NOTES & COMMENTS

A BRIGHT LINE, BUT WHERE EXACTLY? A CLOSER LOOK AT *VANCE V. BALL STATE UNIVERSITY* AND SUPERVISOR STATUS UNDER TITLE VII

by
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Much of employment litigation is about determining why an employer took the action it did—but harassment cases often turn on who did the harassing. Title VII jurisprudence developed a series of tests to determine when an employer could be held vicariously liable for harassment. A key factor in the analysis is whether the harasser was a supervisor. In Vance v. Ball State University *the U.S. Supreme Court held that an individual is a supervisor when he or she is empowered to take tangible employment actions against the harassed employee. That seemingly bright-line rule has generally been seen as favorable to employers (though the ways in which some courts have interpreted the* Vance *holding show that predicting supervisor status is still not an exact science).This Comment argues that courts should take a more nuanced and factual approach when applying the test laid out in* Vance. *That approach is supported by the Supreme Court's rationale for holding employers vicariously liable in the first place—employers should be responsible when they give power to individuals who abuse it to harass other employees.*

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INTRODUCTION

Recent news coverage has drawn attention to the alarming incidence of sexual assaults and harassment on college campuses,[1] in the military,[2] and even on public streets.[3] This increased attention has helped spur debate about what should be done to combat these problems.[4] But what about sexual harassment in the workplace? Despite the fact that federal law has long prohibited workplace sexual harassment,[5] and many employers now provide sexual-harassment training to employees,[6] it remains a serious problem.[7]

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[1] *See, e.g.*, Jennifer Ludden, *Student Activists Keep Pressure on Campus Sexual Assault*, NPR (Aug. 26, 2014), http://www.npr.org/2014/08/26/343352075/student-activists-keep-sexual-assault-issues-in-the-spotlight.

[2] Mark Thompson, *Military's War on Sexual Assault Proves Slow Going*, TIME (Dec. 4, 2014), http://time.com/3618348/pentagon-sexual-assault-military/.

[3] A two-minute video showing a woman being harassed by strangers as she walked around New York City received more than five million views in less than a day, and sparked an intense debate about street harassment. Stav Ziv, *Video Capturing Street Harassment in NYC Sparks Debate*, NEWSWEEK (Oct. 29, 2014), http://www.newsweek.com/video-capturing-street-harassment-nyc-sparks-heated-debate-280715. The video currently has over 41.5 million views on YouTube. Street Harassment Video, *10 Hours of Walking in NYC as a Woman*, YOUTUBE (Oct. 28, 2014), https://www.youtube.com/watch?v=b1XGPvbWn0A.

[4] Proposals have ranged from affirmative consent laws to early-childhood education, and even to encouraging women to carry concealed firearms. *See* Amanda Holpuch, *California Lawmakers Push for 'Yes Means Yes' Consent Law at High Schools*, GUARDIAN (Mar. 4, 2015), http://www.theguardian.com/us-news/2015/mar/04/california-lawmakers-expand-yes-means-yes-consent-high-schools; Mike Domitrz, *Lowering Sexual Assault on College Campuses and in the Military Starts in Elementary School*, HUFFINGTON POST: BLOG (Nov. 16, 2014), http://www.huffingtonpost.com/mikedomitrz/lowering-sexual-assault-o_b_5829602.html; *Women with Guns: Is It a Solution to Rape on Campus?*, CBSNEWS: CRIMESIDER (Feb. 24, 2015), http://www.cbsnews.com/news/women-with-guns-is-the-push-for-concealed-carry-legislation-a-solution-to-rape-on-campus/.

[5] Though Title VII of the Civil Rights Act was passed in 1964, sexual harassment was not recognized as a cause of action under Title VII until 1976. Williams v. Saxbe, 413 F. Supp. 654, 657–58 (D.D.C. 1976), *rev'd on other grounds*, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); s*ee* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 45–46 (1990).

[6] Sexual-harassment training has become a growing industry as more employers seek help from outside experts. Jeff Green, *The Silencing of Sexual Harassment*, BLOOMBERG BUSINESSWEEK, Nov. 21, 2011, at 27. Of course, employers are also motivated to provide training because it is an effective way to avoid liability in harassment claims. *Harassment Training for Supervisors Is Key to Minimizing Risk*, NEV. EMP. L. LETTER, Jun. 2014, at 2, 3–4; *see also infra* notes 28–34 and accompanying text.

[7] Thirty percent of all charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) involved workplace harassment. Press Release, U.S. EEOC, Workplace Harassment Still a Major Problem Experts Tell EEOC at Meeting (Jan. 14, 2015), http://www.eeoc.gov/eeoc/newsroom/release/1-14-15.cfm.

The Supreme Court's recent decision in *Vance v. Ball State University* narrowed when an employer can be held vicariously liable for workplace harassment under Title VII.[8] The Court held that an employer is only vicariously liable for harassment by a supervisor when that supervisor has been given authority to take tangible employment actions against his victim.[9] Many hailed the decision as a victory for employers.[10] However, a number of courts have resisted literally applying the Court's definition of supervisor.[11] This Comment argues that courts should take a more expansive view of supervisor status to account for the varied means by which an employer may effectively delegate the power to take tangible employment actions. The *Vance* decision acknowledged the possibility of de facto supervisor status under certain circumstances, such as when an employer gives the power to take tangible employment actions to such a limited number of individuals that those individuals are effectively forced to rely on the recommendations of others.[12] Courts should extend this rationale to other situations in which an individual lacking formal authority to take tangible employment actions nonetheless wields the power to effectively carry them out.

Part I of this Comment explains the importance of supervisor status in Title VII harassment claims. Part II analyzes the Supreme Court's decision in *Vance v. Ball State University* and highlights the Court's reluctance to fully endorse a standard that considers only the authority an employer formally gives to an employee. The Court sought to allay concerns that its decision would allow employers to insulate themselves from liability by recognizing that an employer may "effectively delegate[]" the authority to take tangible employment actions when it concentrates formal author-

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The EEOC's most recent statistics show that it received nearly 7,000 sexual-harassment charges in 2014. *Charges Alleging Sexual Harassment FY 2010–FY 2014*, U.S. EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm. That data does not include harassment charges filed with state administrative agencies. *Id.* The data for 2011, the most recent year with available statistics for claims filed with the EEOC and state agencies, shows that over 11,000 sexual harassment charges were received nationwide. *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2011*, U.S. EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm. The actual number of sexual harassment cases is likely higher because some states, such as Oregon, do not require plaintiffs to file an administrative charge before proceeding to court. *See, e.g.*, OR. REV. STAT. § 659A.870(2) (2013) ("The filing of a[n administrative] complaint . . . is not a condition precedent to the filing of any civil action.").

[8] Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013).

[9] *Id.*

[10] *See, e.g.*, Pat Murphy, *Defense Lawyers Celebrate U.S. Supreme Court Win on Supervisor Liability*, LAW. USA (June 26, 2013), 2013 WLNR 16122611.

[11] *See* Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 737–39 (10th Cir. 2014); *see also* Cole v. Mgmt. & Training Corp., No. 4:11–CV-118-JHM, 2014 WL 2612561, at *3 (W.D. Ky. June 11, 2014).

[12] *Vance*, 133 S. Ct. at 2452. See *infra* notes 83–86 and supporting text.

ity in such a way that the formal decision-makers are entirely dependent upon the recommendations of others when making employment decisions.[13] Part III discusses the impact that a rigid application of the Court's holding could have on employer liability. The dissent's concern that the Court's standard would preclude employer liability in many situations is examined using several district-court cases where courts applied a narrow interpretation of the *Vance* test for supervisor status.[14] Part IV argues that the preferable approach to supervisor status should include a careful examination of an employer's entire decision-making process, rather than trying to pinpoint an employee's formal authority without considering how that authority is actually exercised in the workplace. A more fluid analysis is essential to recognizing the different ways an individual without the formal power to take tangible employment actions can still effectively carry them out. This approach also comports with the "aided in accomplishing" principle of agency law that the Supreme Court leaned on in *Vance*,[15] and is faithful to the Court's recognition in *Staub v. Proctor Hospital* that an employer should not avoid liability merely because it funnels all final personnel decisions through supervisors who blindly accept the information provided by subordinates.[16] Several scenarios are then offered as examples of when an individual lacking the formal power to take tangible employment actions should be considered a supervisor for purposes of Title VII vicarious liability.

I. WHETHER AN EMPLOYER IS VICARIOUSLY LIABLE FOR HARASSMENT CLAIMS UNDER TITLE VII DEPENDS ON THE STATUS OF THE HARASSER.

