. *Bundy*, 641 F.2d at 947.

48. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–73 (1986) (describing the development of hostile environment claims based on race and holding that a claim of hostile environment sex discrimination is actionable under Title VII).

49. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citing *Meritor*, 477 U.S. 57, 67 (1986)).

50. *Faragher v. Boca Raton*, 524 U.S. 775, 785 (1998) (explaining that since its decision in *Meritor*, “[c]ourts of [a]ppeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743 (1998) (holding that “*Meritor* did not discuss the distinction for its bearing upon an employer’s liability for discrimination, but held, with no further specifics, that agency principles controlled on this point.”).

51. See generally RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (recognizing that a master is liable for the torts of his servants when the torts are committed while acting in the scope of their employment).

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

53. See Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for “Hostile Work Environment” Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667 (1995) (collecting and analyzing post-*Meritor* cases).

54. *Id.* at 672.

55. See *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

merely another employee.<sup>56</sup> An employer is vicariously liable when a supervisor takes tangible employment actions against an employee.<sup>57</sup>

Further, the Court held that where there is no tangible employment action taken, an employer's liability for a hostile environment claim is subject to an employer's affirmative defense.<sup>58</sup>

On the other hand, if the harassment is by a non-supervisor, liability will only arise if the employee can show that the employer was negligent in failing to prevent or remedy the alleged harassment.<sup>59</sup>

### C. The Unsolved Mystery: Who is a Supervisor?

Clearly, after the Court's decisions in *Faragher* and *Ellerth*, the question of whether a harassing employee was a plaintiff's supervisor or co-worker became very important.<sup>60</sup> As in most instances where legislatures<sup>61</sup> fail to provide guidelines or rules, lower courts disagreed on the definition of "supervisor" under Title VII.<sup>62</sup>

The First, Seventh, and Eighth Circuits ruled that for purposes of vicarious liability under Title VII, a supervisor is one who has the power to "hire, fire, demote, promote, transfer or discipline [another] employee."<sup>63</sup> However, the Second, Fourth, and Ninth Circuits took on the broader view<sup>64</sup> established in the Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors ("EEOC Guidance").<sup>65</sup> The EEOC Guidance advised that a supervisor is any individual with the authority to: (1) undertake or recommend tangible employment decisions affecting the employee; or (2) direct and oversee another employee's daily work is a supervisor for purposes of Title VII liability.<sup>66</sup>

56. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 762.

57. Tangible employment actions include: hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 807.

58. An employer can avoid liability by showing: (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 preventive or corrective opportunities [that were] provided." See *Faragher*, 524 U.S. at 778.

59. *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013).

60. Thomas M. Geisler, Jr., *Proof of Employer Liability for Sexual Harassment Claims under Title VII of the Civil Rights Act of 1964*, 52 AM. JUR. 3D *Proof of Facts*, § 4 (1999).

61. See 42 U.S.C. § 2000e.

62. *Employment Litigation and Discrimination*, 25 BUS. TORTS REP. 270, 271-72 (2013).

63. *Parkins v. Civil Constructors*, 163 F.3d 1027, 1034 (7th Cir. 1998). See, e.g., *Noviello v. Boston*, 398 F.3d 76, 96 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002).

64. See, e.g., *Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011); *Whitten v. Fred's Inc.*, 601 F.3d 231, 244 (4th Cir. 2010); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003).

65. The EEOC Guidance states that a "supervisor," for purposes of Title VII liability, is any individual with the authority to: (1) "undertake or recommend tangible employment decisions affecting the employee;" or (2) direct and oversee another employee's daily work. Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 1999 WL 33305874, \*3 (June 18, 1999).

66. *Id.*

In *Vance*, the majority had no qualms following the first approach and provided for a more restrictive and narrow definition of “supervisor.”<sup>67</sup>

#### IV. THE COURT’S RATIONALE

##### A. Majority Opinion<sup>68</sup>

The answer provided by the United States Supreme Court in *Vance* to the question of who qualifies as a “supervisor” left federal courts of appeals divided for over a decade after the decisions in *Faragher* and *Ellerth*.<sup>69</sup> Justice Alito<sup>70</sup> wrote the opinion for this case,<sup>71</sup> holding that for purposes of liability under Title VII, an individual is a supervisor “if he or she is empowered by the employer to take tangible employment actions against the victim.”<sup>72</sup>

##### 1. “Supervisor” as Defined in a Common and Legal Context

While BSU and Vance contested the nature and scope of Davis’s duties,<sup>73</sup> Vance did not claim that Davis had the power to hire, fire, demote, promote, transfer, or discipline her.<sup>74</sup> Rather, Vance contended that a broad definition<sup>75</sup> of “supervisor” should be applied for purposes of determining employer liability under Title VII.

