THE EFFECT OF *VANCE V. BALL STATE* IN TITLE VII LITIGATION

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Title VII has been in effect for over fifty years. For almost as long, however, employers, employees, and courts have struggled to anticipate, understand, and determine whether and to what extent employers are liable for the harassment of employees by other employees. In the 1998 cases of Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton*, the United States Supreme Court first addressed this issue. It held that employers are vicariously liable for unlawful harassment of employees by supervisors; when harassers are coworkers, employers are liable under a negligence standard only.*

Since these cases, the status of the harasser as a coworker or a supervisor has become crucial for determining workplace liability. In 1999, the Equal Employment Opportunity Commission issued important guidance on this topic, announcing a test for determining vicarious supervisory liability: whether the harasser can take tangible employment actions or direct subordinates' daily work activities.

In 2013, the Supreme Court narrowed this definition in Vance v. Ball State*, holding that only employees who can take tangible employment actions—defined as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"—are supervisors.*

Critics of Vance *caution that the narrowed "supervisor" definition will diminish protections for employees and hinder their ability to seek legal recourse for legitimate workplace harassment. To date, the legal scholarship has made blanket assertions to this effect. A handful of scholars have reviewed example cases to show how* Vance *has limited plaintiffs' ability to succeed on hostile work environment claims. However, no article has analyzed* Vance*'s impact systematically, examining data to determine whether and to what extent the narrowed definition affects litigation outcomes.*

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This Article examines all Title VII harassment cases filed in federal court and reported on Westlaw in the five years following Vance *that consider the supervisor issue. Specifically, it analyzes: (1) whether Title VII hostile work environment cases are dismissed because the harasser is not a supervisor; and (2) whether this issue would have been decided differently pre-*Vance*. Ultimately, the Article uses data to show how the narrowed definition impacts each stage of litigation and makes it more difficult for employees to win hostile work environment claims. The Article concludes with an analysis of the advantages and disadvantages of the* Vance *definition and a proposal for redefining "supervisor" in a way that adequately protects employees while ensuring transparency and reasonable parameters on liability. To date, this Article is the only scholarship to evaluate comprehensively whether and to what extent* Vance *has impeded plaintiffs' success in Title VII hostile work environment litigation.*

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I. INTRODUCTION

In *Burlington Industries, Inc. v. Ellerth*[1] and *Faragher v. City of Boca Raton*,[2] the Supreme Court "held that an employer can be vicariously liable under Title VII of the Civil Rights Act of 1964 for harassment by an employee given supervisory authority over subordinates."[3] Shortly after those decisions, the Equal Employment Opportunity Commission ("EEOC") provided enforcement guidance "regarding employer liability for harassment by supervisors,"[4] defining

1. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765–77 (1998).
2. Faragher v. City of Boca Raton, 524 U.S. 775, 776 (1998).
3. Vance v. Ball State Univ., 570 U.S. 421, 451 (2013) (Ginsburg, J., dissenting).
4. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999).

a "supervisor" as: (1) an individual authorized "to undertake or recommend tangible employment decisions affecting the employee" (including, but not limited to, "hiring, firing, promoting, demoting, and reassigning the employee"); *or* (2) an individual authorized "to direct the employee's daily work activities."[5] Some courts adopted the EEOC's definition.[6] Others did not.[7] A circuit split developed, resulting in courts across the country applying inconsistent definitions of "supervisor" to determine Title VII liability.

In *Vance v. Ball State University*, the Supreme Court addressed this circuit split, deciding "a question left open in *Burlington Industries, Inc. v. Ellerth* . . . and *Faragher v. Boca Raton* . . . namely, who qualifies as a 'supervisor' in a case in which an employee asserts a Title VII claim for workplace harassment."[8] In a 5-4 decision, with Justice Alito writing for the majority and Justice Ginsburg for the dissent, the Court held that "a 'supervisor' for purposes of vicarious liability under Title VII" is one "empowered by the employer to take tangible employment actions against the victim,"[9] *i.e.,* to effect 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."[10] *Vance* thus narrowed the EEOC's definition of "supervisor,"[11] excluding the category of individuals who control employees' daily work activities.[12]

The *Vance* decision attracted both praise and criticism. Many hailed it as a victory for employers,[13] lauding the Supreme Court's definition for its ease of application and predictability.[14] Conversely, critics denounced it as an impediment to employees' ability to seek legal recourse for legitimate workplace harassment,[15] citing concerns that it is contrary to Title VII's purposes, ignores

5. *Id.* at 3.

6. *See* Dawson v. Entek Int'l, 630 F.3d 928, 940 (9th Cir. 2011); Whitten v. Fred's, Inc., 601 F.3d 231, 245–47 (4th Cir. 2010); Mack v. Otis Elevator Co., 326 F.3d 116, 126–27 (2d Cir. 2003).

7. *See* Noviello v. City of Boston, 398 F.3d 76, 96 (1st Cir. 2005); Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 (8th Cir. 2004); Parkins v. Civil Constructors, 163 F.3d 1027, 1034 (7th Cir. 1998).

8. *Vance*, 570 U.S. at 423.

9. *Id.* at 424.

10. *Id.* at 431 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

11. Shauhin Talesh, *A New Institutional Theory of Insurance*, 5 U.C. IRVINE L. REV. 617, 630 (2015) ("[T]he Supreme Court in *Vance v. Ball State* narrows the scope of who constitutes a supervisor in sexual harassment cases.").

12. Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 374–75 (2013).

13. *See, e.g.*, *Victory for Employers: The Supreme Court Limits Employer Liability in Harassment Cases*, GUNSTER (July 23, 2013), https://gunster.com/alerts/victory-for-employers-the-supreme-court-limits-employer-liability-in-harassment-cases/ [https://perma.cc/SND2-4YCN]; Michael L. Stevens & Karen S. Vladeck, *A Victory for Employers: The Supreme Court Narrows Employer Vicarious Liability Under Title VII*, LEXOLOGY (June 24, 2013), https://www.lexology.com/library/detail.aspx?g=c7b2ab1f-936d-41c3-adc6-57c890568b62 [https://perma.cc/FYR5-9VBE].

14. *See* discussion *infra* Section V.A.1; *see also* Paul E. McGreal, *Corporate Compliance Survey*, 69 BUS. LAW. 107, 127 (2013).

15. Elizabeth Lee, *Simplicity v. Reality in the Workplace: Balancing the Aims of* Vance v. Ball State University *and the Fair Employment Protection Act*, 67 HASTINGS L.J. 1769, 1788–89 (2016); Scott A. Moss, *Labor and Employment Law at the 2014-2015 Supreme Court: The Court Devotes Ten Percent of Its Docket to Statutory*

workplace realties, fails to protect employees, and reduces the likelihood that individuals will report or seek protection from workplace harassment.[16] In response to these concerns, many have urged Congress to more broadly define the term "supervisor" under Title VII.[17]

Although a seemingly simple issue, much turns on the definition of "supervisor" for both employers and employees. Title VII cases constitute the majority of employment discrimination cases.[18] In 2013—the year the Supreme Court decided *Vance*—the EEOC received approximately 20,000 discrimination charges alleging workplace harassment.[19] By 2018, this number had increased to 30,000.[20] For employers, the breadth of supervisory liability influences business decisions about how to structure and train their workforce and limit legal exposure.[21] For employees, the effects are even more consequential: employment discrimination plaintiffs fare worse than almost any other type of civil plaintiff, winning only a small percentage of their cases in federal court.[22] And under Title VII, harassment victims cannot sue individual harassers.[23] Thus, recourse for workplace harassment lies only where plaintiffs can prove employer liability, an already difficult burden made more so by the narrowed *Vance* definition.

In her dissent, Justice Ginsburg opined, in no uncertain terms, that the majority decision "diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the workforce labor, and disserves the objective

Interpretation in Employment Cases, But Rejects the Argument That What Employment Law Really Needs Is More Administrative Law, 31 A.B.A. J. LAB. & EMP. L. 171, 217 (2016) ("The prediction that *Vance* would make harassment claims more difficult to prove has largely come true . . . ."); Kay Steiger, *The Supreme Court Ruling on Workplace Harassment That Got Buried*, ATL. (July 16, 2013), https://www.theatlantic.com/national/archive/2013/07/the-supreme-court-ruling-on-workplace-harassment-that-got-buried/277826/ [https://perma.cc/SME6-KLWG] ("To the average worker today, though, the Court's restriction on defining a 'supervisor' in this way doesn't make a whole lot of sense.").

16. *See* discussion *infra* Section V.A; *see also* William Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 138 (2013).

17. *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 470–71 (2013) (Ginsburg, J., dissenting).

18. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 117 (2009).

19. The EEOC received 67,558 Title VII charges in 2013. This does not include charges filed with state and local Fair Employment Practices Agencies. *See Title VII of the Civil Rights Act of 1964 Charges (Charges Filed with EEOC) (Includes Concurrent Charges with ADEA, ADA, EPA, and GINA) FY 1997–FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Mar. 18, 2021) [https://perma.cc/C542-GQNK]. The EEOC reports that 30% of its charges of discrimination include allegations of harassment. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, 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 [https://perma.cc/X3VW-VY4V].

20. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Files Seven More Suits Against Harassment (Aug. 9, 2018), https://www.eeoc.gov/eeoc/newsroom/release/8-9-18h.cfm [https://perma.cc/NS8X-4XRW] (noting that one-third of the 80,000 to 90,000 discrimination charges include an allegation of harassment).

21. *See* Talesh, *supra* note 11, at 627–28; Lee, *supra* note 15, at 1769.

22. Clermont & Schwab, *supra* note 18, at 113.

23. *See* Fantini v. Salem State Coll., 557 F.3d 22, 30 (1st Cir. 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.").

of Title VII to prevent discrimination from infecting the Nation's workplaces."[24] Through the construction of "artificial categories where context should be key," she noted, the Court "proceeds on an immoderate and unrestrained course to corral Title VII."[25]

Consistent with Ginsburg's dissent, some scholars have used anecdotal evidence from a handful of cases to remark on *Vance*'s detrimental effect on Title VII litigation.[26] But despite Ginsburg's bleak predictions about the corrosive effect of the narrowed definition on Title VII litigation, not to mention the substantial stakes for employers and employees, no scholarship has comprehensively evaluated *Vance*, systematically analyzing data to determine whether plaintiffs are losing cases—or having a more difficult time proving them—because of it. This Article fills that void, assessing how federal district and appellate courts interpret *Vance* and how their interpretations impact litigants.

The Article is divided into six Parts. Part II provides background on Title VII hostile work environment litigation and the Supreme Court cases establishing supervisor liability. Part III explains the methodology this Article uses to identify and classify Title VII federal court cases considering the *Vance* supervisor issue.[27] Part IV analyzes these cases, focusing on how the *Vance* definition impacts each stage of litigation and affects plaintiffs' ability to succeed. The Part concludes that the Supreme Court's narrowed definition has negatively impacted plaintiffs in 20% of Title VII hostile work environment cases where supervisory liability was at issue. With this analysis as a foundation, Part V assesses the purported advantages and disadvantages of the *Vance* definition. Part VI concludes by proposing a categorization system to redefine "supervisor" to more adequately address harassment in accordance with workplace realities.

II. BACKGROUND: TITLE VII HOSTILE WORK ENVIRONMENT LITIGATION

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[28] Under Title VII, an employer is strictly liable for quid pro quo harassment,[29] a type of harassment occurring "when submission to or rejection of [unwelcome sexual] conduct by

24. Vance v. Ball State Univ., 570 U.S. 421, 451 (2013) (Ginsburg, J., dissenting).

25. *Id.* at 470.

26. *See, e.g.*, Moss, *supra* note 15, at 217 ("The question is not how many plaintiffs lost supervisor claims after *Vance*; it is whether they lost claims they might have won before *Vance*—an inquiry requiring brief examination of what *Vance* changed.").

27. In the five years since the Supreme Court decided *Vance* in 2013, 739 federal district and appellate courts cited the decision in their written orders or opinions on Westlaw. Of these cases, 281 addressed the supervisor issue.

28. 42 U.S.C. § 2000e–2(a)(1).

29. Dabney v. Christmas Tree Shops, 958 F. Supp. 2d 439, 460 (S.D.N.Y. 2013) ("[A]n employer is always strictly liable for *quid pro quo* harassment . . . ."), *aff'd sub nom.*, Dabney v. Bed Bath & Beyond, 588 F. App'x 15 (2d Cir. 2014).

an individual is used as the basis for employment decisions affecting such individual."[30] But employees also can seek recovery under Title VII for a hostile work environment where the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[31]

Before 1998, there was no established "framework for determining when an employer may be held liable for its employees' creation of a hostile work environment."[32] Courts adopted a variety of approaches ranging from strict liability to liability conditioned on actual or constructive knowledge of the harassment.[33]

In 1998, the United States Supreme Court decided *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, addressing the issue of when employers are liable for creating a hostile work environment. In those cases, the Supreme Court held that the standard for imposing vicarious liability for Title VII hostile work environment claims differs depending on the status of the harasser, whether a supervisor or coworker.[34] When the harasser is a supervisor, the employer is vicariously liable when "the harassment culminates in a tangible employment action"[35]—hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[36] When there is no tangible employment action, an employer still can be liable for supervisor harassment, but an employer may avoid liability by showing—by a preponderance of the evidence—that it "exercised reasonable care to prevent and correct promptly any . . . harassing behavior" and the plaintiff "unreasonably failed to take advantage of any preventative or corrective opportunities."[37] When the harasser is a coworker, employers are liable only if the employer is negligent in failing to prevent or respond to the employee's complaint.[38] Proving negligence requires the plaintiff to show that "the employer knew or reasonably should have known about the harassment but failed to take remedial action."[39]

After *Ellerth* and *Faragher*, liability in Title VII hostile work environment cases often hinged on whether the alleged harasser was a supervisor or

30. Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994) (quoting 29 C.F.R. § 1604.11(a)(2) (1993)).

31. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

32. Vance v. Ball State Univ., 570 U.S. 421, 452 (2013) (Ginsburg, J., dissenting).

33. Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 670 (1995) (discussing the "at least six different standards" for determining liability for hostile work environment claims).

34. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).

35. *Vance*, 570 U.S. at 453 (Ginsburg, J., dissenting).

36. *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 807.

37. *Faragher*, 524 U.S. at 807.

38. *Ellerth*, 524 U.S. at 759, 67; *see also Faragher*, 524 U.S. at 807.

39. *Vance*, 570 U.S. at 427.

coworker.[40] However, Title VII does not define the term "supervisor."[41] For almost fifteen years, federal courts struggled to interpret the term, applying materially different definitions.[42] The EEOC defined a "supervisor" for purposes of Title VII as one who had authority to: (1) "undertake or recommend tangible employment decisions affecting the employee;" or (2) "direct the employee's daily work activities."[43] The Second, Fourth, and Ninth Circuits adopted this view, tying supervisory authority to the exercise of significant direction over another "employee's daily work activities."[44] The First, Seventh, and Eighth Circuits adopted a more narrow definition, holding that an employee was a supervisor only if he or she had the "power to hire, fire, demote, promote, transfer, or discipline."[45] The Tenth Circuit adopted a "hybrid approach finding supervisor status in a harasser who was 'in charge of delegating duties and assigning work to plaintiff,' but who was also 'involved in the disciplinary process.'"[46]

In 2013, in *Vance v. Ball State*, the Supreme Court addressed this circuit split, considering who qualifies as a supervisor in a Title VII workplace harassment claim.[47] Plaintiff Maetta Vance was the only African-American woman in the Banquet and Catering Department at Ball State University.[48] In 2005, she began filing complaints with Ball State about fellow employees, particularly a Caucasian woman named Saundra Davis, using racial epithets, "veiled threats of physical harm," and other offensive conduct.[49] In 2006, she filed two charges with the EEOC for race discrimination and retaliation.[50] After receiving a right-to-sue letter,[51] she filed a lawsuit in the United States District Court for the Southern District of Indiana.[52] One claim alleged a racially hostile work environment in violation of Title VII.

Vance did not allege that Davis had the power to hire, fire, demote, promote, transfer, or discipline her. Rather, she alleged that Davis was her supervisor because Davis had control over her daily work activities, and thus Ball State

40. *See* 52 AM. JUR. 3D *Proof of Facts* § 4 (1999).

41. *See* 42 U.S.C. § 2000e.

42. *See* Lakisha A. Davis, *Who's the Boss? A Distinction Without a Difference*, 19 BARRY L. REV. 155, 159–60 (2013); *Employment Litigation and Discrimination*, 25 NO. 10 BUS. TORTS REP. 270, 271–72 (2013).

43. Equal Emp. Opportunity Comm'n, *supra* note 4, at 3.

44. Mack v. Otis Elevator Co., 326 F.3d 116, 126–27 (2d Cir. 2003); *see also* Dawson v. Entek Int'l, 630 F.3d 928, 940 (9th Cir. 2011); Whitten v. Fred's, Inc., 601 F.3d 231, 245–47 (4th Cir. 2010).

45. Noviello v. City of Boston, 398 F.3d 76, 96 (1st Cir. 2005); *see also* Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 (8th Cir. 2004); Parkins v. Civ. Constructors of Illinois, Inc., 163 F.3d 1027, 1034 (7th Cir. 1998).

46. *See* Kramer v. Wasatch Cnty. Sheriff's Off., 743 F.3d 726, 737 n.4 (10th Cir. 2014) (citing Harrison v. Eddy Potash Inc., 248 F.3d 1014, 1016 (10th Cir. 2001)); *see also* Rubidoux v. Colo. Mental Health Inst., 173 F.3d 1291, 1292–93 (10th Cir. 1999). The Third, Fifth, Sixth, and Eleventh Circuits did not adopt a position.

47. Vance v. Ball State Univ., 570 U.S. 421, 423 (2013).

48. *Id.* at 424; Vance v. Ball State Univ., 646 F.3d 461, 465 (7th Cir. 2011).

49. *Vance*, 646 F.3d at 465. Vance's harasser allegedly called her "Buckwheat" and "Sambo." *Id.* at 467.

50. *Id.* at 465.

51. A right-to-sue letter acts as permission from the EEOC to file a lawsuit in federal or state court. It is a prerequisite to filing a lawsuit "under federal law alleging discrimination." *See Filing a Lawsuit*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/lawsuit.cfm (last visited Mar. 18, 2021) [https://perma.cc/6LWR-ZULA].

52. *See* Vance v. Ball State, No. 06-CV-1452, 2008 WL 4247836 (S.D. Ind. Sept. 10, 2008).

was vicariously liable for Davis's conduct.[53] The district court granted summary judgment to Ball State, in part, because Davis did not have the authority to "hire, fire, demote, promote, transfer, or discipline" Vance, and thus was not a supervisor.[54] Vance appealed the dismissal of her hostile work environment claim.[55] The Seventh Circuit affirmed, holding that supervisor status requires "the power to hire, fire, demote, promote, transfer, or discipline an employee."[56] The Supreme Court granted Vance's petition for certiorari.[57]

On June 24, 2013, the Court held that an "employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."[58] The power to direct an employee's tasks is not sufficient. Rather, the individual must have the power to effect 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."[59] Because Vance's alleged harasser did not have the power to effect these changes, she was not a supervisor for purposes of Title VII liability.[60] The Court provided one caveat: where an employer "attempt[s] to confine decisionmaking power to a small number of individuals," and those individuals "rely on other workers who actually interact with the affected employee," the employer "may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."[61]

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented, writing that the majority's opinion "is blind to the realities of the workplace,"[62] which "fortify [the] conclusion that harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicarious employer liability."[63]

53. Brief for Petitioner at 10–12, Vance v. Ball State Univ., 570 U.S. 421 (2013) (No. 11-556), 2012 WL 3803439, at *10–12

54. *Vance*, 2008 WL 4247836, at *12.

55. *Vance*, 646 F.3d at 465.

56. *Id.* at 470.

57. Petition for Writ of Certiorari, Vance v. Ball State Univ., 570 U.S. 421 (No. 11-556); Vance v. Ball State Univ., 570 U.S. 421, 431 (2013).

58. Vance v. Ball Sate Univ., 570 U.S. 421, 424 (2013). In a footnote, the *Vance* majority said it would not afford *Skidmore* deference to the EEOC's definition of "supervisor" because it did not "find the EEOC Guidance persuasive." *Id.* at 431 n.4. The dissent, on the other hand, noted the definition should receive *Skidmore* deference and "garner respect proportional to its power to persuade." *Id.* at 462 (Ginsburg, J., dissenting) (internal quotation marks omitted). The dissent further stated its belief that the defintion has "powerfully persuasive force" based on the "agency's 'informed judgment' and 'body of experience' in enforcing Title VII." *Id.* at 462–63.

59. *Id.* at 431 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

60. *Id.* at 450.

61. *Id.* at 447.

62. *Id.* at 455 (Ginsburg, J., dissenting).

63. *Id.* at 458.

III. METHODOLOGY

Vance quickly became the most cited employment case of its term,[64] with courts across the country struggling to interpret the newly announced definition of "supervisor." While many scholars have hypothesized about the effects of the *Vance* definition on Title VII litigation, no scholarship has comprehensively evaluated the issue. In the following Section, I set forth the methodology I used to identify a universe of federal cases for analyzing how *Vance* has impacted Title VII hostile work environment claims.

A. Screen Cases for Vance *Supervisor Issue*

I began by collecting all cases citing *Vance* on Westlaw that were decided in the first five years after the decision issued (June 24, 2013—June 24, 2018); this yielded 739 results.[65] To narrow the search to relevant cases, I filtered by cases that contained the words "supervisor," "coworker," or "co-worker;" this yielded 698 results. I then removed all state court cases;[66] this yielded 680 cases. Finally, I analyzed all 680 cases to determine whether the court considered the issue of supervisory liability in the context of a Title VII hostile work environment claim.[67]

From the group of 680, I excluded cases where supervisor liability was not at issue. This included cases where the court: (1) cited *Vance* only for a legal principle;[68] (2) dismissed the Title VII claim before considering the supervisor issue;[69] (3) applied the *Vance* "supervisor" definition to non-Title VII federal[70]

64. In the five years after *Vance* issued (from June 24, 2013 to June 24, 2018), the case was cited by federal courts more than all the other employment cases decided that term combined. *See* Sandifer v. U.S. Steel Corp., 571 U.S. 220 (2014) (113 cases citing); Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014) (148 cases citing); Harris v. Quinn, 573 U.S. 616 (2014) (fifty-six cases citing).

65. My research considers only cases reported on Westlaw to avoid selection bias and facilitate review and analysis by other scholars.

66 *See, e.g.*, Coles v. Kam-Way Transportation, No. 75471-8-1, 2017 WL 3980563, at *8 (Wash. Ct. App. Sept. 11, 2017); Smith v. Carter BloodCare, No. 02-12-00523-CV, 2014 WL 1257273, at *4 (Tex. App. Mar. 27, 2014). While *Vance* has influenced courts' interpretations of the supervisor issue in state cases with statutes similar to Title VII, I focus my analysis on Title VII cases brought in federal court.