Title VII prohibits discrimination "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."[17] Its reach is not limited to discrete acts of tangible or economic discrimination.[18] When the alleged discrimination at issue is tangible (e.g., ter-

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[13] *Vance*, 133 S. Ct. at 2452.

[14] The result at the trial level in *Kramer v. Wasatch Cty.*, 857 F. Supp. 2d 1190, 1202–03, 1205–06 (D. Utah 2012), was particularly disturbing because the harasser was clearly in a position of power relative to Ms. Kramer, and used that authority to sexually assault her. *See infra* Part III.B.

[15] *Vance*, 133 S. Ct. at 2441 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–63 (1998)); Faragher v. City of Boca Raton, 524 U.S. 775, 802–03 (1998).

[16] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

[17] 42 U.S.C. § 2000e-2(a)(1) (2012).

[18] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993). The Supreme Court has recognized that the phrase "terms, conditions, or privileges of employment" encompasses a broad array of disparate treatment in the workplace. *Id.* at 21. To be actionable, hostile-work-environment discrimination must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

mination or demotion), much of employment litigation involves proving *why* the employer took the action it did.[19] Harassment cases differ in that they often involve repeated conduct over a period of months or even years,[20] and usually there is a strong argument that the conduct itself was carried out because of personal motives.[21] As a result, employers are not automatically vicariously liable for harassment committed by their employees.[22]

Employer liability is crucial in Title VII harassment claims because the statute does not allow victims of harassment to individually sue their harassers.[23] If an employee cannot establish that his or her employer is

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working environment." *Id.* (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

[19] Even when the alleged act or acts of discrimination are readily identifiable, successfully proving a claim under Title VII is no easy task. A 2009 study of Title VII employment cases revealed that "over 80 percent of defendants' motions for summary judgment in employment discrimination cases are either granted or granted-in-part when decided by the district court." Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1015. For a fascinating examination of the effect summary judgment and the *Iqbal/Twombly* pleading standard have had on employment claims in federal court, see Mark W. Bennett, Essay, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685 (2012–2013).

[20] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.").

[21] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756–57 (1998) (recognizing that sexual harassment frequently is based on sexual urges). Employer liability under Title VII is governed by agency principles. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 541–42 (1999). Ordinarily an employer may be liable for torts committed by an employee in the scope of employment. *Ellerth*, 524 U.S. at 756. One of the requirements for employer liability is that the employee's act, even if misguided, was meant to further the employer's business. *Id.* This can be easy to establish with respect to tangible or economic discrimination because courts routinely hold that such decisions become decisions by the employer when given effect. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998). However, "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757.

[22] *See* Whitten v. Fred's, Inc., 601 F.3d 231, 247 (4th Cir. 2010) (noting that while an employer *may* be held vicariously liable for harassment, that liability is not automatic). Courts have long been resistant to imposing vicarious liability in sexual-harassment cases. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 173 (2013). In particular, many courts struggled with vicarious liability in the sexual-harassment context because the harassment was seen as contrary to the interests of the employer and often in direct violation of company policy. *Id.* at 174.

[23] It is now well established that Title VII only subjects *employers* to liability for unlawful discrimination. *See* Fantini v. Salem State Coll., 557 F.3d 22, 30 (1st Cir.

vicariously liable for statutory employment torts, usually the only recourse is to try to bring common-law claims like assault or intentional infliction of emotional distress based on the harassing conduct.[24] However, conduct that is sufficient to create a hostile work environment under Title VII may not be egregious enough to meet the higher burden required for an intentional-infliction-of-emotional-distress claim.[25] Even when a plaintiff can succeed in bringing common-law tort claims based on harassment, he or she must still establish that the harasser was acting within the course and scope of employment when the acts were committed to trigger vicarious liability of the employer.[26] Perhaps because of the peculiar difficulties that may arise in relying solely on common-law claims, most sexual-harassment lawsuits are brought under Title VII.[27]

2009) ("After reviewing the analysis fashioned by all of our sister circuits, we are persuaded by their analysis and therefore take this opportunity to determine as they have that there is no individual employee liability under Title VII.").

[24] *See* Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (noting that a plaintiff without a remedy under Title VII may still be able to bring a harassment claim under state employment statutes or even as separate common-law tort claims). Virtually every state now has its own employment discrimination statutes, but many states use federal law to interpret these statutes. *See* Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 557 n.109 (2013). A few states have allowed for individual liability for sexual harassment, but they are in the minority. *See, e.g.*, Elezovic v. Ford Motor Co., 697 N.W.2d 851, 861 (Mich. 2005); Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 926 (Wash. 2001). For a detailed discussion of state decisions holding harassers individually liable for sexual harassment, see Anthony D. Pignotti, Note, *If You Grab the Honey, You Better Have the Money: An In-Depth Analysis of Individual Supervisor Liability for Workplace Sexual Harassment*, 5 AVE MARIA L. REV. 207, 210 n.16, 216–20 (2007).

[25] Chamallas, *supra* note 22, at 176. In many states, there are other impediments to bringing common-law tort claims based on harassment. Some states have determined that such claims are preempted by state employment-discrimination statutes, while others have found that they may be barred by workers' compensation-exclusivity statutes. Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 539 (2013); *see, e.g.*, Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) (holding that common-law intentional-infliction-of-emotional-distress claim was preempted by state employment discrimination statute); Green v. Wyman-Gordon Co., 664 N.E.2d 808, 813 (Mass. 1996) (affirming summary judgment for employer after concluding that workers' compensation statute provided the exclusive remedy for common-law tort claims based on workplace sexual harassment).

[26] *Ellerth*, 524 U.S. at 756–57. Vicarious liability is often necessary in order for the plaintiff to be able to satisfy a monetary judgment because the individual perpetrators of harassment are a "notoriously unreliable source of funds." Chamallas, *supra* note 22, at 136–37.

[27] 2 SUSAN M. OMILIAN, SEX-BASED EMPLOYMENT DISCRIMINATION § 25:1 (Supp. 2014–2015). Several articles have advocated that common-law tort claims are the best avenue for bringing sexual-harassment claims, but these arguments do not appear to have been embraced by the legal community. *See, e.g.*, Joanna Stromberg, Student Article, *Sexual Harassment: Discrimination or Tort?*, 12 UCLA WOMEN'S L.J. 317, 319

A. The Faragher–Ellerth *Framework Limits Vicarious Liability to Harassment Committed by Supervisors*

Title VII jurisprudence developed a series of tests to determine when an employer could be held vicariously liable for hostile-work-environment harassment.[28] A key factor in this liability analysis is the status of the harasser.[29] The Supreme Court concluded that when the harasser is a supervisor the employer *may* be subject to vicarious liability.[30] If the harasser is a supervisor then the employer is vicariously liable for harassment when a tangible employment action is actually taken against the victim.[31] But when there is no tangible employment action, the employer may escape liability by proving a two-prong affirmative defense.[32] To establish the *Faragher–Ellerth* defense, the employer must prove (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the victim unreasonably failed to utilize the employer's preventive or corrective procedures.[33]

A circuit split developed over when an individual qualified as a supervisor for purposes of vicarious liability under the *Faragher–Ellerth* framework.[34] The U.S. Supreme Court finally weighed in and created, at

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(2003); *see also* Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 5 (1999).

[28] *See generally* Jason B. Binimow, Annotation, *When Is Supervisor's Hostile Environment Sexual Harassment Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) Imputable to Employer*, 157 A.L.R. FED. 1, 31–34 (1999). It is also possible to bring harassment claims under a quid pro quo theory. Gerald v. Univ. of P.R., 707 F.3d 7, 20 (1st Cir. 2013); Okoli v. City of Baltimore, 648 F.3d 216, 222–23 (4th Cir. 2011). Quid pro quo harassment occurs when a supervisor attempts to use his or her position to extract sexual favors from a subordinate. *Gerald*, 707 F.3d at 20. The harasser may either threaten adverse consequences if the sexual demand is not met or condition a favorable job benefit upon submission to the demand. Craig v. M & O Agencies, Inc., 496 F.3d 1047, 1054 (9th Cir. 2007). Liability will always be established under this theory if the harasser takes a tangible employment action against the victim. *Ellerth*, 524 U.S. at 762–63.

[29] Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013); *see also* Fenton v. HiSAN, Inc., 174 F.3d 827, 829 (6th Cir. 1999). Employer liability for coworker harassment under a negligence standard is discussed briefly *infra* Part I.B. The shortcomings of the negligence framework are explained in more detail *infra* Part III.C.

