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I. INTRODUCTION

The Civil Rights Act of 1964 offers a wide array of protections against discrimination, and has been the subject of prolific litigation.[1] While this litigation is diverse in subject matter, the Supreme Court of the United States granted certiorari in the matter of *Vance v. Ball State University*[2] to determine "who qualifies as a 'supervisor' in a case in which an employee asserts a Title VII claim for workplace harassment[.]"[3] According to the Court, *Burlington Industries, Inc. v. Ellerth*[4] and *Faragher v. City of Boca Raton*[5] had left this question open.[6]

Under Title VII of the Civil Rights Act of 1964 ("Title VII"), an employer may be vicariously liable for harassment perpetrated by one of its employees, depending on the harasser's status.[7] "If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions."[8] In this situation, the victim may only hold the employer vicariously liable by proving that "the employer knew or reasonably should have known about the harassment but failed to take remedial action."[9]

If the harasser is a "supervisor," different rules apply regarding vicarious liability.[10] "If the supervisor's harassment culminates in a tangible employment action, the employer [will be] strictly liable" for the supervisor's actions.[11] If the supervisor took no tangible employment action, however, "the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective

1. 42 U.S.C. § 2000e *et seq.* (2012); *see also Race-Based Charges: FY 1997- FY 2012*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm (last visited Jan. 20, 2014).
2. 133 S. Ct. 2434 (2013).
3. *Id.* at 2439.
4. 524 U.S. 742 (1998).
5. 524 U.S. 775 (1998).
6. *See* Vance v. Ball State Univ., 133 S. Ct. at 2439.
7. *See id.*
8. *Id.*
9. *Id.* at 2441 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. at 768-69 (Thomas, J., dissenting)).
10. *Id.* at 2439.
11. *Vance*, 133 S. Ct. at 2439.

opportunities that the employer provided."[12] This framework, set forth in *Ellerth* and *Faragher*, makes determining whether a harasser is a "supervisor" or a co-worker incredibly relevant to the status of liability for employers.[13]

The majority opinion, written by Justice Alito, 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 . . . ."[14] This decision affirmed the Seventh Circuit Court of Appeals' holding below and formally adopted the circuit's standard for determining whether an employee qualifies as a "supervisor."[15]

Determination of the status of "supervisor" under this definition relies in large part on the definition of a "tangible employment action."[16] "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."[17] This definition limits those whom may be deemed "supervisors" for the purposes of vicarious liability under Title VII to those who can make a "significant change" in an employee's job status.[18]

Justice Alito reasoned that this definition, in contrast with the definition that the Equal Employment Opportunity Commission ("EEOC") recommended, is simpler and will prevent "daunting problems for the lower federal courts and for juries."[19] The dissent, written by Justice Ginsburg, with whom Justices Breyer, Sotomayor, and Kagan joined, viewed the majority's reasoning as extremely limited.[20] The dissent wrote, "[t]he limitation the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[21] In this statement, the dissent made its opposition to the limitations set on the definition of "supervisors" quite clear, evincing the deep seated conflict on this issue.[22]

While the majority opinion's limited view of what constitutes a "supervisor" may be simpler and easier to understand, its definition of

12. *Id.* (citing Faragher v. City of Boca Raton, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).
13. *See id.*
14. *Id.*
15. *See id.*; *see also* Vance v. Ball State Univ., 646 F.3d 461, 465, 470 (7th Cir. 2011).
16. *See Ellerth*, 524 U.S. at 761-62.
17. *Id.* at 761.
18. *See id.* at 761-62.
19. *Vance*, 133 S. Ct. at 2450.
20. *See id.* at 2454 (Ginsburg, J., dissenting).
21. *Id.*
22. *See id.*

"tangible employment action" is significantly flawed. This narrower definition may exclude those who have the power to control employee shifts and overall number of hours, but do not have the authority to hire, fire, promote, or demote employees.[23] The Court's efforts to limit the definition of "supervisor" for purposes of Title VII liability are appropriate; however, the definition of "tangible employment action" is lacking in that it may not include those who have direct control over employee hours and shifts.[24] As a result, the protections Title VII affords against harassment by supervisors will diminish. [25]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