Vance advanced her argument by referencing the term “supervise,” as commonly found in dictionaries<sup>76</sup> and other legal contexts.<sup>77</sup> Vance also asserted that the Court should consider the definition of “supervisor” as defined by the National Labor Relations Act, which defines “supervisor” in broad terms.<sup>78</sup> The majority rejected Vance’s first argument, stating that the meaning of the term “supervisor,” in general usage and in other legal context, is insufficient and too imprecise to address the former issue at hand.<sup>79</sup> The Court further noted that while

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

68. *Id.* at 2438.

69. *Id.* at 2439.

70. Republican President George W. Bush appointed Justice Samuel Anthony Alito, Jr. to the Supreme Court bench in 2006. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited November 27, 2013).

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

72. *Id.* at 2454.

73. Brief for Petitioner, *supra* note 12, at 10–11.

74. *Id.* at 12.

75. *See generally id.* (Vance asserted that a “supervisor” was one that could take tangible employment actions, as well as one who directs the daily activities of a subordinate.).

76. *Id.* at 25–26 (using Webster’s New International Dictionary, Webster’s New World Dictionary, New Oxford American Dictionary, and the Oxford English to define “supervise” as, to oversee and direct the activities of others).

77. *Id.* at 23–26 (describing cases in which courts repeatedly held consistent with the common definition of supervisor—someone who directs and oversees another’s work).

78. Vance stated that “[s]upervisor” also has an assigned meaning under the National Labor Relations Act,” which “includes not only personnel with power ‘to hire . . . promote, discharge, . . . or discipline,’ but also those with ‘responsibility to direct’ other employees or with authority ‘effectively to recommend [personnel] actions . . . .’” *Id.* at 27 (citing 29 U.S.C. § 152(11) (1970)).

79. *Vance v. Ball State University*, 133 S. Ct. 2434, 2444 (2013).

the term “supervise” can mean to direct and oversee, it is also closely tied to the authority to take tangible employment action.<sup>80</sup>

Vance further argued that the Court should adopt the EEOC’s definition of “supervisor,” as established in the EEOC Guidance.<sup>81</sup> The Court declined to accept the EEOC’s definition and referred to it as a “nebulous definition.”<sup>82</sup> The Court considered this definition to be “murky” and had “ambiguity,” noting that even the Government’s own attorney could not clearly explain the bounds of the EEOC’s standard during oral arguments.<sup>83</sup> The Court further explained that while the definition that it adopted is easily applied, the standard advocated by the EEOC would cause confusion during litigation.<sup>84</sup>

## 2. Interpretation of *Faragher* and *Ellerth*

The majority emphasized the fact that Congress failed to define the term “supervisor” under Title VII; rather, it was the Court that adopted the term in *Ellerth* and *Faragher*.<sup>85</sup> Thus, the majority decided to interpret the meaning of “supervisor” in a way that was most suited for the framework implemented in the two cases.<sup>86</sup>

While Vance agreed that *Faragher* and *Ellerth* proscribed a distinction between supervisor and co-workers,<sup>87</sup> Vance argued that in both cases, the Court recognized the dangers of harassment by a superior with the authority to direct and oversee a subordinate’s day-to-day tasks and the need to hold employers liable for such action.<sup>88</sup> Additionally, Vance contended that *Faragher* and *Ellerth* suggest “a subset of high-ranking supervisors whose actions should be subject to a distinct Title VII liability rule.”<sup>89</sup> In providing an example of that distinction, Vance referred to David Silverman, an employee in the *Faragher* case.<sup>90</sup> In *Faragher*, the court found the city of Boca Raton vicariously liable<sup>91</sup> for the conduct of

80. The Court cited various federal codes which define “supervisor” as one with the authority to take tangible employment actions. *See, e.g.*, 29 U.S.C. § 152(11) (defining “supervisor” as one with the ability to take tangible employment actions); *Vance*, 133 S. Ct. at 2444 (citing Webster’s Third New International 2296, def. 1(a) (1976), which defines supervisor as “a person having authority delegated by an employer to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action”).

81. Brief for Petitioner, *supra* note 12, at \*2 (contending that the EEOC definition that “an individual qualifies as an employee’s ‘supervisor’ if: a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or b. the individual has authority to direct the employee’s daily work activities” should be adopted).

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

83. *Id.* at 2449–50.

84. *See id.* at 2450 (explaining that the standard adopted by the EEOC is vague because essential components of the standard require things such as a “‘sufficient authority,’ to assign more than a ‘limited number of tasks’, and authority that is exercised more than ‘occasionally’” but provides no clear meaning).

85. *Id.* at 2446.

86. *Id.*

87. Brief for Petitioner, *supra* note 12, at 10.

88. *Id.* at 33 (citing *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998), which quoted *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

89. *Id.* at 36.

