

Chain of Harassment: Employer Liability and the Definition of Supervisor in Sexual Harassment Cases

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I. INTRODUCTION

A young woman serves as a secretary to the director of the library at a law school. The professors at the school rotate in serving as director, but the secretary remains in her position. The current director is a tenured and distinguished professor, well-loved among students and faculty at the school. He makes frequent demands of the secretary; he has the ability to increase her workload as he, himself, takes on novel challenges. The secretary's duties consist of the administrative and "housekeeping" portions of the director's tasks. Therefore, he assigns her daily work and may overtly or impliedly critique her performance. The two work in close proximity, and their shared office is separate from the rest of the faculty. The secretary, if asked, would likely say that she "works for" the director, or "reports to" this particular professor. In examining the exact hierarchy, however, it is clear that the director has no authority to terminate this secretary's employment; rather, such decisions remain in the control of the school's administrators.

In this (not unusual) situation, what recourse does the secretary have in the event of sexual harassment? If the director cannot effect a significant employment action against her, some courts would consider him simply a co-employee; therefore, the secretary might hold the school liable if it was negligent in not preventing the harassment.¹ Other courts, however, would consider the director a supervisor, and might hold the school vicariously liable for director's harassment but would provide an affirmative defense.² The rationale is that employers do not entrust co-employees with any substantial authority; therefore, the employer should not be liable unless it was negligent in its failure to discover or remedy the harassing conduct.³ Conversely, employers provide supervisors with authority, and this power often aids in supervisors' misconduct.⁴

The question first turns upon the type of harassment, and then, ultimately, on the definition of supervisor. Currently, United States federal courts are split on the supervisory standard, with the majority most likely considering the library's director a co-employee for vicarious

¹ See *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005); *Joens v. Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004); *Mikels v. City of Durham*, 183 F.3d 323 (4th Cir. 1999); *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998).

² See *Mack v. Otis Elevator Co*, 326 F.3d 116 (2d Cir. 2003); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254 (M.D. Ala. 2001); *Kent v. Henderson*, 77 F. Supp. 2d 628 (E.D. Pa. 1999); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998).

³ *Parkins*, 163 F.3d at 1032.

⁴ See *id.* at 1033.

liability purposes under Title VII.⁵ The Second Circuit, however, would apply a multifactor analysis to determine the director's status.⁶ Given his ability to direct her daily activities and her arguably reasonable perspective as to the nature of their employment relationship, the Second Circuit might declare the director to be a supervisor and subsequently hold the school vicariously liable for the director's harassing conduct, subject to an affirmative defense.

In the wake of two Supreme Court cases clarifying the standards for employer liability in sexual harassment claims, lower courts have attempted to implement a test to differentiate between supervisors and mere co-workers. Such a test is necessary because employers are vicariously liable (subject to an affirmative defense) for supervisor harassment, but liable based on their negligence for co-employee harassment. Part II of this Comment describes sexual discrimination under Title VII and the differences between "quid pro quo" and "hostile work environment" harassment claims. Part III addresses the Supreme Court precedent on employer liability based on the Court's holdings in *Burlington Industries, Inc. v. Ellerth*⁷ and *Faragher v. City of Boca Raton*.⁸ Part IV of this Comment describes the subsequent lower court decisions that led to the current split between the circuit courts. Finally, Part V urges the circuit courts to adopt the broad definition of the term supervisor, currently the minority view.

II. SEXUAL HARASSMENT

Sexual harassment is unique compared to other discriminatory behavior.⁹ Title VII provides employees a cause of action when those who engage in harassment discriminate on the basis of membership within a protected class.¹⁰ Most other violations of Title VII require an adverse change in employment by means of compensation or position;¹¹ however, an employee can maintain a Title VII claim for harassment even if the harassment caused no economic or adverse positional impact

⁵ See *Noviello*, 398 F.3d at 76; *Joens*, 354 F.3d at 938; *Mikels*, 183 F.3d at 323; *Parkins*, 163 F.3d at 1027.

⁶ See *Mack*, 363 F.3d 116.

⁷ 524 U.S. 742 (1998).