67. *Vance* applies to harassment cases in a variety of ways; this Article, however, analyzes only cases: (1) in federal court; (2) where *Vance* applies to liability for hostile work environment claims based on supervisor status.

68. *See, e.g.*, Webb v. Round Rock Indep. Sch. Dist., No. A–12–CA–919–LY, 2013 WL 4434245, at *5 (W.D. Tex. Aug. 16, 2013) (citing *Vance* for the legal proposition that "Title VII imposes no general civility code") (internal quotations omitted).

69. This included cases, for example, where the court dismissed the claim for failure to exhaust administrative remedies. *See, e.g.*, Kearney v. Maryland, No. ELH–12–2754, 2013 WL 3964995, at *5 (D. Md. Aug. 1, 2013).

70. Wiercinski v. Mangia 57, Inc., 787 F.3d 106, 114 (2d Cir. 2015) (applying *Vance* to § 1981 case); Watkins v. N.Y. Transit Auth., 16 Civ. 4161 (LGS), 2018 WL 895624, at *4 n.2 (S.D.N.Y. Feb. 13, 2018) (same); Lamarr-Arruz v. CVS Pharmacy, 271 F. Supp. 3d 646, 658–59 (S.D.N.Y. 2017) (same).

or state[71] statutes; or (4) cited *Vance* only to show abrogation of another case.[72] I next excluded cases where supervisor liability was at issue, but the court did not decide it because the court: (1) deferred the issue to a later stage of litigation;[73] (2) found the defendant negligent under the less rigorous coworker standard;[74] or (3) used *Vance* to consider employment status under Title VII but not to determine vicarious liability.[75] I also excluded two cases in which the court analyzed the supervisor issue, but only as it applied to *quid pro quo* claims, not hostile work environment claims.[76] Finally, I excluded duplicate cases.[77] In the end, the set consisted of 281 cases that analyzed the *Vance* supervisor issue in the context of Title VII hostile work environment claims.

B. Remove Uncontested Cases

Next, I removed from the set cases where the supervisor issue was uncontested. I excluded these cases for several reasons: (1) there was no evidence in any of these cases that an argument could be made the other way; (2) these cases

71. *See, e.g.*, Young v. Smithfield Farmland Corp., No. 17–143–DCR, 2017 WL 4287546, at *2 (E.D. Ky. Sept. 27, 2017) (applying *Vance* definition of "supervisor" to Kentucky Civil Rights Act); Nelson v. Allan's Waste Water Serv., Inc., No. 11–cv–01334–TFM, 2013 WL 4045787, at *4 (W.D. Pa. Aug. 8, 2013) (applying *Vance* definition of "supervisor" to the Pennsylvania Human Relations Act).

72. *See, e.g.*, Robinson v. BGM Am., Inc., 964 F. Supp. 2d 552, 575 (D.S.C. 2013).

73. *See, e.g.*, *Pimentel v. Magin*, No. 1:10–CV–0616 GTS/CFH, 2013 WL 4080600, at *9 n.5 (N.D.N.Y., Aug. 13, 2013) ("To be sure, it is questionable, based on the pleadings, whether Magin had the authority to effect 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 necessary to render him a supervisor for purposes of DOH's vicarious liability under Title VII. However, because Plaintiffs allege facts plausibly suggesting that DOH is vicariously liable whether Magin is a co-worker or a supervisor, the Court need not reach the issue at this stage of the litigation.") (citing *Vance,* 133 S. Ct. 2434) (internal quotations omitted).

74. *See, e.g.*, EEOC v. Suffolk Laundry Servs., Inc., 48 F. Supp. 3d 497, 520 (E.D.N.Y. 2014) ("As discussed below, the Court finds that Suffolk Laundry was negligent in controlling the working conditions of the Claimants and therefore does not consider whether Singh is a 'supervisor' for purposes of imposing liability.").

75. *See, e.g.*, Wilson v. Oregon, No. 11–cv–01061–PK, 2013 WL 6196983, at *12 (D. Or. Nov. 27, 2013) (analyzing *Vance* in light of defendant's argument that it did not employ the harasser).

76. I removed two cases where the court analyzed the *Vance* issue only with regard to the *quid pro quo* claim and not the hostile work environment claim. *See* Bruce v. Fair Collections & Outsourcing, Inc., No. CCB–13–3200, 2014 WL 3052477, at *4 (D. Md. June 30, 2014); Higgins v. Lufkin Indus. Inc., No. 9–13–CV–203, 2014 WL 11515019, at *3 (E.D. Tex. Nov. 18, 2014). In these cases, the supervisor issue was not relevant to the hostile work environment claim because the court dismissed the claim on other grounds (*e.g.*, the harassment was not severe and pervasive and did not alter conditions of employment).

77. *See, e.g.*, Holt v. Dynaserv Indus. Inc., 14 Civ. 8299 (LGS), 2016 WL 5108205 (S.D.N.Y. Sept. 19, 2016) (amending an earlier opinion and order in *Holt v. Dynaserv Indus. Inc.*, 14 Civ. 8299 (LGS), 2016 WL 4734661 (S.D.N.Y. Sept. 9, 2016) but not with respect to the *Vance* issue). I also removed magistrates' reports and recommendations if I included the district court order adopting the recommendation. *See* Termilus v. Marksman Sec. Corp., No. 15–61758–CIV–MORENO/O'SULLIVAN, 2016 WL 6212990 (S.D. Fla. June 27, 2016). I included both district and appellate decisions in the same case where both decisions were issued in the relevant time period. For example, in *Justice v. Rockwell*, I included the district court's order granting, in part, the defendant's motion for summary judgment. *See* Justice v. Rockwell Collins, Inc., 117 F. Supp. 3d 1119 (D. Or. 2015). I also included the Ninth Circuit's opinion affirming the district court. *See* Justice v. Rockwell Collins, Inc., 720 Fed. Appx. 365, 367 (2017). In *Velazquez-Perez v. Devs. Diversified Realty Corp.*, 753 F.3d 265 (1st Cir. 2014), however, I included the appellate decision, but I did not include the district court order it reviewed, *Perez v. Devs. Diversified Realty Corp.*, 904 F. Supp. 2d 156 (D.P.R. 2012), because the district court order was issued in September 2012 before the Supreme Court issued *Vance*.

failed to provide helpful insight into how courts analyze the supervisor issue; and (3) in most of these cases, because the parties agreed on supervisor status, there was not enough information about the harasser's job duties to determine whether the outcome would have been different pre-*Vance*.[78]

I categorized a case as uncontested when the defendant explicitly conceded supervisor status or the plaintiff explicitly conceded coworker status, and the court accepted that concession on the *Vance* supervisor issue.[79] I categorized a case as contested when neither the defendant nor the plaintiff conceded the harasser's status, and the court decided (or assumed) the issue.[80]

Of the 281 cases considering the *Vance* issue of supervisor liability in the context of hostile work environment claims, the status of the harasser as either supervisor or coworker was uncontested in thirty-six cases: nineteen cases uncontested coworker, fifteen cases uncontested supervisor, and two cases uncontested coworker and supervisor.[81] Thus, the final set of cases I analyzed consists of those 245 cases where supervisory status was either explicitly or implicitly[82] contested.[83]

C. Evaluate and Categorize Cases

I evaluated and categorized the 245 cases in the contested *Vance* set based on the following information: (1) date, district, and circuit; (2) stage of proceeding; (3) harasser status; (4) disposition; (5) whether the court considered delegation; (6) whether the harasser's status would have been different pre-*Vance*; and (7) whether the harasser's status affected the ultimate claim outcome. The following Section provides notes on this categorization system.[84]

78. *See, e.g.*, Martin v. MCAP Christiansburg, LLC, 143 F. Supp. 3d 442, 448 (W.D. Va. 2015) ("It is undisputed in this case that Long was not Martin's supervisor—he was a co-worker."); Penn v. Citizens Telecom Servs. Co., LLC, 999 F. Supp. 2d 888, 898 (S.D.W. Va. 2014) ("Turning to the substance of Penn's Title VII claim, the parties agree that Kidder was Penn's supervisor and that Citizens Telecom could therefore be liable to Penn under a theory of vicarious liability."). I recognize that *Vance's* narrowed definition of "supervisor" may preclude some plaintiffs from contesting supervisory status. But an analysis of this issue is beyond the scope of this article.

79. I found only one case where both the plaintiff and defendant explicitly conceded a harasser's status, and the court disagreed. *See* Rock v. Blaine, No. 14–cv–01421 (MAD/CFH), 2018 WL 1415202, at *10 (N.D.N.Y. Mar. 20, 2018) ("Although the State Defendants argue, and Plaintiff agrees, that Defendant Blaine was not Plaintiff's supervisor under *Vance*, the Court disagrees.").

80. Even if the plaintiff did not argue supervisory status, I considered the case contested if the plaintiff did not concede coworker status. *See* Ibbison v. USI Ins. Servs. of Conn., No. 12–cv–00545–GWC, 2016 WL 901241, at *10 (D. Conn. Mar. 2, 2016).

81. *See, e.g.*, cases cited *supra* notes 74–79.

82. Implicitly contested means it was unclear if plaintiff made an argument contesting status, but the court analyzed the issue as if contested.

83. I refer to this group throughout the Article as "contested cases."

84. Although individual categories, such as "Date, District, and Circuit" may not be informative on the *Vance* issue in isolation, the information is necessary to perform the end analysis of determining whether *Vance* has negatively impacted plaintiffs' ability to succeed on Title VII hostile work environment claims. For example, without data on the circuit in which each case was filed, I would not be able to analyze if the court would have decided the issue differently pre-*Vance*.

1. Date, District, Circuit

For these categories, I input information on the date the court issued the relevant order or opinion and the district or appellate court in which it was filed.

2. Stage of Proceeding

For stage of proceeding, I categorized cases as follows: (1) motions to dismiss; (2) cross motions for summary judgment; (3) defendants' motions for summary judgment;[85] (4) other;[86] (5) appeals of Fed. R. Civ. P. 12(b)(6) dismissals; (6) appeals of Fed. R. Civ. P. 56 dismissals; and (7) appeals of plaintiff verdicts.

3. Harasser Status: Coworker, Supervisor, or Question of Fact

For "Harasser Status," I organized claims in three categories: (1) coworker; (2) supervisor; or (3) question of fact. In the majority of motion to dismiss cases, the court did not rule on whether the harasser was a coworker or a supervisor. Rather, the court ruled on whether the plaintiff's allegations were sufficient to allege the harasser's supervisory status. I categorized these cases as follows: (1) where the court ruled the plaintiff had pled enough to allege the harasser's supervisory status, I categorized the case in the supervisor category;[87] (2) where the court ruled the plaintiff had not pled enough to allege the harasser's supervisory status, I categorized the case in the coworker category.[88]

85. In addition to standard motions for summary judgment, I included the following cases in the "Defendants' Motions for Summary Judgment" category: (1) two motions for reconsideration of summary judgment; (2) a Magistrate Judge's Report and Recommendation on Defendant's Motion for Summary Judgment; and (3) two orders adopting a Magistrate Judge's Report and Recommendation on Defendant's Motion for Summary Judgment. The two motions for reconsideration of summary judgment were *Connearney v. Main Line Hosps., Inc.*, No. 15–02730, 2016 WL 6569288, at *1 (E.D. Pa. Nov. 4, 2016) (analyzing the defendant's motion to reconsider summary judgment for the plaintiff); and *Morrow v. Kroger Ltd. P'ship I*, No. 3:13–CV–00276–NBB–SAA, No. 13–CV–305–NBB–SAA, 2016 WL 1260778, at *1 (N.D. Miss. Mar. 30, 2016) (analyzing the plaintiff's motion to reconsider summary judgment for the defendant). The magistrate's report and recommendation was *Porter v. United Parcel Serv., Inc.*, No. 13CV–00065–JHM, 2014 WL 12573675, at *1 (W.D. Ky. Dec. 30, 2014). The two orders adopting the magistrate's report and recommendation were *Mack v. Detyens Shipyards, Inc.*, No. 16–1323–RMG, 2017 WL 5952692, at *1 (D.S.C. Nov. 30, 2017); *Termilus v. Marksman Sec. Corp.*, No. 15–61758–CIV, 2016 WL 6237264, at *1 (S.D. Fla. Sept. 1, 2016).

86. The "Other" category consists of defendants' motions for judgment as a matter of law, renewed motions for judgment as a matter of law, motions for judgment notwithstanding the verdict, motions for default judgment, a review of a bankruptcy court decision, and a ruling following a bench trial.

87. In one case, the court ruled the employer could be liable under a supervisor theory because the harasser was the person who fired the plaintiff; I categorized this in the supervisor category. *See* Al-Kaysey v. Engility Corp., No. 11–CV–6318 (RRM) (LB), 2016 WL 5349751, at *14 (E.D.N.Y. Sept. 23, 2016). Additionally, when a court ruled that the plaintiff had alleged enough to state supervisory liability, I also categorized this case in the supervisor category rather than question-of-fact category because this is a more conservative approach in evaluating whether *Vance* negatively has impacted Title VII claims.

88. In two cases, the court assumed (without analysis) that the harasser was a coworker because the plaintiff made no supervisory allegations; I categorized these in the coworker category. *See* Hall v. Okla. Dep't of Hum. Servs., No. 15–CV–0670–CVE–TLW, 2016 WL 2903266, at *8 (N.D. Okla. May 18, 2016); Erasmus v. Deutsche Bank Ams. Holding Corp., No. 15 Civ. 1398 (PAE), 2015 WL 7736554, at *12 (S.D.N.Y. Nov. 30, 2015).

In the majority of summary judgment cases, the court ruled that the harasser was a coworker or supervisor or that the issue was a question of fact; I categorized these cases accordingly. In one summary judgment case, the court assumed, but did not rule, that a harasser was a supervisor for purposes of the motion; I categorized this in the supervisor category.[89] In three summary judgment cases, the court found some harassers were supervisors and others coworkers; I categorized these in the supervisor category.[90]

4. Disposition: Dismissed or Allowed to Proceed

In each case, I determined whether the court dismissed the Title VII hostile work environment claim or allowed it to proceed.

5. Delegation

In the delegation category, I tracked whether the court explicitly or implicitly considered the delegation doctrine, *i.e.*, whether the employer effectively delegated supervisory authority to the harasser. To find that a court explicitly considered delegation, the court must have either referenced the doctrine by name or used the word "delegation" in some form. To find that a court implicitly considered delegation, the court must have discussed the concept of delegatory authority without identifying it by name.

*6. Comparing Harasser Status Pre- and Post-*Vance

In this category, I assessed whether the harasser's status would have been different under the EEOC's definition of "supervisor." In essence, would the court have decided the supervisor issue differently if it had considered whether the harasser could direct the employee's day-to-day work?[91] After identifying this group, I removed cases from those circuits that used the narrower definition of "supervisor" pre-*Vance*, leaving only those cases where *Vance* changed how the court would have decided the issue. For eleven cases, there was insufficient information to determine the harasser's duties.[92]

89. Jones v. Fam. Health Ctrs. of Balt., Inc., 135 F. Supp. 3d 372, 380 (D. Md. 2015).

90. Acevedo v. Stroudsburg Sch. Dist., No. 15–CV–02035, 2018 WL 1370875, at *6 (M.D. Pa. Feb. 15, 2018), *report and recommendation adopted*, No. 15–CV–2035, 2018 WL 1370598 (M.D. Pa. Mar. 16, 2018); Nzabandora v. Univ. of Va., No. 17–CV–00003, 2017 WL 4798920, at *1 (W.D. Va. Oct. 24, 2017); McCall v. Genpak, LLC, No. 13-CV-1947 KMK, 2015 WL 5730352, at *27–28 (S.D.N.Y. Sept. 30, 2015). I categorized these in the supervisor category so that my findings about *Vance*'s detrimental impact to plaintiffs would be conservative.

91. As guidance for this determination, I looked at cases from the Second, Fourth, and Ninth Circuits where supervisory authority was tied to the exercise of significant direction over another's daily work.

92. I categorized these cases as "Insufficient Information."

7. Was Harasser Status Material to the Hostile Work Environment Claim?

In the final category, I determined whether the harasser's status as a supervisor or coworker was material to the disposition of the hostile work environment claim. I categorized cases in the following groups: (1) the supervisor issue was immaterial to claim outcome; (2) the supervisor issue was material to the claim proceeding; (3) the supervisor issue was material to claim dismissal; or (4) the supervisor issue narrowed the claim.

The first group consists of cases where the court dismissed the Title VII claim for reasons unrelated to the supervisor issue (*e.g.*, the harassment was not severe and pervasive). The second group consists of cases where the court allowed the Title VII claim to proceed because the harasser was a supervisor or there was a question of fact on the supervisor issue *and* the plaintiff met the other prima facie elements of harassment. The third group consists of cases where the court dismissed the Title VII claim because the harasser was not a supervisor and the employer was not negligent. The fourth group consists of cases where the court found the harasser was a coworker, but still allowed the claim to proceed under a negligence theory.

IV. ANALYSIS OF CONTESTED CASES

This Section analyzes the data from the 245 cases decided between June 24, 2013 and June 24, 2018 in which the *Vance* supervisor issue was contested.[93] Some of the categories (*e.g.*, "Date, District, Circuit" and "Stage of Proceeding") do not, by themselves, show *Vance*'s effects on Title VII litigation. However, they provide relevant context on when and how courts encounter *Vance* issues and, therefore, are integral building blocks in determining *Vance*'s effects.

93. I used the common rounding method of "round half up" to round each percentage to a whole number. At times, this results in some categories totaling 99% or 101%.

A. Date, District, Circuit

TABLE 1: NUMBER OF CASES BY CIRCUIT[94]

Circuit	# of Cases Considering *Vance* Issue	% of Total
First	10	4%
Second	41	17%
Third	23	9%
Fourth	34	14%
Fifth	21	9%
Sixth	23	9%
Seventh	28	11%
Eighth	6	2%
Ninth	29	12%
Tenth	12	5%
Eleventh	16	7%
DC	2	1%
Total	245	100%

The Second, Fourth, Ninth, and Seventh Circuits had the most *Vance* cases, with 17%, 14%, 12%, and 11% of the overall cases, respectively. Within those circuits, the Northern District of Illinois saw the most *Vance* issues (sixteen cases), followed by the Southern District of New York (fourteen cases), the Eastern District of New York (twelve cases), and the Eastern District of Pennsylvania (ten cases). The DC, Eighth, First, and Tenth Circuits had the fewest *Vance* cases, with 1%, 2%, 4%, and 5% of the overall cases respectively.

At first glance, it is unsurprising that the Second, Fourth, and Ninth Circuits—which applied the broader EEOC definition of "supervisor" pre-*Vance*[95]—had the largest percentage of supervisor issues post-*Vance*. One might speculate that because it was easier to show supervisory liability in these circuits pre-*Vance*, more plaintiffs raised the issue. One might also expect it to take some time post-*Vance* for the narrowed definition to decrease the frequency with which plaintiffs argued supervisory liability.

For a similar reason, it is unsurprising that the First and Eighth Circuits—which used the narrower "supervisor" definition pre-*Vance*—had a smaller percentage of supervisor issues post-*Vance*. However, because the distribution of *Vance* cases likely reflects a number of factors, such as the circuits' caseloads

94. In the column "% of Total *Vance* Set," the word "total" refers to all 245 cases in which the *Vance* supervisor issue was contested.

95. *See, e.g.*, Dawson v. Entek Int'l, 630 F.3d 928, 940 (9th Cir. 2010); Whitten v. Fred's, Inc., 601 F.3d 231, 245 (4th Cir. 2010); Mack v. Otis Elevator Co., 326 F.3d 116, 126–27 (2d Cir. 2003).

generally and the number of employment cases filed, this metric alone does not reveal plaintiffs' general propensity to raise the *Vance* issue in each circuit.[96]

B. Stage of Proceeding

TABLE 2: NUMBER OF CASES BY STAGE OF PROCEEDING[97]

Stage of Proceeding[98]	# of Cases Considering *Vance* Issue	% of Total
Def. MTD	20	8%
Cross MSJ	10	4%
Def. MSJ	182	74%
Other	8	3%
Appeal 12b6	2	1%
Appeal MSJ	21	9%
Appeal Verdict	2	1%
Total	245	100%

In *Vance*, the majority speculated that "supervisor status will generally be capable of resolution at summary judgment."[99] And not surprisingly, courts most frequently consider *Vance* issues in motions for summary judgment (78% of the cases). *Vance* issues are least likely to arise in motions to dismiss (8% of the cases), perhaps because of the fact-intensive nature of determining supervisory liability.

96. It is not surprising that the DC, Eighth, First, and Tenth Circuits saw the fewest *Vance* cases. In 2013, they were among the five circuits with the fewest cases filed. *See* U.S. COURTS, U.S. COURT OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIODS ENDING DECEMBER 31, 2013 AND 2014, https://www.uscourts.gov/sites/default/files/b00dec14_0.pdf (last visited Mar. 18, 2021) [https://perma.cc/EQ92-PENZ] (showing the circuit filings from most to fewest: Ninth (12,761), Fifth (7,455), Eleventh (6,254), Second (4,996), Sixth (4,981), Fourth (4,969), Third (3,910), Eighth (2,838), Seventh (2,992), Tenth (2,071), First (1,575), and DC (1,020).). They also were among the five circuits with the fewest employment cases arising under federal law. *See* U.S. COURTS, U.S. COURT OF APPEALS—NATURE OF SUIT OR OFFENSE IN CASES ARISING FROM THE U.S. DISTRICT COURTS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2013, https://www.uscourts.gov/sites/default/files/statistics_import_dir/B07Dec13.pdf (last visited Mar. 18, 2021) [https://perma.cc/8BCZ-634X] (showing from most to fewest: Second (213), Eleventh (193), Fifth (181), Seventh (162), Sixth (160), Ninth (145), Fourth (141), Third (117), Tenth (71), Eighth (58), First (40), and DC (26)).

97. In the column "% of total," the word "total" refers to all 245 cases in which the *Vance* supervisor issue was contested.

98. In the following tables, when referring to stage of proceeding, the following applies: Def. MTD=defendants' motions to dismiss; Cross MSJ=cross motions for summary judgment; Def. MSJ=defendants' motions for summary judgment; Other=defendants' motions for judgment as a matter of law, renewed motions for judgment as a matter of law, motions for judgment notwithstanding the verdict, motions for default judgment, a review of a bankruptcy court decision, and a ruling following a bench trial; Appeal 12b6=appeals of grants of defendants' motions to dismiss; Appeal MSJ=appeals of grants of defendants' motions for summary judgment; Appeal Verdict=appeals of verdicts for plaintiffs.

99. Vance v. Ball State Univ., 570 U.S. 421, 441 (2013). The court also said: "Under the definition of 'supervisor' that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial." *Id.* at 443.