90. *Id.* at 34.

91. *Faragher*, 524 U.S. at 808–09.

Silverman, although he had no authority to take tangible employment actions.<sup>92</sup> For this reason, Vance believed that the Court should rule in her favor.<sup>93</sup>

The majority agreed that Silverman probably did not wield the authority to make tangible employment decisions;<sup>94</sup> nevertheless, the city of Boca Raton never refuted the fact that Silverman was Faragher's supervisor.<sup>95</sup> Thus, the question of whether Silverman held the authority to hire, fire, promote, or demote never became an issue before the Court.<sup>96</sup> Additionally, the majority stated that *Ellerth* and *Faragher* did not provide for a subset of high-ranking supervisors,<sup>97</sup> and that only one class of supervisors exists (i.e. "those employees with the ability to make tangible employment decisions").<sup>98</sup>

The majority buttressed its argument by explaining that employer vicarious liability is justified when an employer gives a supervisor the authority to take employment actions, because such power can be used as a threat and can also result in economic injury to the victim.<sup>99</sup> The majority stated that employees with the power to direct activities of other individuals can create unbearable work environments, but so can any other co-worker.<sup>100</sup> It further held that the ability to direct another employee's tasks is simply insufficient to characterize an employee as a supervisor.<sup>101</sup> The majority reiterated that where employees cannot show that their harassers are supervisors (i.e. capable of taking tangible employment actions), they can still prevail on their claims by simply showing that the employer was negligent in preventing or remedying the harassment.<sup>102</sup>

The majority ended by explaining that it has adopted a clear standard, which will avoid jury confusion when faced with jury instructions and alternative theories of liability.<sup>103</sup> Additionally, the approach advocated by the majority will facilitate the resolution of supervisor status before trial, contrary to the approach desired by Vance and the dissent.<sup>104</sup>

### B. Concurrence with a Hint of Indifference

Justice Thomas wrote what some would consider a blunt and somewhat indifferent concurring opinion.<sup>105</sup> In less than sixty words, Justice Thomas made it all too clear that he believed "*Faragher* . . . and *Ellerth* . . . were wrongly

92. *Id.* at 781 (explaining that Silverman was "responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training").

93. Brief for Petitioner, *supra* note 12, at 19–20, 33.

94. *Vance v. Ball State University*, 133 S. Ct. 2434, 2446–47 (2013).

95. *Id.* at 2447.

96. *Id.*

97. *Id.* at 2443.

98. *Id.*

99. *Id.* at 2448.

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

101. *Id.*

102. *Id.* at 2451.

103. *Id.*

104. *Id.* at 2438.

105. *Id.* at 2454 (Thomas, J., concurring).

decided.”<sup>106</sup> Justice Thomas stated that he joined the majority opinion because “it provides the narrowest and most workable rule . . . .”<sup>107</sup> In other words, Justice Thomas concurred with the majority primarily because he believed it was the lesser of two evils.

### C. A Scathing Dissent<sup>108</sup>

Justice Ginsburg<sup>109</sup> delivered the dissent in *Vance*, and argued for reversal of the Seventh Circuit’s judgment.<sup>110</sup> Justice Ginsburg contended that the majority’s viewpoint “is blind to the realities of the workplace . . . .”<sup>111</sup> In the dissent, she argued that harassment by an employee with the power to direct the day-to-day work activities of another worker should also trigger vicarious liability for an employer under Title VII.<sup>112</sup>

Justice Ginsburg delivered a powerful dissent which focused on the real-world implications of the Court’s opinion in *Vance*.<sup>113</sup> It is Justice Ginsburg’s supposition that the Court’s decision will weaken Title VII’s purpose of preventing discrimination from polluting the workplace.<sup>114</sup> She stated that the decision by the Court was not only out of accord with the principles outlined in *Faragher* and *Ellerth*,<sup>115</sup> but also contrary to BSU’s belief that an employee may in fact constitute a supervisor even if they cannot make tangible employment actions.<sup>116</sup>

Justice Ginsburg explained that the EEOC definition of “supervisor” should have been utilized in *Vance* because it “reflects the agency’s informed judgment and . . . experience in enforcing Title VII.”<sup>117</sup> Further, the EEOC formed its definition of “supervisor” by considering the framework of *Faragher* and *Ellerth*.<sup>118</sup> For those reasons, among many others, Justice Ginsburg disagreed with the Court’s dismissal of the EEOC’s definition, and argued that the EEOC should have received due deference.<sup>119</sup>

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

107. *Id.*

108. *Id.* (Ginsburg, J., dissenting).

109. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 27, 2013) (Democratic President Bill Clinton appointed Justice Ruth Ginsburg as to the U.S. Supreme Court bench in 1993.).