Petitioner, Maetta Vance, is an African-American woman employed by Ball State University ("Ball State") in the University Banquet and Catering Division of Dining Services.[26] She began her employment in 1989 as a substitute server, but Dining Services promoted her in 1991 to a part-time catering assistant.[27] When the "racially charged" incidents involving Vance began in 2005, she was the only African-American working in the department.[28]

Vance filed complaints identifying coworkers who used racial slurs, threats of physical harm, and even references to family associations with the Ku Klux Klan.[29] While there were multiple coworkers involved in the alleged harassment, the only relevant interactions in the instant case were with a fellow employee, Saundra Davis.[30] In 2001, Davis hit Vance on the back of the head "without provocation," causing Vance to complain orally to her supervisors.[31] Ball State did not take official action at this time because Davis subsequently "transferred to another department [and] Vance did not pursue the matter."[32]

In 2005, Davis returned to the department, and "the two had an altercation in [an] elevator," at which time Davis allegedly said, "I'll do it again," alluding to the earlier slap on the back of her head in 2001.[33] Vance formally reported this incident, as well as the earlier incident in 2001, to

23. *See id.* at 2445 (majority opinion).
24. *See Vance*, 133 S. Ct. at 2445.
25. *See id.*; *see also infra* Part IV.
26. *Vance*, 133 S. Ct. at 2439.
27. *Id.*
28. *Vance*, 646 F.3d at 465.
29. *Id.* at 465-66.
30. *Vance*, 133 S. Ct. at 2439.
31. *Vance*, 646 F.3d at 465.
32. *Id.*
33. *Id.*

Ball State.[34] Ball State began to investigate the matter immediately by involving the Employee Relations Department and counseling the two on proper respect and etiquette in the workplace.[35]

Vance then filed a complaint with the EEOC alleging gender, race, and age discrimination.[36] Despite Ball State's many attempts to remedy the issues that Vance faced, the conflicts continued and eventually led to the filing of this lawsuit in the United States District Court for the Southern District of Indiana in 2006.[37] Vance claimed "she had been subjected to a racially hostile work environment in violation of Title VII."[38] She further claimed that Davis was her supervisor, and that Ball State was therefore vicariously liable for Davis' actions.[39]

Both parties moved for summary judgment and the district court granted Ball State's motion,[40] explaining that Davis was not a "supervisor" because she could not "'hire, fire, demote, promote, transfer, or discipline'" Vance, and was therefore not Vance's supervisor under the Seventh Circuit's definition of the term.[41] The Court also held that Ball State would not be liable for negligence because the university had taken reasonable steps in responding to the incidents.[42] The Seventh Circuit Court of Appeals affirmed the district court's holding, following its prior interpretation of the term "supervisor" and further affirming that Ball State was not negligent in its actions.[43]

III. THE COURT'S DECISION AND RATIONALE

A. The Majority Opinion

Justice Alito, writing for the majority in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined, began with a discussion of the use of Title VII,[44] which states that it is "'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'"[45]

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34. *Id.* at 466.
35. *Id.* at 466-67.
36. *See Vance*, 646 F.3d at 467.
37. *Vance*, 133 S. Ct. at 2440.
38. *Id.*
39. *Id.*
40. Vance v. Ball State Univ., No. 1:06-CV-1452-SEB-JMS, 2008 WL 4247836, at *1 (S.D. Ind. Sept. 10, 2008).
41. *See id.* at *12 (quoting Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)).
42. *Vance*, 133 S. Ct. at 2440.
43. *Id.*
44. *See id.*
45. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)).

The Court noted that although the provision prohibits discrimination that has "direct economic consequences," courts have also extended it to the "creation or perpetuation of a discriminatory work environment."[46]

In *Rogers v. EEOC*,[47] the Fifth Circuit Court of Appeals recognized that Title VII applied to the creation of hostile work environments in an effort to combat the "emotional and psychological" impact such settings have on minority workers.[48] Lower courts, following the decision in *Rogers*, "held that an employer was liable for a racially hostile work environment" when that employer was negligent in its actions.[49] To be negligent by this standard, the employer must have known "or reasonably should have known about the harassment but failed to take remedial action."[50]