C. Harasser Status: Coworker, Supervisor, or Question of Fact

TABLE 3: SUPERVISOR FINDING BY CIRCUIT[100]

Circuit	Coworker	% of Total	Supervisor	% of Total	Fact Question	% of Total
First	4	40%	3	30%	3	30%
Second	25	61%	8	20%	8	20%
Third	7	30%	8	35%	8	35%
Fourth	25	74%	4	12%	5	15%
Fifth	17	81%	3	14%	1	5%
Sixth	16	70%	3	13%	4	17%
Seventh	20	71%	6	21%	2	7%
Eighth	5	83%	0	0%	1	17%
Ninth	21	72%	2	7%	6	21%
Tenth	9	75%	1	8%	2	17%
Eleventh	10	63%	1	6%	5	31%
DC	1	50%	1	50%	0	0%
Totals	160	65%	40	16%	45	18%

TABLE 4: SUPERVISOR FINDING BY STAGE OF PROCEEDING[101]

Stage of Proceeding	Coworker	% of Total	Supervisor	% of Total	Fact Question	% of Total
Def. MTD	9	45%	11[102]	55%	0	0%
Cross MSJ	8	80%	0	0%	2	20%
Def. MSJ	118	65%	23	13%	41	23%
Other	5	63%	2	25%	1	13%
Appeal 12b6	1	50%	1	50%	0	0%
Appeal MSJ	19	90%	1	5%	1	5%
Appeal Verdict	0	0%	2	100%	0	0%
Total	160	65%	40	16%	45	18%

The first substantive question in my analysis was how courts decide the supervisor issue. In 65% of contested cases, the court ruled the harasser was a coworker. In 16% of contested cases, the court ruled the harasser was a supervisor. In 18% of contested cases, the court ruled the coworker/supervisor issue was

100. In the column "% of total," the word "total" refers to the total number of cases in each circuit in which the *Vance* supervisor issue was contested.

101. In the column "% of total," the word "total" refers to the total number of cases at that stage of proceeding in which the *Vance* supervisor issue was contested.

102. As discussed in Section III.C.3, these are cases where the court found the plaintiff pled enough to allege the harasser was a supervisor under *Vance*, not where the court found the harasser was a supervisor under *Vance*. I categorized these in the supervisor category rather than the question-of-fact category because this is a more conservative approach in evaluating whether *Vance* negatively has impacted Title VII claims.

a question of fact. Courts were most likely to rule that a harasser was a coworker in response to appeals of defendants' motions for summary judgment (90% of the time), cross motions for summary judgment (80% of the time), and defendants' motions for summary judgment (65% of the time). Courts were least likely to rule that a harasser was a coworker on appeals of plaintiffs' verdicts (0% of time) and defendants' motions to dismiss (45% of the time). Courts never ruled that a harasser was a supervisor on cross motions for summary judgment and rarely on appeals of defendants' motions for summary judgment (5% of the time). Courts found a question of fact on the supervisor issue almost the same percentage of time on defendants' motions for summary judgment and cross motions for summary judgment (23% of the time versus 20% of the time). The Eighth, Fifth, Tenth, and Fourth Circuits were most likely to find the harasser was a coworker, while the Third and First Circuits were most likely to find the harasser was a supervisor.[103]

1. Coworker Cases

In 65% of contested cases, courts ruled the harasser was a coworker. Some of the most expansive definitions of coworker were found in the following three cases. These cases show that even in situations where harassers had authority to conduct performance evaluations and provide input into disciplinary actions and hiring, courts still did not classify them as supervisors under *Vance*.

In *Stanley v. Northwest Ohio Psychiatric Hospital*, the district court for the Northern District of Ohio considered the status of a "psychiatric/nurse supervisor" who had the authority to prepare disciplinary packets (including fact-finding statements, time/attendance records, and other applicable documents), bring disciplinary problems to human resources, send employees home as a disciplinary measure, conduct performance evaluations, provide input into final disciplinary actions, and attend disciplinary hearings.[104] The court ruled the harasser was not a supervisor because he "did not have the authority to hire, fire, deny promotions, reassign an employee with significant different responsibilities, or cause a significant change in benefits."[105] The court noted that although the harasser "could begin a disciplinary process, the ultimate responsibility regarding disciplinary matters belonged to individuals with higher authority."[106]

In *Morrow v. Kroger Limited Partnership I*, the harasser, the "meat market manager" at a grocery store, filled out performance evaluations, scheduled employees, provided input in hiring decisions, had a close relationship with the store manager, and boasted that he "could influence who was hired into the meat department."[107] Yet the Fifth Circuit held he was not a supervisor; even though he

103. Because the DC Circuit has only two cases in the total universe of cases contesting the supervisor issue, I did not consider it when determining what circuits were more or least likely to rule a particular way.

104. Stanley v. Nw. Ohio Psychiatric Hosp., 7 F. Supp. 3d 731, 742 (N.D. Ohio 2014).

105. *Id.*

106. *Id.*

107. Morrow v. Kroger Ltd. P'ship I, 681 F. App'x 377, 380 (5th Cir. 2017); *see* Matherne v. Ruba Mgmt., 624 F. App'x 835, 840 (5th Cir. 2015) (quoting Vance v. Ball State Univ., 570 U.S. 421, 441(2013)) (holding

had "some leadership responsibilities in the meat department" and had "some influence" over the store manager, he did not have "the authority to cause a tangible employment action as is required under *Vance*."[108]

In *Velazquez v. Helmerich & Payne International Drilling Co.*, the harasser—a "lead fabricator"—was responsible for coordinating daily work, directing employees on job assignments, and managing time and daily tasks.[109] He also issued written discipline to the plaintiff "on at least eight occasions" and "was listed as the supervisor on the discipline forms."[110] Still, the district court for the Northern District of Oklahoma ruled he was not a supervisor because the evidence failed to show that he "had any influence over any tangible change to plaintiff's employment, because the written discipline had nothing to do with plaintiff's termination."[111]

2. Supervisor Cases

In 16% of contested cases, courts ruled the harasser was a supervisor.[112] Some of the most expansive definitions of "supervisor" were found in the following three cases. In these cases, courts found (sometimes contrary to *Vance*'s directive) that harassers with the authority to discipline, schedule work, or assign tasks were supervisors.

In *Gracia v. Sigmatron International, Inc.*, the district court for the Northern District of Illinois ruled that a harasser with the authority to discipline was a supervisor.[113] It described the Supreme Court's definition of a "supervisor" as a "nonexhaustive list of supervisory powers," noting that although the list "does not explicitly mention the authority to impose discipline, *Vance* adopted the Seventh Circuit's definition of 'supervisor,' and in the Seventh Circuit an employee who has the authority to discipline the harassment victim is a supervisor."[114] The court ruled the harasser was a supervisor because the employer empowered the harasser to discipline the plaintiff, and the discipline notices bore the harasser's signature.[115] The court concluded that "although Silverman may not have been able to fire Gracia by his lonesome . . . the fact that he could discipline her makes him her supervisor for Title VII purposes."[116] Interestingly, the court noted the

that the harasser, the "weekend manager," who had "some leadership responsibilities," including control over the book where managers could comment on problems, was not a supervisor because "mere 'leadership responsibilities'" are insufficient to confer supervisory status).

108. *Morrow*, 681 F. App'x at 380.

109. Velazquez v. Helmerich & Payne Int'l Drilling Co., No. 15–CV–0017–CVE–TLW, 2016 WL 379248, at *9 (N.D. Okla. Jan. 29, 2016).

110. *Id*.

111. *Id.*

112. *See supra* Table 3.

113. Gracia v. Sigmatron Int'l, Inc., No. 11-CV-07604, 2013 WL 5782359, at *6 (N.D. Ill. Oct. 25, 2013); *see* Macaddino v. Inland Am. Retail Mgmt., LLC, No. 12 C 8655, 2015 WL 1281475, at *11 (N.D. Ill. Mar. 18, 2015) (holding that "at least, [the harasser's] authority to discipline [the plaintiff] makes him her supervisor for purposes of Title VII").

114. *Gracia*, 2013 WL 5782359, at *6.

115. *Id*.

116. *Id*.

harasser "could only issue discipline that did not affect [the plaintiff's] pay;" thus, even though the harasser was a supervisor, he "never took a tangible employment action."[117]

In *Moody v. Atlantic City Board of Education*, the plaintiff was a substitute custodian, and the harasser was one of "ten custodial foremen at different schools."[118] As a custodial foreman, the harasser "had the authority to decide whether to summon [the plaintiff] to work."[119] The Third Circuit held that the "authority to assign work is a 'tangible employment action' because it is a decision that can 'inflict[ ] direct economic harm' . . . by 'causing a significant change in benefits.'"[120] It further held that the harasser's ability to allow the plaintiff to work was a "tangible employment action" by "setting her hours and hence her pay" or directing her to stay beyond her shift or cover an extra shift.[121]

Similarly, in *Nelson v. Lake Charles Stevedores, L.L.C.*, the district court for the Western District of Louisiana ruled that the power to assign work "constitutes a decision which can cause a significant change in benefits—namely, that is the power to control whether [an employee] works and gets paid at all."[122] In *Nelson*, the plaintiff was a longshoreman, and the harasser was a walking foreman at her job site.[123] Although the employer argued it never empowered the harasser "to do anything on its behalf, let alone take tangible employment action of any kind against [the plaintiff] or any other longshoreman," the court ruled the harasser was a supervisor because he had the authority to "select who will, or will not, be in their gang; in other words, . . . who will work."[124]

3. Question-of-Fact Cases

In *Vance*, the Supreme Court noted that its definition of "supervisor" could be "readily applied" such that "[i]n a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor" or, at the very least, the issue of "supervisor status will generally be capable of resolution at summary judgment."[125] But the data show that some courts struggle to "readily appl[y]" the definition, even at the summary judgment stage.[126] In fact, out of the 192 cases where the supervisor issue was before the court on a motion for summary judgment, the court found a genuine issue of material fact on the

117. *Id*.

118. Moody v. Atlantic. City Bd. of Educ., 870 F.3d 206, 210 (3d Cir. 2017).

119. *Id*. at 216.

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

121. *Id*. at 217.

122. Nelson v. Lake Charles Stevedores, LLC, No. 2:11-CV-1377, 2014 WL 204247, at *6 (W.D. La. Jan. 17, 2014).

123. *Id*. at *1.

124. *Id*. at *6.

125. Vance v. Ball State Univ., 570 U.S. 421, 441 (2013). The Court also said: "Under the definition of 'supervisor' that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial." *Id*. at 443.

126. *Id*. at 441.

supervisor issue in forty-three cases (22% of the time).[127] Thus, while "the definition of supervisor is 'generally . . . capable of resolution at summary judgment,'"[128] in almost a quarter of the cases, that question remains for the jury.[129]

D. Disposition: Dismissed or Allowed to Proceed

TABLE 5: CLAIM DISPOSITION BY CIRCUIT[130]

Circuit	Claim Dismissed	% of Total	Claim Survived	% of Total
First	4	40%	6	60%
Second	15	37%	26	63%
Third	11	48%	12	52%
Fourth	20	59%	14	41%
Fifth	14	67%	7	33%
Sixth	12	52%	11	48%
Seventh	15	54%	13	46%
Eighth	5	83%	1	17%
Ninth	14	48%	15	52%
Tenth	8	67%	4	33%
Eleventh	9	56%	7	44%
DC	0	0%	2	100%
Totals	127	52%	118	48%

127. *See, e.g.*, Gilliam v. Joco Assembly, LLC, No. 15-CV-0622-CVE-FHM, 2016 WL 6462284, at *5 (N.D. Okla. Nov. 1, 2016).

128. Stanley v. N.W. Ohio Psychiatric Hosp., 7 F. Supp. 3d 731, 742 (N.D. Ohio 2014) (quoting *Vance*, 570 U.S. at 441).

129. *See, e.g.*, Gonzalez v. Hostetler Trucking, Inc., No. 2:11-CV-137, 2013 WL 5182835, at *3 (S.D. Ohio Sept. 12, 2013).

130. In the column "% of total," the word "total" refers to the total number of cases in which the *Vance* supervisor issue was contested.

TABLE 6: CLAIM DISPOSITION BY STAGE OF PROCEEDING[131]

Stage of Proceeding	Claim Dismissed	% of Total	Claim Survived	% of Total
Def. MTD	6	30%	14	70%
Cross MSJ	5	50%	5	50%
Def. MSJ	93	51%	89	49%
Other	4	50%	4	50%
Appeal 12b6	1	50%	1	50%
Appeal MSJ	18	86%	3	14%
Appeal Verdict	0	0%	2	100%
Totals	127	52%	118	48%

Next, I considered whether courts more frequently dismissed Title VII harassment claims or allowed them to proceed. In the contested *Vance* cases, courts dismissed 52% of cases and allowed 48% to proceed. Despite this relatively equal split, there were notable differences in dismissal rates between circuits and at different stages of proceedings. The Eighth, Tenth, and Fifth Circuits, for example, were more likely to dismiss harassment claims than allow them to proceed, with 83%, 67%, and 67% dismissal rates respectively, whereas the Second Circuit was more likely to allow harassment claims to proceed (37% dismissed). There also were differences in dismissal rates at different stages of the case. Courts were most likely to dismiss harassment claims—or uphold dismissals—when plaintiffs appealed motions for summary judgment in favor of defendants (86% of the time). Courts were most likely to allow harassment claims to proceed after defendants' motions to dismiss (70% of the time) or appeals of plaintiff verdicts after jury trials (100% of the time). These varying percentages likely reflect the different burdens at each stage of proceeding and the fact-intensive nature of the supervisor inquiry overall.

131. In the column "% of total," the word "total" refers to the total number of cases at that stage of proceeding in which the *Vance* supervisor issue was contested.

E. Delegation

TABLE 7: DELEGATION BY CIRCUIT[132]

Circuit	Explicitly Considered	Implicitly Considered	Total	% of Total
First	2	1	3	30%
Second	4	4	8	20%
Third	3	1	3	17%
Fourth	2	1	3	9%
Fifth	0	0	0	0%
Sixth	1	5	6	26%
Seventh	0	0	0	0%
Eighth	0	0	0	0%
Ninth	1	1	3	7%
Tenth	1	2	2	25%
Eleventh	3	0	3	19%
DC	0	0	0	0%
Totals	17	15	32	13%

TABLE 8: DELEGATION BY STAGE OF PROCEEDING[133]

Stage of Proceeding	Explicitly Considered	Implicitly Considered	Total	% of Total
Def. MTD	0	0	0	0%
Cross MSJ	0	2	2	20%
Def. MSJ	15	13	27	15%
Other	0	0	0	0%
Appeal 12b6	0	0	0	0%
Appeal MSJ	2	0	2	10%
Appeal Verdict	0	0	0	0%
Totals	17	15	32	13%

In *Vance*, the Supreme Court raised the possibility that an employer could be liable under the delegation doctrine:

> If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. . . . Un-

132. In the column "% of total," the word "total" refers to the total number of cases in that circuit in which the *Vance* supervisor issue was contested.

133. In the column "% of total," the word "total" refers to the total number of cases at that stage of proceeding in which the *Vance* supervisor issue was contested.

> der those 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.[134]

But do courts actually consider delegation in deciding cases? In 2014, the National Women's Law Center reviewed forty-three Title VII cases for *Vance* issues.[135] It found that only eight of the forty-three cases considered whether the employer had effectively delegated supervisory authority to the harassers, suggesting that "courts are not consistent in actually looking at whether there's been effective delegation of supervisor responsibilities."[136]

My analysis of the data confirm this. Out of all the contested cases, only seventeen (7% of the cases) explicitly considered delegation (invoking it by name), and only an additional fifteen (6% of the cases) implicitly considered it (discussing it without identifying it).[137] The Second and Sixth Circuits had the most cases that considered the delegation doctrine. The Fifth, Seventh, Eighth, and DC Circuits never considered it.

1. Explicit Delegation

In eight of the seventeen cases where courts explicitly considered delegation, the court ruled the supervisor issue was a question of fact.[138] In six of the seventeen cases, the court ruled the harasser was a coworker because s/he lacked the ability to make recommendations about tangible employment actions.[139] And in three of the seventeen cases, the court used the delegation doctrine to find the harasser was a supervisor.[140] The following are examples of cases in each group.

In *Lindquist v. Tanner*, the district court for the District of South Dakota denied summary judgment to the defendant, finding the issue of employer liability "can not [sic] be resolved as a matter of law."[141] Relying on *Faragher*'s guidance that harassers who make recommendations about tangible employment actions can be supervisors, the court noted that the harasser "was *delegated* authority allowing him to make *effectively determinative* decisions with respect to Plaintiff's hiring, promotion and discipline, and firing."[142] Specifically, the

134. Vance v. Ball State Univ., 570 U.S. 421, 447 (2013) (internal citations omitted).

135. Bryce Covert, *Exclusive: 43 Sexual Harassment Cases That Were Thrown Out Because of One Supreme Court Decision*, THINK PROGRESS (Nov. 24, 2014, 4:24 PM), https://thinkprogress.org/exclusive-43-sexual-harassment-cases-that-were-thrown-out-because-of-one-supreme-court-decision-787793f93ac2/ [https://perma.cc/A8TN-AK98].

136. *Id.*

137. *See, e.g.*, Garcia v. Recondo Tech., No. 16-CV-01386-RBJ, 2017 WL 3206892, at *4 (D. Colo. Apr. 25, 2017).

138. *See, e.g.*, Salen v. Blackburn Bldg. Servs., LLC, No. 14-CV-01361-VAB, 2017 WL 71708, at *11 (D. Conn. Jan. 6, 2017).

139. *See, e.g.*, Nelson v. Zinke, No. CV 16-135-M-DWM, 2018 WL 1083032, at *8 (D. Mont. Feb. 27, 2018).

140. *See e.g.*, Rock v. Blaine, 14-cv-01421 (MAD/CFH), 2018 WL 1415202, at *10 (N.D.N.Y. Mar. 20,2018); Gebremicael v. Cent. Parking Sys., Inc., No. 3:12-CV-0064, 2014 WL 3548972, at *10 (M.D. Tenn. July 17, 2014).

141. Lindquist v. Tanner, No. CA 11-3181-RMG, 2013 WL 4441946, at *4 (D.S.C. Aug. 15, 2013).

142. *Id*. (emphasis added).

court considered that the harasser made successful hiring recommendations, credibly threatened termination, and "was the most senior employee on-site."[143] Overall, the court concluded these actions "make . . . it reasonable to infer that Tanner would have had significant, possibly determinative, say over Plaintiff's performance reviews, hours, and potential for promotion."[144]

In *Parra v. City of White Plains*, the plaintiff argued the harasser was a supervisor because he could "influence her employment status by recommending discipline or other actions," and her supervisors "were likely to rely" on his recommendations.[145] The district court for the Southern District of New York disagreed, noting that the record contained no evidence that any "supervisor in the police department delegated to [the harasser] the power to make tangible employment decisions, either formally or by deferring to his recommendations."[146] It further stated that "Plaintiff's unsupported assertion that [the harasser] could influence her actual supervisors by virtue of his rank and superior knowledge of his employees [wa]s insufficient."[147] Because the court found the harasser did not have the authority to take tangible employment actions, it ruled there was no supervisory liability.[148]

In *Rock v. Blaine*, the district court for the Northern District of New York used the delegation doctrine to find the employer vicariously liable under Title VII.[149] Despite the parties' agreement that the harasser lacked authority to take "tangible employment actions,"[150] the court found supervisory liability, noting that none of the 1,300 employees at the state penal facility had authority to take tangible employment actions.[151] Adopting the defendant's position thus would mean that "among the 1300 workers employed at Clinton CF, there was not a single supervisor under Title VII."[152] Accordingly, the court ruled that the harasser—the highest-ranking person in the facility who was charged with "making rounds about the prison" and acting as the eyes and ears of the employer—was a supervisor.[153]

143. *Id*.
144. *Id*.
145. Parra v. City of White Plains, No. 13-CV-5544 (VB), 2016 WL 4734666, at *5 (S.D.N.Y. Sept. 9, 2016).
146. *Id*. at *6.
147. *Id*.
148. *Id*.
149. Rock v. Blaine, No. 14-cv-01421, 2018 WL 1415202, at *9–11, 16 (N.D.N.Y. Mar. 20, 2018).
150. *Id.* at *10.
151. *Id*.
152. *Id*.
153. *Id*.

2. Implicit Delegation

In seven of the fifteen cases where courts implicitly considered the delegation doctrine, the court ruled that the harasser was a coworker even though s/he had the ability to recommend tangible employment actions.[154] In six of the fifteen cases, the court ruled that the harasser's ability to recommend tangible employment actions created a question of fact on the supervisor issue.[155] And in two of the fifteen cases, the court ruled that the harasser's authority to recommend tangible employment actions made the harasser a supervisor.[156] The following are examples of cases in each group.

In *Meyer v. McBurney*, the district court for the Eastern District of Kentucky considered the plaintiff's argument that the harasser had a "special status in that he might be able to influence whether [the plaintiff] would be hired as a permanent employee."[157] Without discussing the delegation doctrine, the court rejected this argument because "[t]he same argument could be applied to almost any fellow employee . . . and such an exception would swallow the rule."[158] Construing the argument more as one about the harasser's ability to direct daily work activities and less as one about delegation of authority to take tangible employment actions, the court stated that "the *Vance* court soundly rejected" this position.[159]

Conversely, in *Gonzalez v. Hostetler Trucking, Inc.*, although the district court for the Southern District of Ohio did not discuss delegation, it ruled that "'tangible employment actions' also include any action that 'effects a significant change in employment status[,]'" meaning "if an individual is empowered by an employer to make reports, recommendations, or evaluations of an employee that lead directly to a significant change in that employee's employment status, that individual would be a 'supervisor' for the purposes of vicarious liability under Title VII."[160] Because the harasser was "so empowered," training the plaintiff, overseeing and reviewing his performance, and assigning him individual projects, the court ruled that supervisory status was a question of fact.[161]

In *Kyser v. D.J.F. Servs., Inc*., the district court for the Eastern District of Oklahoma discussed the delegation doctrine but did not explicitly invoke it in finding supervisory liability.[162] The plaintiff, a floor hand on an oilfield crew, alleged the crew leader sexually harassed him. He complained to the owner of

154. *See, e.g*., Garen v. Ohio Dep't of Nat. Res., No. 12-CV-178, 2014 WL 661609, at *14 (S.D. Ohio Feb. 19, 2014).

155. *See, e.g.*, Ellorin v. Applied Finishing, Inc., 996 F. Supp. 2d 1070, 1085 (W.D. Wash. 2014).

156. *See, e.g*., Pouncey v. Town of Hamden, No. 14–CV–00475, 2017 WL 5757740, at *12 (D. Conn. Nov. 28, 2017).

157. Meyer v. McBurney, No. 13–CV–27, 2014 WL 2548112, at *7 (E.D. Ky. June 4, 2014).

158. *Id*.

159. *Id*.