110. *Vance*, 133 S. Ct. at 2466 (Ginsburg, J., dissenting).

111. *Id.* at 2457.

112. *Id.* at 2459.

113. *Id.* at 2455–66.

114. *Id.* at 2455.

115. *Id.* at 2457.

116. *Vance*, 133 S. Ct. at 2457 (Ginsburg, J., dissenting) (citing Brief for Respondent at 1–2, which stated that “vicarious liability also may be triggered when the harassing employee has the authority to control the victim’s daily work activities in a way that materially enables the harassment”).

117. *Vance*, 133 S. Ct. at 2461.

118. *Id.*

119. *Id.* at 2461–62.

Additionally, Justice Ginsburg pointed out that even the Court's prior decisions from cases,<sup>120</sup> including *Faragher*, have assumed that employees who direct subordinates' daily work are "supervisors."<sup>121</sup> Furthermore, she stated that while the Court did not squarely address the definition of "supervisor" in *Faragher*,<sup>122</sup> *Faragher* still illustrated the "all-too-plain reality that a supervisor with authority to control a subordinates' daily work is no less aided in his harassment than a supervisor with power to hire, fire, demote."<sup>123</sup>

To illustrate the negative impact of the Court's holding, Justice Ginsburg relied on the facts from several cases where superiors were vested with the authority to control the conditions of a subordinate's daily work activities.<sup>124</sup> She explained that under a common sense application of Title VII, each supervisor from the cases mentioned would be classified as a "supervisor"; however, the harasser's conduct would now fail to trigger the employer's vicarious liability because of the majority's severely confined definition of "supervisor."<sup>125</sup>

Justice Ginsburg noted that while the negligence standard is available for individuals who cannot prove their harasser is a supervisor, it does not afford the protection intended by *Faragher* and *Ellerth*.<sup>126</sup> Ginsburg explained that it is difficult to prove that an employer knew or should have known about a harasser's conduct, and the Court's recent decision will saddle plaintiffs with a burden of proving negligence when the harasser lacked the authority to take tangible employment action.<sup>127</sup> *Faragher* and *Ellerth* intended for this burden to be placed on employers.<sup>128</sup>

Finally, Justice Ginsburg argued that the Court has reduced the incentive for employers to train their superiors and monitor their performance.<sup>129</sup> She asserted that the Court failed to advance the goal of eliminating workplace harassment under Title VII and created law that will leave many victims of harassment without an effective remedy.<sup>130</sup> She closed by urging Congress to overturn the Court's ruling, writing: "The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."<sup>131</sup>

120. *Id.* at 2458. See generally *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140 (2004) (analyzing facts involving a harassing employee who lacked the authority to fire or demote the victim, but held the authority to direct and oversee employee day-to-day shifts).

121. *Vance*, 133 S. Ct. at 2457.

122. *Id.* at 2458 (Ginsburg, J., dissenting).

123. *Id.*

124. *Id.* at 2461.

125. *Id.* at 2460.

126. *Id.* at 2464. Justice Ginsburg explains that the negligence standard barely affords protection under Title VII because it requires the victim to prove that the employer knew or should have known about the harassment. But, it is not uncommon for employers to lack any knowledge of harassment in the workplace because sometimes the complaint never makes its way up to management. Justice Ginsburg notes that *Faragher* was a good illustration of this type of situation. She further notes that victims will now face a steeper procedural and substantive battle when seeking redress for hostile work environments. *Id.*

127. *Vance*, 133 S. Ct. at 2464.

128. *Id.* at 2464 (Ginsburg, J., dissenting).

129. *Id.*

130. *Id.* at 2463.

131. *Id.* at 2466.

## V. ANALYSIS

The majority and dissent offer very different opinions as to what constitutes a “supervisor.” On one hand, the majority emphasizes that a supervisor is one with the ability to affect “tangible employment actions.”<sup>132</sup> The majority supports its opinion by reasoning that it is justified to impart vicarious liability upon an employer who grants a supervisor the authority to take tangible employment actions which can cause economic hardship to an employee.<sup>133</sup> An employee’s “ability to direct” another co-worker’s daily work activity “is simply not sufficient” enough to find vicarious liability on behalf of the employer.<sup>134</sup>

On the other hand, the dissent emphasizes that the Court should have deferred to the EEOC and applied the definition as found in the EEOC Guidance.<sup>135</sup> The dissent asserts that the EEOC’s standard was in accordance with reality, Title VII, and previous case law.<sup>136</sup> Justice Ginsburg firmly believed that the Court’s standard will undermine the Title VII goal of preventing workplace harassment and “will leave many harassment victims without” protection or “an effective remedy.”<sup>137</sup> Justice Ginsburg offered some legitimate concerns regarding the Court’s ruling and its implications.<sup>138</sup>