⁸ 524 U.S. 775 (1998).

⁹ MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 370 (7th ed. 2008) ("[U]nlike other discriminatory behavior, sexual harassment involves much conduct that, in other times and settings, is perfectly appropriate.").

¹⁰ *Id.*

¹¹ *Id.*

at all.¹² Furthermore, an entity may pursue other types of discrimination according to its own policy or, at least ostensibly, according to its own interests.¹³ Harassers, however, typically violate policy as opposed to complying with it.¹⁴ They are more frequently seeking to satisfy their own interests rather than seeking to further an underlying purpose of the employer.¹⁵ Ultimately, this web of agency relations mixed with conflicts of personal and business interests creates a question of employer liability in harassment cases.¹⁶ When should an employer be liable for its employee's harassment of another employee? When does the harasser's status manifest a sufficient relationship with the employer such that it would not be unfair to impute liability to the employer? The judiciary has approached these questions mindful of congressional intent; however, the statutory premises of employment discrimination leave much room for interpretation.

Title VII of the Civil Rights Act prohibits sex discrimination in the employment context, making it unlawful 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."¹⁷ The Supreme Court has interpreted the statute to protect against harassing conduct based on the sex of the victim.¹⁸ Without explicit definitions in the statute, the Court has relied on congressional intent when interpreting and enforcing the statute.¹⁹

A. Quid Pro Quo Versus Hostile Work Environment

The Supreme Court clarified the law governing sexual harassment under Title VII in *Meritor Savings Bank v. Vinson*, establishing that the statutory language does not limit the ability to file suit to "'economic' or 'tangible' discrimination."²⁰ Congress instead intended the statute to

¹² *Id.*

¹³ *See, e.g.,* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (challenging alleged discriminatory hiring practices that resulted in skilled jobs for whites and unskilled jobs for non-whites); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (challenging the requirement of a high school diploma or passing of intelligence tests as a condition of employment unless reasonably related to the measurement of job capability).

¹⁴ *ZIMMER ET AL.*, *supra* note 9, at 370.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 2000(e)-2(a)(1) (2006).

¹⁸ *See Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986) (explaining that sexual harassment is a form of sex discrimination as the Equal Employment Opportunity Commission has defined it).

¹⁹ *See id.*

²⁰ *Id.* at 64.

prohibit a “spectrum” of unequal treatment.²¹ The Court invoked the Guidelines of the Equal Employment Opportunity Commission (EEOC), citing the agency’s definition of sexual harassment.²² The Court noted that, while the Guidelines are not controlling, they represent an informed and experienced authority that can provide guidance to courts and litigants.²³

Importantly, the Court derived two categories of sexual harassment from the Guidelines: situations in which sexual misconduct is “directly linked to the grant or denial of an economic quid pro quo,”²⁴ and situations in which sexual misconduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”²⁵ Both types of harassment, the Court concluded, violate Title VII.²⁶ Quid pro quo harassment alters the terms and conditions of employment by definition.²⁷ To be actionable, however, sexual harassment due to a hostile work environment must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”²⁸ The Court also held that employers are not always automatically liable for sexual harassment committed by their supervisors.²⁹ Instead of a per se rule, the Court advised lower courts to follow guidance from the EEOC and look to agency law in developing this area of Title VII discrimination.³⁰

After *Meritor*, the Court established that the standard for finding that a hostile work environment exists is both subjective and objective.³¹ A plaintiff need not suffer a psychological injury in order to maintain a non-quid pro quo sexual harassment claim.³² Although Title VII certainly prohibits such egregious conduct, that bar is too high.³³ Rather,

²¹ *Id.* (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

²² *Id.*; see *About the EEOC: Overview*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited November 24, 2010). The EEOC is the federal agency with the power to enforce the federal laws that make discrimination on certain bases illegal in the employment context. *Id.*; see *infra* Part IV.A and note 197.

²³ *Meritor Sav. Bank, F.S.B.*, 477 U.S. at 65.

²⁴ *Id.*

²⁵ *Id.* (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

²⁶ *Id.* at 66.

²⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

²⁸ *Meritor Sav. Bank, F.S.B.*, 477 U.S. at 67.

²⁹ *Id.* at 72.

³⁰ *Id.*

³¹ See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

³² *Id.*

³³ *Id.*

the proper standard lies somewhere between “any conduct that is merely offensive” and conduct that may lead to a tangible, negative effect on the plaintiff’s psyche.³⁴ A hostile work environment is one that “would reasonably be perceived, and is perceived, as hostile or abusive.”³⁵

The “reasonable person” aspect of the objective standard is complicated in harassment cases. As some scholars and courts have acknowledged, men and women (as well as whites, non-whites, etc.) have different perspectives of what constitutes harassing behavior.³⁶ For this reason, it is more fair to the harassed employee to use a standard that considers the position of a reasonable person “with the same fundamental characteristics” as the victim.³⁷ While this standard would allow the court to consider the specific attribute of the victim that may vary his or her experience of harassment, it would not go so far as becoming entirely subjective. Courts have avoided the subjective standard because it “would not serve the goals of gender equality to credit a perspective that was pretextual or wholly idiosyncratic.”³⁸

III. EMPLOYER LIABILITY: *ELLERTH* AND *FARAGHER* ESTABLISH THE VICARIOUS LIABILITY STANDARD

If one employee harasses another employee, when can the plaintiff impute liability onto his or her employer for the harasser’s conduct? As the Supreme Court views it, the answer turns on the relationship between the employer and the harasser, and between the harasser and the victim.³⁹ In two cases decided together, the Court established a standard for vicarious employer liability in sexual harassment suits under Title VII.⁴⁰

³⁴ *Id.* at 21.

³⁵ *Id.* at 22.

³⁶ See ZIMMER ET AL., *supra* note 9, at 382.

³⁷ See ZIMMER ET AL., *supra* note 9, at 382 (citing *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (holding that analysis of the harassment should be from the victim’s perspective, and stressing that a reasonable person standard would reinforce discrimination and fail to understand the victim’s view)); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (arguing that women experience sexual harassment differently than men because: (1) women’s physical and social vulnerability to sexual coercion creates discomfort with sexual encounters; (2) women are constantly overwhelmed with sexual violence and objectification in both actual and media-depicted forms; and (3) women generally hold a more limited view of when and how sexual interactions are appropriate); Cf. Victoria Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361 (2004) (discussing the reasonable person standard and “switching” in jury instructions, to allow for a change in the ultimate objective perspective without altering the substantive law).

³⁸ See Abrams, *supra* note 37, at 1210.

³⁹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

⁴⁰ *Id.*; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

By adopting the vicarious liability standard, the Court rejected a negligence standard for supervisor harassment.⁴¹ The Court noted, however, that the lower federal courts have uniformly applied such a negligence standard to co-employee harassment.⁴² Therefore, the Supreme Court created a liability scheme which turns on whether a supervisor or a co-employee has perpetuated the harassing conduct.

A. Burlington Industries, Inc. v. Ellerth

In *Ellerth*, plaintiff Kimberly Ellerth, a salesperson for Burlington Industries, filed a complaint alleging constant sexual harassment by a midlevel manager, Ted Slowik.⁴³ Though he was not Ellerth's immediate supervisor, Slowik had the power to hire and promote employees subject to his supervisor's approval.⁴⁴ Ellerth alleged that Slowik repeatedly made "boorish and offensive remarks and gestures," and that on three occasions he made comments that may have constituted threats against Ellerth's employment.⁴⁵ Slowik first told Ellerth he could "make [her] life very hard or very easy at Burlington" in response to Ellerth rejecting Slowik's advances while on a business trip.⁴⁶ Several months later, during an interview for her promotion, Slowik told Ellerth she was not "loose enough," and then rubbed her knee.⁴⁷ Later, via telephone, Slowik denied Ellerth's request for permission to use a customer's logo in a fabric sample and asked if she was "wearing shorter skirts yet . . . because it would make [her] job a whole . . . lot easier."⁴⁸ Shortly after the phone call, Ellerth's supervisor admonished her about punctuality with customer service, and Ellerth quit.⁴⁹ She first faxed a letter giving reasons aside from the alleged harassment, but later sent a letter citing Slowik's behavior as the reason for her resignation.⁵⁰ Ellerth knew about the company's policy against sexual harassment; however, she did not want to report the incidents while employed and therefore did not notify anyone at the company with the authority to act

⁴¹ See *Faragher*, 524 U.S. at 802, 810.