The Court then recognized that employers are "directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior."[51] This applies if the harassing employee is a co-worker but not considered to be a "supervisor."[52]

When the harassing employee is a "supervisor," however, "an employer may be *vicariously* liable for its employees' creation of a hostile work environment."[53] This type of activity is generally insufficient to establish vicarious liability for the employer because it is outside of the scope of employment.[54] An exception to this rule is provided by the Restatement (Second) of Agency for situations in which the servant was "aided in accomplishing the tort by the existence of the agency relation."[55]

The Court adapted this rule to the Title VII context in *Ellerth* and *Faragher* by identifying "two situations in which . . . [the] employer[,] . . . even in the absence of negligence," will be liable for the harassment by one of its supervisors.[56] First, if a supervisor takes a "tangible employment action" against another employee, the employer will be strictly liable.[57] A "tangible employment action" is an action in which there is a "significant change in employment status, such as hiring, firing, failing to promote,

46. *Id.*
47. 454 F.2d 234 (5th Cir. 1971).
48. *See id.* at 238.
49. *See Vance*, 133 S. Ct. at 2440-41.
50. *Id.* at 2440-41 (citing *Ellerth*, 524 U.S. at 768-69 (Thomas, J. dissenting)).
51. *See id*. at 2441 (citing *Faragher*, 524 U.S. at 789).
52. *See id.*
53. *Id.* (emphasis in original).
54. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).
55. *Id.*
56. *See Vance*, 133 S. Ct. at 2441-42.
57. *See id.* at 2442.

reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[58]

The Court in *Ellerth* explained this rule: "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation."[59] In these situations, the Court held that holding an employer strictly liable is appropriate because of this agency relation.[60]

Vicarious liability may also exist even when the supervisor's harassment does not result in a "tangible employment action."[61] The employer will be "vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense."[62] An employer can avoid liability by affirmatively proving, by a preponderance of the evidence: "(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."[63]

The Court then held "that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim . . . ."[64] It defended this definition, in contrast to the EEOC's preferred definition, by explaining that, by limiting the term "supervisor" to those who can take "tangible employment actions" against other employees, supervisors will be far simpler to identify than under the EEOC's "nebulous" definition.[65]

In addressing the dissent's concerns, the Court pointed to dictionary, statutory, and regulatory definitions to emphasize its argument that one true definition of the term "supervisor" does not exist.[66] The Court seemingly engaged in this textualist-style analysis to indicate that the correct definition should come from the Court's interpretation of the *Ellerth* and *Faragher* framework.[67]

This interpretation differs from the EEOC interpretation in that the Court's definition is far more limited in scope.[68] The Court interpreted the

58. *Ellerth*, 524 U.S. at 761.
59. *Id.* at 761-62.
60. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.
61. *See Vance*, 133 S. Ct. at 2442.
62. *Id.*
63. *See id.* (citing *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).
64. *Id.* at 2443 (citing *Ellerth*, 524 U.S. at 761).
65. *See id.*
66. *See Vance*, 133 S. Ct. at 2444-46.
67. *See id*. at 2446.
68. *See Ellerth*, 524 U.S. at 761.

EEOC definition to be that a "supervisor" must wield authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment."[69] However, this is not the full definition of a "supervisor" as described by the EEOC.[70] "An individual qualifies as an employee's 'supervisor' if: . . . the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* . . . the individual has authority to direct the employee's daily work activities."[71] This definition, though less limited in scope as compared to the interpretation set forth by the Court, is not nearly as ambiguous as the majority argued.[72]

The next argument the majority made in support of its position was the simplification of the issues for courts and juries.[73] The Court claimed, "Under the definition of 'supervisor' that we adopt today, the question of 'supervisor' status, when contested, can very often be resolved as a matter of law before trial."[74] The Court then reiterated its point that in instances where the harassing employee does not meet the criteria of a "supervisor," the negligence standard will "provide adequate protection for tort plaintiffs . . . ."[75]

The majority concluded by turning to the specific facts of the case and determining that Davis did not meet the criteria to be considered a "supervisor."[76] Therefore, under this holding, Ball State could not be vicariously liable for her actions.[77] The Court then reiterated that "the approach we take today will be more easily administrable than the approach advocated by the dissent."[78]

B. Concurring Opinion by Justice Thomas

In a two-sentence concurrence, Justice Thomas concurred in the judgment, but reiterated that he believed both *Ellerth* and *Faragher* were wrongly decided.[79] His dissent to these two cases expressed his belief that "[a]n employer should be liable if, and only if, the plaintiff proves that the

69. *Vance*, 133 S. Ct. at 2446; *see also* EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS 3 (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html.

