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MACK V. OTIS ELEVATOR: CREATING MORE SUPERVISORS AND MORE VICARIOUS LIABILITY FOR WORKPLACE HARASSMENT

JODI R. MANDELL[†]

*“Where have all the employees gone . . . Gone to supervisors
every one”*¹

INTRODUCTION

Sexual harassment is a pervasive problem in the workplace.² To prevent and remedy this problem, Title VII of the Civil Rights Act of 1964³ makes it unlawful for an employer to discriminate against an individual on the basis of sex.⁴ Title VII is violated not only by economic or tangible discrimination, but also when sexual harassment is so severe or pervasive that it alters the conditions of employment and creates an abusive working environment.⁵ With respect to this latter form of harassment,

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¹ Craig Becker & Diana Orantes Ceresi, *Toward a Rational Interpretation of the Term “Supervisor” After Kentucky River*, 18 LAB. LAW. 385, 385 & n.** (2003), <http://www.bnabooks.com/ababna/laborlawyer/18.3.pdf> (stating “[w]ith apologies to Pete Seeger”).

² See *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) (“It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace.”); EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, <http://www.eeoc.gov/policy/docs/harassment.html> (last modified June 21, 1999) (stating that the number of sexual harassment charges filed with the EEOC and state fair employment practices agencies increased from 6,883 in fiscal year 1991, to 15,618 in fiscal year 1998).

³ 42 U.S.C. §§ 2000e to e-17 (2000).

⁴ See *id.* § 2000e-2(a)(1) (prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin); see also *infra* Part I.A. (explaining how employers are vicariously liable for supervisor sexual harassment under Title VII).

⁵ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (describing how quid pro quo and hostile work environment claims both violate Title VII, and how the latter requires severe or pervasive harassment); *Faragher*, 524 U.S. at 786

known as hostile work environment sexual harassment, employers may be subject to vicarious liability when the hostile work environment is created by a supervisor, but not when it is created by a coworker.⁶ Therefore, it is critical to determine whether the harassing employee is a supervisor, or merely a coworker, for Title VII purposes. However, determining who qualifies as a supervisor has been a source of confusion for the courts, because the term is not contained in Title VII and has not been defined by the Supreme Court.⁷ Recently, in *Mack v. Otis Elevator Co.*,⁸ the Second Circuit interpreted broadly the term "supervisor" as one whose authority "enabled or materially augmented" his or her ability to create a hostile work environment.⁹ This broad definition appears to be inconsistent not only with the Supreme Court's holdings in *Burlington Industries, Inc. v. Ellerth*¹⁰ and *Faragher v. City of Boca Raton*,¹¹ the principal cases for analyzing vicarious liability in Title VII hostile work environment cases, but also with the agency

(summarizing what constitutes actionable discrimination under Title VII); *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (explaining that sexual harassment, which creates a hostile work environment, violates Title VII).

⁶ See *Mack v. Otis Elevator Co.*, 326 F.3d 116, 123 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003). When a coworker creates a hostile work environment, the employer can be liable where it knew or should have known of the harassment but failed to take appropriate corrective measures. See *Ellerth*, 524 U.S. at 759 ("An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."); *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 910 (E.D. Tenn. 2003) (citing *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 560-61 (6th Cir. 1999)) (describing the elements a plaintiff must prove when the harasser is a coworker); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 970 (D. Minn. 1998) (explaining that if the harasser and plaintiff were coworkers, the employer would only be liable under a negligence standard).

⁷ See *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998) (noting that Title VII does not provide a definition of the term "supervisor"); *Browne*, 286 F. Supp. 2d at 912 ("The definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts."); Stephanie Ann Henning Blackman, Note, *The Faragher and Ellerth Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor"*, 54 VAND. L. REV. 123, 124 (2001) (noting that while *Ellerth* and *Faragher* clarified the standard for employer liability, they also caused confusion among lower courts in determining who qualifies as a supervisor).

⁸ 326 F.3d 116 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003).

⁹ *Id.* at 126.

¹⁰ 524 U.S. 742 (1998).

¹¹ 524 U.S. 775 (1998).

principles and Title VII objectives upon which the Court relied.¹²

In *Mack*, the plaintiff worked as an elevator mechanic's helper for defendant, Otis Elevator Company, and was assigned to assist six mechanics at the Metropolitan Life building in New York City.¹³ The collective bargaining agreement between Otis and the elevator constructors' union provided that whenever there were five or more employees on one job, as there were at the Metropolitan Life building, one mechanic was to be designated "mechanic in charge."¹⁴ Under the terms of the agreement, the mechanic in charge had responsibility for allocating the work assigned by management, checking the quality of the work, and monitoring safety in the workplace.¹⁵ The plaintiff claimed that from her first day on the job, Connolly, the mechanic in charge, made frequent sexual comments, regularly changed out of his uniform in front of her, boasted often of his sexual exploits, and on one occasion pulled her onto his lap, touched her buttocks, and tried to kiss her.¹⁶ The plaintiff filed suit under Title VII, alleging a hostile work environment, constructive discharge, and retaliation.¹⁷ The district court granted the defendants' summary judgment motion on all of the plaintiff's claims.¹⁸ The Second Circuit affirmed the district court's judgment except for the plaintiff's hostile work environment claim, as to which the judgment was vacated and the case remanded.¹⁹

In evaluating the plaintiff's hostile work environment claim, the Second Circuit first determined that a reasonable jury could conclude "that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the

¹² *Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 807.

¹³ *Mack*, 326 F.3d at 120.

¹⁴ *Id.*

¹⁵ *Mack v. Otis Elevator Co.*, No. 00 CIV 7778 LAP, 2001 WL 1636886, at *3 (S.D.N.Y. Dec. 18, 2001), *aff'd in part and vacated in part*, 326 F.3d 116 (2d Cir. 2003). *But see Mack*, 326 F.3d at 120 (describing the responsibilities of the mechanic in charge as "the right to assign and schedule work, direct the work force, assure the quality and efficiency of the assignment, and to enforce the safety practices and procedures" (quoting Collective Bargaining Agreement between Otis and Local 1 International Union of Elevator Constructors)).

¹⁶ *See Mack*, 326 F.3d at 120.

¹⁷ *Id.* at 122.

¹⁸ *See Mack*, 2001 WL 1636886, at *1.

¹⁹ *See Mack*, 326 F.3d at 130.

conditions of [his or] her work environment."²⁰ The Second Circuit next evaluated whether a basis existed for imputing to the employer the conduct that created the hostile environment.²¹ To determine whether liability should be imputed to Otis, the Second Circuit relied on two Supreme Court decisions, *Burlington Industries, Inc. v. Ellerth*²² and *Faragher v. City of Boca Raton*,²³ which together provide the basis for analyzing vicarious liability under Title VII hostile work environment cases.²⁴

Under *Ellerth* and *Faragher*, an employer can be held vicariously liable for a hostile work environment created by supervisory employees.²⁵ The Court did not provide specific criteria for determining which employees qualify as supervisors, except to state that a supervisor has "immediate (or successively higher) authority over the employee."²⁶ However, in a later case, *Parkins v. Civil Constructors of Illinois, Inc.*,²⁷ the Seventh Circuit defined "supervisor" as one who has "the power to hire, fire, demote, promote, transfer, or discipline an employee."²⁸ Although other circuit and district courts adopted the *Parkins*

²⁰ *Id.* at 122 (alteration in original) (quoting *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999)).

²¹ *Id.*

²² 524 U.S. 742 (1998).

²³ 524 U.S. 775 (1998).

²⁴ *Mack*, 326 F.3d at 123 (stating that *Ellerth* and *Faragher* "together provide the bedrock upon which the current law of vicarious liability in Title VII hostile work environment cases is built").

²⁵ See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Court in *Ellerth* and *Faragher* held that:

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

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; see also *infra* Part I.B (discussing the *Ellerth* and *Faragher* standard for workplace harassment). Prior to *Ellerth* and *Faragher*, an employer would not automatically be liable for hostile work environment sexual harassment by a supervisor unless the employer knew or should have known of the hostile work environment and failed to take corrective action. See *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 966 (D. Minn. 1998) (explaining how *Ellerth* and *Faragher* changed the standards for employer liability).

²⁶ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

²⁷ 163 F.3d 1027 (7th Cir. 1998).