⁴² *Id.* at 799 (noting that a number of courts of appeals have applied a standard where the employer is "liable for co-worker harassment if it 'knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action'").

⁴³ *Burlington Indus., Inc.*, 524 U.S. at 747.

⁴⁴ *Id.*

⁴⁵ *Id.* at 747–48.

⁴⁶ *Id.* at 748.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Burlington Indus., Inc.*, 524 U.S. at 748.

⁵⁰ *Id.*

on such reports.⁵¹ After receiving an EEOC right-to-sue letter, Ellerth filed suit alleging sexual harassment and constructive discharge by Burlington Industries.⁵²

The Supreme Court reasoned that since *Meritor*, the courts of appeals had determined that the standard for holding an employer responsible for the actions of an employee depended on the type of discrimination the victim suffered.⁵³ The plaintiff could impute liability to the employer if she or he established a quid pro quo claim.⁵⁴ Although the petition for certiorari sought a specific answer on Ellerth's quid pro quo claim, the Court focused on deciding a standard for vicarious liability for harassment claims that did not necessarily reach the level of quid pro quo.⁵⁵

The Court reasoned that given "express" congressional direction it must interpret Title VII through the lens of agency principles.⁵⁶ While sexual harassment by a supervisor is generally not considered to be conduct within the scope of employment, which is the normal basis of *respondeat superior* liability, the Court noted that this was not the only basis for holding employers vicariously liable.⁵⁷ The Court looked to the Restatement (Second) of Agency (1957) (Restatement), which sets out principles of vicarious liability for torts outside of the scope of employment in Section 219(2).⁵⁸ In subsections (a) and (c), the Restatement established that a master may be liable for a servant's acts outside of the scope of employment if the master "intended the conduct or the consequences" or "the conduct violated a non-delegable duty of the master."⁵⁹ The Court rejected these subsections as potential grounds for imputing liability in the sexual harassment setting because the employer did not act with any "tortious" intent and the conduct did not involve a non-delegable duty.⁶⁰

⁵¹ *Id.* at 748–49.

⁵² *Id.*

⁵³ *Id.* at 752.

⁵⁴ *Id.*

⁵⁵ *Burlington Indus., Inc.*, 524 U.S. at 754. It is arguable, however, that the use of a "tangible employment action" is a recasting of quid pro quo discrimination. See B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1, 14 (1999) (noting that the Supreme Court's use of "tangible employment action" describes a situation that lower courts previously had described as quid pro quo sexual harassment).

⁵⁶ *Id.* ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law.")

⁵⁷ *Id.* at 757.

⁵⁸ *Id.*

⁵⁹ *Id.* at 758.

⁶⁰ *Id.*

Instead, the Court focused on subsections (b) and (d), which imputed liability if “the master was negligent or reckless” or the employee used “apparent authority” or “was aided in accomplishing the tort by the existence of the agency relation.”⁶¹ Lower courts had already established a negligence standard for the liability of employers under Title VII, and employers were liable if they knew or should have known about the sexual harassment but failed to stop the conduct.⁶² The Court noted that this was a minimum standard for the liability of employers and *Ellerth* sought to impose a more exacting rule.⁶³ The Court therefore shifted its analysis to subsection 219(2)(d).⁶⁴

Subsection (d) involves two distinct bases for establishing employer liability: “apparent authority” and “aided in . . . the agency relation.”⁶⁵ Apparent authority exists where an agent asserts power that the principal has not actually given.⁶⁶ Because harassment usually involves a misuse of actual power instead of a simulation of power, the court rejected apparent authority as a basis for liability.⁶⁷

