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would finally be resolved when the Supreme Court granted certiorari in *Vance v. Ball State University*.[17]

In *Vance v. Ball State University*, the Supreme Court addressed the question it had left open fifteen years prior in *Ellerth* and *Faragher* of who qualifies as a "supervisor" in cases where an employee asserts a Title VII claim for workplace harassment.[18] Resolving the diverging views, the Supreme Court held in *Vance* that an employee is a "supervisor" for purposes of vicarious liability under Title VII if they are empowered by the employer to take "tangible employment actions" against the victim.[19]

Therefore, in *Vance*, the Court chose the restrictive "supervisor" definition, which ties supervisor liability to the ability to exercise significant control.[20] This Note argues that the difficulty the majority and dissenting opinions in *Vance v. Ball State University* had in defining who should qualify as a "supervisor" proves that the distinction between supervisors and co-workers is impracticable for Title VII purposes. This Note then proposes a unitary, alternative standard.

This Note initially provides an overview of employment discrimination law under Title VII and gives a background on important decisions prior to the judgment in *Vance*, highlighting the landmark holdings from *Ellerth* and *Faragher*. It continues by analyzing the procedural history of the *Vance* case, along with a recitation of the relevant facts. Additionally, a discussion concerning the majority opinion written by Justice Samuel Alito[21] will be followed by a discussion regarding the vigorous dissent penned by Justice Ruth Bader Ginsburg.[22] Culminating, this Note will propose an alternative solution to addressing hostile work environment claims under Title VII, setting forth a standard that discards the need to differentiate between supervisors and co-workers, and discuss the possible implications. Concluding, there will be a brief recapitulation of the issue and why the new proposal will prove to be a logical resolution.

I. DEVELOPMENT OF THE LAW

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

17. *Vance*, 133 S. Ct. at 2443.
18. *Id.* at 2439.
19. *Id.*
20. *See id.* at 2443.
21. *Id.* at 2439.
22. *Vance*, 133 S. Ct. at 2454.

origin."[23] Employees who suffer discrimination are able to recover damages or other remedies from their employers.[24] Moreover, Title VII clearly prohibits discrimination in regards to employment actions that have direct economic consequences, such as discharges, demotions, and pay cuts, but there was confusion regarding whether it reached discrimination that did not directly result in economic misfortune.[25]

unlawful employment practice.[33] Specifically, the Fifth Circuit held that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and [we] think Section 703 of Title VII was aimed at the eradication of such noxious practices."[34]

B. The Supreme Court Recognizes a Hostile Work Environment

In light of the *Rogers* decision, lower courts began holding that, in a charge of a racially hostile work environment, the employer is liable only if the injured party can prove that the employer was negligent, i.e., that the employer knew or should have known about the harassment and failed to take remedial action.[35] This issue of vicarious employer liability ultimately reached the Supreme Court in 1986, in the case of *Meritor Savings Bank, FSB v. Vinson*, but the Court declined to decide it.[36] Instead, the Court focused their holding on finding that a claim of "hostile environment" sex discrimination is actionable under Title VII.[37]

The Supreme Court in *Meritor* gave credit to the Fifth Circuit for first recognizing a cause of action based on a discriminatory work environment in *Rogers*.[38] On an interesting side note, the Court incorrectly recalled *Rogers* as involving a Hispanic employee complaining that her employers discriminated against their "Hispanic clientele,"[39] when in fact, the case involved a Hispanic employee complaining about discrimination towards the *Black* clientele.[40] Regardless of this oversight, the Court readily applied the established principle for racial harassment to sexual harassment, noting that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited."[41] However, the Court failed to articulate exactly what factors it considered in deciding whether the alleged harassment actually constituted a hostile work environment.[42] The Supreme Court

33. *Id.*

34. *Id.*

35. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 767–69 (1998) (Thomas, J., dissenting) (citing to a string of cases in support of this proposition).

36. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). The issue in *Meritor* was raised not in the context of racial discrimination, but rather sexual harassment, which has subsequently become the focus of discriminatory harassment jurisprudence. *Id.* at 65–66; *see also infra* notes 46–48 and accompanying text.

37. *Meritor*, 477 U.S. at 73.

38. *Id.* at 65.

39. *Id.* at 65–66.