70. *See* EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 69, at 3.

71. *Id.*

72. *See generally id*.

73. *See Vance*, 133 S. Ct. at 2450.

74. *Id.*

75. *Id.* at 2451-52.

76. *Id.* at 2453-54.

77. *Id.* at 2454.

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

79. *Id.* (Thomas, J., concurring) (citing *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775).

employer was negligent in permitting the supervisor's conduct to occur."[80] Justice Thomas joined in the opinion "because it provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment."[81]

C. Dissenting Opinion by Justice Ginsburg

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, differed from the majority because she would have adopted the definition set forth by the EEOC.[82] She wrote, "[t]he limitation the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[83] She viewed the Court's interpretation of "supervisor" as too narrow and believed that deference should be given to the EEOC definition of the term.[84]

The correct determination of a "supervisor," according to her dissent, is whether "the employer [has] given the alleged harasser authority to take tangible employment actions *or* to control the conditions under which subordinates do their daily work[.]"[85] This definition, endorsed by the EEOC, considers those harassing employees who are able to assign daily work, assign shifts, and assign hours.[86]

The dissent then considered a variety of illustrations, all of which were based on actual cases, to attempt to paint the picture that the majority view of the issue would be a detriment to the common worker.[87] Justice Ginsburg, by including these examples, attempted to show how "a person vested with authority to control the conditions of a subordinate's daily work life" could use his or her position to harass others, even if he or she does not technically have the power to execute a "tangible employment action."[88]

Justice Ginsburg stressed that the definition of "supervisor" devised by the EEOC should receive "respect proportional to its 'power to persuade.'"[89] She further stated that the definition of "supervisor"

80. *See Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting).
81. *Vance*, 133 S. Ct. at 2454 (Thomas, J., concurring).
82. *See id.* at 2454-55 (Ginsburg, J., dissenting).
83. *Id.*
84. *See id.*
85. *Vance*, 133 S. Ct. at 2457 (Ginsburg, J., dissenting).
86. *See id.* at 2455, 2458.
87. *See id.* at 2459-60.
88. *See id.* at 2460.
89. *Id.* at 2461 (quoting United States v. Mead Corp., 533 U.S. 218, 235 (2001) (internal quotation marks omitted)).

supported by the EEOC "reflects the agency's 'informed judgment' and 'body of experience'" in its enforcement of Title VII actions.[90]

While the dissent indicated agreement that Davis would not qualify as a "supervisor" under either standard,[91] Justice Ginsburg believed that "the Court . . . seized upon Vance's thin case to narrow the definition of 'supervisor,' and thereby manifestly limit[ed] Title VII's protections against workplace harassment."[92] The dissent then ended by commenting on the fact that Congress has "intervened to correct this Court's wayward interpretations of Title VII" in the past, and further noted that "[t]he ball is once again in Congress' court to correct the error into which this Court has fallen . . . ."[93]

IV. ANALYSIS

A. Introduction

In *Ellerth* and *Faragher*, the Court expanded the situations in which employers may be vicariously liable for the actions of their employees in the Title VII context.[94] Recognizing vicarious liability in instances in which a supervisor may harass an employee, without taking any tangible employment actions against the victim, was a significant change in Title VII jurisprudence.[95]

This Court, in limiting who may qualify as a "supervisor" for purposes of Title VII vicarious liability, has arguably limited the effectiveness, and certainly the scope, of the Civil Rights Act of 1964.[96] As the dissent noted, those individuals with the power to control subordinates' "daily work activities" have a significant impact on the work environment and daily lives of those individuals.[97]

While the majority's argument was very well reasoned and supported, its definition of "tangible employment actions" is overly limiting in the context of the modern work force. While the majority correctly concluded that the definition supported by the EEOC may be less effective and confusing,[98] those with the power to control work hours and shifts should be