The Court noted that “aided in the agency relation” was the more appropriate standard.⁶⁸ The Court, however, determined that the standard must require “something more than the employment relation itself” because anyone in a working environment might be “aided in” committing intentional torts by virtue of the employment context.⁶⁹ The Court further dissected the potential rule, analyzing its application in cases where a “tangible employment action” did or did not exist.⁷⁰ A tangible employment action is a “significant change in employment status” and includes “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁷¹ The Court noted that lower courts had already determined that the employer is vicariously liable if an act of discrimination results in a tangible employment action.⁷² In the context

⁶¹ *Burlington Indus., Inc.*, 524 U.S. at 759 (internal quotation marks omitted).

⁶² *Id.*; *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

⁶³ *Burlington Indus., Inc.*, 524 U.S. at 759.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 760.

⁶⁹ *See Burlington Indus., Inc.*, 524 U.S. at 760 (“Proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue.”).

⁷⁰ *Id.*

⁷¹ *Id.* at 761.

⁷² *Id.* at 760.

of agency principles, the Court explained that vicarious liability is justifiable because the harasser could not have taken the “action” without the agency relation.⁷³ Only supervisors can make decisions of the tangible kind.⁷⁴ In situations such as the case at hand, however, it is less clear whether the agency relationship aids in a supervisor’s harassment when it does not result in a tangible employment action.⁷⁵

The Court’s ultimate decision therefore combined a number of considerations. First, it considered the potential trouble with imputing liability by the “aided in” standard regardless of whether a tangible employment action occurred.⁷⁶ Second, it reflected on the holding in *Meritor*, which dictated that agency principles compel vicarious liability in supervisor harassment cases.⁷⁷ Finally, the Court weighed the congressional intent and purpose of Title VII: to encourage employers to develop anti-harassment policies as well as systems for grievances.⁷⁸

The courts of appeals were already in agreement with respect to subjecting employers to vicarious liability when a supervisor effects a tangible employment action on a subordinate.⁷⁹ Weighing the above considerations, the Court extended that rule by holding that a plaintiff may also impute liability to an employer for a supervisor’s creation of a hostile work environment, even absent a tangible employment action.⁸⁰ The Court, however, provided an escape hatch from such liability by noting that if the supervisor has not taken a tangible employment action, the employer has an affirmative defense.⁸¹ Employers must first show that: (i) they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (ii) that the “employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁸² Ultimately, Ellerth did not allege that Slowik caused a tangible employment action; however, the Court decided this was not

⁷³ *Id.* at 761–62.

⁷⁴ *Id.* at 762.

⁷⁵ *Burlington Indus., Inc.*, 524 U.S. at 762 (noting that from one perspective, a supervisor is *always* aided in the agency relation; but from another, a supervisor might commit the same acts as a co-employee, so his or her status has little import).

⁷⁶ *Id.* at 763.

⁷⁷ *Id.*

⁷⁸ *Id.* at 764 (reasoning that hinging liability on an employer’s effort to develop deterrent policies would help limit litigation, as it would foster resolution within company procedures). The Court also noted Title VII’s intended similarity to the “avoidable consequences doctrine” of tort law, which would “support the limitation of employer liability in certain circumstances.” *Id.*

⁷⁹ *Id.* at 760.

⁸⁰ *Id.* at 765.

⁸¹ *Burlington Indus., Inc.*, 524 U.S. at 765.

⁸² *Id.*

“dispositive.”⁸³ Therefore, the Court determined that Burlington Industries was subject to vicarious liability, but should have the opportunity to assert and prove the affirmative defense.⁸⁴

In its holding, the Court only vaguely defined supervisor for the purpose of this analysis. This is important because employers may be vicariously liable if “a supervisor with immediate (or successively higher) authority over the employee” creates a hostile work environment.⁸⁵ Because the Court used the term supervisor but also qualified the amount and relational authority of the title, confusion has ensued as to the application of this standard.⁸⁶