160. Gonzalez v. Hostetler Trucking, Inc., No. 11–CV–137, 2013 WL 5182835, at *8 (S.D. Ohio Sept. 12, 2013).

161. *Id*.

162. Kyser v. D.J.F. Servs., Inc., No. CIV–16–542, 2017 WL 5690889, at *2 (E.D. Okla. Nov. 27, 2017).

the company who did nothing.[163] During the lawsuit, the owner denied liability, claiming the harasser was not a supervisor.[164] The court disagreed.[165] It noted that the harasser directed the plaintiff's work on the crew, the owner told the plaintiff that the harasser wanted to "get rid of" him, and the owner testified that the harasser was unhappy with the plaintiff's attendance.[166] All of this, the court noted, "would indicate that [the harasser] was in communication with [the owner] and could apparently affect [the plaintiff's] employment terms by his report."[167]

*3. Status of Delegation Doctrine Post-*Vance

The delegation doctrine has the potential to allow courts to consider the structure and reality of workplaces and find supervisory liability outside the narrow confines of the *Vance* definition.[168] As the district court for the Middle District of Alabama said in *Osburn v. Hagel*:

> [S]upervisors are not limited to those who have a formal, 'on the books' power to take tangible-employment actions. Rather, what the Court sketched in *Vance* is an approach under which "[a] manager who works closely with his or her subordinates and who has the power to recommend or otherwise substantially influence tangible employment actions, and who can thus indirectly effectuate them, also qualifies as a 'supervisor' under Title VII."[169]

Despite this potential, only 7% of contested cases explicitly discussed the delegation doctrine and only 13% considered it at all.[170] And of this 13% (thirty-two cases), only five cases used the delegation doctrine to find supervisory liability.

Moreover, in many cases, the facts seemed ripe for application of the doctrine, yet the court ignored it entirely. In *Stanley v. Northwest Ohio Psychiatric Hospital*, for example, the harasser, a "Nurse Supervisor," had the authority to prepare disciplinary packets, begin disciplinary hearings, attend those hearings,

163. *Id.* at *1.

164. *Id.* at *2.

165. *Id.*

166. *Id.*

167. *Id*.

168. It is not surprising that two of the circuits who used the *Vance* standard pre-*Vance* (the Seventh and Eighth Circuits) did not consider the delegation doctrine at all. *See, e.g.*, Parkins v. Civil Constructors of Ill., 163 F.3d 1027, 1034 (7th Cir. 1998); Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 (8th Cir. 2004). And the circuit that considered delegation the most (the Second Circuit) used the EEOC standard pre-*Vance*. *See, e.g.*, Mack v. Otis Elevator Co., 326 F.3d 116, 126–27 (2d Cir. 2003).

169. Osburn v. Hagel, 46 F. Supp. 3d 1235, 1247 (M.D. Ala. 2014).

170. Thirty-one cases considered the delegation doctrine either explicitly or implicitly. Arguably, instead of comparing these thirty-one cases to the total universe of all contested *Vance* cases, the comparison should be to all contested *Vance* cases *except those* where the court determined the harasser was a supervisor because s/he could take tangible employment actions. In those cases, presumably the court would not have considered the delegation doctrine because it already found vicarious liability through the more direct route of finding the harasser had the ability to take tangible employment actions. Calculating how often courts consider delegation in this way would remove thirty-six cases from the overall contested *Vance* set (those cases where the court found the harasser was a supervisor solely because s/he could take tangible employment actions). This would result in thirty-one out of 210 cases or 15% (rather than 13%) of the time that courts considered the delegation doctrine.

and provide input to the human resources manager who had the power to hire, discipline, and terminate employees.[171] Without any analysis of whether the employer had effectively delegated authority to the harasser, the court ruled the harasser was a coworker because he did not have "ultimate responsibility" for disciplinary matters.[172] Similarly, in *Morrow v. Kroger Limited Partnership*, the Fifth Circuit failed to consider delegation where the harasser filled out performance evaluations, boasted that he could influence who was hired and fired, provided input into hiring decisions, and had a close relationship with the store manager who ultimately was responsible for all tangible employment actions.[173]

*F. Comparing Harasser Status Pre- and Post-*Vance

TABLE 9: COMPARING HARASSER STATUS PRE- AND POST-*VANCE* BY CIRCUIT[174]

Circuit	Status Different EEOC	Status Different Pre-*Vance*	% of Total	Status Same Pre-*Vance*	% of Total	Insufficient Information	% of Total
First	2	0	0%	10	100%	0	0%
Second	14	14	34%	25	61%	3	7%
Third	3	3	13%	19	83%	1	4%
Fourth	15	15	44%	18	53%	1	3%
Fifth	7	7	33%	13	62%	1	5%
Sixth	10	10	43%	11	48%	1	4%
Seventh	8	0	0%	28	100%	0	0%
Eighth	1	0	0%	6	100%	0	0%
Ninth	9	9	31%	18	62%	2	7%
Tenth	5	5	42%	5	42%	2	17%
Eleventh	3	3	19%	13	81%	0	0%
DC	0	0	0%	2	100%	0	0%
Totals	77	66	27%	168	69%	11	4%

171. Stanley v. Nw. Ohio Psychiatric Hosp., 7 F. Supp. 3d 731, 742 (N.D. Ohio 2014).

172. *Id.*

173. Morrow v. Kroger Ltd. P'ship I, 681 F. App'x 377, 380 (5th Cir. 2017).

174. In the column "% of Total," the word "total" refers to the total number of cases in that circuit in which the *Vance* supervisor issue was contested.

TABLE 10: COMPARING HARASSER STATUS PRE- AND POST-*VANCE* BY STAGE OF PROCEEDING[175]

Stage of Proceeding	Status Different EEOC	Status Different Pre-*Vance*	% of Total	Status Same Pre-*Vance*	% of Total	Insufficient Information	% of Total
Def. MTD	5	5	25%	14	70%	1	5%
Cross MSJ	3	2	20%	7	70%	1	10%
Def. MSJ	59	50	27%	126	69%	6	3%
Other	1	1	13%	6	75%	1	13%
Appeal 12b6	0	0	0%	2	100%	0	0%
Appeal MSJ	9	8	38%	11	52%	2	10%
Appeal Verdict	0	0	0%	2	100%	0	0%
Totals	77	66	27%	168	69%	11	4%

Many have theorized that *Vance*'s restrictive definition will diminish plaintiffs' ability to prove supervisory liability.[176] But no one has analyzed court decisions systematically to test this theory. The first step in this analysis is evaluating whether the court in each contested case may have decided the harasser's status differently before *Vance*. Although an inherently subjective assessment, this evaluation provides the foundation to show whether and to what extent *Vance* has affected cases materially.

*1. Different Harasser Status Pre-*Vance

In *Vance*, the Court said it was "skeptical that there are a great number of such cases" where "an employee who cannot take tangible employment actions . . . direct[s] the victim's daily work activities in a meaningful way [and thus] creates an unlawful hostile environment."[177] Based on my analysis, this skepticism is unfounded.

I first identified cases in which the court would have decided the harasser's status differently under the EEOC definition,[178] rather than the *Vance* definition,[179] of "supervisor." This yielded seventy-seven cases (31% of the cases).[180] This category consists of cases where, although there may not be evidence that the harasser could take tangible employment action against the plaintiff, the harasser yielded significant and meaningful control over the plaintiff's day-to-day activities.[181] The following four cases provide examples.

175. In the column "% of Total," the word "total" refers to the total number of cases at that stage of proceeding in which the *Vance* supervisor issue was contested.

176. *See* sources cited *supra* note 15.

177. Vance v. Ball State Univ., 570 U.S. 421, 450 (2013).

178. *See* Equal Emp. Opportunity Comm'n, *supra* note 4, at *3.

179. *See Vance*, 570 U.S. at 431.

180. *See, e.g.*, Velazquez v. Helmerich & Payne Int'l Drilling Co., No. 15–CV–0017, 2016 WL 379248, at *9 (N.D. Okla. Jan. 29, 2016).

181. Scott Moss expressed his belief that courts decided cases differently post-*Vance. See* Moss, *supra* note 15, at 217–21. The two cases he cited as examples are also cases I found likely would have been different pre-*Vance*. *See* Chavez–Acosta v. Sw. Cheese Co., 610 F. App'x 722, 729–30 (10th Cir. 2015); McCafferty v. Preiss Enters., Inc., 534 F. App'x 726, 730–31 (10th Cir. 2013).

In *Spencer v. Schmidt Electric Co*., the district court for the Southern District of Texas found pre-*Vance* that the harasser foremen were supervisors because they had "immediate (or successively higher) authority over the harassment victim."[182] On appeal post-*Vance*, the Fifth Circuit reversed.[183] It said that "[t]he evidence supports that a foreman was 'authorized to direct the employee's daily work activities,' which is the definition of supervisor expressly rejected by the Supreme Court."[184] Accordingly, the court held the harassers were not supervisors because they did not "have power to take tangible employment actions against [the plaintiff]."[185]

Similarly, in *Prabhakar v. C.R. England, Inc.*, the district court for the District of Utah ruled that the harasser (a training driver) was a coworker of the plaintiff (a trainee-driver) because "[the] plaintiff's argument rest[ed] on a definition of supervisor that was rejected by the Supreme Court in *Vance*."[186] The court said that although the harasser "had the ability to direct Plaintiff's day-to-day activities," recommend assignment to a different truck, and refuse to work with the plaintiff, this was insufficient to confer supervisory status.[187]

In *Chavez-Acosta v. Southwest Cheese Co*., the plaintiff was an hourly cheese production employee, and the harasser was an Assistant Team Leader in the cheese department.[188] "[B]ased on the pre-*Vance* definition of a supervisor for Title VII purposes, the district court found that [the harasser] qualified as a supervisor," and the employer did not contest this characterization.[189] But the Tenth Circuit reversed, holding that "[w]hile . . . Stewart was a part of the 'supervisory hierarchy'. . . this is not enough" because his role as an "Assistant Team Leader . . . did not give him the authority to take any 'tangible employment actions.'"[190]

In *McCafferty v. Preiss Enterprises, Inc*., the Tenth Circuit upheld a grant of summary judgment for the defendants.[191] There, the court held it was "clear" that a McDonald's "Shift Manager" was not the supervisor of a fifteen-year-old crew member even though the manager "directly oversaw the work of crew members," "direct[ed] the day-to-day activities . . . by assigning them to specific duties," "schedule[ed] breaks during shifts," "could request that a crew member cover another employee's shift when necessary," "could authorize a crew member to stay . . . past their scheduled shift," could "send an employee home before the end of a shift," was "authorized to a certain degree to impose direct formal discipline," and had "significant amount of influence or say" in hiring, firing,

182. Spencer v. Schmidt Elec. Co., 576 F. App'x 442, 447 (5th Cir. 2014) (quoting Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 353–54 (5th Cir. 2001)) (discussing the district court's opinion which was not reported on Westlaw).

183. *Id.* at 447–48.

184. *Id*. at 448 (quoting Vance v. Ball State Univ., 570 U.S. 421, 451 (2013) (Ginsburg, J., dissenting)).

185. *Id*. at 447.

186. Prabhakar v. C.R. England, Inc., No. 12–CV–881, 2013 WL 5408539, at *3 (D. Utah Sept. 25, 2013).

187. *Id*. at *2–3.

188. Chavez–Acosta v. Sw. Cheese Co., 610 F. App'x 722, 725, 730 (10th Cir. 2015).

189. *Id*. at 730.

190. *Id*.

191. McCafferty v. Preiss Enters., Inc., 534 F. App'x 726, 727 (10th Cir. 2013).

and promotion decisions.[192] The court also rejected the argument that the harasser had the "'authority to make decisions that may have a significant' impact on tangible employment actions," finding that "mere influence in tangible employment decisions" is not sufficient for supervisory liability.[193]

Although seventy-seven cases may have been decided differently under the EEOC's definition of "supervisor," they would not necessarily have been decided differently pre-*Vance*. Rather, this set of cases must be limited to cases in those circuits that had not adopted the narrower definition pre-*Vance*. Thus, from the seventy-seven cases where the harasser's status might be different under the EEOC definition, I removed cases from the First, Seventh, and Eighth Circuits (*i.e.*, the circuits that used a narrow definition that was identical or substantially similar to the *Vance* definition pre-*Vance*). This removed eleven cases (two from the First Circuit, eight from the Seventh Circuit, and one from the Eighth Circuit) for a total of sixty-six cases (27% of the cases) where the court may have determined the harasser's status differently pre-*Vance*.[194]

The most important question (addressed in greater depth in Section IV.H) is in how many of these sixty-six cases was the *Vance* issue dispositive, leading to case dismissal. Of the sixty-six cases where the court may have decided the harasser's status differently pre-*Vance*, the supervisor issue was dispositive in thirty-one of them, meaning that the case satisfied all the other requirements for a hostile work environment claim and the court found no negligence.[195] This suggests that *Vance* is directly responsible for dismissal of 13% of hostile work environment claims where supervisory liability is at issue.[196]

*2. Same Harasser Status Pre-*Vance

In 157 cases (64% of the cases), I determined the harasser's status would have been the same even if the court utilized the EEOC definition[197] of "supervisor." This category consists of cases where there were no allegations or evidence that either: (1) the harasser could take any tangible employment action against the plaintiff; or (2) the harasser had any control over the plaintiff's day-to-day activities. To this group, I added the eleven cases from the First, Seventh,

192. *Id*. at 728.

193. *Id*. at 731. This case can be compared to *Whitten v. Fred's, Inc.*, 601 F.3d 231, 245–46 (4th Cir. 2010), a pre-*Vance* case where a court found that a harasser "store manager" with nearly identical responsibilities was a supervisor.

194. One critique of this analysis is that post-*Vance*, once a defendant in a contested case proves that a harasser cannot take tangible employment actions, the defendant arguably has no incentive to also prove that the harasser cannot direct daily work activities. If this is true, the "different outcome" universe might be overstated. However, given that control over daily work activities is often still a relevant issue in post-*Vance* litigation due to the unsettled doctrines of delegation and apparent authority, I do not believe this is a significant critique. In most cases, plaintiffs argue the harasser is a supervisor both because s/he can take tangible employment actions and control daily work activities, and defendants contest both theories.

195. *See, e.g.*, *McCafferty*, 534 F. App'x at 731.

196. *See infra* Section IV.H.

197. Equal Emp. Opportunity Comm'n, *supra* note 4, at 3–4.

and Eighth Circuits for a total of 168 cases (69% of the cases) where the harasser's status would have been the same pre-*Vance*.[198]

An example from this category is *United States Equal Employment Opportunity Commission v. Wedco Inc.*, where it was undisputed that the harasser, described only as a coworker, did not have the authority to fire, discipline, or recommend discipline for the plaintiff, a temporary stocker and delivery man.[199] There also was no evidence that the harasser had any control over the plaintiff's day-to-day work activities.[200] Although the harasser stepped in for the warehouse supervisor when the supervisor was absent, he did so only to ensure things ran smoothly and did not have any supervisory authority at that time.[201] Thus, there were no facts suggesting a court would have classified the harasser as a supervisor even under the broader pre-*Vance* EEOC definition.

3. Insufficient Information to Determine Status

In eleven cases (4% of the cases), it was not possible to evaluate whether the harasser's status may have been different pre-*Vance*. This category consists of cases where there was not enough information to determine the harasser's and plaintiff's job responsibilities and relationship.[202] For example, in *Phillips v. Donahoe*, the court made the conclusory statement that "the harassment underpinning Phillips' claim was allegedly perpetrated by Jason and Maurice. The record conclusively establishes that neither Jason nor Maurice qualified as a 'supervisor' under *Vance*."[203] The court provided no additional information about Jason, Maurice, their job duties, or titles. Rather, the court described them throughout the opinion as "co-workers."[204]

198. *See, e.g.*, Erasmus v. Deutsche Bank Ams. Holding Corp., 2015 WL 7736554, at *1 (S.D.N.Y. Nov. 30, 2015).

199. U.S. Equal Emp. Opportunity Comm'n v. Wedco, Inc., 65 F. Supp. 3d 993, 1005 (D. Nev. 2014).

200. *Id*.

201. *Id.*

202. *See, e.g.*, Justice v. Rockwell Collins, Inc., 720 F. App'x 365, 366 (9th Cir. 2017).

203. Phillips v. Donahoe, No. 12-410, 2013 WL 5963121, at *9 (W.D. Pa. Nov. 7, 2013).

204. *Id*. at *1, *2, *8.

G. Was Harasser Status Material to the Hostile Work Environment Claim?

TABLE 11: HARASSER STATUS AND EFFECT ON CLAIM BY CIRCUIT[205]

Circuit	Harasser Status Immaterial to Claim Outcome	% of Total	Harasser Status Material to Claim Proceeding	% of Total	Harasser Status Material to Claim Dismissal	% of Total	Harasser Status Narrowed Claim	% of Total
First	3	30%	4	40%	1	10%	2	20%
Second	7	29%	14	34%	8	20%	12	17%
Third	3	13%	12	52%	8	35%	0	0%
Fourth	7	21%	7	21%	13	38%	7	21%
Fifth	4	19%	3	14%	10	48%	4	19%
Sixth	5	22%	7	30%	7	30%	4	17%
Seventh	8	18%	8	29%	7	25%	5	29%
Eighth	3	50%	1	17%	2	33%	0	0%
Ninth	7	24%	8	28%	7	24%	7	24%
Tenth	3	25%	3	25%	5	42%	1	8%
Eleventh	5	31%	4	25%	4	25%	3	19%
DC	0	0%	1	50%	0	0%	1	50%
Totals	55	22%	72	29%	72	29%	46	19%

TABLE 12: HARASSER STATUS AND EFFECT ON CLAIM BY STAGE OF PROCEEDING[206]

Stage of Proceeding	Harasser Status Immaterial to Claim Outcome	% of Total	Harasser Status Material to the Claim Proceeding	% of Total	Harasser Status Material to Claim Dismissal	% of Total	Harasser Status Narrowed Claim	% of Total
Def. MTD	2	10%	11	55%	4	20%	3	15%
Cross MSJ	3	30%	2	20%	2	20%	3	30%
Def. MSJ	46	25%	51	28%	47	26%	38	21%
Other	1	13%	3	38%	3	38%	1	13%
Appeal 12b6	0	0%	1	50%	1	50%	0	0%
Appeal MSJ	3	14%	2	10%	15	71%	1	5%
Appeal Verdict	0	0%	2	100%	0	0%	0	0%
Totals	55	22%	72	29%	72	29%	46	19%

205. In the column "% of total," the word "total" refers to the total number of cases in that circuit in which the *Vance* supervisor issue was contested.

206. In the column "% of total," the word "total" refers to the total number of cases at that stage of proceeding in which the *Vance* supervisor issue was contested.

Another central question in my analysis was whether the *Vance* supervisor issue (that is, whether the harasser was a supervisor or coworker) was material to the hostile work environment claim outcome. In many cases, courts did not discuss the supervisor issue unless it affected the case disposition or the court's ruling on the hostile work environment claim. In other cases, however, the court discussed the supervisor issue even though it had no effect on the ruling.

Determining whether the *Vance* supervisor issue was material to the hostile work environment claim outcome, I divided the cases into four groups: (1) the supervisor issue was immaterial to claim outcome; (2) the supervisor issue was material to the claim proceeding; (3) the supervisor issue was material to claim dismissal; or (4) the supervisor issue narrowed the claim. Most important to my analysis are the cases in groups three and four, where the supervisor issue either led to case dismissal or narrowed the claim, making it more difficult for the plaintiff to recover for a hostile work environment.

1. Supervisor Issue Was Immaterial to the Claim Outcome

In 22% of contested cases, the supervisor issue was immaterial to the claim outcome.[207] This category consists of two types of cases: (1) the court's determination on the supervisor issue was irrelevant; the court dismissed the hostile work environment claim because the plaintiff could not show the prima facie elements of a harassment claim (*e.g.*, the harassment was not sufficiently severe or pervasive); or (2) there was no tangible employment action and the employer was entitled to an affirmative defense.[208] The court's determination on the supervisor issue was least likely to affect the claim outcome in rulings on defendants' motions for summary judgment. For example, in *Saliceti-Valdespino v. Wyndham Vacation Ownership*, the district court for the District of Puerto Rico found that, while the harasser was the plaintiff's supervisor, there was no liability because the plaintiff could not prove the harassment was severe and pervasive.[209]

207. *See, e.g.*, Swyear v. Fare Foods Corp., No. 16-CV-1214-SMY-RJD, 2018 WL 1993492, at *5–6 (S.D. Ill. Apr. 27, 2018) (dismissing the hostile work environment claim because the harassment was not severe and pervasive). There are also harassment cases where the supervisor issue was contested, but not discussed or decided because the court resolved the case on other grounds. *See, e.g.*, Rosario v. Aunt Martha's Youth Serv. Ctr., 16-cv-05648, 2017 WL 4882365, at *3 (N.D. Ill. Oct. 30, 2017). My universe of cases consists only of those where the supervisor issue was contested and the court decided the issue (even if it was not dispositive to the final claim outcome).

208. *See, e.g.*, McKinney v. G4S Gov't Sols., Inc., 179 F. Supp. 3d 609, 621 (W.D. Va. 2016), *aff'd*, 711 F. App'x 130 (4th Cir. 2017) (dismissing the hostile work environment claim because the employer was entitled to the *Faragher*/*Ellerth* affirmative defense); Nelson v. Lake Charles Stevedores, LLC, No. 11-CV-1377, 2014 WL 204247, at *7 (W.D. La. Jan. 17, 2014) (dismissing the hostile work environment claim because the harassment was not severe or pervasive).

209. Saliceti-Valdespino v. Wyndham Vacation Ownership, No. 12-1325, 2013 WL 5947140, at *9 (D.P.R. Nov. 6, 2013).

2. Supervisor Issue Was Material to the Claim Proceeding

In 29% of contested cases, the supervisor issue was material to the court allowing the claim to proceed. This category consists of two types of cases: (1) the court allowed the hostile work environment claim to proceed after finding the harasser was a supervisor (or the plaintiff alleged enough to show supervisory status), and the plaintiff sufficiently produced or alleged evidence of the prima facie elements of harassment (13% of all cases);[210] or (2) the court allowed the hostile work environment claim to proceed because there was a question of fact about whether the harasser was a supervisor, and the plaintiff sufficiently alleged or produced evidence of the prima facie elements of harassment (16% of all cases).[211]

As an example of the first type, in *Johnson v. Philadelphia Housing Authority*, the court denied the defendant's motion for summary judgment on the hostile work environment claim because the harasser was the plaintiff's supervisor, and "Plaintiff's testimony, if credited, would allow a reasonable factfinder to conclude that he was subjected to a pervasive hostile work environment based on race, age, or both."[212] As an example of the second type, in *Isenhour v. Outsourcing of Millersburg, Inc*., the court ruled that while the defendants disputed supervisory status, "it is plausible that a jury could find [the harassers] had supervisory authority over Plaintiff."[213] It also found a question of fact on the other elements of the prima facie hostile work environment claim and, therefore, denied defendants' motion for summary judgment.[214]

3. Supervisor Issue Was Material to Claim Dismissal

In 29% of contested cases, the supervisor issue was material to the court's dismissal of the hostile work environment claim. In each of these cases, the court dismissed the claim after finding the harasser was a coworker (or the plaintiff failed to allege enough to show supervisory status), and the employer was not negligent in responding to the harassment with appropriate remedial action (*i.e.*, the employer took "prompt and effective remedial action once it was aware of the allegedly harassing behavior").[215] For example, in *Clehm v. BAE Systems Ordnance Systems, Inc*., the district court for the Western District of Virginia

210. This category consists of thirty-three cases. *See, e.g.*, Johnson v. Phila. Hous. Auth., 218 F. Supp. 3d 424, 439 (E.D. Pa. 2016).