It is this author’s opinion that Justice Ginsburg’s arguments are sensible and more logical. Courts and legislatures have renounced workplace discrimination for almost half a century,<sup>139</sup> thus one would expect the United States Supreme Court to make decisions that advance the goals of Title VII. However, in the words of Justice Ginsburg, the majority is “guided neither by precedent, nor by the aims of legislators who formulated and amended Title VII.”<sup>140</sup> The majority’s opinion has a “decidedly employer-friendly”<sup>141</sup> slant and “ignores the conditions under which members of the work force labor.”<sup>142</sup> The Court’s decision will ultimately benefit employers because employees with meritorious Title VII claims will now be faced with overcoming the thresholds required by the EEOC, as well as the new standard imposed in *Vance*.<sup>143</sup> With that said, the decision in *Vance* will have a positive impact, as well as a few negative implications for employers.

132. *Id.* at 2439 (majority opinion).

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

134. *Id.* at 2448.

135. *Id.* at 2462 (Ginsburg, J., dissenting).

136. *Id.* at 2461.

137. *Id.* at 2463.

138. *Id.* at 2463–65.

139. *Vance*, 133 S. Ct. at 2440 (majority opinion); *id.* at 2462 (Ginsburg, J., dissenting).

140. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2547 (Ginsburg, J., dissenting).

141. *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).

142. *Id.* at 2455.

143. *Id.* at 2463–65.

### A. Implications for Employers

Proclaiming that the ruling in *Vance* will have a positive impact on employers is an understatement. The Court delivered a huge victory for employers and the decision immediately created several positive outcomes for employers.<sup>144</sup>

Workplace harassment cases are generally fact-intensive.<sup>145</sup> Simply disputing whether the employee in question is a supervisor or a co-worker can prove costly and time-consuming.<sup>146</sup> This decision will make it easier for employers to establish a harasser's non-supervisory status early in litigation.<sup>147</sup> It will also reduce the costs associated with litigating harassment claims. Additionally, a significant reduction in the settlement of harassment claims is likely to ensue because employers will feel less pressured to settle meritless claims, and employees will be less willing to take the risk of having their cases thrown out. The standard will avoid juror confusion and allow for clear jury instructions in trials of harassment claims without the need to instruct on alternative theories of liability.<sup>148</sup> More importantly, the decision will provide judges greater authority to dispose of a case in the pre-litigation phase because "the alleged harasser's status will become clear to both sides after discovery."<sup>149</sup>

In creating a bright-line definition of the term "supervisor," the Court significantly reduced potential employer liability for workplace harassment under Title VII. The Court's ruling will undoubtedly make it more difficult for employees to prove their cases. If a harasser's duties do not fit within the narrowly defined term "supervisor," then an employee's only recourse is to prove the employer's liability under the negligence standard.<sup>150</sup> This requires the employee to prove "that the employer knew or should have known" about the non-supervisor's harassment.<sup>151</sup> Anyone engaged in the practice of law knows that negligence causes of action are generally more difficult to prove than strict and vicarious liability cases.<sup>152</sup>

Although this decision raises the bar for employees who bring harassment actions against their employers, employers should take note of state and local laws

144. *Id.* at 2462–65.

145. *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007) (explaining that the question of "whether a particular work environment is objectively hostile is necessarily a fact-intensive inquiry"). *See also* Laura D. Francis, *What Part of "Hostile Environment" Don't You Understand? The Need for an Entire-Environment Approach in Sexual Harassment Cases*, 72 GEO. WASH. L. REV. 815, 830 (2004); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. L. REV. & WOMEN'S STUD. 311, 311 (1999) ("not[ing] a trend in the district courts to grant summary judgment too readily in sexual harassment cases by deciding fact-intensive issues . . .").

146. Suzanne Lucas, *Why Employers Settle Sexual Harassment Claims*, CBS (Nov. 3, 2013), [http://www.cbsnews.com/8301-505125\\_162-20129075/why-employers-settle-sexual-harassment-claims/](http://www.cbsnews.com/8301-505125_162-20129075/why-employers-settle-sexual-harassment-claims/) (noting that it cost between \$50,000 and \$250,000 for an employer just to fight a harassment claim).

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

148. *Id.* at 2450.

149. *Id.* at 2449.

150. *Id.* at 2456 (Ginsburg, J., dissenting).

