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The Power to Harass: The Supreme Court Adopts A Definition of “Supervisor” that Reduces Employer Liability for Harassment

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Verdict

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[Joanna L. Grossman](#)

The Power to Harass: The Supreme Court Adopts A Definition of “Supervisor” that Reduces Employer Liability for Harassment



In a ruling issued yesterday, *[Vance v. Ball State University](http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf)* (http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf), a divided Supreme Court held that a harasser does not qualify as a supervisor unless he or she has the power to “take tangible employment actions against the victim”—colloquially, the power to hire and fire. This matters because the employer’s liability under Title VII of the Civil Rights Act of 1964 for workplace harassment committed by supervisors is much stronger than it is for harassment inflicted by co-workers.

Writing for the majority, Justice Samuel Alito opted for a bright-line rule over one that might have provided redress for the harm that employees suffer at the hands of harassers who, despite not having the power to hire and fire, nonetheless dictate many or all aspects of employees’ daily working conditions.

The Facts in *Vance v. Ball State University*

This case revolves around allegations by Maetta Vance, an African-American woman who worked at Ball State University (BSU), in its kitchen and catering department, that she was racially harassed. Vance began working at BSU in 2001, and she was, for many of the years she worked there, the only African-American employee.

While employed by BSU, Vance complained numerous times of racial discrimination and retaliation. Upon review by the Supreme Court, however, only her complaints involving one employee, Sandra Davis, were at issue. Davis is a white woman who worked as a catering specialist at BSU, while Vance worked as a catering assistant.

In internal complaints and charges with the Equal Employment Opportunity Commission (EEOC), Vance alleged that Davis cornered her on an elevator in a threatening manner, and told her “I’ll do it again.” And although Justice Alito leaves out these allegations in his description of the facts, Vance also alleged that Davis used the racial slurs “Buckwheat” and “Sambo” to refer to Vance, both in Vance’s presence and outside it. BSU did take some measures in response to Vance’s complaints, but none was sufficient to resolve the problem.

According to the Supreme Court’s opinion, the parties “vigorously dispute the precise nature and scope of Davis’s duties, but they agree that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance.”

Vance eventually filed a lawsuit in federal court alleging that she suffered a racially hostile work environment in violation of Title VII. In her complaint, she alleged that Davis was her supervisor and was responsible for creation of the hostile environment.

The federal district court granted summary judgment to BSU, ruling that BSU could not be held vicariously liable for Davis's actions because she was not Vance's supervisor. And, under the more lenient negligence standard applied to co-worker harassment, BSU prevailed because Vance did not notify BSU of some of the incidents and, with respect to others, BSU's remedial efforts were deemed sufficient. The Seventh Circuit affirmed this ruling, on the theory that supervisor liability only adheres when the harasser has "the power to hire, fire, demote, promote, transfer, or discipline an employee." Because Davis did not meet that standard, BSU was not vicariously liable for any harassment that may have occurred, in the Seventh Circuit's judgment.

Employer Liability for Supervisory Harassment: A Developing Doctrine

The issue in *Vance*—what makes someone a "supervisor" in the harassment context—turns on a distinction that the Court had created in earlier cases, between supervisor and co-worker harassment.

The law of employer liability for harassment under Title VII has been developing for almost twenty years now. Most of these cases, discussed below, involve sexual harassment. But the Supreme Court has made clear that the same standards apply to all forms of unlawful harassment under Title VII, which includes racial harassment. In fact, when the Court first recognized the presence of a hostile work environment as a basis for a viable theory of discrimination, it described the development of hostile work environment theory in a Fifth Circuit case, *Rogers v. EEOC* (<http://law.justia.com/cases/federal/appellate-courts/F2/454/234/438332/>), involving racial harassment. There, the court noted that one "can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."

Harassment law divided into two main questions: Did actionable harassment occur? And, if so, can the employer be held liable for it? The second question matters deeply because individual harassers cannot be held liable under Title VII; thus, employer liability means the difference between having a remedy for the wrongs one has suffered and not having one at all.

In its first harassment case, *Meritor Savings Bank v. Vinson* (<http://supreme.justia.com/cases/federal/us/477/57/case.html>), the Supreme Court held that sexual harassment in the workplace is a form of intentional sex discrimination under Title VII of the Civil Rights Act of 1964. It held that both "quid pro quo" and hostile-environment forms of harassment were actionable. The Court in *Meritor* left open, however, the question of employer liability, stating only that a rule of automatic liability was too harsh for employers, while a rule preconditioning liability on actual notice to the employer was too harsh for victims. The Court then directed lower courts to apply "agency principles"—that is, the law of a principal, and the person or entity that acts on behalf of that principal—when determining whether employers should be held liable for any particular type or incidence of harassment. Lower courts disagreed vehemently in the wake of *Meritor* about the proper standard to be applied.

In 1998, the Supreme Court issued two rulings on employer liability on the same day, *Faragher v. City of Boca Raton* (<http://supreme.justia.com/cases/federal/us/524/775/case.html>) and *Burlington Industries v. Ellerth* (<http://supreme.justia.com/cases/federal/us/524/742/case.html>). Each case raised questions about the proper standard of liability for supervisory harassment.