[30] *See Ellerth*, 524 U.S. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).

[31] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 790.

[32] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 780.

[33] Noviello v. City of Boston, 398 F.3d 76, 94–95 (1st Cir. 2005).

[34] *Compare id.* at 96 (concluding that a harasser cannot qualify as a supervisor when the harasser lacks the power to affect the terms and conditions of the victim's employment), *with* Whitten v. Fred's, Inc., 601 F.3d 231, 245 (4th Cir. 2010) (deciding that "other features of the employment relations" could make a harasser a

least at first glance, a bright-line rule.[35] The Court, in the five-to-four decision *Vance v. Ball State University*, said that an individual is a supervisor when that individual is empowered to take tangible employment actions[36] against the victim of the harassment.[37] But, as the dissent noted, the Court's acknowledgment that in some instances an individual without formal authority to take tangible employment actions may still be a supervisor "dims the light" of its supposed bright-line holding.[38]

B. Employers Also May Be Directly Liable for Their Own Negligence when They Fail to Take Appropriate Steps to Stop Harassment from Occurring or Continuing

An employee who is harassed by a non-supervisor is not entirely without a remedy under Title VII.[39] However, an employer can only be liable for an employee's harassment of a coworker when the employer is negligent with respect to preventing or stopping the harassment.[40] Under this negligence framework, liability turns on the employer's response when an employee is harassed.[41] Once an employer is put on actual or constructive notice of harassment it must respond in a manner that is "reasonably calculated to end the harassment."[42] This often means that

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supervisor even when the harasser lacked the power to take tangible employment actions against the victim).

[35] Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

[36] The Supreme Court has defined a tangible employment action as "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 action taken against the employee must involve an "official act" on the part of the employer. Pa. State Police v. Suders, 542 U.S. 129, 144 (2004) (quoting *Ellerth*, 524 U.S. at 762). When a plaintiff is constructively discharged (i.e., quits because of circumstances under which no reasonable employee would be expected to continue working) that decision to quit is not treated as a tangible employment action for purposes of precluding the employer from relying on the *Faragher/Ellerth* affirmative defense. *Id.* at 148.

[37] *Vance*, 133 S. Ct. at 2439.

[38] *Id.* at 2462 (Ginsburg, J., dissenting).

[39] *Id.* at 2439 (majority opinion).

[40] *See id.* One commentator has noted it is still an open question whether a victim of harassment can even recover damages from an employer on a negligence theory. *See* Samuel R. Bagenstos, *Formalism and Employer Liability Under Title VII*, 2014 U. CHI. LEGAL F. 145, 160–61. Title VII only authorizes damages against employers who engage in *intentional* discrimination, so it is unclear whether an employer being held directly liable for its own negligence in preventing harassment could be liable for damages. *Id.*

[41] Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 605 (7th Cir. 2006) (quoting Dunn v. Wash. Cty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005)) ("[F]or purposes of Title VII hostile work environment liability based on negligence . . . what . . . matter[s] is how the employer handles the problem.").

[42] EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 319 (4th Cir. 2008) (quoting Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126, 1131 (4th Cir. 1995)).

an employer must show that it conducted a prompt investigation and appropriately disciplined the harasser in order to avoid liability.[43] The negligence framework is not limited exclusively to harassment by non-supervisors[44]—in fact, the Supreme Court in *Vance* emphasized that "an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment."[45]

II. THE *VANCE* DECISION AND ITS AFTERMATH

A. Prior to Vance*, Some Circuits Limited Supervisor Status to Individuals with the Power to Take Tangible Employment Action While Others Determined that Day-to-Day Authority in the Workplace Could Make One a Supervisor*

The Supreme Court's decisions in *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth* provided a basic template for sexual harassment cases, but they provided minimal guidance about how to determine the boundaries of this new framework.[46] Lower courts were still left to grapple with how to define terms that featured prominently in the *Faragher* and *Ellerth* opinions—most notably what constituted a tangible employment action[47] and who should be treated as a supervisor for purposes of vicarious liability.[48]

Less than a year after *Faragher* and *Ellerth* were decided, the EEOC revised its enforcement guidelines on vicarious employer liability for harassment under Title VII.[49] The agency adopted a broad interpretation of who qualified as a supervisor for vicarious liability purposes.[50] First, an individual would be considered a supervisor if authorized to "undertake *or* recommend tangible employment decisions" affecting the victim of the harassment—the power to recommend would be sufficient as long as the

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[43] EEOC v. Xerxes Corp., 639 F.3d 658, 669 (4th Cir. 2011).

[44] The negligence framework is also the only means for a plaintiff to hold an employer liable for harassment committed by non-employees, like independent contractors or even customers. *Erickson*, 496 F.3d at 605; Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998).

[45] *Vance*, 133 S. Ct. at 2452.

[46] Christine Bradshaw, Comment, *A Revised Tangible Employment Action Analysis: Just What* Is *an Undesirable Reassignment?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 385, 391–93 (2006).

[47] *Id.* at 393–401.

[48] *See* Jodi R. Mandell, Comment, Mack v. Otis Elevator*: Creating More Supervisors and More Vicarious Liability for Workplace Harassment*, 79 ST. JOHN'S L. REV. 521, 524–25 (2005) (noting that the Supreme Court did not provide any specific criteria for determining which employees qualify as supervisors, leading to conflicting definitions being developed by lower courts).

[49] U.S. Equal Emp't Opportunity Comm'n, Notice: Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), http://www.eeoc.gov/policy/docs/harassment.html.

[50] *Id.* § 3(B).

recommendation received substantial weight from the final decisionmaker.[51] Second, an individual with the authority to direct the victim's daily work activities would also be considered a supervisor.[52] Individuals with the power to direct a victim's daily activities were considered to be supervisors because they possessed the power to manipulate a victim's workload by assigning undesirable tasks—the agency reasoned this authority enhanced the ability to commit harassment.[53]

Courts struggled to develop a clear test to determine supervisor status.[54] The general premise in most courts' analyses was the same—under *Faragher* and *Ellerth* supervisor status required some authority given by the employer to the harasser which the harasser could use to accomplish the harassment.[55] There was little consistency, however, regarding precisely what level of authority the harasser needed to possess.[56] The Fourth[57] and Seventh[58] Circuits adopted narrower interpretations of supervisor status that turned on an individual's power to *actually take* tangible employment actions.[59] Other courts accepted the EEOC's position that recommendations regarding tangible employment actions[60] and the ability to control the victim's daily activities[61] could make an individual a supervisor.[62] While it was clear that conflicting case law had developed at the circuit level, some cautioned after the Supreme Court granted certiorari in *Vance v. Ball State University* that despite the attractiveness of predictability, "a bad, clear rule is worse than a good, complex rule."[63]

B. Vance *Chose the Power to Take Tangible Employment Actions Standard as the Correct Test for Supervisor Status Under Title VII*

The Supreme Court concluded in *Vance v. Ball State University* that the power to take tangible employment actions was necessary to be a su-

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[51] *Id.* § 3(A) (emphasis added).

[52] *Id.*

[53] *Id.* § 3(A)(2).

[54] *See* Mandell, *supra* note 48, at 536–37.

[55] Burlington Indus. v. Ellerth, 524 U.S. 742, 761–63 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 803–05 (1998); Mandell, *supra* note 48, at 536–41.

[56] Mandell, *supra* note 48, at 537–41.

[57] Mikels v. City of Durham, 183 F.3d 323, 333 (4th Cir. 1999).

[58] Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998).

[59] Mandell, *supra* note 48, at 537–38.

[60] Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1254, 1265 (M.D. Ala. 2001).

[61] Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 973 (D. Minn. 1998).

[62] *See* Mandell, *supra* note 48, at 539–41.