151. *Id.*

152. Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1278 (1988) ("[p]roving cause-in-fact in a negligence action is usually not difficult, but demonstrating proximate cause is a more problematic issue").

that may define supervisory status in a broader sense.<sup>153</sup> Employers will need to be cautious of the impact that such changes may have in other legal contexts, such as eligibility to vote and unionize under the National Labor Relations Act (“NLRA”)<sup>154</sup> and exemption status under the Fair Labor Standards Act (“FLSA”).<sup>155</sup>

The Court’s ruling also encourages unscrupulous employers to attempt to avoid strict and vicarious liability by granting decision-making authority to only a few individuals, in order to limit who qualifies as a “supervisor.” However, employers should be conscious of the consequences that may result from such behavior. As the Court acknowledged, employers who concentrate most of their authority on a few might force that small few to delegate their authority to subordinates who have more contact with victimized employees.<sup>156</sup> As a result of this delegation, the subordinates may ultimately qualify as supervisors under Title VII.<sup>157</sup>

One of the most important implications of the Court’s ruling involves the impact on employer programs aimed at combating discrimination. Prior to the ruling, the threat of vicarious liability provided incentive for employers to implement guidelines and preventative training for workplace harassment.<sup>158</sup> Inevitably, the Court’s limited definition of “supervisor” will severely undermine efforts to stamp out harassment and discrimination in the workplace. Ironically, such imprudence by employers will ultimately make them more vulnerable to harassment claims.

153. See generally Julia E. Judish, et al., *Impact of Supreme Court Pro-Employer Title VII Decisions Blunted by State Laws*, PILLSBURY L. (July 8, 2013),

<http://www.pillsburylaw.com/publications/impact-of-supreme-court-pro-employer-title-vii-decisions-blunted-by-state-laws> (explaining that “the Supreme Court’s holdings in *Vance* and *Nassar* apply to federal claims brought under Title VII. Many employers, however, may also be subject to harassment and retaliation cases brought under state and local anti-discrimination laws that include legal standards more favorable to employees”).

154. “Determining whether an employee is a ‘supervisor’ is particularly important because under the statutory structure of the” National Labor Relations Act (“NLRA”), ‘supervisors’ are not ‘employees.’” As a result, the NLRA’s protections do not extend to supervisors. *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1263 (11th Cir. 1999);

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C.A. § 152(11) (LexisNexis 2013).

155. Supervisory status is particularly important when considering the Fair Labor Standards Act (“FLSA”) because supervisors (executives) are generally exempt from the requirements of the FLSA. See 5 C.F.R. §§ 551.101, 551.202 (2013); a supervisor is exempt only if the employee

[c]ustomarily and regularly directs the work of two or more other employees . . . and has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees, are given particular weight.

5 C.F.R. § 551.205(a)(1)–(2) (2013).

156. *Vance*, 133 S. Ct. at 2452.

157. *Id.*

158. *Id.* at 2464 (Ginsburg, J., dissenting).

## B. Implications for Employees

Because of the Court's narrow definition of "supervisor," *Vance* will make it difficult for employees to bring and win harassment claims against employers for strict and vicarious liability under Title VII. Such a definition will certainly reduce the incentive for employees to sue their employers. Of course, this is a positive outcome for frivolous suits, but unfortunate for meritorious claims that advance the purpose of Title VII.

Title VII provides greater protections against supervisor harassment than co-worker harassment.<sup>159</sup> Thus, attorneys will be less inclined to bring Title VII harassment suits if they cannot prove that an alleged harasser was a "supervisor." Justice Ginsburg emphasized the reality of the majority's restrictive viewpoint by comparing an employee's ability to walk away from a fellow employee harasser, while not necessarily being able to avoid the torment and nuisance of a superior employee without fearing the consequence.<sup>160</sup> Consequently, more harassment will go undetected and without remedy, and workers will be more vulnerable to the whims of employers.

Even if an employee cannot prove that their alleged harasser was a supervisor, he or she can still make a claim under the negligence standard.<sup>161</sup> However, there will likely be more procedural hurdles and lower compensation that will exclude punitive damages.<sup>162</sup> Moreover, negligence claims are much more difficult to prove than strict liability claims.<sup>163</sup>

Two potential positive outcomes for employees as well as employers are: (1) the standard will avoid juror confusion and allow for clear jury instructions in trials of harassment claims without the need to instruct on alternative theories of liability; and (2) fewer employees will waste money filing meritless or weak harassment claims.

## C. No *Chevron* Deference?<sup>164</sup>

As stated previously, after *Faragher* and *Ellerth*, the EEOC analyzed both cases and created the EEOC Guidance. Based upon the EEOC Guidance, an individual qualifies as an employee's "supervisor" if: "(1) an individual authorized

159. *See id.* at 2439.

160. *Id.* at 2456 (Ginsburg, J., dissenting).

161. *Id.* at 2451 (majority opinion).

162. 42 U.S.C.A. § 1981a(b)(1) (LexisNexis 2013) ("[a] complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.").