²⁸ *Id.* at 1034.

test,²⁹ the Second Circuit rejected this test and instead focused on “whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.”³⁰ The Second Circuit’s test relied both on those courts that did not define “supervisor” so narrowly³¹ as well as on the Equal Employment Opportunity Commission (“EEOC”) enforcement guidelines.³² Because Connolly directed the plaintiff’s work activities and was the senior employee on site, the *Mack* court concluded that Connolly was in fact the plaintiff’s supervisor, and that Otis would be vicariously liable for Connolly’s acts, unless Otis could establish an affirmative defense.³³

It is submitted that the Second Circuit defined too broadly the term “supervisor” when it relied on the harasser’s ability to direct work activities, rather than the authority to hire, fire, demote, promote, transfer, or discipline an employee. This

²⁹ See, e.g., *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (stating that the harasser did not have the authority to take tangible employment actions against the plaintiff and only the authority to occasionally direct her operational conduct); *Mack v. Otis Elevator Co.*, No. 00 CIV 7778 LAP, 2001 WL 1636886, at *6 (S.D.N.Y. Dec. 18, 2001), *aff’d in part and vacated in part*, 326 F.3d 116 (2d Cir. 2003) (noting a “distinction between low-level supervisors who were the equivalent of [coworkers] and supervisors whose authority and power was sufficient to make consequential employment decisions affecting the subordinate, such that the supervisor was effectively acting on the employer’s behalf” (quoting *Parkins*, 163 F.3d at 1033)); *Trigg v. New York City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *7 (E.D.N.Y. July 26, 2001) (recognizing that the Second Circuit did not yet establish criteria for identifying a supervisor versus a coworker, but that the Seventh Circuit adopted a “sound statement on how to differentiate the two”), *aff’d*, No. 01-9104, 2002 WL 1900463 (2d Cir. Aug. 16, 2002); *Kent v. Henderson*, 77 F. Supp. 2d 628, 633–34 (E.D. Pa. 1999) (concluding that the harasser was not the plaintiff’s supervisor because he did not have “authority to hire, fire, re-assign, or demote her or set her work schedule or pay rate” nor did he have the “power to take tangible employment action against her or affect her daily work activities”).

³⁰ *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003).

³¹ See *id.* at 126–27 (citing *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) and *Kent*, 77 F. Supp. 2d at 634).

³² See *id.* at 127 (finding persuasive the EEOC’s definition of “supervisor”); see also *infra* Part I.C (describing the EEOC enforcement guidelines).

³³ See *Mack*, 326 F.3d at 127. When no tangible employment action is taken, an employer may raise an affirmative defense, which comprises two elements: (1) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

Comment asserts that the Second Circuit should have considered the fact that the alleged harasser and the plaintiff were both members of the same union, and that the harasser, therefore, did not have the authority to make such economic decisions affecting the plaintiff. This ability to make economic decisions seems to distinguish a supervisor from a mere coworker and to ensure that the individual was aided in accomplishing his or her sexual harassment by his or her position as an agent of the employer. Not only does the Second Circuit definition seem to part from the agency principles and Title VII objectives upon which the Supreme Court relied, it also appears to contradict the definition of "supervisor" in the National Labor Relations Act ("NLRA").³⁴ While the NLRA definition does not have to be consistent with the Title VII definition, it can be helpful in determining which employees should qualify as supervisors for Title VII purposes. The Second Circuit's test will likely make it more difficult for companies to distinguish between coworkers and supervisors and may have negative implications on company training and monitoring. It is suggested that the Second Circuit should have defined the term "supervisor" as one who has the authority to take or to recommend tangible employment actions³⁵ against his

³⁴ 29 U.S.C. § 152(11) (2000). The NLRA defines "supervisor" narrowly, as "any individual having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." *Id.* Although the definition includes the responsibility "to direct" the employee within the definition of "supervisor," the use of "direct" is still narrow, as it is only conclusive if "the exercise of such authority is not of a merely routine or clerical nature," as the direction of another employee must include "the use of independent judgment." *Id.*

³⁵ "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. The following are characteristics of a tangible employment action:

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
 - it requires an official act of the enterprise;
 - it usually is documented in official company records;
 - it may be subject to review by higher level supervisors; and
 - it often requires the formal approval of the enterprise and use of its internal processes.
 2. A tangible employment action usually inflicts direct economic harm.
 3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.
- EEOC, *supra* note 2.

or her subordinate employees.

Part I of this Comment will provide a brief overview of Title VII and the EEOC guidelines, as well as the Supreme Court's vicarious liability standard under *Ellerth* and *Faragher*. Part II will explain how the definition of "supervisor" has been a source of confusion for the lower courts. Part III will analyze the Second Circuit's definition of "supervisor" in *Mack*, and how it applied the *Ellerth* and *Faragher* standard for workplace harassment. This section will also discuss how the Second Circuit's definition seemingly contradicts the definition of "supervisor" provided in the NLRA. It will also focus on the reasons why supervisory employees are excluded from the bargaining units of their subordinates under the NLRA, and compare that to the rationale behind the vicarious liability of employers for harassment by their supervisors. This section will include a discussion of the negative implications of the Second Circuit's holding. Finally, Part IV will propose how courts should distinguish between supervisors and coworkers.

I. AN EMPLOYER'S VICARIOUS LIABILITY FOR SUPERVISOR SEXUAL HARASSMENT

A. *Title VII of the Civil Rights Act*

Title VII of the Civil Rights Act prohibits sex discrimination in employment.³⁶ Specifically, Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise 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 origin."³⁷ Sexual harassment is a form of sex-based employment discrimination prohibited by Title VII.³⁸

Title VII does not contain or define the term "supervisor."³⁹

³⁶ See 42 U.S.C. § 2000e-2(a)(1) (2000).

³⁷ *Id.*

³⁸ See *Ellerth*, 524 U.S. at 752 ("Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment . . ."); *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986) (explaining that sexual harassment as defined by the EEOC is a form of sex discrimination prohibited by Title VII).

³⁹ See 42 U.S.C. § 2000e; see also EEOC, *supra* note 2 (explaining that the

To determine employer liability under Title VII for sexual harassment by supervisors, courts have looked to Title VII's definition of the term "employer."⁴⁰ The term "employer" is defined under Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."⁴¹ The Supreme Court has concluded that by including the term "agent" within the definition of employer, Congress intended to invoke traditional agency principles.⁴² Such agency principles, however, according to the Court "may not be transferable in all their particulars to Title VII" and should be considered in light of the statute's objectives.⁴³

The primary objective of Title VII is to avoid harm by preventing violations, while a secondary goal is to provide a remedy for discrimination.⁴⁴ Congress, recognizing that employees lack bargaining power, gave employees statutory rights and imposed upon employers an obligation to screen, to train, and to monitor supervisors who might violate those rights.⁴⁵ Congress also designed Title VII to encourage the

federal employment discrimination statutes do not define the term "supervisor").

⁴⁰ See, e.g., *Meritor*, 477 U.S. at 70–72 (evaluating employer liability based on Title VII's definition of "employer").

⁴¹ 42 U.S.C. § 2000e(b).

⁴² See *Ellerth*, 524 U.S. at 763 ("[A]gency principles constrain the imposition of vicarious liability in cases of supervisory harassment."); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998) ("[O]ur obligation here . . . is to adapt agency concepts to the practical objectives of Title VII."). Since Title VII was amended to include the prohibition against sex discrimination at the last minute on the floor of the House of Representatives, there is little legislative history to guide courts in interpreting the Act. See *Meritor*, 477 U.S. at 63–64. However, the Court considered the fact that Congress amended Title VII after its *Meritor* decision without modifying the holding to be an affirmation of its statutory interpretation. See *Ellerth*, 524 U.S. at 763–64; *Faragher*, 524 U.S. at 792.

⁴³ *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 802 n.3; *Meritor*, 477 U.S. at 72 (noting that Congress wanted courts to rely on agency principles for guidance in this area but cautioning that courts should also take into consideration the purpose of Title VII).

⁴⁴ See *Faragher*, 524 U.S. at 805–06 ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") (citations omitted) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975)); EEOC, *supra* note 2 (stating that "[w]hile the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations").

⁴⁵ See *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1265 (M.D. Ala. 2001) (stating reasons why Title VII holds employers liable for supervisory sexual harassment).

creation of sexual harassment policies and effective grievance procedures.⁴⁶ By “encouraging forethought by employers and saving action by objecting employees,”⁴⁷ Congress sought to “promote conciliation rather than litigation in the Title VII context.”⁴⁸ Finally, by invoking agency principles, Congress revealed an intention to place some limits on employer liability.⁴⁹

B. The Ellerth and Faragher Standard for Workplace Harassment

Ellerth and *Faragher* provide the basis for analyzing employer vicarious liability in a Title VII hostile work environment claim.⁵⁰ According to these cases, an employer is not always vicariously liable for a hostile work environment.⁵¹ Rather, liability depends on whether the person charged with creating the hostile environment is the plaintiff’s “supervisor with immediate (or successively higher) authority over the employee.”⁵² If the harassing employee is a supervisor, and he or she took a “tangible employment action” against the plaintiff, the employer will be strictly liable.⁵³ If, however, the supervisor did not take a tangible employment action against the plaintiff, the employer may raise as an affirmative defense that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid

⁴⁶ *Ellerth*, 524 U.S. at 764.

⁴⁷ *Id.* (accommodating agency principles and Title VII policies); *Faragher*, 524 U.S. at 807 (incorporating Title VII policies into its holding).

⁴⁸ *See Ellerth*, 524 U.S. at 764.