[63] Catherine L. Fisk, *Supervisors in a World of Flat Hierarchies*, 64 HASTINGS L.J. 1403, 1419 (2013).

pervisor under the *Faragher–Ellerth* framework.[64] Ball State University's dining services division had employed Maetta Vance for over fifteen years when she sued her employer for subjecting her to a racially hostile work environment.[65] Ms. Vance, who is African-American, alleged that a white employee named Saundra Davis attempted to intimidate her in the workplace and that Davis's behavior continued even after Vance had complained to her employer.[66] Ms. Vance held a part-time catering assistant position while Ms. Davis was a catering specialist.[67] Ms. Vance's lawsuit alleged that Davis was her supervisor and therefore Ball State was vicariously liable for Davis' harassment.[68] The parties disagreed about what power Ms. Davis had as a catering specialist, but agreed that she "did not have the power to hire, fire, demote, promote, transfer, or discipline Vance."[69] The District Court concluded that Ms. Davis could not be considered a supervisor without such authority, and ultimately entered summary judgment in favor of Ball State.[70] The Seventh Circuit affirmed, and the Supreme Court granted certiorari.[71]

The Supreme Court approached the issue of supervisor status from the context of the general framework it had announced in *Faragher* and *Ellerth*.[72] It emphasized that "supervisor" was not a statutory term, and therefore should be defined in a way that harmonized with *Faragher* and *Ellerth*.[73] The Court reasoned that both decisions presumed a "unitary category of supervisors" and therefore were incompatible with any proposed definition that would establish two categories of supervisors—those with the power to take tangible employment actions, and those lacking this power but possessing the power to control a victim's daily activities.[74] The Court rejected the uncertainty of such an approach and proclaimed that the *Faragher–Ellerth* framework presupposes that supervisor status "can usually be readily determined, generally by written documentation."[75] It called the EEOC's approach to the level of control sufficient to make one a supervisor a "standard of remarkable ambiguity," and point-

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[64] Vance v. Ball State Univ., 133 S. Ct. 2434, 2454 (2013).

[65] *Id.* at 2439–40.

[66] *Id.*

[67] *Id.* at 2439.

[68] *Id.* at 2440.

[69] *Id.* at 2439.

[70] *Id.* at 2440.

[71] *Id.*

[72] *Id.* at 2443.

[73] *Id.* at 2446. Title VII defines "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person" but does not distinguish between different types of agents (i.e., supervisors vs. employees). *See* 42 U.S.C. § 2000e(b) (2012).

[74] *Vance*, 133 S. Ct. at 2443.

[75] *Id.*

ed out that Ms. Vance and the United States as amicus curiae reached different conclusions when applying that standard to the facts in the record.[76]

The Court stressed the need for a definition of supervisor that could be easily applied in the context of litigation, both by trial courts and the parties themselves.[77] It touted the power to take tangible employment actions as the best way to clearly distinguish between supervisors and coworkers for vicarious-liability purposes.[78] The Court was clear in its ultimate holding—an employee is a supervisor for vicarious-liability purposes under Title VII if he or she is empowered to take tangible employment actions against the victim of the harassment.[79]

The Court dismissed the dissent's critique that the ability to control an employee's daily work could also be used to perpetuate harassment by noting that many individuals, even coworkers, are capable of deliberately making the workplace unpleasant for others.[80] It accepted that most workplace tortfeasors are aided to some extent by their agency relation with their employers, and therefore concluded that an ability-to-control test for supervisor status would be overinclusive.[81] The Court's repeated response to the dissent's criticism that its holding would leave victims of harassment unprotected was to highlight that negligence was effectively a safety net that could always be relied on by employees as a basis for establishing employer liability.[82]

The Court did provide a meaningful response to the dissent's critique that the majority's definition would allow employers to insulate themselves from liability by concentrating the authority to take tangible employment actions in the hands of a few select individuals.[83] It deter-

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[76] *Id.* at 2449–50.

[77] *Id.* at 2450.

[78] *Id.* at 2443.

[79] *Id.* at 2454.

[80] *Id.* at 2447–48.

[81] *Id.*

[82] *Id.* at 2448, 2451–53. Professor Samuel Bagenstos highlighted the significance of the *Vance* Court's formal adoption of negligence as the baseline rule for employer liability. Bagenstos, *supra* note 40, at 156–64. He noted that although the Court had assumed negligence was the standard for coworker harassment, it had never formally adopted it. *Id.* at 156–57.

[83] *Vance*, 133 S. Ct. at 2452. Indeed, attorneys have already begun to advise employers to make changes to their management practices in response to the *Vance* decision. *See* Ryan B. Frazier, *Supersize Victory: Shift Leader Isn't Supervisor Under Title VII*, UTAH EMP. L. LETTER 1, 3 (Dec. 2013), http://www.kmclaw.com/media/article/218_Frazier_HRHero_Dec%202013.pdf (advising employers to consolidate the authority to take tangible employment actions in the hands of a limited number of employees); *Attys Weigh In on Justices' Ruling in Harassment Suit*, LAW360 (June 24, 2013), http://www.law360.com/articles/452731/attys-weigh-in-on-justices-ruling-in-harassment-suit (quoting employment attorneys who recommend employers draft job

mined that an employer attempting to insulate itself from liability in this fashion might unwittingly allow employees without the formal authority to take tangible employment actions to be deemed supervisors.[84] The Court surmised that the few individuals formally given the power to take tangible employment actions would have limited independent discretion, presumably due to their lack of direct involvement in day-to-day operations, and therefore would have to rely on the recommendations of non-supervisor employees with actual first-hand knowledge when making decisions.[85] The Court stated that under such circumstances "the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."[86]

C. The Dissent Argued that the Court's Narrow Test for Supervisor Status Would Deprive Many Harassment Victims of the More Plaintiff-Friendly Faragher–Ellerth *Framework for Employer Liability*

Justice Ginsburg, joined by three other justices in dissent, criticized the majority's holding as at odds with *Faragher* and *Ellerth*, blind to the realities of the workplace, and contrary to the ultimate objective of Title VII—preventing discrimination.[87] She would have followed the EEOC's approach that an individual with the authority to direct an employee's

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descriptions that clearly delegate tangible-employment-action authority and provide appropriate supervisory training).

[84] *Vance*, 133 S. Ct. at 2452.

[85] *Id.*

[86] *Id.* The Court cited only one case as a possible example of when an employer might be held to have "effectively delegated" the power to take tangible employment actions. *Id.* (citing Rhodes v. Ill. Dep't of Transp., 359 F.3d 498 (7th Cir. 2004)). The plaintiff in *Rhodes*, an employee with the Illinois Department of Transportation, brought a hostile-work-environment harassment claim against her employer based on conduct by a superior who was second-in-command at the maintenance yard where she worked. *Rhodes*, 359 F.3d at 501–03, 505. No one at the maintenance yard where the plaintiff worked had the authority to take tangible employment actions. *Id.* at 501–02. That authority was instead given to an off-site employee. *Id.* at 502. The Seventh Circuit applied its standard for supervisor status, which is almost identical to the test established in *Vance*, and concluded that the plaintiff's harasser was not a supervisor because he did not have the power to "*directly* affect the terms and conditions" of Rhodes's employment. *Id.* at 506 (emphasis in original). The Supreme Court quoted from Judge Rovner's partial concurrence in *Rhodes*, which was ironic given her outspoken criticism of the very test for supervisor status that the Supreme Court adopted in *Vance*. *See Rhodes*, 359 F.3d at 510 (Rovner, J., concurring in part and concurring in judgment) ("Cases like this one suggest that we ought to re-examine the criteria we have articulated for identifying supervisors. The standard . . . arguably does not comport with the realities of the workplace[,] . . . [and] may have the practical, if unintended, effect of insulating employers from liability for harassment . . . .").

[87] *Vance*, 133 S. Ct. at 2455–56 (Ginsburg, J., dissenting).

daily activities is also a supervisor.[88] The real sting in her criticism of the majority came from the case illustrations she provided to demonstrate the harsh outcomes the Court's test for supervisor status would cause.[89] In each of the cases, the harasser clearly was aided by an ability to control the daily working conditions of the victim, but none of the harassers had the formal authority to take tangible employment actions.[90] The dissent concluded by calling for Congress to amend Title VII to overrule the Court's test for supervisor status.[91]

The majority attempted to distinguish the examples provided by the dissent, but its response was unconvincing.[92] The Court questioned whether any of the cases truly turned on the definition of supervisor, and returned to its familiar refrain that a plaintiff could always establish liability by proving the employer was negligent in preventing or stopping the harassment.[93] These arguments miss the dissent's point—the examples were meant to illustrate that in many instances harassment victims would be *forced* to rely on the often less favorable negligence standard.[94] The dissent was specifically concerned that plaintiffs would find the negligence standard more difficult to satisfy than the *Faragher–Ellerth* framework.[95] The majority's failure to directly respond to the dissent's critique of the negligence standard detracts from the "negligence is always an option" rationale it heavily leaned on, but in reality has no effect on how the Court's holding on the definition of supervisor status should be applied.

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[88] *Id.* at 2455.

[89] *Id.* at 2459–60.

[90] *Id.* at 2460.

[91] *Id.* at 2466.

[92] *See id.* at 2452–53 (majority opinion).

[93] *Id.*

[94] *Id.* at 2463–64 (Ginsburg, J., dissenting).