90. *Vance*, 133 S. Ct. at 2461 (Ginsburg, J., dissenting).
91. *See id.* at 2465.
92. *Id.* at 2465-66.
93. *See id.* at 2466.
94. *See Ellerth*, 542 U.S. 742, 765; *see also Faragher*, 542 U.S. 775, 808.
95. *See Ellerth*, 542 U.S. at 765. For a review of Title VII treatment, *see* Ann K. Wooster, *Title VII Sex Discrimination in Employment—Supreme Court Cases*, 170 A.L.R. FED. 219 § 2(a) (2001).
96. *See Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).
97. *See id.*
98. *See id.* at 2450 (majority opinion).

included in the definition of "supervisor" because of the incredibly significant impact this type of authority has on subordinate workers.[99]

This is not to say that the dissent was entirely correct either. Vicarious liability puts a significant burden on any employer, and significantly broadening the classification to include anyone who can affect "daily work activities" is taking a step too far.[100] In *Vance*, the Court's outcome fits squarely within the legal precedent set forth in *Ellerth* and *Faragher*, but did not quite reflect the realities of the modern workplace.[101]

B. Discussion

1. Conforming to Precedent

While the Court's opinion conformed to the precedents set forth in *Ellerth* and *Faragher*, it more clearly defined the term "supervisor" with regard to Title VII vicarious liability.[102] The Court 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 . . . ."[103] This definition, as adopted by the Seventh Circuit, is the interpretation of *Ellerth* and *Faragher* that the Court chose to follow.[104]

This definition requires that supervisors have "'the power to hire, fire, demote, promote, transfer, or discipline an employee.'"[105] This narrows the definition of a "supervisor" by a significant degree.[106] The Court only considered those with very specific authority to affect a subordinate's job status to be "supervisors" for the purpose of Title VII vicarious liability.[107]

However, while the Court stated that it was following the Seventh Circuit's precedent,[108] it further defined what is required to qualify as a "supervisor" by clarifying what comprises a "tangible employment action."[109] A "tangible employment action" is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a

99. *See id.* at 2457 (Ginsburg, J., dissenting).
100. *See id.* at 2455.
101. *See infra* Part IV.
102. *See Vance*, 133 S. Ct. at 2439 (majority opinion).
103. *Id.*
104. *Id.*; *see also* Valentine v. Chicago, 452 F.3d 670, 678 (7th Cir. 2006); Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998).
105. *Vance*, 133 S. Ct. at 2440 (internal quotation marks omitted).
106. *See id.* at 2439.
107. *See id.*
108. *See id.*
109. *See id.* at 2443.

significant change in benefits."[110] This slightly broader definition adds those individuals with the power to reassign tasks that significantly alter the "responsibilities" of a subordinate, as opposed to limiting it to only those who perform the tasks defined by the Seventh Circuit.[111]

The Court justified the use of this definition by stating that "the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined . . . ."[112] This easy determination, according to the Court, justified limiting those individuals that qualify as "supervisors" according to the *Ellerth* and *Faragher* line of cases.[113]

Unlike the dissent or the EEOC, the majority firmly believed that "there is no hint in either *Ellerth* or *Faragher* that the Court contemplated anything other than a unitary category of supervisors, namely, those possessing the authority to effect a tangible change in a victim's terms or conditions of employment."[114] While co-workers may "inflict psychological injuries," they "cannot dock another's pay, nor can one co-worker demote another."[115]

This important distinction between a "supervisor" and a co-worker is crucial in balancing the interests of both employers and employees in the Title VII context.[116] Opening up vicarious liability, especially strict liability, to co-worker cases puts too high a burden on legitimate employer interests.[117] Vicarious liability, for supervisors, is justifiable because the supervisor is acting for the employer in an official capacity.[118] While employers are not generally held responsible for the actions of their employees when their actions are "outside the scope of employment,"[119] *Ellerth* and *Faragher* recognized an exception when the employee was "aided in accomplishing the tort by the existence of the agency relation."[120] This exception is an important component in protecting the interests of employees against harassment by those to whom they are subordinate.[121]