In a joint holding, the Court ruled that for supervisory harassment culminating in a tangible employment action, such as a demotion or firing, employers are automatically liable. For supervisory harassment that does not result in a tangible employment action (the more common kind), the Court also imposed automatic liability, but it created a two-pronged affirmative defense that a defending employer may raise. As the Court explained, the "defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

This defense was crafted from the “agency principles” to which *Meritor* directed attention. The Court drew a line that it believed distinguished when supervisors are “aided by the existence of the agency relation” in committing harassment, and when they are not. When supervisors fire or otherwise penalize a victim, they are clearly drawing on the powers delegated them by the employer; when they create a hostile environment, they may well be doing the same, but the possibility is weighed against the desire to encourage employers and employees to intervene to minimize potential harm.

Although *Faragher* and *Ellerth* both involved harassment by supervisors, the Court also indirectly approved the application of a negligence standard—the standard asking if the employer knew or should have known of, and failed to respond to, claims of co-worker or third-party harassment.

Faragher and *Ellerth* created as much confusion as they resolved. The proper scope and application of the affirmative defense have been hotly litigated. By and large, lower federal courts have interpreted the affirmative defense in a way that benefits employers, rather than victims. (Some of these problems are described in earlier columns [here \(http://writ.lp.findlaw.com/grossman/20070403.html\)](http://writ.lp.findlaw.com/grossman/20070403.html), [here \(http://writ.news.findlaw.com/grossman/20030408.html\)](http://writ.news.findlaw.com/grossman/20030408.html), and [here \(http://writ.news.findlaw.com/grossman/20020507.html\)](http://writ.news.findlaw.com/grossman/20020507.html).)

Vance gave the Court one more opportunity to protect—or choose not to protect—victims of workplace harassment. A broad definition of “supervisor” would bring more cases under the stricter standard of liability; a narrow definition would do just the opposite.

The Ruling in *Vance v. Ball State University*

In affirming the grant of summary judgment to BSU, the U.S. Court of Appeals for the Seventh Circuit ruled that Davis was not Vance’s supervisor. To reach that conclusion, the court applied a definition of supervisor that encompasses only “someone with the power to directly affect the terms and conditions of the plaintiff’s employment,” with authority that “primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.” The Seventh Circuit held that Davis was not a supervisor, even if she “periodically had authority to direct the work of other employees.” That power, the court reasoned, “would still not be sufficient to establish a supervisory relationship for purposes of Title VII.”

The Supreme Court’s likely motivation for agreeing to review the Seventh Circuit’s opinion was a circuit split. While the First and Eighth Circuits also used the “power to hire and fire” definition of supervisor, three other Circuits, however, have adopted a broader definition that also includes individuals with the authority to direct and oversee the victim’s daily work.

The circuit split turns on the proper understanding of agency principles: Is an individual without the power to make tangible employment actions, but with the power to direct or control day-to-day activities, acting as an agent of the employer? The EEOC, which issued an enforcement guidance in 1999 in the wake of *Faragher* and *Ellerth*, took the broader view of supervisory status. Under that guidance, an employee who has the “authority to direct [the victim’s] daily work activities” or the power “to recommend,” though not personally affect, “tangible employment decisions” qualifies as a supervisor because his or her ability to harass “is enhanced by his or her authority to increase the employee’s workload or assign undesirable tasks.”

The majority in *Vance*, however, disagreed with the EEOC’s approach and upheld the Seventh Circuit’s. It described the EEOC’s definition as “nebulous” and unpersuasive. It chose instead a narrower standard that is “workable” and “can be applied without undue difficulty at both the summary judgment stage and at trial.” “The alternative,” the majority feared, would require a “highly case-specific evaluation of numerous factors” that “would frustrate judges and confound jurors.”

The majority’s substantive defense of the standard lies in the *Faragher/Ellerth* framework. It read those cases as both drawing a sharp distinction between supervisors and co-workers, and tying the concepts of supervisory status and tangible employment actions together. In other words, the same harassers who could have taken a tangible employment action against a victim for refusing sexual advances (a quid pro quo) are those who can

engender vicarious liability for the employers.

The majority cast off Vance's (and the EEOC's) definition of supervisor as based on "colloquial" uses of the term, which were inconsistent across contexts. The opinion strings together a series of completely random definitions of "supervisor" from Internet dictionaries to the rules governing the administration of Native American schools, to the complex rules of Medicaid administration. The point, I suppose, is to show that there is no uniform definition of "supervisor" in the law or in English usage. But, of course, that was not the question before the Court, nor the position urged by both the plaintiff and the United States, which filed an amicus brief urging the Court to adopt the EEOC's position. The question it should have been limited to is: What is the proper definition of supervisor within this single context: an anti-discrimination law that holds employers liable when superiors harass their subordinates.