163. Angela Scott, *Employers Beware! The United States Supreme Court Opens the Floodgates on Employer Liability Under Title VII*, Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), 24 S. ILL. U. L.J. 157, 177 (1999) (citing Jansen v. Packaging Corp. of Am., 123 F.3d 490, 505 (7th Cir. 1997), which noted that strict liability is an easier burden of proof than the negligence standard).

164. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (stating that the Court "[has] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

‘to undertake or recommend tangible employment decisions affecting the employee,’ including ‘hiring, firing, promoting, demoting, and reassigning the employee’; or (2) an individual authorized ‘to direct the employee’s daily work activities.’<sup>165</sup>

The EEOC did not hastily establish guidelines for determining supervisor status.<sup>166</sup> When developing these guidelines, the EEOC considered and analyzed opinions made by the Court in *Faragher*, *Ellerth*, and other federal authority.<sup>167</sup> In *Faragher* and *Ellerth*, the Court explained that holding an employer vicariously liable for its supervisors’ conduct is sometimes justified because “a supervisor’s harassment of a subordinate is more apt to rise to the level of intentional infliction of emotional distress than comparable harassment by a co-employee.”<sup>168</sup>

Despite the Court’s finding, it still rejected the EEOC’s second qualifier, and completely disregarded the fact that a supervisor who directs an employee’s daily work activities can intentionally inflict emotional distress more so than a mere co-employee.<sup>169</sup> A person with control over a subordinate’s daily activities could inflict emotional distress by making the subordinate do things such as work insanely long hours, assign unbearable workloads, prohibit reasonable and necessary breaks, and more.

An overview of the EEOC Guidance makes it clear that the EEOC interpreted recent case law and common law principles in developing standards to determine supervisory status.<sup>170</sup> For example, in order to prevent vicarious liability from being predicated upon a mere combination of agency relationship and improper conduct by an employee, the EEOC pronounced that the “authority must be of a sufficient magnitude so as to assist the harasser” explicitly or implicitly “in carrying out the harassment.”<sup>171</sup> Under the EEOC Guidance, the determination as to whether a harasser had such authority would be based on his or her job function rather than job title and specific facts.<sup>172</sup> Still, the Court omitted the EEOC’s second standard and deemed the agency’s advice as unpersuasive and “murky.”<sup>173</sup>

165. *Vance*, 133 S. Ct. at 2455 (Ginsburg, J., dissenting) (citing EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 1999 WL 33305874, \*1).

166. The EEOC’s enforcement guidelines state that,

[t]he determination of whether an individual has sufficient authority to qualify as a “supervisor” for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law. Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 1999 WL 33305874, \*3.

167. *Vance*, 133 S. Ct. at 2461 (Ginsburg, J., dissenting).

168. See *Faragher v. Boca Raton*, 524 U.S. 775, 802–03 (1998) (citing *White v. Monsanto Co.*, 585 So. 2d 1205, 1209–10 (La. 1991) (“[A] supervisor’s harassment of a subordinate is more apt to rise to the level of intentional infliction of emotional distress than comparable harassment by a co-employee.”)).

169. *Vance*, 133 S. Ct. at 2458–59 (Ginsburg, J., dissenting).

170. *Id.* at 2461.

171. *Id.*

172. *Id.*

173. *Id.* at 2449–50 (majority opinion).

Most would agree that the EEOC created standards that the real world workforce would consider when determining supervisory status.<sup>174</sup> Yet, the Court provided for a narrower standard, and gave distinctions, which wield no true difference when applied in the real world.<sup>175</sup> In the words of Ginsburg, “the Court misses the forest for the trees.”<sup>176</sup> “A supervisor with authority to control subordinates’ daily work is no less aided in his harassment than a supervisor with the ability to fire, demote, or transfer.”<sup>177</sup> By ignoring EEOC Guidance, the Court’s ruling “runs contrary to a common sense understanding of the term ‘supervisor’.”<sup>178</sup>

The Court mentioned that an alternative rule would, in many cases, exasperate judges and confuse jurors.<sup>179</sup> However, the EEOC’s standard is not wholly untested as it has been the law for quite some time in the Second, Fourth, and Ninth Circuits.<sup>180</sup> It is this author’s opinion that the EEOC’s interpretation deserved *Chevron* deference,<sup>181</sup> and that the Court should have utilized the standards established by the EEOC. If the Court believed that the EEOC Guidance was vague, then the Court should have provided clarification. Instead, the Court disregarded and deleted an entire group of what the workforce would consider “supervisors,” thereby contravening one purpose of Title VII—to prevent workplace harassment.