110. *Vance*, 133 S. Ct. at 2443 (quoting *Ellerth*, 524 U.S. at 761) (internal quotation marks omitted).
111. *See id.*
112. *Id.*
113. *See id.* at 2446.
114. *See id.* at 2448.
115. *Ellerth*, 524 U.S. at 762.
116. *See Vance*, 133 S. Ct. at 2444.
117. *See id.*
118. *See id.* at 2441.
119. RESTATEMENT (SECOND) OF AGENCY § 219(2); *Vance*, 133 S. Ct. at 2441, 2444.
120. *Vance*, 133 S. Ct. at 2441, 2444.
121. *See id.* at 2441.

2. Simplification of the "Supervisor" Definition

The Court's more limited definition of "supervisor" eases the burden on courts and juries in determining who may qualify as a "supervisor" for purposes of Title VII vicarious liability.[122] "[T]he question of supervisor status, when contested, can very often be resolved as a matter of law before trial."[123] The Court further explained that "[t]he plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the *Ellerth/Faragher* affirmative defense."[124]

It is evident that the opinion of the Court on this matter is true; a jury will have a better understanding of its role in determining Title VII liability when it does not have to consider whether a particular employee is a "supervisor."[125] "[T]he danger of juror confusion is particularly high where the jury is faced with instructions on alternative theories of liability under which different parties bear the burden of proof."[126] If the process of determining "supervisor" status is simplified, this approach "will help to ensure that juries return verdicts that reflect the application of the correct legal rules to the facts."[127]

However, the dissent argued that this "will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment."[128] The Court effectively countered by acknowledging that "victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur . . . ."[129] This legal remedy is sufficiently adequate in co-worker harassment cases and "is thought to provide adequate protection for tort plaintiffs in many other situations."[130]

The dissent's proposed test would complicate issues for the jury and place too high a burden on employers in the Title VII context.[131] The more limited definition, as defined by the Court, is simpler and ultimately more effective than the dissent's preferred standard.[132]

122. *See id.* at 2444, 2450.
123. *Id.* at 2450.
124. *Id.*
125. *See Vance*, 133 S. Ct. at 2451.
126. *Id.*
127. *Id.*
128. *Id.* at 2463 (Ginsburg, J., dissenting).
129. *Id.* at 2451 (majority opinion).
130. *See Vance*, 133 S. Ct. at 2451-52.
131. *See id.*
132. *See id.* at 2444, 2451-52.

3. Expanding the Definition

Limiting the definition of "supervisor" is important to protecting the interests of employers, employees, and juries in that it provides a much clearer explanation of who may fall within that category.[133] The definition of a "tangible employment action," however, is lacking in one key area. Remember that 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."[134] The Court has missed a crucial part of a supervisor's capacity, one that can have a significant impact on an employee facing harassment by his or her supervisor.[135] This missing piece is the power to control employee hours and shifts directly.[136]

In its limitation of the definition of a "tangible employment action," the Court has effectively stripped "supervisor" status from those who have a very real economic power over their subordinates.[137] The Court considered those actions "that have direct *economic* consequences, such as termination, demotion, and pay cuts."[138] The Court further stated: "'[t]he supervisor has been empowered by the company *as a distinct class* of agent to make *economic* decisions affecting other employees under his or her control . . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.'"[139]

This emphasis on the economic impact of the supervisor's subordinates is crucial to understanding the definition of a "tangible employment action" reached by the Court in *Vance*, *Ellerth*, and *Faragher*.[140] The control over subordinates' hours and shifts enables use of the supervisor's authority for harassment, in which case the employee should be protected just as he or she would be for any of the other economic harms proffered by the Court.[141] As Justice Ginsburg noted in her dissent, "[an employee] may be saddled with an excessive workload or with *placement on a shift* spanning hours disruptive of [his or] her family life."[142]

133. *See id.* at 2454.
134. *Ellerth*, 524 U.S. at 761.
135. *See id.*
136. *See id.*
137. *See id.* at 761-62.
138. *Vance*, 133 S. Ct. at 2440 (emphasis added).
139. *Id.* at 2448 (quoting *Ellerth*, 524 U.S. at 762) (emphasis added in part).
140. *See id.* at 2439, 2448. *See also Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 808.
141. *See Vance*, 133 S. Ct. at 2456 (Ginsburg, J., dissenting).
142. *Id.* (emphasis added).