B. Faragher v. City of Boca Raton

In a companion case to *Ellerth*, the Court applied the same holding to a different set of facts. In *Faragher v. City of Boca Raton*, plaintiff Beth Ann Faragher, an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department (the “Department”) of Boca Raton, Florida, worked with other lifeguards under the immediate supervision of Bill Terry, David Silverman, and Robert Gordon.⁸⁷ During the five years of Faragher’s employment, Terry subjected the female employees, including Faragher, to repeated and uninvited touching, crude remarks about women, and specific comments insulting Faragher’s body.⁸⁸ Silverman touched Faragher without invitation and made various comments about women, sex, and the lifeguards’ bodies.⁸⁹ Faragher did not complain about Terry or Silverman to her management.⁹⁰ Although she told Gordon about the pair’s behavior, she did not consider these conversations formal complaints.⁹¹ Gordon did not feel that it was his responsibility to report the conduct of Terry or Silverman to his supervisor or to any other official.⁹²

The city organized the department with a “paramilitary” chain of command.⁹³ Terry was the chief of the Marine Safety Division, and had authority to hire, supervise, reprimand, and record any actions he took

⁸³ *Id.* at 766.

⁸⁴ *Id.*

⁸⁵ *Id.* at 765.

⁸⁶ *See infra* Part IV.

⁸⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

⁸⁸ *Id.* at 782.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 783.

⁹³ *Faragher*, 524 U.S. at 781.

with respect to the lifeguards.⁹⁴ Silverman was a Marine Safety Division lieutenant for four years and then became a captain.⁹⁵ Gordon was also promoted from lieutenant to captain; in this position, the pair supervised the lifeguards' daily assignments and fitness training.⁹⁶ Within the "chain," the lifeguards answered to the lieutenants and captains, who in turn answered to Terry.⁹⁷ Although the city adopted a sexual harassment policy in 1986 and revised and reissued it in 1990, the city failed to distribute the material to the employees of the Marine Safety Section.⁹⁸ Therefore, Terry, Gordon, Silverman, and many of the lifeguards were unaware of the policy.⁹⁹

As in *Ellerth*, the Supreme Court focused on agency law in determining that "it makes sense" to impute liability onto employers for some conduct made possible by an abuse of supervisory authority.¹⁰⁰ The Court then reasoned that, despite this logic, a vicarious liability standard must also consider the *Meritor* holding that employers are not automatically liable for a supervisor's harassment.¹⁰¹ The Court issued the same holding as in *Ellerth*¹⁰² and explained the deterrent effect of the affirmative defense, noting that holding employers vicariously liable for the actions of supervisors without an incentive to prevent sexual harassment from occurring would be "at odds" with the statutory policy of Title VII.¹⁰³ Therefore, with the availability of the affirmative defense, plaintiffs who might have found redress for a grievance through an employer's "preventive or remedial apparatus" should not have access to damages for a harm that the plaintiff could have avoided.¹⁰⁴

IV. THE CIRCUIT SPLIT: DEFINING SUPERVISOR IN THE WAKE OF *ELLERTH* AND *FARAGHER*

After *Ellerth* and *Faragher*, lower federal courts have faced problems applying the defense to specific employment situations. To appropriately apply the defense, the courts have been called upon to interpret the definition of supervisor in the Supreme Court's holdings. Shortly after the Court made the defense available, the Seventh Circuit

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 781–82.

⁹⁹ *Faragher*, 524 U.S. at 782.

¹⁰⁰ *Id.* at 802.

¹⁰¹ *Id.* at 804; see *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 72 (1986).

¹⁰² *Faragher*, 524 U.S. at 807.

¹⁰³ *Id.* at 806.