As the majority concedes, "supervisor" is not a statutory term found in Title VII. The Supreme Court crafted the distinction between tangible-employment-action harassment and hostile-environment harassment and created the affirmative defense to go with the latter out of whole cloth. Having invented a term and given it statutory force, the Court's responsibility is now to interpret the term in a way that serves the statute's underlying purposes. But the majority does the opposite: It adopts a narrow, strained definition of supervisor that expands the already broad safe harbor for employers who do little to monitor work environments or to be proactive in preventing and correcting harassment.

The majority also rejects Vance's argument that the narrower definition of supervisor would not have been met in *Faragher*—one of the Supreme Court opinions in which the current structure was established. While the majority claims that she has "misread" the prior decisions, it concedes that one of the "supervisors" in *Faragher* "may have wielded less authority" than the other and was primarily "responsible for making the lifeguards' daily assignment, and for supervising their work and fitness training." Under the "power to hire and fire" rule the Court adopts in *Vance*, this direction of daily work activities would clearly not have been sufficient. Yet, the Court treated this as a case of supervisory harassment. The majority's rejection of Vance's argument on this point is not a rejection on the merits of the case before the Court. Rather, the majority says that the parties in that case did not dispute the status of the alleged harassers, or present to the Court "the question of the degree of the authority that an employee must have in order to be classified as a supervisor." It may well be that the Court did not need to decide the supervisor question in that case, but it is a little odd now to decide that a narrow definition of supervisor is implicit in a case in which the definition would likely not have been met.

In the end, the majority is unfazed by any form of argument. It prefers a bright-line rule to a fact-specific one (questioning the ability of jurors and judges to assess facts in ways no more complicated than they do on a daily basis in other cases), and an employer-friendly rule to a victim-friendly one. (Justice Thomas would have gone even further to minimize employee protections. He wrote separately in concurrence because he believes *Faragher* and *Ellerth* were "wrongly decided"; indeed, he believes that employers should never be held vicariously liable for harassment by their supervisors.)

The ruling in *Vance* harkens back to Justice Alito's majority opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which he took a stringent view of the statute of limitations in pay discrimination cases—a view that not only disregarded longstanding precedent, but also ignored the realities of the way pay discrimination is practiced, perceived, and redressed. Congress eventually passed legislation to overrule his ruling in *Ledbetter*, with the Lilly Ledbetter Fair Pay Act (which I have written about [here](http://writ.news.findlaw.com/grossman/20090213.html) (<http://writ.news.findlaw.com/grossman/20090213.html>)), a turn of events that would make sense here as well.

In Dissent: Justice Ginsburg Persuasively Criticizes the Majority

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented from the majority's holding and argued for the broader definition of "supervisor" that is endorsed by the EEOC and several federal appellate courts. By striking "from the supervisory category employees who control the day-to-day schedules and assignments of others," Ginsburg wrote, the Court "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."

Justice Ginsburg's dissent focuses on the realities of the workplace, which were better captured by *Faragher* and *Ellerth* than by the ruling in *Vance*. Ginsburg reasoned as follows:

Exposed to fellow employee's harassment, one can walk away or tell the offender to 'buzz off.' A supervisor's slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life. And she may be demoted or fired.

As Ginsburg demonstrates by citing this array of actions, it is not only the superior with the power to hire and fire who can wield authority that aids him in his efforts to harass—or to get away with it. And in either case, the superior has that power because the employer has given it to him. The narrower view adopted by the majority, Ginsburg wrote, is “blind to the realities of the workplaces” as well as insufficiently sensitive to the expertise of the EEOC, which has been charged with interpreting and enforcing Title VII.

Justice Ginsburg provides a series of vignettes, based on real, litigated cases, in which “in-charge employees”—the types of supervisors that are now exempted from formal supervisor status under the *Vance* rule—to show just how much they are able to negatively transform a subordinate's work environment. Here are her examples: A lead driver who forced a trainee into unwanted sex, which she believed was necessary to gain a favorable evaluation. A retail clerk who was told by the manager to “give [him] what [he] want[ed]” in order to get long weekends off. A lead highway worker who forced a subordinate female employee to wash her snow plow in below-freezing weather and prevented another employee from fixing the heating in her truck. In each of these cases, all of which the majority rejects as irrelevant to the issue in *Vance*, “a person vested with the authority to control the conditions of a subordinate's daily work life used his position to aid his harassment.” Each harasser would be commonly understood by the employees whose destinies they controlled to be a supervisor. Yet each is relegated to the status of an ordinary co-worker, whose conduct is not attributable to the employer.

In the end, Justice Ginsburg notes, “the Court's definition of supervisor will hinder efforts to stamp out discrimination in the workplace.” Vicarious liability is designed to give employers an incentive to screen, train, and monitor their supervisors more closely, rather than letting them run amok in a workplace full of employees who feel afraid to resist their supervisor's misconduct. It is already extremely difficult for a victim of harassment to prevail in a Title VII lawsuit (a problem addressed in part [here](http://writ.corporate.findlaw.com/grossman/20070904.html) (<http://writ.corporate.findlaw.com/grossman/20070904.html>)). The majority's ruling in *Vance* has made it that much more difficult.



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