211. This category consists of thirty-nine cases. *See, e.g*., Preuss v. Kolmar Lab'ys, Inc., 970 F. Supp. 2d 171, 186–87 (S.D.N.Y. 2013).

212. *Johnson*, 218 F. Supp. 3d at 438–39.

213. Isenhour v. Outsourcing of Millersburg, Inc., No. 14-CV-1170, 2015 WL 6447512, at *8 (M.D. Pa. Oct. 26, 2015).

214. *Id*.

215. This category consists of seventy-two cases. *See, e.g.*, Mack v. Detyens Shipyards, Inc., No. 16-1323-RMG, 2017 WL 5952692, at *2 (D.S.C. Nov. 30,2017). In one case included in this group, the court found one harasser a coworker and another a supervisor, but then analyzed both harassers under the coworker negligence standard. *See* Acevedo v. Stroudsburg Sch. Dist., No. 15-CV-02035, 2018 WL 1370875, at *6 (M.D. Pa. Feb. 15, 2018).

dismissed the hostile work environment claim, finding that the harassers were coworkers and the plaintiff failed to report harassing behavior or otherwise put the employer on notice of the harassment.[216]

4. Supervisor Issue Narrowed the Claim

In 19% of contested cases, although the supervisor issue was not material to claim dismissal, it did narrow the scope of the hostile work environment claim.[217] This category consists of cases where the court ruled that the harasser was a coworker (and therefore there was no supervisory liability), but the court allowed the plaintiff to proceed under a negligence theory.[218] Thus, even though the claim survived, the plaintiff had to meet a heightened standard to prove liability (*i.e.*, show that the employer knew of the harassment and failed to stop it).[219]

H. Significance of Vance

TABLE 13: *VANCE*'S EFFECT BY CIRCUIT[220]

Circuit	*Vance* Caused Outcome	% of Total	*Vance* Did Not Affect Outcome	% of Total	Vance Affected Outcome	% of Total	Not Clear	% of Total
First	0	0%	10	100%	0	0%	0	0%
Second	5	12%	28	68%	5	12%	3	7%
Third	2	9%	20	87%	0	0%	1	4%
Fourth	8	24%	21	62%	5	15%	0	3%
Fifth	5	24%	14	67%	1	5%	1	0%
Sixth	6	26%	14	61%	2	9%	1	4%
Seventh	0	0%	28	100%	0	0%	0	0%
Eighth	0	0%	6	100%	0	0%	0	0%
Ninth	2	7%	22	76%	4	14%	1	3%
Tenth	3	25%	8	67%	0	0%	1	8%
Eleventh	1	6%	14	88%	1	6%	0	0%
DC	0	0%	2	100%	0	0%	0	0%
Totals	32	13%	187	76%	18	7%	8	3%

216. Clehm v. BAE Sys. Ordnance Sys., Inc., 291 F. Supp. 3d 775, 788–90 (W.D. Va. 2017).

217. This category consists of forty-six cases. *See, e.g.*, Reich v. Software One, Inc., No. 12-C-0746, 2014 WL 4267438, at *17 (E.D. Wis. Aug. 28, 2014).

218. *See, e.g.*, Marugame v. Napolitano, No. 11-00710 LEK-BMK, 2013 WL 4608079, at *12–13 (D. Haw. Aug. 28, 2013).

219. *See, e.g.*, Davis v. Saint Mary's Cath. Cemetery & Mausoleum, No. 13-CV-01083-GEB-DAD, 2015 WL 3953687, at *5 (E.D. Cal. June 29, 2015).

220. In the column "% of total," the word "total" refers to the total number of cases in that circuit in which the *Vance* supervisor issue was contested.

TABLE 14: *VANCE*'S EFFECT BY STAGE OF PROCEEDING[221]

Stage of Proceeding	*Vance* Caused Outcome	% of Total	*Vance* Did Not Affect Outcome	% of Total	Vance Affected Outcome	% of Total	Not Clear	% of Total
Def. MTD	2	10%	15	75%	3	15%	0	0%
Cross MSJ	1	10%	7	70%	1	10%	1	10%
Def. MSJ	21	12%	144	79%	13	7%	4	2%
Other	1	13%	6	75%	0	0%	1	13%
Appeal 12b6	0	0%	2	100%	0	0%	0	0%
Appeal MSJ	7	33%	11	52%	1	5%	2	10%
Appeal Verdict	0	0%	2	100%	0	0%	0	0%
Totals	32	13%	187	76%	18	7%	8	3%

The most important questions this Article seeks to address are "does the narrowed *Vance* definition matter, and if so, how much?" In Justice Ginsburg's *Vance* dissent, she predicted the case would undermine Title VII's goal of preventing workplace harassment and "leave many victims without an effective remedy."[222] Similarly, many scholars have speculated that "[b]ecause of the Court's narrow definition of 'supervisor,' *Vance* will make it difficult for employees to bring and win harassment claims against employers for strict and vicarious liability under Title VII."[223]

Yet no analysis has explored whether these predictions prove true. As evidence of *Vance*'s impact, scholars cite cases where courts rule the harasser is a coworker, not a supervisor, and dismiss the claim.[224] But often this scholarship fails to consider whether the supervisor issue was dispositive, meaning whether the hostile work environment claim would have been dismissed for other reasons (*i.e.*, whether the plaintiff met the other elements of a prima facie harassment claim).[225] Even when scholarship considers whether the supervisor issue is dispositive, it often fails to consider whether the outcome would have been different pre-*Vance* (*i.e.*, whether the issue was decided in a circuit that already utilized the narrower definition pre-*Vance*). A 2014 National Women's Law Center study, for example, found forty-three sexual harassment cases that were dismissed because the harasser did not meet *Vance*'s definition of "supervisor," and

221. In the column "% of total," the word "total" refers to the total number of cases at that stage of proceeding in which the *Vance* supervisor issue was contested.

222. Vance v. Ball State Univ., 570 U.S. 421, 466 (2013) (Ginsburg, J., dissenting).

223. *See* Davis, *supra* note 42, at 169.

224. *See* Moss, *supra* note 15, at 217.

225. For example, Scott Moss provides examples of "Cases Rejecting 'Supervisor' Arguments That Could Have Prevailed Pre-*Vance*." *See id.* at 217–21. As an example, he cites *Velazquez-Perez v. Dev. Diversified Realty Corp.*, 753 F.3d 265, 272 (1st Cir. 2014). *Velazquez*, however, was decided in a circuit that utilized the narrowed definition pre-*Vance*, and, therefore, the supervisor issue would not have been decided differently. Furthermore, the supervisor issue was not dispositive. Rather, the court dismissed the claim because the harassment was not severe and pervasive. Thus, while *Velazquez* may be a good example of a supervisor finding that would been decided differently under the EEOC's definition, it does not shed light on whether *Vance* has caused additional case dismissals. *See* Moss, *supra* note 15, at 220–21. The Supreme Court leveled a similar criticism of the dissent's assertion that the *Vance* standard "would cause the plaintiffs to lose in a handful of cases involving shocking allegations of harassment," noting that the "dissent does not mention why the plaintiffs would lose in those cases," *i.e.*, "it is not clear in any of those examples that the legal outcome hinges on the definition of 'supervisor.'" *Vance*, 570 U.S. at 447.

the victim could not prove that the employer was negligent in coworker harassment.[226] But the study does not address whether the issue would have been decided differently before *Vance*. Thus, it cannot show whether *Vance* caused the dismissals.

This Article is the first to comprehensively analyze the issue of whether plaintiffs are losing cases (or having a more difficult time proving them) solely because of *Vance*. The analysis focuses on two inquiries: (1) whether cases were dismissed *because of* the supervisor issue (*i.e.,* the case would have proceeded *but for* lack of supervisory liability or negligence-based coworker liability); and (2) whether the outcome would have been different in the particular jurisdiction before *Vance*. Based on this analysis, I conclude that Justice Ginsburg's prediction that *Vance* would "leave many victims without an effective remedy"[227] is true.

The answer to the first inquiry—are cases dismissed *because of* the supervisor issue—is yes. As shown in Section IV.G, in 29% of contested cases the supervisor issue was dispositive, leading to dismissal of the hostile work environment claim.[228] In 19% of contested cases, although the supervisor issue was not dispositive, it forced the plaintiff to meet the more stringent standard of showing the employer was aware of the harassment and negligent in remediating it.[229] Thus, in almost half of contested cases, the supervisor issue impeded the plaintiff's recovery.

But this only partially answers the question this Article seeks: is this impediment due to *Vance*? The answer to the second inquiry—whether the outcome would have been different before *Vance*—completes the picture. As shown in Section IV.F, in 27% of contested cases, the court may have decided the supervisor issue differently pre-*Vance*.[230]

Combining these inquiries generates two groups of cases: (a) cases dismissed solely *because of* the narrowed *Vance* definition (*i.e.*, the supervisor issue was dispositive and would have been decided differently pre-*Vance*); and (b) cases where the narrowed *Vance* definition forced the plaintiff to meet the more stringent negligence standard (*i.e.*, the supervisor issue would have been decided differently pre-*Vance* and, although not dispositive, required the plaintiff to prove negligence to show liability). The combination of these two groups yields the number of cases where the *Vance* definition negatively impacted plaintiffs' success on hostile work environment claims.

To determine the number of cases in group (a)—where the case was dismissed *because Vance* narrowed the definition of "supervisor" and the plaintiff could not prove the employer was negligent—I determined which cases were in

226. Covert, *supra* note 135.

227. *Vance*, 570 U.S. at 466.

228. In seventy-two out of 245 cases, the supervisor issue was the sole reason the case was dismissed. This means that the court found no supervisory liability and no negligence. *See* cases cited *supra* note 215.

229. In forty-six out of 245 cases, the court ruled the harasser was not a supervisor but the plaintiff either pled enough to show the employer was negligent or it was a question of fact. *See supra* note 217.

230. *See* discussion *supra* Section IV.F.1 (showing that in sixty-six cases the supervisor issue would have been different pre-*Vance*).

both the category of cases where the supervisor issue affected the outcome and led to dismissal and the category of cases that may have been decided differently pre-*Vance*. Thirty-one cases fit both criteria. Thus, in thirty-one out of 245 contested cases (13% of the cases), the court's application of the narrowed *Vance* definition was directly responsible for the dismissal of the plaintiff's claims (*i.e.*, the plaintiff's claim was dismissed solely because the harasser was not a supervisor as newly defined by *Vance*, and the plaintiff could not prove the employer was negligent in responding to coworker harassment).[231]

To determine the number of cases in group (b)—where the narrowed *Vance* definition required the plaintiff to meet the more stringent burden of proving the employer was negligent in responding to the harassment—I determined which cases were in both the category of cases where the court required the harassment claim to proceed only on a negligence theory and the category of cases that may have been decided differently pre-*Vance*. Eighteen cases fit both criteria. Thus, in eighteen of 245 contested cases (7% of the cases), *Vance* was directly responsible for barring supervisory liability and forcing the plaintiff to meet the more stringent negligence standard.[232]

Combining groups (a) and (b) yields a total of forty-nine cases (20% of the cases) where supervisory liability was at issue and the Supreme Court's definition impacted the case, either leading to outright case dismissal or requiring plaintiffs to meet a heightened liability burden. This finding supports the speculation that *Vance* has meaningfully altered employer liability under Title VII.[233] Additionally, although it is beyond the scope of this Article, *Vance* likely has significantly altered liability in other contexts too because courts have applied its "supervisor" definition to state discrimination and harassment claims,[234] federal discrimination claims under the Rehabilitation Act,[235] and the ADEA.[236]

231. Technically, there were thirty-two cases where *Vance* affected the outcome because there was one case where the supervisor issue affected the outcome positively for the plaintiff (*i.e.*, the court found the harasser was a supervisor based on *Vance*'s delegation doctrine), and I determined the outcome may have been different pre-*Vance*. *See* Gebremicael v. Cent. Parking Sys., No. 12-CV-0064, 2014 WL 3548972, at *10 (M.D. Tenn. July 17, 2014). Thus, this is the one case I found that arguably could have been influenced in the plaintiff's favor by *Vance*.

232. *See* Chemerinsky, *supra* note 12, at 374–75 (2013) ("Regardless, one strong effect of *Vance* is that employees can succeed in showing workplace harassment only by proving an employer was negligent.").

233. It is important to note that this number only partially accounts for *Vance*'s negative effects on Title VII hostile work environment claims. As discussed in Section V.B.3, in addition to making individual case as harder to prove, *Vance* likely discourages plaintiffs from pursuing supervisory liability in the first place. It also is important to note that my analysis here assumes a "but-for" world in which the circuit split on the supervisor issue continued unresolved. Under a less conservative approach, however, one could assume a "but-for" world in which the Supreme Court applied the EEOC definition to the term "supervisor." In this framing, the effects of *Vance* would be even greater.

234. *See supra* note 66.

235. Bonzani v. Shinseki, No. 2:11-cv-0007-EFB, 2013 WL 5486808, at *1, 10 (E.D. Cal. Sept. 30, 2013).

236. Jones v. Unipres, U.S.A., Inc., No. 12-cv-1089, 2013 WL 5782930, at *14 (M.D. Tenn. Oct. 28, 2013).

I. Open Questions

As the above analysis shows, despite the Supreme Court's belief that its definition of "supervisor" is one that "is easily workable" and "can be applied without undue difficulty,"[237] courts still struggle to apply it with any certainty or ease. The task is further complicated by the Supreme Court's lack of guidance on issues that directly affect the definition. Two of these common issues—whether apparent authority serves as a basis for liability and what constitutes a tangible employment action—have failed to receive consistent judicial treatment post-*Vance*.

1. Is Apparent Authority a Basis for Liability?

The first issue is the concept of apparent authority, which the Supreme Court described in *Ellerth* as relevant "where the agent purports to exercise a power which he or she does not have."[238] Of the 245 contested cases, ten cases considered the issue of apparent authority (either implicitly or explicitly) and reached varying conclusions.[239]

In four cases, courts explicitly considered whether apparent authority was relevant to determining if someone qualifies as a supervisor under *Vance*.[240] In three of these four cases, district courts ruled that apparent authority was an "insufficient basis to support a finding of supervisor status."[241] In the fourth case, however, the Tenth Circuit relied on the concept of apparent authority to deny summary judgment on the issue of supervisory liability.[242] The court noted that if a harasser "had or appeared to have the power to take or substantially influence tangible employment," the employer would be vicariously liable.[243] And it denied summary judgment because there was a question of fact about whether the harasser "had the power to recommend and influence tangible employment actions" or "whether under apparent authority principles [the plaintiff] was reasonable in believing [the harasser] had such powers even if he in fact did not."[244]

237. Vance v. Ball State Univ., 570 U.S. 421, 432 (2013).

238. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

239. One additional case raised the issue of apparent authority, suggesting it may be relevant to a *Vance* analysis, but declined to analyze the issue: "[P]laintiff admitted that Hyatt was not her supervisor, and she cannot rely on his apparent authority." Martinez v. Colvin, No. 14-cv-01487-AA, 2016 WL 8737442, at *3 (D. Or. Mar. 4, 2016).

240. Kramer v. Wasatch Cnty. Sheriff's Off., 743 F.3d 726, 739 (10th Cir. 2014); Termilus v. Marksman Sec. Corp., No. 15-61758-CIV, 2016 WL 6212990, at *13 (S.D. Fla. June 21, 2016); Houck v. ESA, Inc., No. CIV. 12-4197-KES, 2014 WL 2615773, at *8–9 (D.S.D. June 12, 2014); McCafferty v. Preiss Enterprises, Inc., 534 F. App'x 726, 731–32 (10th Cir. 2015); *Martinez*, 2016 WL 8737442, at *2.

241. *Houck*, 2014 WL 2615773, at *8, *13 (quoting Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 n.7 (8th Cir. 2004)). *See Termilus*, 2016 WL 6237264, at *1–2 (agreeing with the defendant that "apparent authority is not a viable theory for imposing vicarious liability in Title VII cases post-*Vance*"); *McCafferty*, 534 F. App'x at 730–32.

242. *Kramer*, 743 F.3d at 737–39.

243. *Id.* at 739.

244. *Id*.

In six cases, although not mentioning the apparent authority doctrine, courts considered whether a harasser's or plaintiff's subjective belief about supervisor status was relevant to vicarious liability.[245] In five of these cases, the court found that whether the "alleged harassers viewed themselves as supervisors"[246] or the plaintiff "reasonably believed the assailant was her supervisor" was irrelevant to determining supervisor status.[247] In one case, however, the court found a genuine issue of material fact on the supervisor issue because the plaintiff testified at a deposition that the harasser "told her she would not receive an offer for a permanent position unless she first got a 'sign-off' from him" and others.[248] Thus, the court based its decision, at least in part, on the plaintiff's subjective belief.

2. What Is a Tangible Employment Action?

The second issue that has failed to receive consistent analysis post-*Vance* is what constitutes a tangible employment action. *Vance* held that only individuals with the authority to take tangible employment actions are supervisors.[249] It further clarified that "tangible employment actions" are those that can effect 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."[250] But does the ability to assign daily work constitute "reassignment with significantly different benefits?" The *Vance* court suggests it does not.[251] And multiple lower courts have interpreted the *Vance* definition to exclude individuals with the ability to assign work.[252] But not all lower courts agree.

245. *See* Clehm v. BAE Sys. Ordnance Sys., Inc., 291 F. Supp. 3d 775, 787 (W.D. Va. 2017), *aff'd*, 786 F. App'x 391 (4th Cir. 2019); Rice v. Howard Cty. Gov't, No. CV ADC-16-3498, 2017 WL 6547994, at *9 (D. Md. Dec. 19, 2017), *aff'd*, 744 App'x 840 (4th Cir. 2018); Hilgers v. Rothschild Inv. Corp., No. 15-C-3572, 2017 WL 4164036, at *6 (N.D. Ill. Sept. 20, 2017); Santos v. J.W. Grand, Inc., No. 13-00559, 2015 WL 3456627, at *4–5 (M.D. La. May 29, 2015); Humphrey v. Dresser-Rand Co., No. 12-CV-32, 2013 WL 4805804, at *3 (E.D. Mo. Sept. 9, 2013); Marugame v. Napolitano, No. 11-00710, 2013 WL 4608079, at *11 (D. Haw. Aug. 28, 2013).

246. *See, e.g.*, *Humphrey*, 2013 WL 4805804, at *5.

247. *Marugame*, 2013 WL 4608079, at *11. *See Clehm*, 291 F. Supp. 3d at 787 ("While Clehm's harassers may have ranked above her as tub house 'chiefs,' it matters not whether Clehm regarded them as supervisors—they are not supervisors within the meaning of Title VII.") (citation omitted); *Rice*, 2017 WL 6547994, at *10 ("For purposes of Title VII, it does not matter whether Plaintiff thought of Mr. Tomaskovic and Ms. Junis as supervisors because they simply were not supervisors within the meaning of Title VII."); *Santos*, 2015 WL 3456627, at *5 ("An individual's 'belief' that someone is a 'supervisor,' without more, does not make it so.").

248. *Hilgers*, 2017 WL 4164036, at *8.

249. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

250. *Id*. at 429 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

251. *Id*. at 439 ("The ability to direct another employee's tasks is simply not sufficient.").

252. *See, e.g.*, Hylko v. Hemphill, 698 F. App'x 298, 299 (6th Cir. 2017) ("Here, Hemphill had the authority to assign Hylko his daily duties, but not the authority to promote, to demote, or to fire him. And though Hemphill could recommend disciplinary action against Hylko, other U.S. Steel managers could do what they liked with those recommendations. Thus, Hemphill was not authorized to effect a significant change in Hylko's employment status."); Zerfas v. Burwell, No. PWG-14-2806, 2015 WL 3949372, at *10 (D. Md. June 26, 2015) (finding the harasser was not a supervisor even though "he frequently gave her work assignments").

For example, the Third Circuit has held that "[t]he authority to assign work is a 'tangible employment action' because it is a decision that can 'inflict[] direct economic harm.'"[253] Similarly, in *Burrell v. United Parcel Service, Inc*., the district court for the Northern District of Illinois suggested that the ability to determine work assignments is a tangible employment action: "But Mr. Adams has never held a management position at UPS, and he has never had the authority to change any aspect of Plaintiff's employment (*e.g.*, hire her, fire her, discipline her, change her pay, determine her work assignments, etc.)."[254]

Similarly, courts disagree about whether job titles are relevant to determining whether one has the power to take tangible employment actions. In *Vance*, the Supreme Court held that the term "supervisor" or "manager" is not controlling for purposes of Title VII liability.[255] But in *Nalepa v. Jolley Industrial Supplies Company, Inc.*, the district court for the Western District of Pennsylvania denied the defendant's motion for summary judgment on the supervisor issue, in part, because the harasser had the title, "Chief Operations Officer."[256] Additionally, in *Kramer v. Wasatch County Sheriff's Office*, the Tenth Circuit noted that one factor favoring supervisory liability was that the employer "characterized" the harasser as a supervisor.[257]

Finally, courts disagree over whether economic impact is determinative of a tangible employment action. The *Vance* court suggests "economic injury" is the appropriate test: "It is because a supervisor has that authority [the authority to 'inflict direct economic injury']—and its potential use hangs as a threat over the victim—that vicarious liability (subject to the affirmative defense) is justified."[258] And some lower courts agree that economic injury is determinative of tangible employment actions.[259] But others have found that although "economic injury is almost always sufficient to create a tangible employment action, it is not always necessary."[260]

V. PURPORTED ADVANTAGES VERSUS DISADVANTAGES OF *VANCE*

The data suggest *Vance* impacts Title VII cases more than the Supreme Court anticipated. Additionally, although the *Vance* Court asserted the advantages of its narrowed "supervisor" definition, the case analysis shows that

253. Moody v. Atl. City Bd. Educ., 870 F.3d 206, 216 (3d Cir. 2017) (quoting *Ellerth*, 524 U.S. at 762).

254. Burrell v. United Parcel Serv., Inc., 163 F. Supp. 3d 509, 515 (N.D. Ill. 2016), *reconsideration denied,* No. 14-CV-5127, 2016 WL 4720024 (N.D. Ill. Sept. 8, 2016).