¹⁰⁴ *Id.* at 806–07.

defined supervisor narrowly, limiting a plaintiff's potential recovery from employers to situations in which the harasser had authority to make tangible employment actions even if he or she did not actually effect a change in the employee's status.¹⁰⁵ The First and Eighth Circuits agreed with the Seventh Circuit's approach.¹⁰⁶ Similarly, the Fourth Circuit took an analogous approach to the definition even before the Supreme Court issued its decision on a vicarious liability standard.¹⁰⁷

At nearly the same time, the Seventh Circuit issued its opinion on the definition of the term supervisor, the District Court for the District of Minnesota issued an opinion that established a broader definition, the effect of which would subject more employers to vicarious liability by treating more individuals as supervisors.¹⁰⁸ The Second Circuit also employed a broad definition of supervisor, creating a circuit split.¹⁰⁹ The Second Circuit, however, remains the sole appellate court to reject the narrow, bright line rule; thus, it has adopted a rule that is fundamentally more fair to employees while still fulfilling the preventive purposes of Title VII.¹¹⁰ The following section will explain the circuit split and illustrate the various nuances within the different definitions of supervisor in hostile work environment sexual harassment claims.

A. Narrow Definition

The Seventh Circuit was the first appellate court to define supervisor in the wake of the *Ellerth* and *Faragher* decisions.¹¹¹ In *Parkins v. Civil Constructors of Illinois*, the plaintiff, Lesley Parkins, sued her employer under Title VII alleging hostile work environment sexual harassment and retaliation.¹¹² As a dump-truck driver, her duties

¹⁰⁵ *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (holding that the "essence of supervisory status is the authority to affect the terms and conditions of the victim's employment" and such authority consists mainly "of the power to hire, fire, demote, promote, transfer, or discipline an employee").

¹⁰⁶ *Joens v. Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) ("[T]he alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties."); *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005) (holding no vicarious liability because the harassers did not have the authority to "terminate, discipline, or otherwise affect the terms and conditions of [plaintiff's] employment").

¹⁰⁷ *Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999).

¹⁰⁸ *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998).

¹⁰⁹ *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003).

¹¹⁰ *But see Whitten v. Fred's, Inc.*, 601 F.3d 231 (2010) (suggesting that the Fourth Circuit may be aligning with the Second Circuit on a broader definition of supervisor).

¹¹¹ *Parkins*, 163 F.3d at 1033-34.

¹¹² *Id.* at 1031.

at Civil Constructors included “hauling construction materials and debris to and from work sites.”¹¹³ From 1994 to 1996, various co-workers mistreated Parkins using coarse language and eventually participating in uninvited touching.¹¹⁴ In 1996, five co-workers harassed Parkins by making suggestive comments about a pornographic picture at the workplace.¹¹⁵ On this occasion, Parkins alleged that her co-workers also grabbed her.¹¹⁶ Although she complained to her dispatcher and to one of the alleged harassers throughout her employment, she did not complain to the superintendent or the Equal Employment Opportunity officer until after this last incident.¹¹⁷ In August 1996, Parkins filed a formal grievance, which spurred Civil Constructors to conduct an investigation and ultimately punish the employees.¹¹⁸ While the harassment ceased, Civil Constructors did not rehire Parkins for the next season’s work,¹¹⁹ and Parkins sued, alleging hostile work environment sexual harassment.¹²⁰

The Seventh Circuit required that the plaintiff show a “basis for employer liability” for her hostile work environment claim.¹²¹ The court acknowledged the *Ellerth/Faragher* defense and focused on determining the essential attributes of a supervisor for the purpose of assigning employer liability.¹²² The court considered the common law of agency and the purposes of Title VII, and it reasoned that a nominal supervisor is not necessarily a supervisor in this context.¹²³ Then, the Seventh Circuit posited that the “essence of supervisory status is the authority to affect the terms and conditions of the victim’s employment,” and that such authority “primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.”¹²⁴ Using this definition, the Seventh Circuit rejected the notion that Parkins’s harassers were supervisors because the men had limited authority and control over the work setting,

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Parkins*, 163 F.3d at 1031.

¹¹⁸ *Id.*

¹¹⁹ *Id.* The facts are not specific with respect to who made the actual decision not to rehire Parkins, and for this reason there is no real analysis of a tangible employment action. *See id.*

¹²⁰ *Id.* Parkins also alleged retaliation; the District Court granted summary judgment for defendant because it had remedied the harassment quickly and because Parkins failed to make a prima facie showing of a retaliation claim. *Id.*

¹²¹ *Id.* at 1032.

¹²² *Id.* at 1033.