[95] *Id.* Justice Ginsburg emphasized that it is difficult for harassment victims to establish negligence liability because they must show that an employer knew or should have known of the harassment but failed to take appropriate corrective action. *Id.* at 2463. She pointed out that the Eleventh Circuit in *Faragher* found the employer was not liable under a negligence theory because the harassment was confined to the supervisor level and therefore the employer, through its higher management, lacked constructive notice. *Id.* at 2464. There are a number of other reasons why the negligence theory of employer liability may be more difficult for a plaintiff to establish than the *Faragher/Ellerth* vicarious-liability standard, including differences in the burden of proof at summary judgment. *See, e.g.*, Lamar v. Inst. for Family Health, No. 1:09-CV-1154 (MAD/DRH), 2011 WL 2432925, at *14 (N.D.N.Y June 16, 2011) ("[B]ecause the employer bears the burden of proving the *Faragher/Ellerth* defense, summary judgment on this issue is cautioned against unless the evidence is so overwhelming that the jury could rationally reach no other result." (internal quotation marks omitted)), *aff'd*, 472 F. App'x 98 (2d Cir. 2012). These differences are discussed *infra* Part III.C.

D. How Bright of a Line Did the Court Draw in Vance*?*

The *Vance* opinion separately repeats the Court's holding three times.[96] However, there is a subtle, but important difference in the language the Court uses in these instances. The holdings at the beginning and end of the opinion are identical—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."[97] However, the Court's holding in the middle of the opinion is narrower—there it states 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."[98] That language is unequivocal—an individual *must* be empowered to take tangible employment actions to be considered a supervisor for vicarious liability purposes.[99]

The scope of the Court's holding in *Vance* would seem to turn on what it means for an employee to be empowered to take tangible employment actions. The Court offers little guidance about how to interpret this phrase. Its prediction that supervisor status will frequently be ascertainable to the parties before litigation might suggest that some form of official authorization from an employer is required.[100] Yet the Court also refers to the ability to take tangible employment actions as the power "to effect" a significant change in employment status.[101] The ability "to effect" a particular result does not necessarily require the use of some formal means to achieve it (i.e., the power to effect change).[102] Some courts have already interpreted this language as allowing individuals with the indirect power to effect significant changes in employment status to be deemed supervisors.[103]

The Oxford English Dictionary defines "empower" as: "1. To invest legally or formally with power or authority; to authorize, license. 2. To impart or bestow power to an end or for a purpose; to enable, permit."[104] These meanings suggest an official or explicitly granted type of authority. The circuit courts that had adopted a tangible-employment-action test for supervisor status pre-*Vance* also seemed to assume that formal delegation

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[96] *Vance*, 133 S. Ct. at 2439, 2443, 2454.

[97] *Id.* at 2439, 2454.

[98] *Id.* at 2443 (emphasis added).

[99] *Id.*

[100] *See id.* at 2449.

[101] *Id.* at 2443.

[102] *Effect*, Oxford English Dictionary (2d ed. 1989).

[103] *See* Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 737–38 (10th Cir. 2014); Cacciola v. Work N Gear, 23 F. Supp. 3d 518, 530 (E.D. Pa. 2014), discussed *infra* note 190.

[104] *Empower*, Oxford English Dictionary (2d ed. 1989).

of that power by the employer was necessary.[105] The language used by the Court in *Vance* could certainly be read in the same manner—namely, that to be "empowered" to take tangible employment actions means that an individual has received an employer-sanctioned grant of authority.

The Court's acknowledgement that under certain circumstances an employer could be held to have "effectively delegated" the power to take tangible employment actions suggests a second possible interpretation of its holding.[106] Confronted with the dissent's concern that employers would be able to insulate themselves from liability, the Court countered that in those circumstances employers could still be subject to vicarious liability.[107] The way the Court explained the basis for that result is significant. It did not create a separate rule or carve out an exception to its holding. Instead, the Court synthesized this scenario into its holding that the power to take tangible employment actions is necessary for supervisor status by confirming that in certain circumstances an employer could make individuals supervisors for liability purposes by impliedly giving them the power to take tangible employment actions.[108]

It seems clear then that the Court's holding in *Vance* is capable of (at least) two interpretations, which theoretically could be placed at opposite ends of the possible spectrum of supervisor status. On one end, there is a narrow approach that would restrict supervisor status by requiring an employer to formally grant an individual the power to take tangible employment actions. Presumably this grant of power would come in the form of an official job description or some other employer-sanctioned document. At the opposite end of the spectrum is an approach that would recognize an individual as a supervisor when his or her participation in tangible-employment decisions reaches such a threshold that the employer could be said to have effectively given that individual the power to make those decisions. Some examples may be useful to illustrate this difference.

Suppose a large online office-supplies retailer operates a regional branch that has over 150 employees. The senior management employee at the regional branch is a branch manager named Bridget. She supervises all the individual department managers at the branch (customer service, marketing, warehouse, etc.) who in turn supervise the employees in their own departments on a daily basis. The non-department managers, who make up the bulk of the branch's workforce, have little-to-no contact with Bridget. Bridget is the only employee at the regional branch that

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[105] *See* Noviello v. City of Boston, 398 F.3d 76, 95–96 (1st Cir. 2005); Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 (8th Cir. 2004); Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1033–34 (7th Cir. 1998).

[106] *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2452 (2013).

[107] *Id.*

[108] *Id.*

corporate management has formally authorized to hire, fire, promote, or demote other employees. If a court were to adopt the narrowest construction of the *Vance* test, Bridget would be the only supervisor at the regional branch.

Continuing with this example, suppose that Bridget always included the individual department managers in her decision-making process whenever she was considering a tangible employment action. A court applying the *Vance* test in its broadest sense could find that every department manager is also a supervisor for purposes of vicarious liability because each department manager routinely participates in tangible-employment decisions.

If these two approaches represent the boundaries of the Court's holding in *Vance*, it would seem that courts will still have some flexibility in determining supervisor status.

III. WORKPLACES ARE TOO VARIED FOR A RIGID SUPERVISOR STANDARD

A. Defining Supervisors Exclusively by Examining an Employer's Own Formal Hierarchy Is at Odds with the Characteristics of Modern Workplaces

"Supervisors, like the workplaces they manage, come in all shapes and sizes."[109] Workplaces are in a state of flux. Openness, transparency, and individuality are becoming important features in many office environments.[110] Employers are embracing layouts designed to stimulate interaction and creativity[111] and some are even eliminating traditional offices altogether as a means of symbolizing an informal structure of shared leadership.[112] Some might dismiss these trends as superficial attempts to incorporate younger individuals into the workforce. But these changes are not merely about where people sit (or stand) at work—they are about *how* employers are choosing to operate.[113]

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[109] *Id.* at 2463 (Ginsburg, J., dissenting).

[110] *See* Olga Khazan, *Zen and the Art of Cubicle Living*, ATLANTIC (Nov. 20, 2014), http://www.theatlantic.com/health/archive/2014/11/the-perfect-office-for-mental-health/382948; *see also* Jennifer R. Baumer, *Using Office Design and Style to Woo Workers*, 35 AREA DEV.: SITE & FACILITY PLAN. (July 1, 2000), 2000 WLNR 7402604; Ethan Bernstein, *The Smart Way to Create a Transparent Workplace*, WALL ST. J. (Feb. 22, 2015), http://www.wsj.com/articles/the-smart-way-to-create-a-transparent-workplace-1424664611.

[111] Bernstein, *supra* note 110.

[112] Lawrence W. Cheek, *In New Office Designs, Room to Roam and to Think*, N.Y. TIMES (Mar. 17, 2012), http://www.nytimes.com/2012/03/18/business/new-office-designs-offer-room-to-roam-and-to-think.html.

[113] David Coleman, *How Mobile Is Changing Organizational Structures and the Future Workplace*, CMSWIRE (May 17, 2012), http://www.cmswire.com/cms/social-

Many employers are moving away from traditional hierarchies in favor of more flexible organizational structures.[114] Project-based workforces are becoming particularly popular.[115] The Court in *Vance* acknowledged these trends, though it relied on them to justify its conclusion that the power to direct daily activities is not indicative of supervisory authority.[116] The Court noted that employees in these less-centralized organizations will often have overlapping authority and fluctuating responsibilities.[117]

It is not reasonable to expect that supervisor status can be accurately discerned solely from job descriptions or express grants of power from upper management in these more fluid modern workplaces. These sorts of formal classifications are apt to become inaccurate in less hierarchical workplaces where an employee's work assignments frequently change.[118] Additionally, management may consciously decide not to strictly adhere to its own formal employee classifications when making employment decisions.[119] For example, a company seeking to quickly react to new technologies may defer to lower-level managers on personnel matters because those managers are better positioned to assess what they need to help make the company more successful.[120] Undoubtedly there are still many hierarchical workplaces that do strictly adhere to accurate job descriptions when making employment decisions. And in those workplaces, courts should give significant weight to those classifications when assessing supervisor status for harassment liability. But it makes little sense

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[114] *See* Avner Ben-Ner & Stephanie Lluis, *Learning: What and How? An Empirical Study of Adjustments in Workplace Organization Structure*, 50 INDUS. REL. 76, 76 (2011).