255. *Vance*, 570 U.S. at 449.

256. Nalepa v. Jolley Indus. Supplies Co., Inc., No. CV 14-41, 2016 WL 1213584, at *9 (W.D. Pa. Mar. 29, 2016).

257. Kramer v. Wasatch Cnty. Sheriff's Off., 743 F.3d 726, 739–41 (10th Cir. 2014) (noting that the title was not dispositive but was on factor favoring supervisor status).

258. *Vance*, 570 U.S. at 440.

259. McCormack v. Safeway Stores Inc., No. CV-12-02547, 2014 WL 554192, at *2 (D. Ariz. Feb. 12, 2014) ("*Vance* requires Plaintiffs to show that Lopez had power to make economic decisions affecting Stabenchek's employment at Safeway such as the ability to fire, hire, promote, or change Stabenchek's compensation. Plaintiffs have presented no evidence that Lopez possessed such authority.").

260. *Kramer*, 743 F.3d at 738 (citation omitted).

few of the purported advantages have materialized. Rather, the *Vance* definition generates the same types of confusion and inconsistencies as the EEOC definition did before it.[261] At the same time, the narrowed definition is contrary to the purposes of Title VII, limits plaintiffs' ability to seek legal recourse for legitimate workplace harassment, fails to protect employees from harassment, and ignores the realities of modern workplaces.

A. Purported Advantages

1. Easily Workable, Early Resolution

The first advantage touted by the Supreme Court—and one of its purported goals in rendering the decision—is that the *Vance* definition is easily workable and "can be applied without undue difficulty at both the summary judgment stage and at trial."[262] According to the Court, *Vance* simplifies the establishment of supervisory status early in litigation,[263] which results in fewer trials of discrimination claims.[264] Ultimately, cases are less costly to litigate, and jurors are spared complicated jury instructions on supervisor status, affirmative defenses, and negligence.[265]

Many articles have taken the Court's predictions at face value.[266] As one commentator said:

> On its surface, the Supreme Court created much-needed certainty as to who qualifies as a "supervisor" for *Faragher/Ellerth* purposes. But on a deeper level, the Court has signaled that its clarification of "supervisor" was needed, in part, to simplify complicated Title VII lawsuits, if not resolve them altogether before any litigation begins. *Vance*, accordingly, will benefit litigants, courts, and jurors alike by streamlining—and, perhaps, truncating—harassment and discrimination cases that have grown more complicated since the Court decided *Faragher* and *Ellerth* 15 years ago.[267]

261. *Vance*, 570 U.S. at 464–65 (Ginsburg, J. dissenting) ("Someone in search of a bright line might well ask, what counts as 'significantly different responsibilities'? Can *any* economic consequence make a reassignment or disciplinary action 'significant,' or is there a minimum threshold? How concentrated must the decisionmaking authority be to deem those not formally endowed with that authority nevertheless 'supervisors'? The Court leaves these questions unanswered, and its liberal use of 'mights' and 'mays,' *ante*, at 2446, n. 8, 2447, n. 9, 2452, dims the light it casts.").

262. *Id.* at 432.

263. *Id.* at 443.

264. *See* Corbett, *supra* note 16, at 135.

265. *Vance*, 570 U.S. at 443 ("The elimination of this issue from the trial will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply. The plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the *Ellerth/Faragher* affirmative defense."); *see* McGreal, *supra* note 14, at 127 ("And because this question can usually be answered based on written documents, many cases can be resolved without resort to costly testimony and other evidence.").

266. McGreal, *supra* note 14, at 127 ("Second, the narrow definition is easier to apply, which yields greater certainty and fewer disputes.").

267. *See* ROBERT J. NOBILE, GUIDE TO EMPLOYEE HANDBOOKS § 5:21 (Thompson Reuters ed., 2010).

But, as the data show, the definition is not as easily workable as the *Vance* majority or its supporters suggest. The dissent argued this would be the case.[268] And, as it predicted, lower courts have grappled with many questions post-*Vance*:[269] Does apparent authority matter? What is a tangible employment action? Do tangible employment actions encompass only actions with direct economic injury? How does an employer effectively delegate supervisory authority?

Compare *Kramer v. Wasatch County Sheriff's Office*[270] and *McCafferty v. Preiss Enterprises, Inc.*,[271] two cases decided five months apart by different panels of the Tenth Circuit. In *Kramer*, the Tenth Circuit reversed the district court's grant of summary judgment to the employer, finding a question of fact on the supervisor issue because the harasser could "take or *substantially influence* tangible employment actions and used the threat of taking such actions to subject [the plaintiff] to a hostile work environment."[272]

In *McCafferty*, on the other hand, the Tenth Circuit affirmed the district court's grant of summary judgment to the employer, holding the McDonald's "shift manager"—who could direct the day-to-day assignments of the fifteen-year-old plaintiff, oversee her work, schedule breaks, ask her to cover extra shifts or stay late, send her home from a shift, impose discipline, and influence hiring, firing, and promotion—was not a supervisor even though "individuals in [the harasser's] position had the authority to make decisions that may have a significant impact on tangible employment actions."[273]

These decisions are at odds. In both, the harassers were similarly situated—one could "substantially influence tangible employment actions," while the other could "have a significant impact on tangible employment actions"—and yet the plaintiffs encountered contradictory decisions on the supervisor issue. In fact, the

268. *Vance*, 570 U.S. at 464 (Ginsburg, J. dissenting) ("There is reason to doubt just how 'clear' and 'workable' the Court's definition is. A supervisor, the Court holds, is someone empowered to take tangible employment actions against the victim, *i.e.,* to effect 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. Whether reassignment authority makes someone a supervisor might depend on whether the reassignment carries economic consequences. The power to discipline other employees, when the discipline has economic consequences, might count, too. So might the power to initiate or make recommendations about tangible employment actions. And when an employer concentrates all decisionmaking authority in a few individuals who rely on information from 'other workers who actually interact with the affected employee,' the other workers may rank as supervisors (or maybe not; the Court does not commit one way or the other).") (internal citations and quotations omitted).

269. Fatima Goss Graves, Vice President for Educ. and Emp., Nat'l Women's L. Ctr., Testimony at the U.S. Equal Emp. Opportunity Comm'n on Preventing and Addressing Workplace Sexual Harassment (Jan. 14, 2015) [Hereinafter "Graves"], https://nwlc.org/resources/fatima-goss-graves-testifies-eeoc-preventing-and-addressing-workplace-sexual-harassment/ [https://perma.cc/D9KE-C87X] ("Making matters worse, many courts have adopted a constrained interpretation of the *Vance* decision, which has led to plaintiffs who allege harassment being denied their day in court. And yet other courts have interpreted *Vance* more broadly. Plaintiffs, therefore, have little certainty about whether the court will find that their harasser is a supervisor, and employers lack clarity about the standards for liability.").

270. Kramer v. Wasatch Cnty. Sheriff's Off., 743 F.3d 726, 730–31 (2014).

271. McCafferty v. Preiss Enters., Inc., 534 Fed. Appx. 726, 727 (10th Cir. 2013).

272. *Kramer*, 743 F.3d at 739 (emphasis added).

273. *McCafferty*, 534 Fed. Appx. at 727–31.

opinions suggest that the *Kramer* panel would have found the authority held by the harasser in *McCafferty* sufficient to confer supervisory status.[274]

Kramer also highlights how, in the rare circumstances where courts analyze the delegation doctrine, the *Vance* decision shifts the analysis from one difficult question to another. Post-*Vance*, rather than considering whether a harasser can control an employee's day-to-day work activities, courts and jurors are tasked with considering whether a harasser has substantial input in tangible employment decisions such that "the employer may be held to have effectively delegated the power to take tangible employment actions."[275] As one scholar argues, the delegation doctrine

> muddies the waters of the test settled on by the Court. . . . Now instead of cases requiring litigation to determine whether or not an employee qualified as a supervisor due to their control over a plaintiff's daily work activities, litigation will be necessary to determine whether or not the power of the employee to recommend tangible employment actions regarding the plaintiff qualifies them as a supervisor.[276]

The varying post-*Vance* interpretations of "supervisor" thus show how the same criticism the Court leveled against the EEOC definition—that it would make the determination of supervisor status complicated and dependent on a highly case-specific evaluation of numerous factors[277]—applies to the *Vance* definition.[278] And similar to the EEOC definition, interpretation of the *Vance* definition has been inconsistent and unpredictable.[279]

Because of these inconsistencies, *Vance* has failed to provide an "easily workable solution" or simplify litigation as anticipated. The preceding analysis shows that post-*Vance*, the supervisor issue is unresolved at summary judgment and thus left for jury determination in about 20% of contested cases.[280] In another 50% of contested cases, courts find that harassers are coworkers at the summary judgment stage, leaving juries to determine whether the employer was negligent

274. MERRICK T. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 5:8, Westlaw (database updated Aug. 2020) (discussing inconsistencies between *McCafferty* and *Kramer*).

275. Vance v. Ball State Univ., 570 U.S. 421, 447 (2013) (quoting Rhodes v. Ill. Dept. of Transp., 359 F.3d 498, 509 (7th Cir. 2004) (Rovner, J., concurring)); *see* Nicholas Jacobson, Vance v. Ball State University*: The Court Misses the Forest for the Trees with Its Definition of Supervisors Under Title VII*, 22 DIG.: NAT'L ITALIAN AM. BAR ASS'N L.J. 115, 122–23 (2014) ("However, the Court failed in its effort to establish an easily workable test which can be readily applied at the summary judgment stage. Under the test established in *Vance*, litigation will still be required to determine whether employees are supervisors based on their input into hiring and firing decisions.").

276. Jacobson, *supra* note 275, at 122.

277. *Vance*, 570 U.S. at 432.

278. Jeffrey M. Hirsch, *The Supreme Court's 2012-2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17 EMP. RTS. & EMP. POL'Y J. 157, 173 (2013) ("It does not take strong prognostication skills to predict that lower courts will struggle to determine where the new supervisory line lies.").

279. *See* Covert, *supra* note 135 (quoting Liz Watson, senior counsel and director of workplace justice for women at the National Women's Law Center).

280. *See supra* Section IV.C.3 (discussing the forty-three cases in which the supervisor issue was unresolved at summary judgment). This Article does not assess whether fewer harassment claims proceeded to trial before or after *Vance*.

in remediating harassment.[281] This is an equally challenging and nebulous question.[282] Overall, in 69% of contested cases,[283] juries are tasked with determining either whether a harasser was a supervisor or whether the employer was negligent in responding to the harassment.

In sum, the case analysis does not support the Court's conclusion that the *Vance* definition is one that is "clear and easily administrable."[284]

2. Liability Planning and Workplace Management

Another purported advantage of the "simplicity" of the *Vance* approach is that it "provides much-needed guidance to both employers and employees regarding who qualifies as a supervisor for purposes of Title VII."[285] Equipped with this guidance, employers can, presumably, better craft job descriptions and titles,[286] clearly establish and communicate who qualifies as a supervisor,[287] provide targeted harassment training,[288] and avoid liability for coworker harassment

281. *See supra* Table 10 (showing 126 cases where the court determined at the summary judgment stage that the harasser was a coworker); *see also* Martin H. Malin, *The Employment Decisions of the Supreme Court's 2012-13 Term*, 29 A.B.A.J. LAB. & EMP. L. 203, 221 (2014) ("I suggest, however, that the case has primarily shifted the fight to whether the alleged harasser in fact had authority to take tangible employment actions and to whether the employer was negligent.").

282. Hirsch, *supra* note 278, at 173 ("For instance, in discussing its earlier treatment of the supervisor classification in *Faragher*, the Court suggested that supervisory status can exist if tangible employment decisions are subject to approval by higher management or if the decisionmakers rely on the harasser's 'substantial input' to such a degree that they have effectively delegated their authority. As the Court's own struggles with decision-making delegation under the cat's paw theory shows, these types of determinations can be quite difficult."); Malin, *supra* note 281, at 221 (discussing how the negligence question may resist determination on summary judgment).

283. This category consists of 169 cases.

284. *See* Vance v. Ball State Univ., 570 U.S. 421, 451 (2013) (Thomas, J., concurring); Jacobson, *supra* note 275, at 122 ("The majority's assertion that, 'in every case, the approach ... [taken] will be more easily administrable than the approach advocated by the defense,' is wishful thinking."); Hirsch, *supra* note 278, at 173 ("In addition to its dismissal of the risk that *Vance* will encourage employers to manipulate the number of employees with supervisory authority, the Court made another questionable assertion in claiming that its rule is clear and easy to apply.").

285. *Supreme Court Narrowly Defines 'Supervisor' in Discrimination* Case, 27 WL J. EMP. *1, *1 (July 10, 2013).

286. Luther Wright, Jr., *Labor and Employment Law Issue Update for Corporate Counsel*, AM. HEALTH ASS'N SEMINAR PAPERS, Feb. 19, 2014, at 17, WESTLAW, 20140219 AHLA Seminar Papers 17 (Feb. 19, 2014) ("As a result of this decision, employers now have uniformity and clarity in deciding which of their employees are supervisors for the purposes of Title VII hostile work environment claims. . . . Employers should also review current job descriptions to determine if they should be modified.").

287. Daniel Myerson, *Helping Employers Avoid Harassment and Retaliation Claims*, 102 ILL. B.J. 188, 190 (2014) ("[F]or an employer who has not clearly established and communicated its supervisory relationships, the *Vance* decision is a very good reason to do so.").

288. Wright, *supra* note 286 ("As a result of this decision, employers now have uniformity and clarity in deciding which of their employees are supervisors for the purposes of Title VII hostile work environment claims. Employers should evaluate which of their employees have the authority to create vicarious liability under *Vance* and target these employees for special harassment training."); ROSSEIN, *supra* note 274, at 4 (providing an action plan for employers on how to respond to *Vance*).

through robust ethics and compliance programs.[289] In practice, however, *Vance* fails to provide these alleged benefits.

To start, as discussed above, *Vance* fails to provide clarity on liability.[290] Just as in the pre-*Vance* era, courts vary drastically on what qualifies one as a supervisor. Given the widely divergent interpretations, there is no assurance of outcomes. In fact, even where both the employer and employee agree the harasser is not a supervisor, the court may find otherwise.[291]

Moreover, even when employers attempt to comply with *Vance*'s limited "guidance" by structuring workplaces to avoid liability, the narrowed definition may result in poor business decisions. Artificially concentrating supervisory authority in a small percentage of the workforce may successfully limit liability for Title VII harassment, but it may not be a sound business practice;[292] rather, it could dissuade employers from training individuals for supervisory positions or limit the numbers of employees who participate in anti-harassment and discrimination training.[293] It also could inhibit the development of management skills like decision-making, planning, delegation, and problem solving in individuals who are not considered supervisors. Ultimately, this contrived structuring could have negative business consequences.

B. Disadvantages

As discussed above, aside from limiting employer liability, the data suggest *Vance* has produced few advantages in practice. In fact, the narrowed definition generates many disadvantages.

289. McGreal, *supra* note 14, at 127 ("Because a company is vicariously liable for co-worker harassment only when the company was negligent in preventing or addressing the harassment, if a company can prove that it had an effective compliance and ethics program, it should avoid liability for co-worker harassment.").

290. Graves, *supra* note 269 ("Making matters worse, many courts have adopted a constrained interpretation of the *Vance* decision, which has led to plaintiffs who allege harassment being denied their day in court. And yet other courts have interpreted *Vance* more broadly. Plaintiffs, therefore, have little certainty about whether the court will find that their harasser is a supervisor, and employers lack clarity about the standards for liability.").

291. Rock v. Blaine, No. 8:14-cv-01421, 2018 WL 1415202, at *10 (N.D.N.Y Mar. 20, 2018).

292. Talesh, *supra* note 11, at 630 ("Rather than focusing on the proper role of supervisors, EPLI risk-management consultants and lawyers steer employers toward avoiding liability and defending cases. Risk-management consultants and attorneys suggest that employers not have many supervisors, selectively use the term 'supervisor,' clearly document and communicate levels of authority, and avoid behavior that gives an inference that the employee is a supervisor."). Although the Court cautioned that employers could not avoid liability by concentrating decision-making authority in a select few, the fact that courts rarely analyze supervisory authority under the delegation doctrine suggests this advice is valid. *See* discussion *supra* note 170.

293. Talesh, *supra* note 11, at 630 ("[F]ield actors dissuade employers from having lots of employees participate in training programs that could suggest an employee is a supervisor."); *see* Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO STATE L.J. 1057, 1074 (2018) ("[If] the law adopted the more inclusive definition of 'supervisor,' employers would face a greater potential of liability for harassment, and they would have a heightened incentive to implement preventative measures.").

1. Contrary to Purposes of Title VII

The first disadvantage of the *Vance* definition is that it is contrary to the purposes of Title VII, which was enacted with the broad remedial goal of ending harassment and discrimination against employees.[294] The *Vance* court focused on providing for the easy administration and determination of Title VII cases—a reasonable objective, certainly, but neither the stated nor intended purpose of the expansive statute.[295] Rather than crafting a definition that aligns with Title VII, then, *Vance* creates one at odds with it, sacrificing employee protection for an allegedly simple and straightforward judicial approach.[296] As Justice Ginsburg said, "In so restricting the definition of supervisor, the Court once again shuts from sight the 'robust protection against workplace discrimination Congress intended Title VII to secure.'"[297]

The *Vance* definition also permits employers to control liability by limiting the number of individuals who can take tangible employment actions. Planning for and limiting liability is also a reasonable objective. By defining "supervisor" so narrowly, however, *Vance* gives employers significant latitude to structure workplaces to avoid liability and essentially determine the breadth of Title VII's protections.[298]

2. Ignores Workplace Realities

The second disadvantage of the *Vance* definition is that, as the dissent first noted, it is "blind to the realities of the workplace," ignoring "the conditions under which members of the work force labor."[299] Because of this, as the *Vance* defendant recognized, the Court's definition "does not necessarily capture all

294. Jacobson, *supra* note 275, at 115 ("Employees who are harassed by coworkers, including those who direct their daily tasks, will now be unable to hold their employer strictly liable for such conduct unless the harasser had the authority to take tangible employment actions against the victim. This holding is contrary to the purposes of Title VII, and fails to recognize that control over the daily work activities of subordinates is the defining characteristic of supervisors in the workplace."); Davis, *supra* note 42, at 171 ("Instead, the Court disregarded and deleted an entire group of what the workforce would consider 'supervisors,' thereby contravening on purpose of Title VII—the prevent workplace harassment."); Lee, *supra* note 15, at 1781–82 ("Evaluating the majority's narrow interpretation of supervisor in *Vance*, the call for a response from Congress is justified because the decision is inconsistent with both the underlying intent and remedial aims of Title VII.").

295. LaDelle "DeDe" Davenport, Vance v. Ball State University *and the Ill-Fitted Supervisor/Co-Worker Dichotomy of Employer Liability*, 52 HOUS. L. REV. 1431, 1435 (2015) (noting the purpose of Title VII is to prevent discrimination).

296. Lee, *supra* note 15, at 1785–86.

297. Vance v. Ball State Univ., 570 U.S. 421, 463 (2013) (Ginsburg, J., dissenting) (quoting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting)).

298. Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?,* 74 LA. L. REV. 1161, 1169 (2014) ("When an employer is allowed to exercise too much authority in deciding an issue that is fundamental to liability, the employer effectively controls Title VII's scope.").

299. *Vance*, 570 U.S. at 451, 55, 58 (Ginsburg, J. dissenting). ("Workplace realities fortify my conclusion that harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicarious employer liability."); *see* Jacobson, *supra* note 275, at 120 ("In its opinion, the Court failed to address the realities of the workplace."); Davenport, *supra* note 295, at 1445 ("This approach, it is argued, 'departs from the common-sense understanding of the word in the workplace environment' and goes against 'the realities of the workplace.'").

employees who may qualify as supervisors."[300] The *Vance* majority and dissent agreed that workplaces vary significantly[301] and are becoming less, not more, hierarchical.[302] "Under these flatter structures, lower-level supervisors are taking on increasingly managerial roles and making decisions that affect employees' everyday work including: the maintenance of safety, cleanliness, and equipment; employee training and scheduling; and facilitating 'human relations' counseling, union-management relations, and other external relations."[303]

Workplaces also are becoming more fluid, with responsibilities shifting from one project to another.[304] In these fluid environments, "[i]t is not reasonable to expect that supervisor status can be accurately discerned solely from job descriptions or express grants of power from upper management."[305] Workplaces frequently employ individuals who lack the authority to take tangible employment actions but have significant, if not complete, control over daily work activities.[306] And in these situations, employees are particularly susceptible to harassment that has no legal recourse.

This is especially true in industries with low-wage workers. An informal survey by the National Women's Law Center found that in ten low-income industries, lower-level supervisors without the authority to take tangible employment actions had the authority to train new employees, assign tasks, give permission for breaks, set schedules, make teams, coach employees, and evaluate performance.[307] Congress's proposed "Fair Employment Protection Act" recognized this reality, noting that:

> Workers in industries including retail, restaurant, health care, housekeeping, and personal care, which may pay low wages and employ a large number of female workers, are particularly vulnerable to harassment by individuals who have the power to direct day-to-day work activities but lack the power to take tangible employment actions.[308]

300. Brief for Respondent at 1, *Vance*, 570 U.S. 421 (No. 11-556).

301. *See Vance*, 570 U.S. at 456, 465 (Ginsburg, J. dissenting).

302. Andrew Freeman, *A Bright Line, but Where Exactly? A Closer Look at* Vance v. Ball State University *and Supervisor Status Under Title VII*, 19 LEWIS & CLARK L. REV. 1153, 1170 (2015) ("Workplaces are in a state of flux. Openness, transparency, and individuality are becoming important features in many office environments. Employers are embracing layouts designed to stimulate interaction and creativity and some are even eliminating traditional offices altogether as a means of symbolizing an informal structure of shared leadership.").

303. Lee, *supra* note 15, at 1783. *See* FATIMA GOSS GRAVES, LIZ WATSON, KATHERINE GALLAGHER ROBBINS, LAUREN KHOURI & LAUREN FROHLICH, NAT'L WOMEN'S L. CTR., REALITY CHECK: SEVENTEEN MILLION REASONS LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT 5 (2014), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/final_nwlc_vancereport2014.pdf [https://perma.cc/HXP9-AYWF] ("The substantial responsibilities assigned to lower-level supervisors reflect a trend toward a flattening of organizational hierarchies . . . .").

304. Freeman, *supra* note 302, at 1171.

305. *Id*.

306. Lee, *supra* note 15, at 1784; GRAVES, *supra* note 303, at 8 (reporting that there are "3.1 million lower-level supervisors" who "oversee low-wage workers" but do not have authority to take tangible employment actions).

307. GRAVES ET AL., *supra* note 303, at 3–5.

308. *Id*. at 5 (quoting Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong.§ 2(a)(15) (2d Sess. 2014)).