40. Chew & Kelley,

provided some clarity, but not much more, in regard to what specifically constituted a hostile work environment in *Harris v. Forklift Systems, Inc*.[43] In that case, the Court held that the workplace needed to be permeated with such severe or pervasive discrimination that it altered the conditions of the victim's employment and created an abusive working environment.[44] Explaining this standard, the Court stated that it took a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[45]

II. THE LANDMARK DECISIONS

First and perhaps foremost, the *Meritor* decision is additionally critical for what the Supreme Court declined to decide. The parties in that case wanted a definitive ruling on vicarious employer liability, but the Court refused to do so, expressly declining to create a general standard for employer liability in Title VII sexual harassment cases.[46] In coming to this conclusion, the Court felt the record was too bare for such an impactful ruling, as the district court did not resolve the conflicting testimony about the true existence of a sexual relationship between the employee and her supervisor.[47] More specifically, the Court did not know "whether [the supervisor] made any sexual advances toward respondent at all," let alone how pervasive or serious they potentially were.[48] In light of the bare factual record, the Court still discussed in dicta the employer's potential liability, just as the district and appellate courts had done before.[49] In doing so, the Court agreed with the EEOC and Congress and wanted courts to look at agency principles for guidance in these situations.[50] Moreover, and perhaps most importantly, the Court endorsed the idea that employers are not always automatically liable for sexual harassment by their supervisors.[51]

43. *See, e.g.*, Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

44. *Id.* at 21.

45. *Id.* ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.")

46. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

47. *Id.* at 61, 72.

48. *Id.* at 72.

49. *Id.* at 69–70.

50. *Id.* at 72. The EEOC's argument was presented by an amicus brief and highlighted that Congress has focused on directing courts to be guided by agency principles when hearing issues of employer liability. Ronald Turner, *Employer Liability Under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of* Meritor Savings Bank, 33 HOW. L.J. 1, 29 (1990).

51. *Meritor*, 477 U.S. at 72.

A. Ellerth *and* Faragher*: The Framework*

Twelve years later, on the last day of the 1997–1998 term, the Supreme Court further developed this area, fashioning an intelligible vicarious liability rule for employers when their supervisors harass their employees.[52] The holding was first articulated in *Burlington Industries, Inc. v. Ellerth* and was subsequently adopted later that same day in *Faragher v. City of Boca Raton*.[53]

be held liable for both the negligent and intentional torts committed by employees within the scope of their employment.[61] Intentional torts can fall under the "scope of employment" umbrella when the conduct is "'actuated, at least in part, by a purpose to serve the

have resulted absent the agency relationship, and thus the decision vicariously becomes the act of the employer.[72]

What is far more difficult to determine is whether the agency relationship aids in the supervisor's harassing activities that do not result in a tangible employment action.[73]

a supervisor for purposes of determining employer liability."[92] The Seventh Circuit concluded that supervisor authority consisted of the ability "to hire, fire, demote, transfer, or discipline an employee."[93] In other words, supervisory status hinges on tangible employment action authority—the power "to affect the terms and conditions" of the subordinate's employment.[94]

In subsequent opinions, the Seventh Circuit continued to apply the *Parkins* definition of a supervisor.[95] In *Hall v. Bodine Electric Co.*, the court applied the *Parkins*

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Nevertheless, four years later, Davis returned to Vance's department, and controversy returned as well.[114] On September 23, 2005, Davis blocked Vance from exiting an elevator, and said to her, "I'll do it again," seemingly referring to the 2001 incident.[115] Vance took action, and on October 17, 2005, she requested a complaint form from University Compliance, orally complaining about the slap from four years prior, and in early November, she filed her complaint about the recent elevator incident with Davis.[116] In response, Ball State investigated the complaint, which revealed contradictory stories of what happened.[117] The University decided the best way to resolve this issue would be to subject both employees to counseling about respect in the workplace, and no one was formally disciplined.[118] Specifically, Vance was lectured regarding communicating respectfully in the workplace, but it is unclear whether a similar conversation ever took place with Davis.[119] Shortly thereafter, Vance overheard Davis using the terms "Sambo" and "Buckwheat" while conversing with a fellow employee, and Vance believ

not result in tangible employment action and therefore decided to sanction the affirmative defense.[145]

Continuing, the Court reviewed the supervisor characterizations from both *Ellerth* and *Faragher* but noted that because these characterizations were not

of the EEOC definition, as both Vance and the United States, in its amicus brief, applied the same "open-ended" test for analyzing Davis's employment status but came to different conclusions.[155] Finding this discrepancy predictable, the Court noted that Vance believed since Davis sometimes led or directed employees in the kitchen, she qualified as a supervisor, while the United States believed the same facts not to be dispositive on the issue.[156]