⁴⁹ *See id.* at 763 (“[A]gency principles constrain the imposition of vicarious liability in cases of supervisory harassment.”); *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 72 (1986). The Court also suggests that Title VII incorporates the doctrine of avoidable consequences, “and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.” *Ellerth*, 524 U.S. at 764. The avoidable consequences doctrine, also known as the “mitigation-of-damages doctrine,” requires a plaintiff to alleviate the effects of an injury or breach. *See BLACK’S LAW DICTIONARY* 1018 (7th ed. 1999).

⁵⁰ *See Mack v. Otis Elevator Co.*, 326 F.3d 116, 123 (2d Cir.) (basing its vicarious liability analysis on *Ellerth* and *Faragher*), *cert. denied*, 540 U.S. 1016 (2003); *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 911 (E.D. Tenn. 2003) (analyzing employer vicarious liability by starting with *Ellerth* and *Faragher*).

⁵¹ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

⁵² *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

⁵³ *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

harm otherwise.”⁵⁴ If the harassing employee is not the plaintiff's supervisor, but rather a coworker, liability exists only if the employer was negligent.⁵⁵ Under a negligence standard, a plaintiff must prove that the employer knew or should have known of the hostile work environment, but failed to take the proper corrective measures.⁵⁶

The Supreme Court did not actually define the term “supervisor” in *Ellerth* or *Faragher*; however, it did provide instructive guidance in determining who may qualify as a supervisor.⁵⁷ For example, the Court seemed to indicate that to be a supervisor, the alleged harasser should be given a significant amount of authority by the employer.⁵⁸ Such authority, according to the Court, should include more than simply directing the work of others, but rather should include the ability to take or to recommend a tangible employment action.⁵⁹ The Court also seemed to suggest that employers should have some control over their supervisors' behavior through screening, training, and monitoring so as to better prevent discrimination.⁶⁰ Finally, given the amount of authority that supervisors should possess and the level of control that employers should have over their supervisors, the Court seemed to reveal that supervisors should be a select group of employees.⁶¹

1. *Burlington Industries, Inc. v. Ellerth*

Kimberly Ellerth, a salesperson at one of Burlington's divisions, alleged that she was subjected to sexual harassment by her supervisor, Ted Slowik.⁶² Ellerth claimed that Slowik made offensive remarks and gestures as well as unfulfilled threats to affect her terms and conditions of employment.⁶³ Slowik was not Ellerth's immediate supervisor, but was a mid-level manager who “had authority to make hiring and promotion decisions

⁵⁴ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

⁵⁵ See *supra* note 6.

⁵⁶ See *supra* note 6.

⁵⁷ See discussion *infra* Part I.B.1-2.

⁵⁸ See discussion *infra* Part I.B.1-2.

⁵⁹ See discussion *infra* Part I.B.1-2.

⁶⁰ See discussion *infra* Part I.B.1-2.

⁶¹ See discussion *infra* Part I.B.1-2.

⁶² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

⁶³ *Id.* at 747-48.

subject to the approval of his supervisor.”⁶⁴ The Court accepted the district court’s finding that Slowik’s behavior was severe and pervasive enough to create a hostile work environment.⁶⁵

To determine whether Burlington should be held vicariously liable for Slowik’s actions, the Court focused primarily on agency law principles.⁶⁶ First, the Court evaluated section 219(1) of the *Restatement Second of Agency*,⁶⁷ and concluded that, as a general rule, “sexual harassment by a supervisor is not conduct within the scope of employment.”⁶⁸ The second basis of liability on which the Court focused was section 219(2) of the *Restatement*.⁶⁹ The Court determined that section 219(2)(d), the “aided in the agency relation” standard, was the proper ground for imposing liability on an employer for a supervisor’s sexual harassment.⁷⁰

The Court noted that most employees are aided by the existence of the agency relation by mere proximity and regular contact to one another in the workplace.⁷¹ These factors alone, however, cannot satisfy the agency relation standard, because “an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment,” a result which would be undesirable according to

⁶⁴ *Id.* at 747.

⁶⁵ *Id.* at 754.

⁶⁶ *Id.* at 754–64. The *Ellerth* Court stated that because the Title VII definition of the term “employer” includes the term “agents,” Congress has directed federal courts to interpret Title VII based on agency principles. *Id.* at 754.

⁶⁷ *See id.* at 755–57. Section 219(1) of the RESTATEMENT states the following: “A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

⁶⁸ *Ellerth*, 524 U.S. at 757.

⁶⁹ *Id.* at 758–59. Section 219(2) of the RESTATEMENT states the following:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

- (a) the master intended the conduct or the consequences, or
- (b) the master was negligent or reckless, or
- (c) the conduct violated a non-delegable duty of the master, or
- (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT, *supra* note 67, § 219(2).

⁷⁰ *Ellerth*, 524 U.S. at 759–60 (“When a party seeks to impose vicarious liability based on an agent’s misuse of delegated authority, the Restatement’s aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis.”).

⁷¹ *Id.* at 760.

the Court.⁷² The Court stated that a supervisor is "empowered by the company as a distinct class of agent to make economic decisions" and is aided by the agency relation because of his or her unique ability to take tangible employment actions.⁷³ Therefore, although the Court did not specifically define who qualifies as a supervisor, it did note the importance of the supervisor's ability to take tangible employment actions against a subordinate employee.

In determining Burlington's liability, the Court also considered the purpose and goals of Title VII.⁷⁴ More specifically, the Court suggested that basing employer liability in part on an employer's efforts to create anti-harassment policies and effective grievance mechanisms would serve Title VII's deterrent purpose and effectuate Congress' intention to limit litigation.⁷⁵ The Court also indicated that limiting employer liability might encourage employees to report sexual harassment before it becomes severe or pervasive.⁷⁶ The Court's suggestions seem to support a narrow and consistent definition of "supervisor," which would limit an employer's liability by providing realistic limitations on who may be considered a supervisor, as well as offer an incentive for companies to implement preventive measures.

2. *Faragher v. City of Boca Raton*

Faragher, decided the same day as *Ellerth*, also involved a determination of when an employer may be held liable under Title VII for a hostile work environment created by supervisory employees.⁷⁷ The Court applied the same rationale as it did in *Ellerth*, evaluating agency principles,⁷⁸ as well as Title VII policies,⁷⁹ to conclude that the city of Boca Raton was vicariously liable to the plaintiff for the actionable hostile work environment

⁷² *Id.* (noting that the aided in the agency relation standard "requires the existence of something more than the employment relation itself").

⁷³ *Id.* at 762 (stating that "[t]angible employment actions fall within the special province of the supervisor" and "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates").

⁷⁴ *Id.* at 764.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

⁷⁸ *Id.* at 793-803.

⁷⁹ *Id.* at 805-07.

created by supervisory employees.⁸⁰

Beth Ann Faragher, a part-time lifeguard for the city of Boca Raton, alleged that her supervisors, Bill Terry and David Silverman, created a hostile work environment at the beach “by repeatedly subjecting Faragher . . . to ‘uninvited and offensive touching,’ by making lewd remarks, and by speaking of women in offensive terms.”⁸¹ Terry, who was Chief of the Marine Safety Division, had “authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards’ work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline.”⁸² Silverman, a lieutenant who was later promoted to captain, had responsibility for “making the lifeguards’ daily assignments, and for supervising their work and fitness training.”⁸³ The Court considered both men supervisors, because they had “virtually unchecked authority” over the plaintiff, “directly controll[ing] and supervis[ing] all aspects of [Faragher’s] day-to-day activities,” and because the plaintiff and her colleagues were “completely isolated from the city’s higher management.”⁸⁴

The *Faragher* decision seemingly raises the issue of whether supervisory authority must include the ability to take a tangible employment action, or whether directing daily work activities is sufficient to impose supervisory status. Since only one of the supervisors clearly had authority to take tangible employment actions, the EEOC and some courts have concluded that in order for an individual to be considered a supervisor, he or she need only possess the authority to direct work activities.⁸⁵ On the

⁸⁰ *Id.* at 808.

⁸¹ *Id.* at 780 (quoting Plaintiff’s Complaint, *Faragher v. City of Boca Raton*, 864 F. Supp. 1552 (S.D. Fla. 1994) (No. 92-8010)).

⁸² *Id.* at 781.

⁸³ *Id.*

⁸⁴ *Id.* at 808 (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1544 (11th Cir. 1997) (Barkett, J., dissenting in part and concurring in part), *rev’d*, 524 U.S. 775 (1998)).