And it is precisely in these contexts—where employees have limited options and harassers control significant daily work activities that affect economic and emotional well-being—that protection against workplace harassment should be paramount.

The *Vance* definition, for example, ignores the importance of scheduling, a meaningful day-to-day task that materially affects employees but is not considered a tangible employment action. The number of hours an employee works is an integral aspect of working conditions that has a direct economic impact.[309] Similarly, the distribution of hours is significant because it determines an employee's ability to engage in other life responsibilities like caring for family or working additional jobs, both of which can have an economic impact.[310] Thus scheduling—including how long and at what time employees work—often tangibly affects employees' economic and emotional well-being.[311]

The *Vance* definition also ignores the impact of apparent authority or perceived apparent authority because it construes supervisor status without regard to a plaintiff's belief about who holds supervisory authority.[312] Depending on the workplace, employees may not consider individuals with authority to take tangible employment actions as supervisors.[313] These individuals, especially in strictly hierarchical organizations, may interact so infrequently with subordinates that employees barely know them. Instead, employees may view those who manage schedules and oversee their daily work as supervisors.[314] And, in organizations of this nature, "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."[315]

Thus, subjective belief is important. As one scholar argued:

> [T]he Court's disregard for the manner in which the victim of sexual harassment experiences his or her harasser's power in the workplace is significant. . . . From the perspective of a victimized employee, irrespective of

309. *See* Covert, *supra* note 135 ("Things like schedules are significant changes for workers . . . because they have everything to do with how much money someone earns.").

310. *See* Graves, *supra* note 269 ("Lower-level supervisors have enormous ability to affect an employee's work environment. They make decisions about who works the night shift and who works days, who cleans the toilets and who works the cash register, who can take a break and who cannot.").

311. *See* Vance v. Ball State Univ., 570 U.S. 421, 457–58 (2013) (Ginsburg, J., dissenting) ("A supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer. That Silverman could threaten Faragher with toilet-cleaning duties while Terry could orally reprimand her was inconsequential in *Faragher*, and properly so. What mattered was that both men took advantage of the power vested in them as agents of Boca Raton to facilitate their abuse.").

312. *See* Khadija Murad, *Sexual Harassment in the Workplace*, NAT'L CONF. OF STATE LEGIS. (Feb. 17, 2020), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx [https://perma.cc/92EJ-TT6Z] (noting sexual harassment may occur when "when a supervisor or other person with apparent authority to confer or withhold employment benefit demands sexual favors"); Chambers, *supra* note 298, at 1169 ("[H]ow an employee experiences the supervisor/coworker's power in the workplace would also seem relevant to whether the supervisor/coworker was aided in harassing the employee by the power given to him or her by the employer . . .").

313. Jacobson, *supra* note 275, at 122.

314. *Id*.

315. Freeman, *supra* note 302, at 1178.

> whether a harasser technically possesses certain powers, to the extent that he controls aspects and the atmosphere of her employment he is acting to color, if not corrode, the terms and conditions of her employment when he harasses her.[316]

Arguably, the *Vance* majority accounted for workplace realities through the delegation doctrine by recognizing that "in modern organizations that have abandoned a highly hierarchical management structure, it is common for employees to have overlapping authority with respect to the assignment of work tasks."[317] But, as the data show, courts are not evaluating whether employers delegate authority; less than 7% of contested cases explicitly considered delegation as a mechanism for finding vicarious liability. The failure to consider the delegation doctrine validates the dissent's concern that employers can insulate themselves from liability by concentrating the authority to take tangible employment actions in a select group of individuals.

Moreover, even if courts consider delegation, determining when it makes one a supervisor may be difficult within organizations where authority is fluid. For example, a company may state that managers are consulted when making hiring decisions about their store. However, for a certain position that has specialized knowledge, the company also may consult another employee who is not a manager (*e.g.*, consulting an IT employee about applicants' technical skills). The extent to which a certain position has delegatory authority, then, may not be clear.[318]

3. Inhibits Legal Redress for Workplace Harassment

By ignoring workplace realities and classifying harassers who hold significant and meaningful power over employees as coworkers rather than supervisors, *Vance* creates an environment where plaintiffs are unlikely to report harassment *and* unable to seek legal recourse for it.[319]

In theory, employees can stop coworker harassment by reporting it to their employer. And this theory may function in practice when the harasser is truly a coworker (*i.e.*, there is no power imbalance between harasser and victim), and the victim can report the harasser to the employer without fear of retribution. But the calculus changes when the harasser has significant control over the employee's work. Reporting carries greater risk when the harasser, even if not technically a supervisor under *Vance*,[320] can wield power retributively, potentially

316. Kerri Stone, *Reality's Bite*, 28 J. C.R. & ECON. DEV. 227, 232 (2015).

317. Vance v. Ball State Univ., 570 U.S. 421, 446 (2013).

318. *See* Freeman, *supra* note 302, at 1171 ("Additionally, management may consciously decide not to strictly adhere to its own formal employee classifications when making employment decisions. 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.").

319. Chambers, *supra* note 298, at 1166 ("Restricting supervisory status so narrowly potentially limits recovery for HWE harassment.").

320. Lee, *supra* note 15, at 1793 (discussing a category of employees who reasonably believe their harasser has tangible employment authority).

compounding the employee's harm (*i.e.*, the harassment *plus* the retaliation for reporting it).[321] An employee who suffers such harassment may fail to report it for fear of retaliation.[322]

Harassment by employees with such power is thus more likely to go unreported and thereby unabated absent an external recourse. By misclassifying harassers with significant and meaningful control over their victims as coworkers, however, *Vance* has restricted that recourse.[323] With vicarious liability foreclosed by *Vance*'s "supervisor" definition, negligence is the only claim available.[324] But in this scenario, where the employee is inhibited from reporting harassment based on a reasonable fear of retaliation, a negligence claim will fail because it requires proof that the employee reported the harassment to the employer or the harassment was so obvious that the employer should have been aware of it.[325]

321. *See* Graves, *supra* note 269 ("The victims know that if they try to stop the harassment a lower-level supervisor can retaliate by giving them an extremely difficult schedule, assigning them to less desirable job duties, or making them work in unsafe conditions.").

322. *See id.* ("Because of the significant barriers to entry, women who suffer harassment in nontraditional jobs may be especially unlikely to report harassment for fear of retaliation, ranging from further harassment, losing their jobs, or even having their physical safety put at risk."); Press Release, Nat'l Women's L. Ctr., Black Women Disproportionately Experience Workplace Sexual Harassment, New NWLC Report Reveals (Aug. 2, 2018) [hereinafter NWLC Report], https://nwlc.org/press-releases/black-women-disproportionately-experience-workplace-sexual-harassment-new-nwlc-report-reveals/ [https://perma.cc/KS3B-DEBH] (reporting that 1 in 3 women who filed sexual harassment charges also reported retaliation); Richard Gonzales, *McDonald's Facing New Charges of Sexual Harassment*, NPR (May 21, 2019, 9:57 PM), https://www.npr.org/2019/05/21/725557211/mcdonalds-facing-new-charges-of-sexual-harassment [https://perma.cc/F9CE-FKDG] ("Every day, workers are forced to choose between getting a paycheck or speaking up about their abuse. When they report harassment, workers are often fired or have their shifts cut—and since nothing is done to stop it, the scourge continues."); *see also Vance*, 570 U.S. at 454 (Ginsburg, J., dissenting) ("Exposed to a 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. Facing such dangers, she may be reluctant to blow the whistle on her superior, whose 'power and authority invests his or her harassing conduct with a particular threatening character.'") (quoting Burlington Indus. vs. *Ellerth,* 524 U.S. 742, 763 (1998)); *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998); Brief for Respondent at 23, *Vance*, 570 U.S. 421 (No. 11-556) ("The potential threat to one's livelihood or working conditions will make the victim think twice before resisting harassment or fighting back.").

323. Lee, *supra* note 15, at 1783–84 ("Under this new standard, an employee who has endured harassment at the hands of someone whom he or she perceives to possess supervisory authority will be deprived of the greatest form of redress if the harasser did not possess 'tangible employment action' authority.").

324. Hirsch, *supra* note 278, at 170 ("Thus, the non-supervisory standard presumes that the employer is not liable for harassment unless the employee-plaintiff can prove negligence.").

325. *Termilus* provides a good example. Termilus v. Marksman Sec. Corp., No. 15-61758-CIV, 2016 WL 6212990 (S.D. Fla. June 27, 2016). In *Termilus*, the harasser told the plaintiff that he wanted to have sex with her, "repeatedly touch[ed] her on her butt . . . ;" played her videos of animals engaging in oral sex on a man; "would stand close to [her] back to rub his penis and would tap [her] on her butt, and called Plaintiff to watch porn with him . . . ." *Id*. at *4. Because the harasser was responsible for scheduling and responding to complaints and expressed his ability to fire individuals, the plaintiff believed he was her supervisor. She did not report the harassing behavior even after human resources questioned her about it, in part, because she was intimidated by an anonymous, threatening phone call and feared retaliation. *Id*. at *5. The court found the harasser was a coworker; but because the plaintiff did not report the harassment, there was no liability under the negligence standard. *Id.* at *18.

This challenge has particularly pervasive effects on low-income workers, especially racial minorities and women.[326] As one scholar opined: "Employees across industries, especially low-wage workers, find themselves 'between a rock and a hard place' when they experience harassment in the workplace—choosing between the risk of losing their job after reporting the harassment, and the risk of unsuccessfully litigating their claims under the narrow *Vance* standard."[327] Women, and especially women of color, are among the lowest paid workers and also experience sexual harassment at the highest rates.[328] Yet the majority of women are unlikely to report sexual harassment.[329]

Additionally, because *Vance* makes Title VII claims more difficult to prove,[330] employees may have a reduced incentive to sue their employers,[331] and plaintiffs' attorneys may be less likely to accept these cases.[332] Employers' success at the summary judgment stage (one where plaintiffs already are particularly

326. *See* Gonzales, *supra* note 322 ("It's a brutal reality across the fast food industry that at least one in four workers—especially women of color working low-wage jobs — experience sexual harassment as a routine part of their job."); NWLC Report, *supra* note 322 ("The statistics confirm that sexual harassment is alive and well across all industries—and women of color working low-wage jobs are facing the brunt of this abuse . . . ."); Steiger, *supra* note 15 (hypothesizing that the ruling is "likely to disproportionately affect women").

327. Lee, *supra* note 15, at 1787 ("Both risks are all the more threatening to low-wage workers, who are least able to bear the costs associated with the risk of losing their employment and jeopardizing their financial stability."); *see* Graves, *supra* note 269 ("Because of the significant barriers to entry, women who suffer harassment in nontraditional jobs may be especially unlikely to report harassment for fear of retaliation, ranging from further harassment, losing their jobs, or even having their physical safety put at risk.").

328. *See* Graves, *supra* note 269.

329. Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html [https://perma.cc/Q4DG-UGK2] (finding that 70% of women who experienced sexual harassment by either a supervisor or coworker did not report it). In this poll, 13% of women reported sexual harassment by a supervisor and 19% by a coworker. Men are not immune from this harassment. The poll found 6% of men experienced sexual harassment by a supervisor and 14% reported harassment by a coworker. *Id*. And "an estimated 87 to 94 percent of individuals who experience workplace sexual harassment never file a formal legal complaint." *See* NWLC Report, *supra* note 322.

330. Suzanne Specker, *"Hun, I Want* You *for Dessert": Why Eliminating the Sub-Minimum Wage for Restaurant Servers Will Empower Women*, 19 U. PA. J.L. & SOC. CHANGE 335, 342 (2016) ("[T]hese claims are significantly more difficult to bring than before because of the Supreme Court's 2013 decision in *Vance v. Ball State University*.").

331. Davis, *supra* note 42, at 169; *Supreme Court Narrowly Defines 'Supervisor' in Discrimination case, supra* note 285, at *1 (noting the ruling could make it more difficult to sue employers over alleged workplace harassment). Although it is beyond the scope of this article, I hypothesize that the narrowed definition may have reduced the number of Title VII hostile work environment cases filed because the burden is higher, and, therefore, chance of success is lower.

332. Specker, *supra* note 330, at 342. Although analysis of the number of Title VII cases filed since *Vance* is beyond the scope of this paper, we do know that employment discrimination filings have been decreasing. There has been no similar decline in other types of federal cases, such as contract or tort cases. Scholars hypothesize that this is due to the "negative experiences of many plaintiffs and their lawyers," not the decrease in workplace harassment or discrimination. *See* Clermont & Schwab, *supra* note 18, at 117–20. The *Vance* definition likely continues this trend, further diminishing the strength of plaintiffs' employment discrimination cases in federal court.

disadvantaged)[333] may make employers less likely to settle claims early.[334] Justice Ginsberg predicted this: "We can expect that, as a consequence of restricting the supervisor category to those formally empowered to take tangible employment actions, victims of workplace harassment with meritorious Title VII claims will find suit a hazardous endeavor."[335]

Employment discrimination plaintiffs already face an uphill battle, achieving, on average, worse outcomes than employment discrimination defendants and plaintiffs who pursue a "broad range of other claims."[336] And Title VII hostile work environment cases in particular are complicated and difficult to win.[337] *Vance* exacerbates this difficulty, providing a "roadmap for employers" to narrow their liability for workplace harassment under Title VII[338] even though harassers may be empowered by the employer to control employees' day-to-day working conditions.[339] Thus, it is yet another way for employers to escape liability for conduct that is unquestionably discriminatory.[340]

333. Talesh, *supra* note 11, at 630 ("[E]mployers are encouraged to bring more motions for summary judgment since the law has narrowed the definition of supervisor."); Stephen L. Hayford et. al., *Employment Arbitration at the Crossroads: An Assessment and Call For Action*, 2014 J. DISP. RESOL. 255, 261 (2014) ("Indeed, both *Vance v. Ball State University* and *University of Texas Southwestern Medical Center v. Nassar* justify their decidedly employee-unfriendly holdings at least in part on how they will allow more cases to be resolved prior to trial, particularly at the summary judgment stage (where we know employees are at a decided disadvantage)."); 24A West's Legal Forms, Employment § 5.4 (updated Dec. 2019).

334. Davis, *supra* note 42, at 167.

335. Vance v. Ball State Univ., 570 U.S. 421, 467–68 (2013) (Ginsburg, J., dissenting).

336. Hayford et al., *supra* note 333, at 261.

337. Hirsch, *supra* note 278, at 172 ("The data on employment discrimination plaintiffs' success suggests that very few showings under Title VII are simple."); Clermont & Schwab, *supra* note 18, at 104 ("We should disclose at the outset our concluding view that results in the federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts.").

338. Chambers, *supra* note 29898, at 1166 ("[T]he Court provided a roadmap for employers to restrict the workers who can be deemed supervisors for HWE harassment purposes, potentially narrowing liability for such harassment even further."); Jacobson, *supra* note 275, at 123 ("While failing to achieve its stated goal of establishing an easily workable test, the Court's decision will allow employers to escape liability by limiting the number of employees possessing the authority to take tangible employment actions."); Hirsch, *supra* note 278, at 158 ("In setting forth a narrow interpretation of 'supervisor' under Title VII's hostile work environment protection, the Court maintained its efforts to restrict employer liability for workplace harassment.").

339. Jacobson, *supra* note 275, at 120–21 ("This decision will allow employers to insulate themselves from liability, while unfairly restricting opportunities for victims of discrimination to recover from their employers even when harassers are aided in their unlawful actions by the ability to control the work activities of the victim.").

340. Sabreena El-Amin, *Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 4 (2015) ("Cases like *Faragher v. City of Boca Raton, Ricci v. DeStefano*, and *Vance v. Ball State* have increased the burden on plaintiffs to give evidence of the true intentions of discriminatory actors and offers employers a broad set of defenses, available even for conduct that appears on its face to be clearly discriminatory."). Example cases that were unfair to employees include *Spencer v. Schmidt Elec. Co.*, 576 F. App'x 442, 448 (5th Cir. 2014); *Kramer v. Wasatch Cnty.*, 857 F. Supp. 2d 1190, 1207 (D. Utah 2012), *rev'd sub nom.*, *Kramer*, 743 F.3d 726.

4. Increases and Intensifies Workplace Discrimination

The lack of viable recourse for victims of harassment both internally and externally creates bad incentives for employers, increasing the likelihood that workplaces will become more, not less, discriminatory.[341] Before *Vance* narrowed the definition of "supervisor," the threat of vicarious liability encouraged employers to establish policies and procedures to prevent workplace harassment.[342] Because plaintiffs now face an uphill battle to hold employers vicariously liable, employers may be less likely to implement such measures. As Justice Ginsburg wrote: "Inevitably, the Court's definition of supervisor will hinder efforts to stamp out discrimination in the workplace."[343]

Significantly, *Vance* incentivizes employers to escape liability through strategic organization, concentrating tangible employment power in a select few, rather than through harassment prevention training for all.[344] As one scholar noted, law firms are counseling clients to "consider strategic opportunities to capitalize on the *Vance* and *McCafferty* decisions by limiting the scope of authority that certain leaders possess in order to narrow the scope of [their] risk for vicarious supervisory liability."[345] While *Vance* established the delegation doctrine to combat this strategy, the delegation doctrine is an inadequate safeguard of employees' rights.[346]

Some argue that because plaintiffs can pursue liability under a negligence theory, employers have an ongoing duty to monitor the workplace.[347] But the negligence standard is difficult to meet and considers only how the employer reacts once on notice of the harassing behavior.[348] Therefore, it provides little

341. Stone, *supra* note 316, at 229 ("[C]ritics believe that this narrow definition leaves victims of harassment with inadequate protection and will deter the vindication of rights under the statute."); Davis, *supra* note 42, at 167 (discussing how *Vance* makes it more difficult for employees to bring claims).

342. Davis, *supra* note 42, at 168.

343. Vance v. Ball State Univ., 570 U.S. 421, 468 (2013) (Ginsburg, J., dissenting).

344. Lee, *supra* note 15, at 1789–90. *See generally Vance*, 570 U.S. at 468 (Ginsburg, J., dissenting) ("Because supervisors are comparatively few, and employees are many, 'the employer has a greater opportunity to guard against misconduct by supervisors than by common workers,' and a greater incentive to 'screen [supervisors], train them, and monitor their performance.' Vicarious liability for employers serves this end. When employers know they will be answerable for the injuries a harassing jobsite boss inflicts, their incentive to provide preventative instruction is heightened. If vicarious liability is confined to supervisors formally empowered to take tangible employment actions, however, employers will have a diminished incentive to train those who control their subordinates' work activities and schedules, *i.e.*, the supervisors who 'actually interact' with employees.") (citations omitted).

345. Lee, *supra* note 15, at 1790.

346. *See supra* Section III.E.

347. *Supreme Court Narrowly Defines 'Supervisor' in Discrimination Case*, *supra* note 285, at *3.

348. Davis, *supra* note 42, at 167, 167 n.152, 169 (citing Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE. L. REV. 1235, 1278 (1988)) ("Proving cause-in-fact in a negligence action is usually not difficult, but demonstrating proximate cause is a more problematic issue."); Angela Scott, Case Note, *Employers Beware! The United States Supreme Court Opens the Floodgates on Employer Liability Under Title VII.* Burlington Industries, Inc. v. Ellerth, 24 S. ILL. U.L.J. 157, 177 (1999) (noting that strict liability is an easier burden of proof than the negligence standard); Steiger, *supra* note 15 (noting that it is "really, really tough" to "bring forward cases under a negligence claim for failing to stop harassment by a co-worker"). The National Women's Law Center also found that "[c]ourts have . . . largely ignored factors set forth in *Vance* that articulate whether an employer may have been negligent in preventing coworker harassment." Covert, *supra* note 135.

incentive for employers to proactively monitor the workplace for harassment.[349] In fact, it may discourage them from doing so.[350] Under the current legal framework, employers are obligated to stop coworker harassment only if they know about it; plaintiffs bear the burden of proving this.[351] And, as discussed, employees may not report harassment perpetrated by individuals who control their day-to-day activities, even if those individuals cannot take tangible action against them.[352] Thus, the *Vance* definition may discourage "the creation of antiharassment policies and effective grievance mechanisms," which is precisely what Title VII was designed to encourage.[353]

VI. REMEDIES

A. A Failed Solution

The inadequacy of the *Vance* definition to protect employees and provide clarity on liability has led numerous scholars,[354] and Justice Ginsburg herself, to propose that Congress define the term "supervisor" in a way that more accurately

Specifically, it found only seven of forty-three reviewed cases discussed factors such as whether an employer failed to monitor the workplace for sexual harassment, respond to complaints, provide a system to register complaints, or effectively discouraged employees from filing them. *Id.* The negligence framework is even more problematic in conjunction with *Vance*'s directive to disregard employees' subjective belief about who constitutes a supervisor. To succeed on a negligence claim, the employee must show that the employer knew or should have known of the harassment and was negligent in responding to it. As discussed, however, employees may find it difficult to report harassment by a supervisor (or one believed to be a supervisor). *Vance*, 570 U.S. at 466 (Ginsburg, J., dissenting) ("It is not uncommon for employers to lack actual or constructive notice of a harassing employee's conduct. An employee may have a reputation as a harasser among those in his vicinity, but if no complaint makes its way up to management, the employer will escape liability under a negligence standard."). Plaintiffs who do not report harassment because they believe (erroneously) that the harasser is a supervisor and fear retaliation will not be able to meet the negligence standard.

349. Hirsch, *supra* note 278, at 172 (noting that it "seems unlikely that the risk of negligence liability will offset employer incentives to reduce the number of *Vance* supervisors").

350. Christa Conry, *Forbidden Fruit: Sexual Victimization of Migrant Workers in America's Farmlands*, 26 HASTINGS WOMEN'S L.J. 121, 136 n.95 (2015) (discussing how *Vance* "insulates the employer from proactive policing of harassment amongst its employees").

351. *Vance*, 570 U.S. at 445–56. *See id*. at 467 (Ginsburg, J., dissenting) ("On top of the substantive differences in the negligence and vicarious liability standards, harassment victims, under today's decision, are saddled with the burden of proving the employer's negligence whenever the harasser lacks the power to take tangible employment actions. *Faragher* and *Ellerth,* by contrast, placed the burden squarely on the employer to make out the affirmative defense.").

352. *Id.* at 468 (Ginsburg, J. dissenting) ("When employers know they will be answerable for the injuries a harassing jobsite boss inflicts, their incentive to provide preventative instruction is heightened. If vicarious liability is confined to supervisors formally empowered to take tangible employment actions, however, employers will have a diminished incentive to train those who control their subordinates' work activities and schedules, *i.e.,* the supervisors who 'actually interact' with employees.").

353. Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998); Jacobson, *supra* note 275, at 121 ("The approach established by the majority shifts the burden from the employer, who would be required to prove an affirmative defense to avoid vicarious liability under the definition of supervisors proffered by the EEOC, to the victim, who now has the burden to establish that the employer was negligent in permitting the harassment to occur. The Court's decision unjustly increases the burden on victims seeking to hold employers accountable for the actions of their agents and undermines Title VII's purpose of preventing workplace harassment.").