[115] *See* Tammy Erickson, *The Project-Based Workforce*, BLOOMBERG (Jan. 31, 2008), http://www.bloomberg.com/bw/stories/2008-01-31/the-project-based-workforcebusinessweek-business-news-stock-market-and-financial-advice.

[116] Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013).

[117] *Id.*

[118] *See supra* notes 14–16 and accompanying text; *see also* VALVE CORP., HANDBOOK FOR NEW EMPLOYEES 9, 16–17 (2012), http://www.valvesoftware.com/company/Valve_Handbook_LowRes.pdf (informing employees they were "not hired to fill a specific job description" and discouraging hierarchical structures that "inevitably begin to serve their own needs"). But in workplaces where an employee's job duties may change depending on what type of project she is working on, a job description would either need to be very broad to account for frequent changes in work, or a constantly updated, almost temporary job description. *Cf. Human Resources Audits: An Essential Tool for Improved Performance and Compliance*, [Workforce Strategies] Human Resources Rep. (BNA) at 14 (Dec. 30, 2013) (recommending regular audits to satisfy legal requirements that depend on accurate job descriptions). The latter approach would seem to be more accurate, but may not be feasible for human resources personnel.

[119] *See* Karan Girotra & Serguei Netessine, *Four Paths to Business Model Innovation*, HARV. BUS. REV., July–Aug. 2014, at 96, 101.

[120] *See id.*

to make these sorts of classifications the determining factor of supervisor status in *all* workplaces. Though they drew different conclusions from the observation, both the majority and dissent in *Vance* agreed that workplaces vary tremendously.[121] This variation is best accounted for in an approach to supervisor status that does not ignore the realities of how employment decisions are made—too narrow of an approach to supervisor status can have harsh results.

B. Strict Adherence to the "Official" Chain of Command May Produce Unfair Outcomes even in Traditionally Structured Workplaces

Justice Ginsburg lamented that the majority's narrower definition of supervisor status would leave many harassment victims without a remedy.[122] Several district-court decisions illustrate this point.

In *Kramer v. Wasatch County*, a plaintiff who was sexually assaulted by her harasser had her harassment claim dismissed by the district court on summary judgment.[123] Camille Kramer was employed by Wasatch County as a jailer and a deputy bailiff, and worked under Sergeant Benson's direction.[124] Benson had some control over Ms. Kramer's vacation schedule and also prepared her performance evaluations, but only the Sheriff had the formal authority to take tangible employment actions.[125] Benson persuaded Ms. Kramer to give him foot massages by offering to take her out for "road experience," which Kramer believed she needed in order to become a police officer.[126] Benson did not use the road session as a teaching opportunity—instead he forcibly kissed, groped, and tried to undress her.[127] Benson later cornered Ms. Kramer and raped her at his home, where he had lured her with the promise of paid cleaning work.[128] Benson threatened to fire her if she reported any of his behavior.[129] Ms. Kramer eventually reported Benson's behavior, but she alleged she was constructively discharged because she could not return to work due to the

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[121] *Vance*, 133 S. Ct. at 2451–52; *id.* at 2463 (Ginsburg, J., dissenting).

[122] *Id.* at 2463–64 (Ginsburg, J., dissenting).

[123] Kramer v. Wasatch County, 857 F. Supp. 2d 1190, 1205–06, 1213 (D. Utah 2012). The Tenth Circuit later reversed the trial court and concluded that there were disputed issues of fact about whether Sergeant Benson could be deemed to be Ms. Kramer's supervisor. Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 739 (10th Cir. 2014). The court reached this conclusion by taking an expansive view of supervisor status under which an individual with the power to recommend or influence tangible employment actions could qualify as a supervisor. *Id.* at 739–41.

[124] *Kramer*, 857 F. Supp. 2d at 1195.

[125] *Id.*

[126] *Id.* at 1202.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1203.

harassment she had endured.[130] Ms. Kramer brought a Title VII sexual-harassment claim and a § 1983 claim against her employer, but the trial court dismissed both claims on summary judgment.[131] The court held that Benson was not a supervisor for purposes of vicarious liability because he did not have the actual authority to affect the "material terms and conditions" of Kramer's employment.[132] The court rejected Ms. Kramer's argument that she believed Benson had the de facto authority to take these actions by highlighting the County's personnel policy which gave these powers only to the Sheriff.[133]

Though it would be helpful to have more facts than those provided by the trial court in *Kramer*, the case does illustrate the problem with blind deference to an employer's stated policies regarding individual authority to make employment decisions. As a bailiff, Ms. Kramer worked under the direction of Benson.[134] She appears to have had little if any ordinary job-related contact with the Sheriff, who was the only person formally authorized to take tangible employment actions.[135] Benson had the authority to recommend tangible employment actions to the Sheriff, but that would not be enough if a court were to confine supervisor status to individuals with the authority to *actually take* tangible employment actions.[136] Applying that narrow conception of the *Vance* holding, only harassment by the Sheriff would trigger vicarious liability.

But suppose the Sheriff were really just an office paper-pusher, and the county relied on a "deputy" to run the day-to-day operations. As long as the deputy did not have the *formal* power to take tangible employment actions, the county would be effectively insulated from any vicarious liability for harassment by anyone other than the office-bound Sheriff. The court in *Vance* expressly declined to allow employers to shield themselves from liability using these types of tactics.[137] Again, this is not to suggest that an employer's formal designations regarding the power to take tangible employment actions should be ignored. Rather, they should be a starting point against which the employer's actual decision-making process is compared.

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[130] *Id.* at 1204.

[131] *Id.* at 1194.

[132] *Id.* at 1205–06.

[133] *Id.* The court went on to note that alternatively, even if Benson were Ms. Kramer's supervisor, she was not subjected to a tangible employment action, and therefore the County was allowed to rely on the *Faragher/Ellerth* affirmative defense. *Id.* at 1206–09. The court concluded that the county had carried its burden of establishing both prongs of the defense and also granted the county summary judgment on that basis. *Id.* at 1209.

[134] *Id.* at 1195.

[135] *Id.*

[136] *Id.*

[137] *Vance*, 133 S. Ct. at 2452.

Spencer v. Schmidt Electric Co. is another example of how a narrow approach to supervisor status can result in an employee having no remedy for workplace harassment.[138] Spencer, who is African-American, was harassed by two white foremen who made racist comments about lynching African-Americans and left nooses around the job site.[139] Around the Christmas holiday one of the foremen sent Spencer a text message containing a cartoon image of Santa Claus wearing a white hood while holding a noose and standing in front of a burning cross.[140] Spencer complained to his union steward and later left his position because of racial tension in the workplace.[141] The district court entered summary judgment for Spencer's employer on his harassment claim after concluding that the foremen were not Spencer's supervisors, and the Fifth Circuit affirmed.[142] The Fifth Circuit's analysis treated the lack of formal authority to take tangible employment actions as conclusive evidence that the foremen were not supervisors, despite acknowledging that there was evidence in the record that the foremen had an indirect authority to terminate employees by going to the general foreman for permission.[143] Spencer was thus left with no remedy for the harassment he suffered because he was unable to establish that his employer was negligent with respect to stopping the foremen's harassment after they were put on notice of it.[144]

The Tenth Circuit's dismissal of the plaintiff's hostile work environment claim in *Chavez-Acosta v. Southwest Cheese Co.* also illustrates the adverse effect a narrow application of the *Vance* test for supervisor status may have for victims of workplace harassment.[145] Ms. Chavez-Acosta alleged that she was harassed by a male employee who repeatedly flashed his genitals at her in the workplace.[146] The trial court, prior to the Supreme Court's opinion in *Vance,* had concluded that Ms. Chavez-Acosta's harasser was her supervisor.[147] On appeal, the Tenth Circuit characterized the harasser as a coworker under *Vance* because he had not been given the "authority to take 'any tangible employment actions'" against Ms. Chavez-Acosta.[148] The court rejected Ms. Chavez-Acosta's arguments that her harasser could be deemed a supervisor on the basis of his de facto supervisor authority.[149]

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[138] Spencer v. Schmidt Elec. Co., 576 F. App'x 442, 444 (5th Cir. 2014).