## VI. RECOMMENDATIONS

### A. The Control Test for “Acting Supervisors”

Supervisory status depends on the totality of the circumstances and reasonable expectations.<sup>182</sup> Even Ball State University recognized that a tangible-employment-action-only test did not encompass all employees who may qualify as supervisors.<sup>183</sup> To avoid creating a narrow standard, the Court could have permitted plaintiffs to prove vicarious liability through factors similar to the common law control test,<sup>184</sup> specifically for harassers who only have the authority to direct the harassee’s daily work activities. Establishing such a test would eliminate the need for the narrow and blanket rule provided by the Court.

174. *See id.* at 2455, 2462–63 (Ginsburg, J., dissenting).

175. *Vance*, 133 S. Ct. at 2464–65.

176. *Id.* at 2458.

177. *Id.*

178. *See* Brief of Nat’l P’ship for Women & Families, et al., as Amici Curiae in Support of Petitioner, *Vance v. Ball State University*, 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 3945851 at \*3.

179. *Vance*, 133 S. Ct. at 2444.

180. *See, e.g.*, *Dawson v. Entek Int’l*, 630 F.3d 928 (9th Cir. 2011); *Whitten v. Fred’s Inc.*, 601 F.3d 231 (4th Cir. 2010); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), *cert. denied*, 540 U.S. 1016 (2003).

181. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

182. *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).

183. *Id.* at 2457, 2466.

184. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

Where a harasser cannot make tangible employment actions, a control test would allow the victim of harassment to prove vicarious liability by demonstrating that the harasser exercised so much direction over their daily actions that he or she should be considered a “supervisor.” As the Court explained years ago, agency-relation principles provide an appropriate starting point for determining liability.<sup>185</sup> Thereafter, one would consider factors, such as: (1) how often the harasser directs the victim’s daily work activities; (2) how long the harasser has been directing the victim’s daily work activities; (3) the harasser and victim’s job titles; (4) the harasser and victim’s job duties; (5) the number of employees who are directed by the harasser; and (6) whether the harasser is the only individual directing the victim’s daily activities. Examining the surrounding circumstances would at least give employees an opportunity to prove that an alleged harasser is a supervisor, even if he or she does not have the authority to hire, fire, demote, or promote. Such a test may prove more costly than just a blanket rule; however, cost should not outweigh the protections and remedies afforded under Title VII for workplace harassment.

### B. The Ball is in Congress’ Court<sup>186</sup>

Congress failed to define “supervisor” under Title VII, which enabled the *Vance* Court to provide a narrow interpretation of the term. However, its interpretation conflicts with Congress’ intent when enacting Title VII, and is inconsistent with the statute’s broad remedial purpose.<sup>187</sup> Many opponents of the *Vance* ruling have urged Congress to take action against the ruling in *Vance*—most notably Justice Ginsburg.<sup>188</sup> Congress may allow the Court’s decision to stand, or it can take action to secure the protections against workplace harassment under Title VII. Congress has the power to overturn the majority’s decision, as it has done with various cases in the past.<sup>189</sup> Congress could overturn *Vance* by codifying the EEOC’s definition of “supervisor”—which is supported by the dissent<sup>190</sup>—or it could simply establish a rule that broadens the Court’s restrictive ruling. If Congress codified the EEOC’s definition, it would simply clarify any ambiguities highlighted in the Court’s opinion.

Overturning *Vance* by establishing a broader definition of “supervisor” would restore protections against workplace harassment under Title VII, which are significantly diminished by the Court’s restrictive interpretation.<sup>191</sup>

185. Faragher v. Boca Raton, 524 U.S. 775, 791–92 (1998).

186. *Vance*, 133 S. Ct. at 2466 (Ginsburg, J., dissenting).

187. *Id.* at 2462–63.

188. *Id.* at 2466.

189. *Id.* (listing cases overturned by Congress). See also Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (overturned when Congress enacted the Pregnancy Discrimination Act).

190. See *Vance*, 133 S. Ct. at 2461–62 (Ginsburg, J., dissenting).

191. See *id.* at 2466.

## VII. CONCLUSION

In conclusion, Title VII provides essential protections against workplace harassment. The Court in *Vance* severely limited the broad remedial purpose of Title VII, and made it more difficult for employees to prove employer vicarious liability for workplace harassment. While the definition of “supervisor” cannot be so broad that it opens the floodgates to meritless harassment claims, it also cannot be so narrow that it hinders employees from making valid vicarious liability claims against employers. As Justice Ginsburg argued, the Court’s decision was “blind to the realities” of the labor force and ignored direction from an agency established by Congress to do exactly what the court did in *Vance*—interpret and enforce Title VII.<sup>192</sup> Now, it is up to Congress to either allow the Court to significantly diminish the protections afforded to employees under Title VII, or overturn *Vance* by codifying the EEOC’s Guidance to comport with the realities of the workplace today.

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192. *Id.* at 2457.