354. *See* Corbett, *supra* note 16, at 141 ("There also has been a growing crescendo among scholars in the past decade or so that federal employment discrimination law is broken and Congress needs to fix it.").

reflects the goals of Title VII and the realities of workplaces around the country. As Justice Ginsburg said: "The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."[355]

Ginsburg used the same strategy to successfully urge Congress to pass the Lilly Ledbetter Fair Pay Act.[356] Immediately after *Vance*, however, Supreme Court scholar Jeffrey Toobin predicted her "Ledbetter play" would be unsuccessful in this context because: (1) the media would be "swamped by the other, more dramatic cases at the end of the term" and the case would not receive as much attention as *Ledbetter*; (2) there was no "compelling figure, like Ledbetter, to bring the cause to life;" and (3) "most important, the politics of the day are different," and "the Republican House shows little interest in the plight of victims of job discrimination."[357]

Toobin's prediction proved true. Less than one year post-*Vance*, legislators proposed a bill to reverse the Supreme Court's definition and restore the EEOC's broader meaning of the term "supervisor."[358] With twelve co-sponsors in the Senate and seventeen in the House, the Fair Employment Protection Act ("FEPA")[359] sought to "correct[] the error in the *Vance* decision and clarif[y] when employers should be held directly responsible for unlawful harassment."[360] According to one of the senators who introduced the bill:

> Promoting fair and open workplaces is essential to ensuring that millions of hardworking Americans find good jobs so that our economy can continue to grow. Unfortunately, evidence shows that workplace harassment remains an issue for many Americans, particularly women. The Supreme Court recently exacerbated the problem when a slim majority decided to significantly weaken the protections for workers from harassment.[361]

355. *Vance*, 570 U.S. at 470–71 (Ginsburg, J., dissenting).

356. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting), *abrogated by statute*, 111 Pub. L. No. 2, 123 Stat. 5. (Jan. 29, 2009).

357. Jeffrey Toobin, *Will Ginsburg's Ledbetter Play Work Twice?*, NEW YORKER (June 25, 2013), https://www.newyorker.com/news/daily-comment/will-ginsburgs-ledbetter-play-work-twice [https://perma.cc/BY48-AQZM]; Hirsch, *supra* note 278, at 174 ("The short-term outlook for such an amendment seems low.").

358. Moss, *supra* note 15, at 217.

359. Fair Employment Protection Act of 2014, H.R. 4227, S. 2133, 113th Cong. (2014); *see H.R.* 4227 *(*113*th Cong.): Fair Employment Protection Act of* 2014, GOVTRACK, https://www.govtrack.us/congress/bills/113/hr4227/details (last visited Mar. 18, 2021) [https://perma.cc/3DB9-AQJR]; *S. 2133 (113th): Fair Employment Protection Act of 2014*, GOVTRACK, https://www.govtrack.us/congress/bills/113/s2133/details (last visited Mar. 18, 2021) [https://perma.cc/55E7-UDWN].

360. *See* Lisa Milam-Perez, *Democrats Introduce Legislation to Undo Supreme Court's 2013* Vance *Decision*, ACCOMMODATING DISABILITIES—BUS. MGMT. GUIDE (CCH) ¶ 74336D, 2014 WL 1050073 (Mar. 19, 2014); Moss, *supra* note 15, at 217 n.296.

361. Press Release, U.S. Senate Comm'n. on Health, Educ., Lab. & Pensions, Harkin, Baldwin, Miller, DeLauro Introduce Bill to Fight Workplace Harassment: "Fair Employment Protection Act" Restores Workplace Protections (Mar. 13, 2014) (statement of Tom Harkin), https://www.help.senate.gov/ranking/newsroom/press/harkin-baldwin-miller-delauro-introduce-bill-to-fight-workplace-harassment [https://perma.cc/5GCM-2MCE].

The legislation did not pass.[362] A serious impediment (aside from timing and political considerations) may have been the reluctance to return to the EEOC definition, which the *Vance* majority, among others, believed lacked clearly defined limits on liability.[363] As an alternative to that definition, I propose a system of defining the term "supervisor" that is easily administrable, accounts for workplace realities, accords with the purposes of Title VII to prevent workplace harassment, and is fair to employers and employees alike.

B. Sources to Guide the Definition

As the preceding analysis shows, it is challenging to define "supervisor" in a way that is fair to both employers and employees, recognizes the realities of the workplace, complies with the purposes of Title VII, and is easy to administer. Yet, there are many resources available to craft a reasonable definition. The first is the EEOC. As the agency charged with administering Title VII,[364] it provides insight into how to craft a definition that adheres to the purposes of the act. The EEOC definition shows that the definition of "supervisor" cannot rely solely on "tangible employment action."[365] Rather, a reasonable definition must also encompass something akin to the ability to control an employee's daily work activities.

The definition of "supervisor" in the National Labor Relations Act ("NLRA") is another source:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.[366]

Although "the purposes of the NLRA's supervisor exclusion and liability for supervisory actions under Title VII are different,"[367] the NLRA definition highlights the importance of including actions such as assigning work and directing tasks.

Finally, as both the *Vance* majority and dissent acknowledge, agency law can offer useful insights for crafting a definition.[368] In fact, this may be the most

362. Moss, *supra* note 15, at 217.

363. Vance v. Ball State Univ., 570 U.S. 421, 442 (2013) ("[T]he EEOC's definition of supervisor . . . is a study in ambiguity.").

364. *What Laws Does EEOC Enforce?*, EEOC, https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce (last visited Mar. 18, 2021) [https://perma.cc/9CVN-Z8ZS].

365. *Vance*, 570 U.S. at 449 (defining "tangible employment action").

366. 29 U.S.C. § 152(11). Similar to Title VII, litigation before the National Labor Relations Board has focused on the definition of "supervisor." *See, e.g.*, DH Long Point Mgmt. LLC & Unite Here Local 11, 369 NLRB No. 18, 4 (Feb. 3, 2020) ("The burden is on the party asserting 2(11) supervisory status to establish by a preponderance of the evidence that the individual has the authority to perform or effectively recommend at least one of these listed actions.").

367. Hirsch, *supra* note 278, at 173–74.

368. *Vance*, 570 U.S. at 428, 430, 441, 452–53, 455.

useful source because, as the Supreme Court noted, "Congress wanted courts to look to agency principles for guidance" on employer liability under Title VII.[369] The majority discussed the master-servant rule and its exceptions, for example, "for situations in which the servant was 'aided in accomplishing the tort by the existence of the agency relation.'"[370] It explained that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation," and, thus, liability is warranted.[371]

As one scholar notes, however, neither the majority nor the dissent mentioned "the superior-servant exception to the fellow-servant rule."[372] Under this exception, liability depends on whether the employer granted the tortfeasor control over the injured employee and "whether that control was implicated in the tort."[373] Specifically, it considers "whether the tort arises out of the tortfeasor's authorized control over the details of the injured employee's work."[374] Although this exception applies to torts occurring within the scope of employment, and harassment is considered outside the scope of employment,[375] the exception may be well-suited to crafting a definition that is cognizant of the realities of the workplace.

Interestingly, this exception bears similarities to definitions advanced by both the dissent and the *Vance* defendant. The dissent suggested that rather than focus on the authority to take tangible employment actions, the court should consider whether the employer gave the harasser authority "of a sufficient magnitude so as to assist [the harasser] . . . in carrying out the harassment."[376] Similarly, the *Vance* defendant recognized that the Seventh Circuit's "test [did] not necessarily capture all employees who may qualify as supervisors"[377] and that "the agency principles this Court has adopted appear to foreclose the Seventh Circuit position as a complete answer to who is a supervisor."[378] Notably, it acknowledged that vicarious liability may be appropriate "when the harassing employee has the authority to control the victim's daily work activities in a way that *materially enables* the harassment."[379] Defining what "materially enables the harassment," Ball

369. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 755–56, 771 (1998) (relying on agency principles in Restatement of Agency section 219 to determine employer liability).

370. *Vance*, 570 U.S. at 428 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)).

371. *Id.* at 429 (quoting *Ellerth*, 524 U.S. at 761–62).

372. Case Comment, *Title VII - Employer Liability for Supervisor Harassment* - Vance v. Ball State University, 127 HARV. L. REV. 398, 403 (2013).

373. *Id*.

374. *Id*. at 407.

375. *Id*.; *see* Burlington Indus. v. Ellerth, 524 U.S. 742, 757–66 (1998) ("[A] supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives . . . .").

376. *Vance*, 570 U.S. at 462–63 (Ginsburg, J., dissenting).

377. Brief for Respondent, *supra* note 300, at 1.

378. *Id*. at 16.

379. *Vance*, 570 U.S. at 455, 458, 462 (Ginsburg, J., dissenting) (emphasis added) ("What mattered was that both men took advantage of the power vested in them as agents of Boca Raton to facilitate their abuse."); *see* Brief for Respondent, *supra* note 300, at 14–18.

State proposed including the ability "to increase the victim's workload, or to assign the victim undesirable tasks."[380] It also suggested, however, that "if employee's authority over the victim's daily activities is temporary or intermittent, vicarious liability is triggered only for harassment that occurs when the employee actually possesses the relevant powers."[381]

In essence, the superior-servant exception, the *Vance* dissent, and the *Vance* defendant show that missing from the *Vance* "supervisor" definition is any consideration of whether the harasser's control enables the harassment by function of actual or apparent authority. Relevant then is both the harasser's actual control over an employee's working conditions and an employee's belief about the harasser's control over working conditions. Put more simply, the definition must consider whether the employee reasonably believed s/he could treat the harasser like any other coworker without job-related repercussions.[382] This consideration, omitted entirely from the *Vance* definition, is important because employees may be hesitant to report harassment when the harasser possesses a meaningful ability to alter their working conditions.

C. A Category-Based Definition

For the reasons discussed above, the definition of "supervisor" cannot rely solely on a harasser's ability to take tangible employment actions. To account for the realities of differing workplaces, comply with the purposes of Title VII, and fully protect employees, the definition also must encompass a harasser's ability to control aspects of an employee's job. Additionally, because workplaces vary significantly, the definition cannot ignore how employers make decisions within an organization.[383] As Justice Ginsburg recognized in *Vance*, "supervisors, like the workplaces they manage, come in all shapes and sizes."[384] Thus, there must be some way to account for the complexities and vast differences in workplaces around the country.

There also must be some way to account for employers' interests in planning for and protecting against liability. In fact, as the Supreme Court noted in *Ellerth*, "to the extent limiting liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."[385] Therefore, a good definition should provide rational parameters for liability and give employers clarity on what relationships subject them to it.

Because of these varied and, at times, competing concerns, merely expanding the definition of tangible employment actions is not sufficient. For example,

380. *See* Brief for Respondent, *supra* note 300, at 15–17.
381. *Id.* at 17.
382. Chambers, *supra* note 298, at 1169.
383. *See* Freeman, *supra* note 302, at 1172.
384. *Vance*, 570 U.S. at 465 (Ginsburg, J., dissenting).
385. Burlington Indus. v. Ellerth, 524 U.S. 742, 755–56, 764 (1998).

adding the ability to train employees or set work schedules would expand liability unnecessarily while also failing to capture the myriad ways a harasser may exercise supervisory authority.

Instead, I propose a category-based definition, where supervisory liability is triggered when a harasser has authority to take a set number of actions in a given category. This system integrates components of the definitions of "supervisor" from the EEOC, the NLRA, and agency law, such as a harasser's ability to control an employee's daily work activities and the extent to which that control enables the harassment. In sum, the proposal accounts for the many ways individuals exercise control in employment settings while still setting reasonable and transparent parameters on liability.

Below is an example framework for a category-based definition that encompasses a wide array of employment actions. These actions are based on the most common types of supervisory authority found in the 245 contested cases reviewed. But this is not intended as an exhaustive or definitive definition. Rather, this example provides a general framework for developing a fair, nuanced, and predictable definition. Legislators, then, can determine whether the actions below should be revised or expanded to craft a viable definition.

Under the proposed system below, a harasser is considered a supervisor for purposes of Title VII vicarious liability where the harasser has the authority to take one action in Category A, two actions in Category B, or three actions in Category C.[386] Combining actions in a lower category may count as one action in a higher category. For example, two actions in Category C count as one action in Category B. Thus, if a harasser has authority to take one action in Category B and two in Category C, supervisory liability is triggered. To deem a harasser to have authority to take any of the below actions, the harasser must actually possess such authority, and there must be some evidence that the plaintiff believed (either accurately or with some reasonable basis) that the harasser had such authority.[387]

Category A (one action required)

- Hire
- Fire
- Promote
- Demote
- Reassign plaintiff to a position with significantly different benefits
- Determine changes in salary

386. The last item in Category C is a status rather than an action.

387. This requirement is important because if the plaintiff does not believe the harasser holds supervisory authority, we reasonably would believe them to report the harassment to the employer, and thus the negligence standard would apply.

Category B (two actions required)

- Recommend or provide input on any of the Category A actions to another person with the authority to take that action
- Assign plaintiff's number of hours worked (*e.g.*, control how much plaintiff works during a pay period)
- Impose discipline with economic consequence (*e.g.*, discipline leads to reduction in pay, hours, demotion, etc.)
- Conduct performance evaluations
- Control non-salary economic benefits like bonuses
- Purports to have authority to take Category A action, and plaintiff reasonably believes this authority exists

Category C (three actions required)

- Recommend or provide input on any of the Category B actions to another person with the authority to take that action
- Transfer plaintiff to a position without significantly different benefits
- Assign plaintiff's work times (*e.g.*, control when plaintiff works)
- Train plaintiff
- Direct tasks or oversee work (*i.e.,* control how one completes tasks)
- Determine work assignments (*e.g.*, assign work or delegate duties)
- Impose discipline that does not have economic consequence
- Provide input for performance evaluations
- Control non-salary benefits like paid time off
- Is the highest person in the chain of command present at the work site during the majority of plaintiff's working hours
- Temporarily take any actions in Categories A-C (*e.g.*, steps in when true supervisor is absent)
- Purports to have authority to take Category B action, and plaintiff reasonably believes this authority exists
- Control access to work resources (like new equipment or materials)
- Is referenced as a supervisor, manager, or some similar supervisory title in job description or title

D. Advantages of the Category-Based Definition

On first impression, this category-based system appears more complex than either the EEOC or *Vance* definition of "supervisor." Unlike *Vance*'s shortlist of tangible employment actions, this system requires consideration of multiple categories and factors. Yet, it has many advantages over the other definitions. The first and most obvious is that this system is structured, unambiguous, and easily administrable. Although it contains many factors, the factors address outstanding

issues (like apparent authority and delegation)[388] that create uncertainty and inconsistencies post-*Vance*. There is thus little room for confusion or variance. The system is more straightforward than any used or proposed by the EEOC, federal courts, or Title VII litigants to date.[389]

Second, the system is transparent. The more detailed the categories, the easier it is for employers to assess liability, for litigants to gauge the strength of a case, and for judges to determine vicarious liability. Even in cases where questions of fact arise, the categories focus judges or jurors on discrete questions such as, "does the harasser assign plaintiff's work times?," rather than the nebulous questions of whether a harasser can effect a "significant change in employment status" or make "a decision causing a significant change in benefits."

Third, the system reflects the realities of modern workplaces and "particular circumstances" of each case.[390] This advantage is especially salient as it relates to the delegation doctrine. In addition to the direct actions that subject a harasser to liability in a particular category, each category includes the act of recommending or providing input in employment decisions in other categories. This is significant because post-*Vance*, the delegation doctrine is the only avenue by which courts can find supervisory liability where harassers lack formal authority to take tangible employment actions but hold broad, meaningful power.[391] The delegation doctrine thus adds nuance to determining employer liability and better accounts for the dynamics of individual workplaces. By incorporating delegatory authority in each of the proposed categories, this system accounts for these nuances in a concrete analytical framework. It is far easier to answer questions like, "did the harasser provide input for performance evaluations?" than it is to determine whether an employer has "attempt[ed] to confine decisionmaking power to a small number of individuals" who "likely rely on other workers who actually interact with the affected employee."[392]

Fourth, and perhaps most importantly, the system advances the purposes of Title VII to provide relief to victims of harassment and create equitable workplaces.[393] The categories encompass actions that signify direct and significant power over employees' work lives. Imposing supervisory liability on employers

388. *See supra* Section IV.A.

389. *See* Catherine L. Fisk, *Supervisors in a World of Flat Hierarchies*, 64 HASTINGS L.J. 1403, 1419 (2013) ("[A] bad, clear rule is worse than a good, complex rule.").

390. Vance v. Ball State Univ., 570 U.S. 421, 465–66 (2013) (Ginsburg, J., dissenting) ("The Court's focus on finding a definition of supervisor capable of instant application is at odds with the Court's ordinary emphasis on the importance of particular circumstances in Title VII cases. The question of supervisory status, no less than the question whether retaliation or harassment has occurred, "depends on a constellation of surrounding circumstances, expectations, and relationships.") (citations omitted). *See*, *e.g.*, Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006) ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances."); Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").

391. Moss, *supra* note 15, at 221 ("Post-*Vance*, numerous district and appellate courts still have allowed claims that individuals lacking formal authority to fire (or undertake other tangible actions) can be 'supervisors.'").

392. *Vance*, 570 U.S. at 446–47.

393. *See supra* Section IV.B.

for harassers who wield such power provides legal recourse that encourages employees to report discriminatory and harassing behavior.[394] It also incentivizes employers to implement mechanisms to prevent workplace harassment.

Finally, this system accounts for legitimate employer concerns. Although it likely will increase the scope of potential liability, it does so in a way that is principled and transparent. Employers are subject to vicarious liability only when they vest an employee with the significant ability to control aspects of others' jobs. More importantly, employers have notice of what actions will subject them to liability. This will allow employers to provide training for employees who hold such authority, institute policies that deter harassment, better monitor compliance, and anticipate liability. Additionally, because of this transparency, some litigation (or at the very least some aspects of litigation) should subside.

A real case shows how this system would affect employer liability. Recall that in *Stanley v. Northwest Ohio Psychiatric Hospital*, the district court for the Northern District of Ohio ruled that a harasser, a "psychiatric/nurse supervisor," was not a supervisor, even though he had the authority to prepare disciplinary packets (including fact-finding statements, time/attendance records, and other applicable documents), bring disciplinary problems to human resources, send employees home as a disciplinary measure, conduct performance evaluations, provide input into final disciplinary actions, and attend disciplinary hearings.[395] I categorized this case as one that likely would have been decided differently pre-*Vance*. And under my proposed system, the harasser would be a supervisor based on the following analysis:

	Action	**Notes**
Category A (0 actions total)		
Category B (1 action total)	Conduct performance evaluations.	
	Impose discipline with economic consequences.	There is insufficient information to determine if the harasser had this authority. He could send employees home as a disciplinary measure, but it is unclear if this resulted in docked pay. Because there is not enough information to make that determination, this act will not count.

394. *See Vance*, 570 U.S. at 465 (Ginsburg, J., dissenting) ("That the Court has adopted a standard, rather than a clear rule, is not surprising, for no crisp definition of supervisor could supply the unwavering line the Court desires. Supervisors, like the workplaces they manage, come in all shapes and sizes. . . . One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim. That is why *Faragher* and *Ellerth* crafted an employer liability standard embracive of all whose authority significantly aids in the creation and perpetuation of harassment.").

395. Stanley v. Northwest Ohio Psychiatric Hosp., 7 F. Supp. 3d 731, 742 (N.D. Ohio 2014).

Category C (3 actions total)	Recommend or provide input on any of the Category B actions to another with the authority to take that action.	Harasser could bring disciplinary problems to human resources and provide input into final disciplinary actions.
	Impose discipline that does not have economic consequences.	Harasser could send employee home as a disciplinary measure (assuming no docked pay).
	Has the name "supervisor" in job title.	

This example shows how this proposed system better accounts for liability in situations where an employee has a significant level of control over others even if s/he lacks the ability to take a tangible employment action. This is significant because expecting the plaintiff in *Stanley* to report the harasser without fear of retribution (as the coworker negligence standard requires) ignores the substantial power the harasser held over the plaintiff. This system thus properly accounts for the real-world impact that a harasser's power has over workplace harassment victims and provides meaningful legal recourse consistent with Title VII's purpose.

On the other hand, consider a case where I determined the outcome would not have been different pre-*Vance*. In *Felmine v. Star*,[396] the harasser, a "Lead Agent" for a cargo handling service, had the ability to coordinate truck movement, oversee loading work, and provide routine oversight and direction to employees. Additionally, he threatened to fire the plaintiff even though he did not have the authority to do so. Under my proposed system, the harasser would *not* be a supervisor based on the following analysis:

	Action	**Notes**
Category A (0 actions total)		
Category B (1 action total)	Purports to have authority to take Category A action, and plaintiff reasonably believes this authority exists.	Harasser made threats about firing, and plaintiff believed that harasser could fire her.
Category C (1 action total)	Direct tasks and oversee work.	Harasser provided routine oversight and direction to employees.

With authority to take only one act in Category B and one in Category C, the harasser in this case would not qualify as a supervisor. This example shows how this proposed system does not impose liability in situations where neither the EEOC nor the *Vance* definition would find supervisory authority.

396. Felmine v. Star, 13-CV-2641, 2016 WL 4005763, at *2 (E.D.N.Y. July 25, 2016).

VII. CONCLUSION

This Article highlights the challenges courts encounter in applying the *Vance* "supervisor" definition, how these challenges lead to inconsistent interpretations of Title VII, and how *Vance* has changed case outcomes. The analysis also shows how *Vance* has restricted Title VII relief at a critical time when over one-third of employees believe they have been harassed at work.[397]

Directly, *Vance*'s adoption of the narrowed definition negatively impacts one in five Title VII hostile work environment plaintiffs in cases where supervisory liability is at issue. Indirectly, it disincentivizes employers from proactively monitoring workplace harassment or implementing preventative measures. Moreover, the Article demonstrates ways in which the *Vance* definition is incongruous with workplace hierarchies and management structures and fails to meet Title VII's broad remedial goal to end discrimination and harassment against employees.

To promote workplace equality in accordance with the mandates set forth in Title VII, a new definition of "supervisor" is necessary. My proposed category-based system for defining the term "supervisor" accounts for the realities of modern workplaces but also considers employers' concerns in limiting and anticipating liability. The categories are easily administrable and provide necessary clarity for employers, employees, and courts, without sacrificing the law's fundamental remedial purpose to combat workplace harassment. Overall, implementation of this new definition will ensure fairness for plaintiffs who are harassed at work, while also providing employers a roadmap to mitigate workplace harassment and corresponding liability.

397. *2018 Hiscox Workplace Harassment Study* 1, HISCOX (Aug. 2018), https://www.hiscox.com/documents/2018-Hiscox-Workplace-Harassment-Study.pdf [https://perma.cc/83HE-R62U].