⁸⁵ *See, e.g.*, *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126–27 (2d Cir.) (adopting an expansive definition of “supervisor”), *cert. denied*, 540 U.S. 1016 (2003); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) (holding that an employee is a “supervisor” if he can “direct another employee’s day-to-day work activities in a manner that may increase the employee’s workload or assign additional or undesirable tasks”); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (noting that the *Faragher* court did not consider the power to take a tangible employment action to be dispositive); EEOC, *supra* note 2 (noting that in *Faragher* there was no question that the Court viewed

other hand, "one can infer from the unique circumstances in *Faragher* that the individual defendants had effective control over more than just daily work activities."⁸⁶ For example, the Court described the work routine as a "paramilitary configuration" with a strict line of command in which lifeguards reported to lieutenants and captains, who in turn reported to Terry, the Chief of the Division.⁸⁷ This type of work environment, combined with the complete isolation of the Division, indicates that both harassers likely had the power to discipline the plaintiff and exercised considerable control over her as well.⁸⁸ Therefore, it seems that the Court did not intend to define the term "supervisor" as one who has the authority only to direct other employees' work activities, but rather as one who can take or recommend tangible employment actions.

Faragher gave other indications that a supervisor's authority should include the ability to take or recommend tangible employment actions. For example, the Court suggested that an employee cannot respond to a supervisor's harassment in the same way he or she would respond to harassment by a coworker because of the supervisor's power "to hire and fire, and to set work schedules and pay rates."⁸⁹ The mere fact that supervisors have this special authority, even if they do not exercise it, enhances supervisors' ability to create a hostile work environment for subordinate employees.⁹⁰ Finally, the Court pointed out that supervisors are fewer in number, giving employers a greater opportunity to screen supervisors, to train

both of the harassers as supervisors even though only one of them had authority to take tangible employment actions).

⁸⁶ *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 917 (E.D. Tenn. 2003).

⁸⁷ *Faragher*, 524 U.S. at 781; see also *Browne*, 286 F. Supp. 2d at 917 (describing the work environment in *Faragher* as having a formal hierarchy and rigid discipline).

⁸⁸ See *Browne*, 286 F. Supp. 2d at 917-18 (commenting that higher ranking officers in paramilitary organizations might not have the authority to hire or fire other employees, but they do have significant power to discipline and to control subordinates).

⁸⁹ *Faragher*, 524 U.S. at 803 (quoting Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)). The Court noted that "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor." *Id.*

⁹⁰ See *id.* at 801-02, 805 (noting that supervisors have special authority, even if not explicitly invoked, that aids them in sexually harassing subordinate employees).

them, and to monitor their performance.⁹¹ Imposing supervisor status on employees who simply have authority to direct other's work activities would seemingly create many more supervisors than the Court had contemplated.⁹²

C. *The EEOC's Guidelines*

After the *Ellerth* and *Faragher* decisions, the EEOC revised its enforcement guidelines regarding employer liability for supervisory harassment under Title VII.⁹³ The guidelines point out the importance of determining whether the alleged harasser had supervisory authority over the complainant employee and provide suggestions for making that determination.⁹⁴ First, the guidelines suggest that the principles of agency law as well as the purpose of Title VII and the reasoning of the Supreme Court should be considered.⁹⁵ Second, the alleged harasser's authority "must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment."⁹⁶ Finally, the determination should be fact-specific rather than based simply on the alleged harasser's job title.⁹⁷

Adopting a broader definition of "supervisor," the EEOC considers an employee to be a supervisor where the employee has the authority to: (1) take or to recommend tangible employment actions affecting another employee; or (2) direct another

⁹¹ *Id.* at 803.

⁹² *See infra* notes 170–73.

⁹³ EEOC, *supra* note 2 ("This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors."). The EEOC's enforcement guidelines are not binding on courts; however, some courts have found them persuasive. *See, e.g., Mack v. Otis Elevator Co.*, 326 F.3d 116, 127 (2d Cir.) (drawing support from the EEOC enforcement guidelines), *cert. denied*, 540 U.S. 1016 (2003); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94–95 (2d Cir. 2002) (finding persuasive the EEOC enforcement guidelines), *aff'd*, No. 03-7662, 2004 U.S. App. LEXIS 3383 (2d Cir. Feb. 23, 2004); *see also Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986) (stating that EEOC guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *But see Browne*, 286 F. Supp. 2d at 913 (finding unpersuasive the EEOC's definition of "supervisor").

⁹⁴ EEOC, *supra* note 2.

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

employee's daily work activities.⁹⁸ The guidelines state that an individual qualifies as a supervisor if the individual has the power to take tangible employment actions against the employee, even if an individual's tangible employment decision is subject to review by a higher level supervisor.⁹⁹ "As long as the individual's recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor."¹⁰⁰ Further, the EEOC guidelines state that an individual who could not make tangible employment decisions, but who is authorized to direct the employee's daily work activities, could qualify as a supervisor.¹⁰¹ However, the EEOC then qualifies this ability to direct work activities by stating that if the person simply "relays other officials' instructions regarding work assignments" or "directs only a limited number of tasks or assignments," the person would not qualify as a supervisor.¹⁰²

II. LOWER COURTS' APPLICATION OF *ELLERTH* AND *FARAGHER*

The lower courts have interpreted differently the *Ellerth* and *Faragher* standard for workplace harassment.¹⁰³ For example, the Seventh and Fourth Circuits, as well as several district courts, have narrowly defined the term "supervisor" and have concluded that supervisory authority consists primarily of the ability to take a tangible employment action.¹⁰⁴ These courts

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6.

¹⁰² *Id.*

¹⁰³ See *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 912 (E.D. Tenn. 2003) ("The definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts."); *Schele v. Porter Mem'l Hosp.*, 198 F. Supp. 2d 979, 989 (N.D. Ind. 2001) ("Determining whether an employee is a supervisor as opposed to a mere co-worker has been a tricky business for courts . . ."); *Blackman*, *supra* note 7, at 144-52 (noting that lower courts have employed different definitions of "supervisor").

¹⁰⁴ See, e.g., *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (concluding that the harasser was not the plaintiff's supervisor because he did not have authority "to take tangible employment actions" and had only "the occasional authority to direct her operational conduct"); *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (stating that supervisory authority consists of the ability to take a tangible employment action); *Browne*, 286 F. Supp. 2d at 918 (E.D. Tenn. 2003) (holding that the trial court's instruction was correct because supervisory authority must include the ability "to initiate, recommend, or effect tangible employment actions"); *Trigg v. New York City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *7 (E.D.N.Y. July 26, 2001) (adopting the *Parkins*

appear to have focused mainly on the extent of the alleged harasser's authority and ability to make economic decisions affecting the terms and conditions of the plaintiff's employment.¹⁰⁵ Other courts have viewed the term "supervisor" as "more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion."¹⁰⁶ Although these district courts do not consider the power to take a tangible employment action to be determinative of supervisory authority, such authority, according to these courts, does seem to include more than simply the ability to direct others' work activities.¹⁰⁷

A. *The Narrow Definition of the Term "Supervisor"*

Shortly after the *Ellerth* and *Faragher* decisions, the Seventh Circuit concluded in *Parkins v. Civil Constructors of Illinois, Inc.*¹⁰⁸ that to be a supervisor, an individual must have "the power to hire, fire, demote, promote, transfer, or discipline an employee."¹⁰⁹ In *Parkins*, a truck driver sued her employer, Civil Constructors, under Title VII alleging hostile work

definition of supervisor), *aff'd*, No. 01-9104, 2002 WL 1900463 (2d Cir. Aug. 16, 2002); Jackson v. T & N Van Serv., 86 F. Supp. 2d 497, 501 (E.D. Penn. 2000) (relying on the *Parkins* test).

¹⁰⁵ See, e.g., *Mikels*, 183 F.3d at 333-34; *Parkins*, 163 F.3d at 1033-34.

¹⁰⁶ *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 972 (D. Minn. 1998); see also *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) (including within its definition of "supervisor" the ability to direct another employee's work activities).

¹⁰⁷ Although the *Dinkins* and *Grozdanich* holdings include within their broad definitions of "supervisor" the authority to direct others' work activities, the *Mack* court found that this ability to direct was not the only supervisory authority maintained. Compare *Dinkins*, 133 F. Supp. 2d at 1267-68 (concluding that the harassers trained and monitored other employees, signed employee timesheets, and issued warnings to employees), and *Grozdanich*, 25 F. Supp. 2d at 973 (determining that the harasser had authority to control the plaintiff's daily activities and to recommend disciplinary measures), with *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir.) (concluding that the harasser directed the particulars of the plaintiff's work day, including her work assignments), *cert. denied*, 540 U.S. 1016 (2003).

¹⁰⁸ 163 F.3d 1027 (7th Cir. 1998).