The EEOC definition of a supervisor was articulated in an Enforcement Guidance,[157] which the Court referred to as a "study in ambiguity."[158] Specifically, the majority opinion found that certain terms and phrases used by the EEOC—"'sufficient' authority, authority to assign more than a 'limited number of tasks,' and authority that is exercised more than 'occasionally'"—had no clear interpretation and would prove to be troublesome for courts attempting to apply the definition.[159] The Court believed this ambiguity would force trials to devote ample time to determining the status of the alleged harasser and, perhaps most troubling, would be far more complex and confusing for juries to analyze.[160] Failing to be persuaded by the argument that the EEOC's approach is better equipped to resolve cases in which an alleged harasser only has the authority to assign unpleasant tasks (inflicting psychological damage), the Court said victims could still prevail by proving the employer was negligent in handling the harassment.[161] Moreover, juries would be instructed to consider the degree of authority given as an indicator of negligence.[162] More simply put, the Court believed the standard adopted by the majority, supplemented by sufficient jury instructions, could be equally effective in cases where the alleged harasser had certain authority over the victim but not enough authority to qualify as a supervisor.[163]

The Court then began responding to certain claims made by the dissent and started by arguing that the "hierarchical management structure," which the dissent assumed to be widely used, was outdated and replaced by an "overlapping authority" structure.[164] Furthermore, the Court rejected the

155. *Id.*

156. *Id.* The Government believed that it would not be enough to impugn supervisory status on Davis since she only "occasionally took the lead in the kitchen." Brief for the United States as Amicus Curiae in Support of Neither Party at 31, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 3864279.

157. *See supra* notes 15–16 and accompanying text.

158. *Vance*, 133 S. Ct. at 2449–50.

159. *Id.* at 2450.

160. *See id.*

161. *Id.* at 2451.

162. *Id.*

163. *See Vance*, 133 S. Ct. at 2451.

164. *Id.* at 2452. Justice Alito gave the example that members of a team may each be responsible for different aspects of a task and can direct each other regarding them, thus, essentially making everyone each other's supervisors under the EEOC definition. *Id.*

majority opinion in the present case.[171] Generally, Silverman had the ability to "punish lifeguards who would not date him [by assigning them] full-time

applied the definition for fourteen years.[179] Perhaps wanting to clear up any confusion on the leniency of the definition it supported, the dissent reiterated that an employee "who direct[ed] only a *limited number* of tasks or assignments" likely would not qualify as a supervisor, as the harassing

cope with, and while that argument is not without merit, it is not entirely true. Employees still have to satisfy the steep burden of establishing that the harassment complained of was so severe and pervasive that it created an actionable hostile environment.[207] Therefore, it logically follows that if the harassing conduct was so severe and pervasive, then the employer likely knew or should have known about it, and should have made an effort to stop or prevent it. The employers are fairly tasked with explaining the hostile environment and whether or not it properly handled the situation.

a. Presumptions Generally

Since this proposal is framed as a rebuttable presumption, it is important to understand how "presumptions" work in grasping this standard. A presumption is a "court-made device that says that if a party can prove certain . . . facts, the court will conclude that an additional fact exists."[208] Here, the "certain facts" proven would be the plaintiff's prima facie case showing a hostile work environment, and the presumed "additional existing fact" would be that the employer was negligent in allowing the hostile environment. Fundamentally, a presumption is a "legally mandated conclusion which follows from certain specific facts."[209] A classic example follows:

> [I]f A is proved then B is presumed to be true. Once B is presumed to be true, and if the presumption is rebuttable, the opposing party must now produce evidence that B is not true, even though the party who produced evidence of A produced no evidence of B.[210]

Therefore, referring back to the hypothetical about Abe and Bev, after Bev proves her prima facie case, regardless of the fact that Abe is only a co-worker, the employer would be presumptively negligent, and the burden would fall on it to prove otherwise, instead of saddling Bev with the task.[211]

C. Implications of Adopting the Proposal

There are practical reasons for this proposal, as the employer is truly in "the best position to know what remedial procedures it offers to employees and how those procedures operate."[212] Allocating the burden of proof is extremely important in the United States legal system, and often can have a significant

207. Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

208. Candace S. Kovacic-Fleisher, *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics as Substance*, 39 AM. U. L. REV. 615, 625 (1990).

209. *Id.*

210. *Id.* In the above example, applied to the current situation, "A" is the hostile work environment, and "B" is the employer's negligence.

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impact on the outcome of cases.[213] Factual disputes are at the heart of a plethora of discrimination cases,[214] and under the proposed approach, there will likely still be disputes regarding whether or not the employer was negligent. Fortunately, however, there will not be the added factual disputes over whether the alleged harasser was a supervisor or co-worker. As multiple authorities have previously identified, there is a not a single dominant principle when it comes to deciding how to allocate the burden of proof.[215] However,