Though the dissent acknowledged this problem, it goes too far in expanding its definition of "supervisor."[143] To expand the definition to those who control a subordinate's "daily work" is overly ambiguous and will not provide a strong framework for vicarious liability analysis.[144] This definition, adopted by the EEOC in response to *Ellerth* and *Faragher*, significantly expands those who may qualify as "supervisors" in contrast to the Court's definition in *Vance*.[145]

The EEOC notes:

> In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training. There was no question that the Court viewed them *both* as "supervisors," even though one of them apparently lacked authority regarding tangible job decisions.[146]

In reaching this conclusion, the EEOC erred in that the Court did not consider whether the other lifeguard was a supervisor, as neither party contested this issue.[147] Because the issue was not squarely before the Court, it was not decided.[148] The EEOC, therefore, was overzealous in its decision to so greatly expand the scope of what qualifies an individual as a "supervisor" for the purpose of Title VII vicarious liability.[149]

4. The Negligence Standard

If "[t]he ability to direct another employee's tasks is simply not sufficient," then the negligence standard will apply to Title VII liability.[150] This issue is hotly contested between the Court and the dissent.[151] The dissent opined that this definition "will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment."[152] This is most certainly not the case as the negligence standard, though not providing for vicarious liability, establishes an avenue through which harassed employees may seek remedy.[153]

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143. *See id.* at 2457.
144. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 69, at 3.
145. *Compare id. with Vance*, 133 S. Ct. at 2448.
146. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 69, at 4.
147. *See Vance*, 133 S. Ct. at 2447 (majority opinion).
148. *Id.*
149. *See id.* at 2447.
150. *Id.* at 2448.
151. *See id.* at 2448, 2455.
152. *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).
153. *See id.* at 2453 (majority opinion).

The Court concluded that "[n]egligence provides the better framework for evaluating an employer's liability when a harassing employee lacks the power to take tangible employment actions."[154]

> In any event, the dissent is wrong in claiming that our holding would preclude employer liability in other cases with facts similar to these. Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant. Thus, it is not true, as the dissent asserts, that our holding "relieves scores of employers of responsibility" for the behavior of workers they employ.[155]

Absent the ability to take a "tangible employment action" against other employees, a harassing employee is simply a co-worker in terms of Title VII remedies.[156] The definition of a "tangible employment action," though lacking in the aspect of those individuals with the power to control employee shifts and hours directly, is narrow enough to protect the legitimate interests of employers, yet broad enough to afford extra protection to harassed employees.[157]

V. CONCLUSION

The holding in *Vance* represents a chasm between two competing modes of thought.[158] Correctly, the Court held that "supervisors" are only those who can take a "tangible employment action" for purposes of Title VII vicarious liability.[159] This limitation will simplify the analysis for both courts and juries, and will help prevent confusion by reducing the complexity of these analyses.[160]

While the Court's definition of a "supervisor" is correct, its definition of what constitutes a "tangible employment action" is limited in that it does not account for those individuals who have the ability to control

154. *Id.* at 2448.
155. *Id.* at 2453 (internal citations omitted).
156. *See id.* at 2448.
157. *See Vance*, 133 S. Ct. at 2448.
158. *Compare id.* at 2439 (majority opinion) *with id.* at 2457 (Ginsburg, J., dissenting) *and* EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 69, at 3.
159. *See Vance*, 133 S. Ct. at 2454 (majority opinion).
160. *See id.* at 2450.

subordinates' work shifts and hours.[161] In this aspect only, the dissent was correct when it argued that "[t]he limitation the Court decrees . . . ignores the conditions under which members of the work force labor . . . ."[162] This slight expansion of the Court's definition of a "tangible employment action" would serve as a more appropriate balance between the contrasting views of the Court, and better protect individuals seeking a remedy under Title VII.

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161. *See Ellerth*, 524 U.S. at 761.
162. *See Vance*, 133 S. Ct. at 2455 (Ginsburg, J., dissenting).