¹⁰⁹ *Id.* at 1034. Prior to the *Ellerth* and *Faragher* decisions, the Seventh Circuit, as well as other circuits, "made an effort to maintain a line between low-level supervisors who were the equivalent of [coworkers] and supervisors whose authority and power was sufficient to make consequential employment decisions affecting the subordinate, such that the supervisor was effectively acting on the employer's behalf." *Id.* at 1033 & n.1 (identifying cases prior to *Ellerth* and *Faragher* where the supervisor's authority included the power to take tangible employment actions).

environment and retaliation.¹¹⁰ The plaintiff alleged that two of her harassers, foremen Strong and Charles Boeke, were her supervisors.¹¹¹ The Seventh Circuit noted that Title VII provides no definition of the term "supervisor" and determined that it had to base its understanding of the term on agency principles and the purpose of Title VII.¹¹² The court held that "the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment."¹¹³ Applying this standard, the Seventh Circuit concluded that neither Strong nor Boeke was the plaintiff's supervisor for purposes of imputing liability to Civil Constructors, because both were members of labor unions, had only minimal authority, and could only recommend, but not take any, tangible employment action.¹¹⁴

Another illustration of the courts' narrow interpretation of the term "supervisor" is the Fourth Circuit case, *Mikels v. City of Durham*.¹¹⁵ In *Mikels*, the plaintiff, a police officer for the city of Durham, alleged that another member of her squad, Corporal Robert Acker, created a hostile work environment.¹¹⁶ The Fourth Circuit evaluated what conduct is "aided by the agency relation," and concluded that the determining factor is: whether there is a continuing threat to the victim's employment conditions that makes the victim "vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not."¹¹⁷ The court indicated that an individual's ability to take tangible employment actions, even if not exercised, is the most powerful indicator of such vulnerability.¹¹⁸ Applying these factors, the Fourth Circuit concluded that although Acker was the plaintiff's superior in rank, he was not her supervisor, because he did not have authority to take tangible employment actions and had only occasional authority to direct her

¹¹⁰ See *id.* at 1031.

¹¹¹ *Id.* at 1032-33.

¹¹² *Id.* at 1033.

¹¹³ *Id.* at 1034.

¹¹⁴ *Id.* at 1034-35.

¹¹⁵ 183 F.3d 323 (4th Cir. 1999).

¹¹⁶ *Id.* at 326-28 (describing the hostile work environment as primarily one incident where Acker "grabbed Mikels on each side of her face, pulled her to him, and kissed her on the mouth" and then "shadow-box[ed]" at Mikels' face).

¹¹⁷ *Id.* at 333.

¹¹⁸ *Id.*

operational conduct.¹¹⁹

B. The Broad Definition of the Term “Supervisor”

Other courts have not defined the term “supervisor” as narrowly. For example, in *Dinkins v. Charoen Pokphand USA, Inc.*,¹²⁰ the district court rejected the *Parkins* test for one that involved a “multi-factorial analysis” of the employment relationship rather than a “simplistic taxonomy.”¹²¹ The plaintiffs, female employees at a chicken processing plant, alleged that their supervisors created a hostile work environment by making sexual comments and improperly touching employees.¹²² The *Dinkins* court held that an employee is a supervisor when the employee has “actual authority to take tangible employment actions, or to recommend tangible employment actions if his [or her] recommendations are given substantial weight by the final decisionmaker, or to direct another employee’s day-to-day work activities in a manner that may increase the employee’s workload or assign additional or undesirable tasks.”¹²³ In the absence of such actual authority, the *Dinkins* court concluded that an employee would also qualify as a supervisor if the employee had apparent authority to supervise, provided that the victim reasonably believed that the harasser possessed supervisory authority.¹²⁴ Given the harassers’ ability to train and to monitor employees, to sign timesheets, and to issue written warnings, the court concluded

¹¹⁹ *Id.* at 334. The Fourth Circuit also considered the plaintiff’s level of isolation from higher management, as well as the plaintiff’s response to the harassment (“an obscenity and profanity-laced outburst,” rejection of his apology, and filing a grievance the next day), which demonstrated a lack of vulnerability and defenselessness. *Id.*

¹²⁰ 133 F. Supp. 2d 1254 (M.D. Ala. 2001). In rejecting the narrow *Parkins* definition of “supervisor,” the *Mack* court cited *Dinkins* as an illustration of a case where the court did not define so narrowly the term “supervisor.” See *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003).

¹²¹ *Dinkins*, 133 F. Supp. 2d at 1266 (rejecting the *Parkins* test because “it improperly truncates the Supreme Court’s holdings in *Faragher* and *Ellerth*”).

¹²² *Id.* at 1258–61 (describing in detail the unwelcome comments and touching to which the plaintiffs were subjected).

¹²³ *Id.* at 1266 (citations omitted).

¹²⁴ See *id.* at 1266–67 (“Determining whether an employee reasonably believed that the harasser was a supervisor means considering the totality of the circumstances,” including “the overall work environment, the structural rigidity of the workforce hierarchy, and the relationship among all employees, supervisors, and managers.”).

that the plaintiffs had provided substantial evidence that the alleged harassers were either actual or apparent agents of the employer.¹²⁵ Therefore, although the *Dinkins* court included within its definition of "supervisor" the ability to direct another employee's work activities, the harassers seemingly possessed much greater supervisory authority.

Similarly, in *Grozdanich v. Leisure Hills Health Center, Inc.*,¹²⁶ the district court adopted a broader definition of the term "supervisor" that did not rely solely on an individual's ability to take tangible employment actions.¹²⁷ In *Grozdanich*, the plaintiff, a staff nurse, alleged that a charge nurse sexually harassed her.¹²⁸ The court concluded that the charge nurse was a supervisor for Title VII purposes, because he had authority to control the plaintiff's daily activities, to evaluate the plaintiff's performance, and to make recommendations regarding hiring, firing, and disciplining.¹²⁹ The court reasoned that adopting the narrow definition of "supervisor" might allow an employer to insulate itself from liability "simply by directing all critical personnel decisions to be effected by a personnel department, which may have no direct, and only infrequent contact with the employee subject to the harassment."¹³⁰ Although it rejected the narrow *Parkins* definition, the *Grozdanich* court relied on more than the harasser's ability to direct work activities, and took into account the harasser's ability to recommend tangible

¹²⁵ *Id.* at 1267–68 (determining that it would be "natural" for employees to view the harassers as "extensions of management, with the authority to act on behalf of the company").

¹²⁶ 25 F. Supp. 2d 953 (D. Minn. 1998).

¹²⁷ *See id.* at 972 (stating that the *Ellerth* and *Faragher* decisions make it clear that the Supreme Court views the term "supervisor" as more expansive than the ability to decide issues of hiring, firing, and promotion).

¹²⁸ *Id.* at 961–63 (describing plaintiff's allegations of sexual harassment).

¹²⁹ *Id.* at 971, 973.

¹³⁰ *Id.* at 973 (expressing concern that a limited construction of the term "supervisor" would enable a company to insulate itself from the application of *Ellerth* and *Faragher*). The court's argument has been criticized because it is unrealistic to think that employers would be able to, or want to, reorganize their companies in such a manner. *See Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 916 (E.D. Tenn. 2003) ("[T]here is no reason to believe companies will ever be able to eschew the evaluative and administrative processes so completely that personnel decisions are formulated and influenced solely by individuals who have never had any contact with the subject employee."); Blackman, *supra* note 7, at 151 (criticizing the *Grozdanich* court's argument of reorganization as being economically unwise for companies).

employment actions.¹³¹

III. THE SECOND CIRCUIT'S DEFINITION OF "SUPERVISOR" IS TOO BROAD

The Second Circuit may have extended the definition of the term "supervisor" too far by relying on the EEOC enforcement guidelines and decisions of the courts that did not define "supervisor" so narrowly. First, the definition seems inconsistent with the Supreme Court's *Ellerth* and *Faragher* decisions. Second, the Second Circuit's definition seems to contradict the definition of "supervisor" provided in the NLRA. Finally, the Second Circuit's broad definition could have negative implications for companies, particularly with respect to supervising, training, and monitoring.

A. *The Second Circuit's Decision Is Inconsistent with Ellerth and Faragher*

The Second Circuit seems to have expanded the definition of "supervisor" beyond what the Supreme Court intended in *Ellerth* and *Faragher*. For example, the *Mack* court considered Connolly a supervisor, because his authority over the plaintiff simply "enabled or materially augmented" his ability to create a hostile work environment for the plaintiff.¹³² While the Supreme Court did not expressly state that a supervisor must have the ability to take a tangible employment action, it did state that "[t]angible employment actions fall within the special province of the supervisor."¹³³ Connolly had no power to take tangible employment actions against the plaintiff, or even to recommend such actions.¹³⁴ Even if one interprets *Faragher* as including within the scope of supervisory authority the ability to directly control and supervise all aspects of the victim's day-to-day

¹³¹ *Grozdanich*, 25 F. Supp. 2d at 973 (stating that there is no reason to distinguish between "supervisors who manage their subordinates' daily activities, but who can only recommend significant personnel decisions, and supervisors who have plenary authority over all such matters").

¹³² *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir.) (rejecting the *Parkins* test for one that asks "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates"), *cert. denied*, 540 U.S. 1016 (2003).