[139] *Id.*

[140] *Id.*

[141] *Id.* at 444–45.

[142] *Id.* at 446–48.

[143] *Id.* at 447.

[144] *Id.* at 448.

[145] Chavez-Acosta v. Sw. Cheese Co., 610 F. App'x 722, 730 (10th Cir. 2015).

[146] *Id.* at 726.

[147] *Id.* at 730.

[148] *Id.*

[149] *Id.*

While it is true that a negligence theory of liability was available to the plaintiffs in each of these cases, none of them were able to survive summary judgment under that theory.[150]

C. The Negligence Theory of Employer Liability will Often Be Less Favorable to Plaintiffs than the Vicarious Liability Approach for Supervisor Harassment

The Supreme Court in *Vance* repeatedly touted employer liability based on negligence both as an adequate remedy for workplace harassment and as a reasonable way to incentivize employers to police workplaces.[151] The negligence approach does have some advantages—most notably that it can provide a basis for employer liability in situations where a harassment victim never formally complained to his or her employer.[152] But this is not a valid reason to force more plaintiffs to pursue harassment claims under a negligence theory by limiting the availability of the *Faragher–Ellerth* vicarious liability framework—negligence is always an option to establish employer liability and an employee can simply elect to proceed on this basis even when the harasser is a supervisor.[153]

The negligence theory of employer liability does however have a number of disadvantages compared to the *Faragher–Ellerth* standard. Prior to *Vance*, courts had generally accepted that a victim of harassment could establish employer liability under this theory by proving that (1) the employer knew or should have known about the harassment and (2) thereafter failed to take adequate measures to stop it.[154] In cases where an employee formally complains it should be relatively straightforward to

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[150] *Id.* at 733; Spencer v. Schmidt Elec. Co., 576 F. App'x 442, 448 (5th Cir. 2014); Kramer v. Wasatch Cty. 857 F. Supp. 2d 1190, 1207 (D. Utah 2012), *rev'd sub nom.* Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726 (10th Cir. 2014).

[151] Vance v. Ball State Univ., 133 S. Ct. 2434, 2451–53 (2013).

[152] *See, e.g.*, Zayadeen v. Abbott Molecular, Inc., No. 10 C 4621, 2013 WL 361726, at *11–12 (N.D. Ill. Jan. 30, 2013) (holding that employee's failure to formally complain about harassment did not preclude employer liability based on negligence because much of the harassment occurred in open areas where it could be observed by management).

[153] *See Vance*, 133 S. Ct. at 2452 ("[A]n employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment."); *see also* Davis v. Lakeside Motor Co., No. 3:10-CV-405 JD, 2014 WL 6606044, at *6 (N.D. Ind. Nov. 20, 2014) ("The supervisor standard, which permits vicarious liability and is easier for a plaintiff to meet, is not available when the harasser is merely a co-worker, but that does not necessarily mean the opposite is true . . . . An employer's own negligence is always a basis upon which it can be held liable for harassment . . . .").

[154] *See* Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998); Williamson v. City of Houston, 148 F.3d 462, 464 (5th Cir. 1998).

establish that the employer was on notice of the harassment.[155] The second prong of this test, however, will frequently allow an employer to avoid liability because the inquiry focuses on whether the employer took prompt steps to *stop* the harassment, even though its response and investigation may have been deficient in other respects.[156]

Both the negligence and *Faragher–Ellerth* vicarious theories of liability include an element of employer knowledge of the harassment. To establish negligence, a plaintiff must show the employer was or should have been on notice of the harassment.[157] The *Faragher–Ellerth* affirmative defense also considers an employer's knowledge of the harassment by examining whether the plaintiff utilized the employer's policies to report the harassment to the employer.[158] The negligence approach is less favorable to plaintiffs because they must carry the burden of proving notice, whereas it is the employer who must prove *as an affirmative defense* that it is entitled to summary judgment based on the *Faragher–Ellerth* defense.[159] Summary judgment on an affirmative defense is proper only when the moving party has established the defense "so clearly that no rational jury could have found to the contrary."[160] An employer may still be able to carry this burden,[161] but plaintiffs are in a better position to create issues of fact regarding the reasonableness of their failure to utilize an employer's remedial measures.[162]

The other major disadvantage of the negligence theory is that it limits a plaintiff's recovery to damages for harassment that occurred *after* the employer was on notice.[163] Thus, a plaintiff will have no remedy under Title VII for workplace harassment by a coworker until the employer is on actual or constructive notice of that harassment.

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[155] It is nonetheless possible to establish an employer was or should have been on notice of harassment even in the absence of employee complaints. *See Zayadeen*, 2013 WL 361726, at *12.

[156] *See* Swenson v. Potter, 271 F.3d 1184, 1197–98 (9th Cir. 2001).

[157] *Noviello*, 398 F.3d at 95.

[158] *Id.*

[159] *Id.* at 94–95.

[160] Snyder v. Kohl's Dep't Stores, Inc., 580 F. App'x 458, 461 (6th Cir. 2014) (quoting Beck-Wilson v. Principi, 441 F.3d 353, 365 (6th Cir. 2006)).

[161] *See, e.g.*, Hardage v. CBS Broad. Inc., 427 F.3d 1177, 1188 (9th Cir. 2005).

[162] *See* Kurtts v. Chiropractic Strategies Grp., Inc., 481 F. App'x 462, 466–67 (11th Cir. 2012) (finding plaintiff's testimony that she reasonably believed her employer would not take any meaningful action to stop the harassment was sufficient to create a disputed question of fact about whether the employer was entitled to the *Faragher/Ellerth* affirmative defense).

[163] Hostetler v. Quality Dining, Inc., 218 F.3d 798, 881 (7th Cir. 2000); s*ee* Swenson v. Potter, 271 F.3d 1184, 1198 (9th Cir. 2001).

IV. EXAMINING *HOW* TANGIBLE EMPLOYMENT DECISIONS ARE REACHED IS THE BEST METHOD OF DETERMINING SUPERVISOR STATUS

A. De Facto Authority to Take Tangible Employment Actions Is Capable of Being Wielded to Aid in the Accomplishment of Harassment the Same Way Formal Authority Might Be

The Supreme Court has repeatedly wrestled with agency law principles in crafting a system for determining employer liability for harassment under Title VII.[164] The Court ultimately fashioned its vicarious liability rules for harassment claims based on the principle that supervisors have been bestowed with a level of authority that aids in the commission of their harassment.[165] The Court in *Vance* explained that this level of authority gives harassment a more threatening character that makes it difficult for ordinary employees to address on their own.[166] The title of a particular employee did not seem to matter much to the Court.[167] It even admitted that the term "supervisor" was used to describe so many types of employees that it could not be a reliable indicator of the type of authority that imbued harassment with a more threatening character.[168] Abstract supervisory authority was not enough—the power to take tangible employment actions was identified as the true test because that power "fall[s] within the special province of the supervisor."[169]

The Court's own rationale shows why it is unwise to determine supervisor status exclusively from an employer's "official" policies regarding tangible employment actions. Putting aside the argument that many forms of authority can be used to bolster harassment, tangible employment actions have been deemed the threshold.[170] But it is helpful to consider why the Court found this authority so significant. A harasser is not magically transformed into an overpowering and unstoppable brute by virtue of this authority. Instead, the power to take tangible employment actions is significant because its "potential use hangs as a threat over the victim."[171] That is not to say that any threatening conduct should trigger vicarious liability. Under *Vance*, an employee could not establish vicarious liability for harassment by a coworker merely because the victim believed the coworker had the power to take tangible employment actions.

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[164] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 756–57 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998).

[165] *Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 790–91.

[166] Vance v. Ball State Univ., 133 S. Ct. 2434, 2442 (2013).

[167] *Id.* at 2444.

[168] *Id.*

[169] *Id.* (quoting *Ellerth*, 524 U.S. at 762).

[170] *Vance*, 133 S. Ct. at 2443.

[171] *Id.* at 2448.