¹³³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

¹³⁴ *Mack*, 326 F.3d at 126 (recognizing that Connolly had no authority to take a tangible employment action against the plaintiff).

activities,¹³⁵ Connolly's authority did not appear to rise to that level. At most, Connolly seemed to have a merely routine or clerical responsibility of allocating the work assigned by management.¹³⁶ In fact, even the EEOC's enforcement guidelines distinguish between individuals who direct employees' work activities and those who simply relay other officials' instructions regarding work assignments.¹³⁷

The Second Circuit seemed to overstate the mechanic's level of isolation from management as well as the harasser's "special dominance" over the other mechanics.¹³⁸ For example, in *Faragher*, the plaintiff and the alleged harassers were stationed at a beach, where the plaintiff had no significant contact with city officials.¹³⁹ In contrast, the mechanic's supervisor, Phil Gallina, maintained an office at the Metropolitan Life building.¹⁴⁰ Although Gallina was seldom on site, he was accessible to the plaintiff, because she testified that she complained repeatedly to Gallina about Connolly's behavior.¹⁴¹ Further, the plaintiff in

¹³⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

¹³⁶ See *supra* note 15 and accompanying text (describing Connolly's job responsibilities). The plaintiff maintained that "as part of [Connolly's] responsibilities in assigning and overseeing daily tasks, Connolly also assigned overtime work; the defendants counter[ed] that this was merely a clerical responsibility." *Mack*, 326 F.3d at 121. The defendants' argument seems to be based on the fact that under the NLRA, an employee would not qualify as a supervisor if his or her authority was of a merely routine or clerical nature. See *infra* notes 165-67 and accompanying text (explaining the three-part test to determine whether an employee qualifies as a supervisor under the NLRA's definition of "supervisor").

¹³⁷ See *supra* Part I.C (providing background information on the EEOC enforcement guidelines).

¹³⁸ *Mack*, 326 F.3d at 125 ("There was no one superior to Connolly at 200 Park whose continuing presence might have acted as a check on Connolly's coercive misbehavior toward other Otis employees there."); see also *Expanding the Definition of a "Supervisor" and a Company's Liability for Workplace Harassment*, EMP. L. ALERT (Nixon Peabody LLP), Oct. 2003, at 2 [hereinafter *Expanding the Definition of a "Supervisor"*] (arguing that Otis managers were close by and that there was not the same level of isolation from management that was present in *Faragher*).

¹³⁹ *Faragher*, 524 U.S. at 781. The Court noted that the alleged harassers had "unchecked authority" and that "Faragher and her colleagues were 'completely isolated from the city's higher management.'" *Id.* at 808 (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1544 (11th Cir. 1997) (Barkett, J., dissenting in part and concurring in part), *rev'd*, 524 U.S. 775 (1998)). For example, the Marine Safety Headquarters, where the lifeguards worked, was a "small one-story building containing an office, a meeting room, and a single, unisex locker room with a shower." *Id.* at 781.

¹⁴⁰ *Mack*, 326 F.3d at 120.

¹⁴¹ *Id.* at 120-21.

Faragher was completely unaware of the city's sexual harassment policy, which likely would have provided a mechanism for reporting to management complaints of sexual harassment.¹⁴² The plaintiff in *Mack*, however, was aware of Otis's policy and knew there were several avenues of complaint available to her.¹⁴³

Finally, the Second Circuit's rejection of the *Parkins* test appears to be based on a misreading of *Ellerth* and *Faragher*.¹⁴⁴ For example, the Second Circuit rejected the *Parkins* test for focusing improperly on an employee's ability to take a tangible employment action.¹⁴⁵ According to the Second Circuit, "*Ellerth* and *Faragher* hold that an employer may be vicariously liable even for the misbehavior of employees who do *not* take tangible employment actions against their subordinate victims."¹⁴⁶ In fact, the Supreme Court seemed to be contemplating two different factual scenarios—one where a supervisor took a tangible employment action and one where a supervisor had the authority to, but did not take, a tangible employment action—not two different types of supervisors.¹⁴⁷ More specifically, the Supreme Court explained that an employer is automatically liable when a supervisor's harassment culminates in a tangible employment action, but that the employer is subject to an affirmative defense when the supervisor does not take a tangible employment action.¹⁴⁸ The Court did not indicate that the latter type of liability involved an employee having a lesser degree of supervisory authority.¹⁴⁹ Rather the difference between the two

¹⁴² *Faragher*, 524 U.S. at 782 (indicating that many of the employees of the Marine Safety Section were unaware of the city's sexual harassment policy because the city failed to disseminate its policy to the Section).

¹⁴³ *Mack*, 326 F.3d at 121; see also *Expanding the Definition of a "Supervisor,"* *supra* note 138, at 2 (pointing out that the plaintiff knew she could complain to Otis human resources, the Otis ombudsman, or by calling an "800" telephone number).

¹⁴⁴ See *Mack*, 326 F.3d at 126 (disagreeing with the *Parkins* test for determining who qualifies as a supervisor); see also *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 915–16 (E.D. Tenn. 2003) (explaining that the Second Circuit missed the point when it rejected the *Parkins* test); *Expanding the Definition of a "Supervisor,"* *supra* note 138, at 2 (arguing that the Second Circuit's reasoning was flawed in its attempt to distinguish the *Parkins* decision).

¹⁴⁵ See *Mack*, 326 F.3d at 126.

¹⁴⁶ *Id.*

¹⁴⁷ See *Browne*, 286 F. Supp. 2d at 915–16.

¹⁴⁸ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

¹⁴⁹ See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

bases of liability appears to be focused on whether the supervisor actually took a tangible employment action, or simply had the power to do so.¹⁵⁰

*B. The Second Circuit's Decision Is Inconsistent with the NLRA*¹⁵¹

The Second Circuit's definition of "supervisor" seemingly contradicts the definition of "supervisor" provided in the NLRA.¹⁵² This contradiction is particularly significant in *Mack*, because both the plaintiff and the alleged supervisor were

¹⁵⁰ See *Ellerth*, 524 U.S. at 765 ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."); *Faragher*, 524 U.S. at 807-08; see also *Broune*, 286 F. Supp. 2d at 916 (concluding that whether a hostile work environment should be attributed to the employer is a question of whether the employee had the ability to take a tangible employment action, and not whether the action was taken).

¹⁵¹ The NLRA, as amended by the Labor Management Relations Act (LMRA), provides covered employees "the right to self-organiz[e], . . . to bargain collectively through representatives of their own choosing, . . . to engage in other concerted activities" related to collective bargaining, and to refrain from engaging in such activities. See National Labor Relations Act, 29 U.S.C. § 157 (2000) (providing for rights of covered employees). Congress initially enacted the NLRA in 1935 to empower employees and to alleviate obstructions to commerce caused by labor-management disputes. See *id.* § 151 (findings and policies); see also Harry G. Hutchison, *Toward a Robust Conception of "Independent Judgment": Back to the Future?*, 36 U.S.F. L. REV. 335, 336 (2002) (explaining the motivation behind the enactment of the NLRA); Kristin Hay O'Neal, Note, *NLRB v. Health Care & Retirement Corporation of America: Possible Implications for Supervisory Status Analysis of Professionals Under the National Labor Relations Act*, 47 BAYLOR L. REV. 841, 844 (1995) (providing an overview of the "political purpose and the societal backdrop upon which the NLRA was founded").

¹⁵² Compare *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir.) (adopting a test for determining who qualifies as a supervisor based on "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates"), *cert. denied*, 540 U.S. 1016 (2003), with 29 U.S.C. § 152(3) (excluding specifically from the term "employee" any individual employed as a supervisor), and *id.* § 152(11) (defining the term "supervisor"). Under the NLRA, the term "supervisor" includes the following individuals:

[A]ny 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.

Id.

members of the same bargaining unit.¹⁵³ Since the NLRA expressly excludes supervisory employees from the bargaining units of their subordinates,¹⁵⁴ Connolly was clearly not a supervisor under the NLRA. The union contract provisions designating Connolly as the “mechanic in charge” did not make him a supervisor, because he still “remained an hourly-paid bargaining unit employee covered by a union contract.”¹⁵⁵ Therefore, it seems rather ironic that the Second Circuit used these union contract provisions to make Connolly a supervisor for Title VII purposes when he was not even a supervisor under the union contract or under the NLRA.¹⁵⁶

While the NLRA definition of “supervisor” has no effect on the meaning of the term for Title VII purposes,¹⁵⁷ the reasoning behind why supervisory employees are excluded from the bargaining units of their subordinates under the NLRA is similar to the rationale behind the vicarious liability of employers for harassment by their supervisors. For example, supervisory employees are excluded from the bargaining units of their subordinates because they are considered “agents” of their

¹⁵³ See *Mack*, 326 F.3d at 120 (describing the collective bargaining agreement between Otis Elevator and the Local 1 International Union of Elevator Constructors, of which the plaintiff and Connolly were both members).