However, the threatening nature of harassment committed by an individual who has been effectively given the power—in practice rather than on paper—to take tangible employment actions may have no meaningful difference from harassment by an officially christened supervisor. In both instances the harasser has the ability to retaliate against an uncooperative victim via tangible employment actions. The degree of the perceived threat may vary somewhat depending on the relative status of the harasser in the workplace. But in workplaces where the victim's interaction with individuals above the harasser in the chain of command is limited, the perceived threat posed by a de facto supervisor may be indistinguishable from that of an official supervisor.[172]

An employer may seem more culpable for harassment committed by an individual it has formally rather than effectively designated as a supervisor. It is important to note however that unless an employer was negligent, it is not being held directly liable for its own conduct in harassment claims.[173] The Supreme Court decided on a system of vicarious liability, a system built around a policy of encouraging employers to affirmatively take steps to prevent harassment in the workplace.[174] Allowing employers to be held vicariously liable for harassment committed by individuals to whom they effectively delegate the power to take tangible employment actions will only further that goal.

B. "Cat's Paw" Theory Supports Holding Employers Liable when They Effectively Give Individuals the Power to Act on Discriminatory Motives

The Supreme Court has previously confronted the question of an employer's liability when it unknowingly gives formal effect to the conduct of an individual acting with discriminatory motives.[175] The Court ultimately determined that in these sorts of "cat's paw" cases, employer liability could be established.[176] In *Staub v. Proctor Hospital*, an employee brought a Uniformed Services Employment and Reemployment Rights

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[172] *See, e.g.*, Burlington v. News Corp, 55 F. Supp. 3d 723, 740–41 (E.D. Pa. 2014) (equating the question whether the harasser had been aided by the existence of the agency relationship with the inquiry into when an employer has effectively delegated the power to take tangible employment actions).

[173] *Vance*, 133 S. Ct. at 2441.

[174] Bagenstos, *supra* note 40, at 171–72.

[175] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1189 (2011).

[176] *Id.* at 1194. The phrase "cat's paw" comes from a fable by Aesop. John S. Collins, Comment, *Another Hairball for Employers? "Cat's Paw" Liability for the Discriminatory Acts of Co-Workers After* Staub v. Proctor Hospital, 64 BAYLOR L. REV. 908, 912 (2012). In the fable, a monkey convinces a cat to retrieve chestnuts roasting over a fire, using the cat's paws so that it would not burn itself. *Id.* Judge Richard Posner later used the phrase to describe when an employer could be liable for the acts of an employee who influences, but does not actually carry out, an adverse employment action. *Id.* (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990)).

Act (USERRA) claim against his employer alleging he was fired because two of his supervisors had fabricated complaints about his performance in order to get rid of him because of his continuing military service.[177] The actual decision-maker who fired Staub did not have any bias against him because of his military service, and was unaware of the bias that motivated Staub's supervisors to complain about him.[178] But the decision-maker did accept the recommendations of the complaining supervisors without conducting any type of independent investigation.[179] The Court reasoned that an employer should not be allowed to shield itself from liability by having a detached supervisor robotically sign off on its employment decisions.[180]

Supervisor status must be interpreted in a manner that captures how an employer actually makes tangible employment decisions—otherwise, an employer could shield itself from liability by channeling all employment decisions through a select few actors.[181] Admittedly, *Staub* concerned causation for purposes of direct rather than vicarious liability.[182] Nonetheless, it is inconceivable that the Supreme Court would repudiate employer attempts to insulate themselves from liability for discriminatory employment decisions but endorse those very same efforts in the context of harassment.

C. Scenarios when an Individual Should Be Deemed to Be a Supervisor for Purposes of Vicarious Liability Under Title VII

Despite the need for some flexibility when considering supervisor status, any workable standard must not stray from the pillars identified in *Vance*. First, the individual must be able to at least substantially affect tangible employment decisions.[183] Second, this power must be capable of being wielded against the victim of the harassment.[184] With these principles in mind, the following circumstances represent when an individual should be classified as a supervisor.

The most obvious scenario is an individual who has been formally given the authority to take tangible employment actions against his vic-

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[177] *Staub*, 131 S. Ct. at 1190.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 1192–93.

[181] *See* Burlington v. News Corp, 55 F. Supp. 3d 723, 734 (E.D. Pa. 2014) ("[I]f *Staub* limits liability on a cat's paw theory to supervisors . . . and *Vance* limits the supervisor designation to employees who are empowered to take tangible employment action . . . then there is no longer any circumstance in which liability can be predicated on a cat's paw theory."); *see also* Cole v. Mgmt. & Training Corp., No. 4:11CV-118-JHM, 2014 WL 2612561, at *3 (W.D. Ky. June 11, 2014).

[182] *Staub*, 131 S. Ct. at 1191–92.

[183] Vance v. Ball State Univ., 133 S. Ct. 2434, 2448 (2013).

[184] *Id.*

tim. While it is possible for an individual without this type of formal authority to be considered a supervisor,[185] an individual who does possess it should always be considered a supervisor. Even if that power is rarely exercised, the fact that it has been granted by the employer still functions as an implied threat towards the victim of the harassment.[186]

In circumstances where a victim of harassment was actually subjected to a tangible employment action, but the harasser did not have the official authority to take that action, cat's paw principles should be applied to determine whether the harasser can be considered a supervisor. In *Staub*, the Supreme Court held that when an individual acts with the intent to cause an adverse employment action, and that action is a proximate cause of the employer actually taking that decision, then the employer is liable.[187] A harasser should be considered a supervisor if she acts with the purpose of causing a tangible employment action, and that conduct is a proximate cause of the tangible employment action an employer actually takes.[188] Because the victim will have suffered a tangible employment action in such a case, the employer should not be able to rely on the *Faragher–Ellerth* affirmative defense assuming supervisor status is established.[189]

The least precise method of determining supervisor status is when an employer has effectively delegated the power to take tangible employment actions. When an employer chooses to structure its workforce in a manner that completely isolates employees from having any interaction with formal supervisors, it should be held to have effectively made the employees who recommend tangible employment decisions into supervisors.[190] This is not the only situation in which an employer should be held to have effectively given an individual supervisor status. If an employer solicits recommendations about tangible employment decisions, and then actually adopts that individual's recommendations, he or she should be deemed to be a supervisor.[191] Even in situations where an employer does not formally seek recommendations, courts should still consider

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[185] *Id.* at 2452.

[186] *Id.* at 2448.

[187] *Staub*, 131 S. Ct. at 1194.

[188] *See, e.g.*, Andrews v. Pryor Giggey Co., No. 1:13-cv-00835-KOB, 2015 WL 225449, at *6 (N.D. Ala. Jan. 16, 2015).

[189] Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1303 (11th Cir. 2007) ("The *Faragher–Ellerth* defense is not available where the discrimination the employee has suffered included a tangible employment action.").

[190] *See* Cacciola v. Work N Gear, 23 F. Supp. 3d 518, 530 (E.D. Pa. 2014) (finding employer who limited tangible employment authority to an off-site manager had effectively delegated that authority to a harasser who was his victim's day-to-day manager); *see also* Beecham v. Wyndham Vacation Resorts, Inc., No. 11-00129 ACK-BMK, 2013 WL 6730755, at *10 (D. Haw. Dec. 18, 2013).

[191] *See* Cole v. Mgmt. & Training Corp., No. 4:11CV-118-JHM, 2014 WL 2612561, at *3 (W.D. Ky. June 11, 2014).

whether the employer has effectively adopted a policy of blindly adopting unsolicited suggestions regarding tangible employment actions. The Tenth Circuit in *Kramer* concluded that the ability to influence tangible employment decisions could be sufficient to make one a supervisor.[192] Courts will need to be cautious so as not to allow this sort of effectively delegated exception to swallow the rule provided in *Vance*.

These inquiries are likely to be very fact intensive, but should offer starting points from which parties can begin to assess supervisor status during discovery.

V. CONCLUSION

The Supreme Court in *Vance* sought to create a straightforward, workable test for supervisor status.[193] The Court's holding certainly will be straight forward to apply to harassment in *some* workplaces, but may lead to harsh results in others. Predictability is valuable in employment litigation,[194] but leaving many harassment victims without a remedy is too great a cost. With the proliferation of pre-trial motions in employment litigation,[195] courts are likely to be called upon to resolve questions of supervisor status in the context of a variety of workplaces. They would be wise to recognize that the line drawn by the Court in *Vance* may not be all that bright in some workplaces.

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[192] Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 738–39 (10th Cir. 2014).

[193] Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013).

[194] *See* Anna E. McDowell, Comment, *References Available upon Request: An Inequitable Rule Applied to Title VII Retaliatory Job Reference Cases*, 44 WASHBURN L.J. 439, 464–65 (2005).

[195] *See* Bennett, *supra* note 19, at 697–99.