¹⁵⁴ See 29 U.S.C. § 152(3) (providing that “the term ‘employee’ . . . shall not include . . . any individual employed as a supervisor”). The NLRA, as originally enacted, did not distinguish between employees and supervisors. It was not until the enactment of the LMRA that supervisors were specifically excluded from the NLRA’s definition of the term “employee.” See National Labor Relations Act, Pub. L. No. 74-198, ch. 372, § 2(3), 49 Stat. 449, 450 (1935); see also Kevin J. Hasson & Crystal L. Miller, *Labor Law—Limiting an Employer’s Liability for Firing a Supervisor for Union Activity*, 59 NOTRE DAME L. REV. 270, 271–72 (1983) (tracing the history of the NLRA).

¹⁵⁵ *Expanding the Definition of a “Supervisor,” supra* note 138, at 2; see also *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034–35 (7th Cir. 1998) (noting that the alleged harassers were not supervisors because both were members of labor unions and had only minimal authority over the plaintiff). In making its determination that the harassers were not supervisors, the Seventh Circuit also relied on the fact that both men “were laborers who were required to account for their time on a time card, were paid an hourly wage, and received overtime pay.” *Id.* at 1034.

¹⁵⁶ See *Expanding the Definition of a “Supervisor,” supra* note 138, at 2 (stating that it was “ironic that the Otis union contract provisions . . . made Connolly a supervisor for vicarious liability purposes when he [was] not even a supervisor under that contract or under long-standing NLRB rules defining supervisors”).

¹⁵⁷ See EEOC, *supra* note 2 (recognizing that numerous statutes, including the NLRA, contain and define the term “supervisor,” but noting that these definitions do not control the meaning of the term in the employment discrimination statutes).

employers.¹⁵⁸ In other words, NLRA supervisors are viewed as extensions of management, who are more loyal to management than to their subordinates and who act in the best interests of their employers.¹⁵⁹ Given this loyalty and the employer's ability to better control supervisors' conduct, employers can be vicariously liable for conduct that violates the NLRA if the individual involved was a supervisor rather than a mere employee.¹⁶⁰ Similarly, employers are held vicariously liable under Title VII for sexual harassment through supervisors, because supervisors are aided in accomplishing their sexual harassment by their position as agents of the employer.¹⁶¹ Under Title VII, a supervisor has the authority to act on behalf of the employer, so that "[f]rom the perspective of the employee, the supervisor and the employer merge into a single entity."¹⁶² Further, employers are held vicariously liable for a hostile work environment created by supervisors, because employers have a greater opportunity to guard against their misconduct.¹⁶³

¹⁵⁸ Hutchison, *supra* note 151, at 372 ("It seems vital that a 'supervisor' must have 'the power to act as an agent of the employer in relations with other employees and to exercise independent judgment of some nature.'") (quoting THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT 1610 (Patrick Hardin ed., 3d. ed 1992)).

¹⁵⁹ Congress enacted the LMRA in an effort to respond to "organized labor's growing control over management personnel" and to restore equality of bargaining power between employers and employees. See *GAF Corp. v. NLRB*, 524 F.2d 492, 495 (5th Cir. 1975) (considering the legislative history of the NLRA); see also O'Neal, *supra* note 151, at 844 (explaining that Congress enacted the LMRA to lessen the imbalance established by the NLRA). Congress was concerned that if supervisors had the right to organize they might be more loyal to their subordinates than to management and that their independent judgment might be impaired. See *Hasson & Miller*, *supra* note 154, at 272. Not only did employees have the right to be free from their supervisors' control, but also employers had the right to have loyal supervisors who acted in the employer's best interests. See *id.*; Hutchison, *supra* note 151, at 341 ("The exclusion of supervisors from coverage by the Act was approved, *inter alia*, to 'further the interest[s] of employers in the undivided loyalty of supervisors and the interest of employees in organizing free of supervisory interference . . .'" (alteration in original) (quoting DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 21 (1999))).

¹⁶⁰ See *Expanding the Definition of a "Supervisor," supra* note 138, at 2 (explaining that if the alleged harasser made an anti-union comment to the plaintiff, vicarious liability for that comment would not be imputed to the employer).

¹⁶¹ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759-60 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998).

¹⁶² *Ellerth*, 524 U.S. at 762 (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)).

¹⁶³ See *Faragher*, 524 U.S. at 803.

Another similarity is that under the NLRA and Title VII, a distinction should be made between low-level supervisors who are equivalent to regular employees, and true supervisors who have been given actual authority by the employer.¹⁶⁴ For example, under the NLRA's statutory definition, an employee qualifies as a "supervisor" when: (1) the employee has authority to hire *or* transfer *or* suspend *or* lay off *or* recall *or* promote *or* discharge *or* assign *or* reward *or* discipline other employees *or* responsibly direct them *or* to adjust their grievances *or* effectively to recommend such action;¹⁶⁵ (2) the exercise of that authority is not of a merely routine or clerical nature, but rather requires the use of independent judgment; and (3) the employee holds the authority in the interest of the employer.¹⁶⁶ Under this definition, supervisors can take tangible employment actions, recommend such actions, or *responsibly* direct other employees. It is important to note, however, that merely assigning tasks to employees or directing another's work does not suffice to make an employee a supervisor in the NLRA context.¹⁶⁷ Rather, supervisory authority includes the ability to assign or to direct *employees*, not simply their work activities.¹⁶⁸ Therefore, while the NLRA definition appears at first glance to be consistent with the EEOC's Title VII definition of "supervisor," which includes

¹⁶⁴ See *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998) (explaining that courts have made an effort to distinguish "between low-level supervisors who were the equivalent of [coworkers] and supervisors whose authority and power was sufficient to make consequential employment decisions affecting the subordinate, such that the supervisor was effectively acting on the employer's behalf"); see also *Becker & Ceresi*, *supra* note 1, at 388–89 (arguing that Congress did not intend to include within the definition of "supervisor" those employees with "minor supervisory duties").

¹⁶⁵ National Labor Relations Act, 29 U.S.C. § 152(11) 2000. The twelve supervisory functions listed in the NLRA should be read disjunctively, so that the possession by an employee of any of the enumerated supervisory powers or functions is sufficient to make the employee a "supervisor." See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (stating that employees are supervisors under the NLRA if they "hold the authority to engage in any [one] of the [twelve] listed supervisory functions"); see also *O'Neal*, *supra* note 151, at 846 n.25.

¹⁶⁶ *Ky. River*, 532 U.S. at 713; see also *Hutchison*, *supra* note 151, at 342; *O'Neal*, *supra* note 151, at 846.

¹⁶⁷ See *Becker & Ceresi*, *supra* note 1, at 398–404 (suggesting a limiting construction of the terms "assign" and "responsibly direct").

¹⁶⁸ See *id.*; see also *Ky. River*, 532 U.S. at 720 (suggesting that the NLRB adopt "a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other *employees*").

the authority to direct employees' work activities, the NLRA's definition is actually more limited.¹⁶⁹

C. *Negative Implications of the Second Circuit's Definition of "Supervisor"*

The *Mack* court's definition of "supervisor" will likely expose employers to an inordinate threat of liability.¹⁷⁰ With the changing composition of the workforce and a greater number of employees directing the work of others, the *Mack* court's definition of "supervisor" would likely extend vicarious liability to cover too many employees.¹⁷¹ "[L]ead men, low-level supervisors, working supervisors, project or job leaders and even coworkers with some additional authority [would] all become 'supervisors' whose actions bind their employer."¹⁷² Although requiring an employer, rather than an innocent employee, to automatically bear the cost of a hostile work environment created by *all* employees may seem desirable at some level, it does not seem to be the result intended by Congress or the Supreme Court and it could have adverse effects on companies.¹⁷³

¹⁶⁹ See *supra* Part I.C (describing the EEOC's enforcement guidelines). Interestingly, just as the authority to direct and assign has caused confusion in the Title VII context, it has been troublesome in the NLRA context as well. See Becker & Ceresi, *supra* note 1, at 389. Perhaps this ambiguity is due to the fact that the authority to take or to recommend a tangible employment action clearly places employees who possess such authority apart from other employees, while the authority to assign or to direct is not as distinguishable. See *id.*

¹⁷⁰ See Blackman, *supra* note 7, at 155–56 (arguing that a broad construction of the term "supervisor" may expose employers to an excessive and unfair threat of liability); see also *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003); *supra* note 152 and accompanying text (describing the *Mack* test).

¹⁷¹ See Hutchison, *supra* note 151, at 335–36 (explaining how changes in the workforce will inevitably lead to problems distinguishing between supervisors and regular employees under the NLRA); O'Neal, *supra* note 151, at 855–60 (describing changes in the employment setting, which are leading to a greater number of employees directing the work of others).

¹⁷² *Expanding the Definition of a "Supervisor," supra* note 138, at 1; see also *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 915 (E.D. Tenn. 2003) ("[U]nder the logic of the *Mack*/EEOC approach, vicarious liability should be extended even further to cover any and all employees with any sort of superiority over a plaintiff-employee.").

¹⁷³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 800 (1998) (rejecting "scope-of-employment" as a basis for vicarious liability because under scope of employment reasoning it would seem just as appropriate to require employers to bear the cost of a hostile work environment created by coworkers as when it was created by supervisors).

The Second Circuit's broad and far-reaching definition of "supervisor" will likely discourage employers from taking preventive measures, one of the basic policies of Title VII.¹⁷⁴ In fact, "[t]he more nebulous the standard for determining which employees are supervisors, the less incentive there is for companies to engage in preventive forethought."¹⁷⁵ For example, if an employer cannot determine who qualifies as a supervisor, there may simply be too many employees for the company to carefully select, train, and monitor.¹⁷⁶ In contrast, companies can guard against supervisor harassment more easily when they have a clear understanding of the standards of liability, and there is a limited number of potential supervisors.¹⁷⁷

Finally, it is possible that the *Mack* court's definition of "supervisor" will make it more difficult for companies to implement proper training programs, because employers may not know what type of training employees need.¹⁷⁸ Supervisors need to be trained not only to demonstrate that the employer is taking proper steps to prevent sexual harassment, but also to ensure that supervisors understand the employer's policy and know how to handle properly any complaints.¹⁷⁹ Employers should also train non-supervisory employees, but should do so in separate

¹⁷⁴ See *Browne*, 286 F. Supp. 2d at 914 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) and *Faragher*, 524 U.S. at 805–06) (stating that the Mack definition of "supervisor" is inconsistent with the Title VII policy of encouraging forethought by employers).

¹⁷⁵ *Id.*

¹⁷⁶ Seyfarth Shaw, *Prevention and Response: What Works, What Doesn't?*, in *SEXUAL HARASSMENT IN THE PUBLIC WORKPLACE* 137, 160 (Benjamin E. Griffith ed., 2001) (stating that careful selection, training, and monitoring of supervisors is an employer's only defense to being vicariously liable for supervisor sexual harassment).

¹⁷⁷ See *Faragher*, 524 U.S. at 800–01 (recognizing that "employer[s] can guard against [supervisors'] misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees"); see also *Browne*, 286 F. Supp. 2d at 914 (explaining that the *Mack* court's definition of "supervisor" is contrary to the Court's rationale in *Ellerth* and *Faragher*, because it will result in a large number of potential supervisors).

¹⁷⁸ See *Expanding the Definition of a "Supervisor," supra* note 138, at 3 (suggesting that the Second Circuit's definition of "supervisor" makes it difficult for employers to determine who to invite to the training sessions for supervisors).

¹⁷⁹ See EEOC, *supra* note 2; see also Shaw, *supra* note 176, at 157–58. Supervisors should be trained to recognize sexual harassment, to understand their reporting responsibilities, to respond properly to any complaints brought by subordinate employees, to maintain confidentiality, and how to avoid allegations of sexual harassment. See *id.* at 164–66.

sessions because of their different responsibilities.¹⁸⁰ Therefore, it seems that employers that cannot distinguish between regular employees and supervisors may not be protecting themselves properly by providing inadequate training.

IV. HOW COURTS SHOULD DISTINGUISH BETWEEN COWORKER AND SUPERVISOR

This Comment suggests that an employee should qualify as a supervisor for the purposes of finding the employer vicariously liable under Title VII when the employer has granted to the employee the authority to recommend or to take tangible employment actions against his or her subordinates. It is this actual power to make economic decisions affecting other employees that distinguishes a supervisor from a mere coworker and aids the supervisor in creating a hostile work environment.¹⁸¹ The authority given to a supervisory employee need not be plenary, but it should include more than simply the ability to direct another employee's work activities.¹⁸² Finally, determining which employees qualify as supervisors should not be based on title, but requires "a particularized inquiry into the nature and extent of the authority bestowed upon an employee by an employer."¹⁸³

Defining the term "supervisor" as one who has the authority to recommend or to take tangible employment actions is consistent with the Supreme Court's holdings in *Ellerth* and

¹⁸⁰ Shaw, *supra* note 176, at 160. Non-supervisory employee training should emphasize the employee's duty to know the employer's policy, to follow the policy, to report sexual harassment, and to cooperate in investigations by the employer. See *id.* at 160-61.

¹⁸¹ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998) ("[W]e can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate."); *Faragher*, 524 U.S. at 800-01 (noting that supervisors have special authority that enhances their capacity to harass their subordinates).

¹⁸² See *Browne*, 286 F. Supp. 2d at 918 (holding that a supervisor does not have to possess absolute authority but rather significant authority "to initiate, recommend, or effect tangible employment actions"); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998) ("The disutility of drawing any distinction between supervisors who manage their subordinates' daily activities, but who can only recommend significant personnel decisions, and supervisors who have plenary authority over all such matters, underscores the Supreme Court's holdings in *Faragher* and *Ellerth*.").

¹⁸³ *Browne*, 286 F. Supp. 2d at 918.

Faragher, as well as the agency principles and Title VII objectives upon which those decisions relied.¹⁸⁴ For example, an individual who can make economic decisions affecting other employees clearly has been vested with the employer's authority and represents the interests of management.¹⁸⁵ By defining "supervisor" with precision, the proposed definition also recognizes that there are limits on "acts of employees for which employers under Title VII are to be held responsible."¹⁸⁶ In addition to limiting liability, this precision encourages employers to exercise forethought and to take measures toward preventing sexual harassment in the workplace.¹⁸⁷

The proposed definition of "supervisor" seems to be consistent with the definition of "supervisor" provided in the NLRA.¹⁸⁸ While this consistency need not exist, it can be helpful in cases like *Mack*, where the plaintiff and the alleged harasser are members of the same bargaining unit.¹⁸⁹ Further, the reasons why supervisory employees are excluded from the bargaining units of their subordinates under the NLRA can be compared to the rationale behind the vicarious liability of employers for harassment by their supervisors.¹⁹⁰ Courts can draw on these similarities when determining who qualifies as a supervisor under Title VII.

Finally, while the proposed definition of "supervisor" may limit vicarious liability, it does not entirely insulate employers from liability.¹⁹¹ A plaintiff who suffers a hostile work

¹⁸⁴ See *supra* Part I.B (explaining the *Ellerth* and *Faragher* holdings); see also *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (holding that supervisory authority consists of the ability "to affect the terms and conditions of the victim's employment").

¹⁸⁵ See *Ellerth*, 524 U.S. at 762 ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates . . . [and] requires an official act of the enterprise, a company act."); see also *supra* Part III.B (explaining how the NLRA includes within its definition of "supervisor" the ability to make economic decisions because supervisors are supposed to be loyal to management and represent the employer's best interests).

¹⁸⁶ *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 72 (1986); see also *Faragher*, 524 U.S. at 804 (agreeing with the Meritor Court's holding that employers are not automatically liable for supervisory harassment).

¹⁸⁷ See *supra* notes 174–77 and accompanying text.

¹⁸⁸ See 29 U.S.C. § 152(11) (2000) (defining the term "supervisor").

¹⁸⁹ See *supra* notes 152–56 and accompanying text.

¹⁹⁰ See *supra* notes 157–58 and accompanying text.

¹⁹¹ Paul E. Starkman, *Learning the New Rules of Sexual Harassment: Faragher, Ellerth and Beyond*, 66 DEF. COUNS. J. 317, 326 (1999) ("[M]erely because a court

environment by a coworker could still recover from the employer, albeit under a negligence standard, rather than a vicarious liability standard.¹⁹² This lesser standard seems fair, however, since “employers do not entrust mere co-employees with any significant authority with which they might harass a victim.”¹⁹³ Therefore, the proposed definition seems to strike a balance between allowing plaintiffs with strong hostile work environment claims to prevail, and limiting vicarious liability for the acts of those employees over whom the employer has sufficient control.

CONCLUSION

Employers may be vicariously liable for a hostile work environment created by a supervisor, whereas they may be liable under a negligence standard when a hostile work environment is created by a mere coworker. Accordingly, it is critical to determine whether the harassing employee qualifies as a supervisor for Title VII purposes. This Comment has suggested that the Second Circuit defined too broadly the term “supervisor,” as one whose authority “enabled or materially augmented” his or her ability to “create a hostile work environment.”¹⁹⁴ Had the Second Circuit focused instead on whether the employee had the authority to take or to recommend a tangible employment action, its *Mack* holding would have been consistent with the Supreme Court’s holdings in *Ellerth* and *Faragher*, as well as the agency principles and Title VII objectives upon which the Court relied. Further, the Second Circuit’s definition of “supervisor” would not have contradicted the definition of “supervisor” provided in the NLRA. Finally, defining “supervisor” as one who has the authority to take or to recommend tangible employment actions would not leave employers wondering where all of their employees have gone.

applies a negligence rather than a strict liability standard to co-worker harassment does not mean that the employer can escape liability.”).

¹⁹² See *id.*; see also *supra* note 6.

¹⁹³ See *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

¹⁹⁴ *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003).