¹²³ *Parkins*, 163 F.3d at 1033.

¹²⁴ *Id.* at 1034.

and none of them had the power to “hire, fire, promote, demote, or discipline.”¹²⁵

Both the Eighth and the First Circuits subscribed to the bright-line, narrow approach to decide an employee’s supervisory status. The Eighth Circuit aligned with the Seventh Circuit in deciding *Joens v. John Morrell & Co.*, an appeal from summary judgment against a plaintiff claiming that her harasser had some supervisory authority over her.¹²⁶ Joens worked in a “box shop” in the employer’s meat packing plant, where she made boxes from flat pieces of cardboard.¹²⁷ She recognized that the superintendent of the floor was her immediate supervisor, but she also alleged that her harasser, the day shift foreman, was a supervisor because of his ability to demand that she make more boxes for his floor.¹²⁸ In assessing the employer’s liability, the court adopted its own version of the *Parkins* rule, holding that “the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.”¹²⁹ The court rejected the plaintiff’s contention, finding that she had not shown a genuine issue of material fact because the harasser had “no direct authority” to control her, no real power to discipline her, and no meaningful power to assign her more work.¹³⁰

Similarly, the First Circuit adopted the *Parkins* definition in *Noviello v. City of Boston*.¹³¹ In this case, the plaintiff worked within an extensive hierarchy of Boston’s Department of Parking Enforcement.¹³² The plaintiff caused the dismissal of her immediate supervisor by reporting an egregious act of sexual harassment.¹³³ Her complaint alleged sexual and retaliatory harassment in the months after the initial incident by those above her in the department’s hierarchy.¹³⁴ The

¹²⁵ *Id.* at 1034–35.

¹²⁶ *Joens v. Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (“She submitted evidence that Johnson ‘had some supervisory authority over [her] because he could write her up for violation of company policies or failing to perform her work’ and ‘could provide her with additional work.’”).

¹²⁷ *Id.* at 938.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 941.

¹³¹ *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005).

¹³² *Id.*

¹³³ *Id.* at 82 (“While on the job on September 11, 1999, plaintiff-appellant . . . was riding in a city-owned van with her immediate superior, José Ortiz. After first announcing his intentions, Ortiz forcibly unhooked the plaintiff’s brassière, ripped it from her body, hung it on the van’s outside mirror, and bellowed a crude sexual remark to a fellow employee on the street.”).

¹³⁴ *Id.* at 83.

workplace consisted of four or five “rungs” of authority; while the plaintiff argued that those on higher “rungs” were her supervisors, the court rejected such an approach that “elevates nomenclature over actual authority.”¹³⁵ Similarly, the two harassers chiefly involved in creating the abusive work environment did not have the authority to “terminate, discipline, or otherwise affect the terms and conditions of [plaintiff’s] employment.”¹³⁶ The court decided that the negligence standard of co-employee harassment applied, meaning that the city would be liable only if it knew or should have known about the conduct and did not address it appropriately.¹³⁷

The Fourth Circuit handed down a similar decision in *Mikels v. City of Durham*, but the court approached the issue in a broader sense and considered additional factors that tempered the severity of the bright line rule.¹³⁸ Mikels, a police officer, filed suit after a fellow police officer grabbed her face and kissed her on the mouth.¹³⁹ In its analysis, the court first cited *Ellerth* for the proposition of acknowledging “malleable terminology” in deciphering a standard for “supervisory” employees.¹⁴⁰ Then, it suggested that an inquiry “may have to run deeper into the details of relationships and particular circumstances” and looked to the Supreme Court’s agency reliance as a “touchstone, though not a prescription.”¹⁴¹

Moreover, *Mikels* considered whether the relationship between harassers and victims is such “to constitute a continuing threat to her employment conditions that make her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not.”¹⁴² While the court cited an employee’s ability to make tangible employment actions as a “powerful indicator” that he is a supervisor, it supplemented this factor with a consideration of the

¹³⁵ *Id.* at 96. Analyzing the department’s structure, the court found only two actors with sufficient authority to qualify as supervisors; however, these individuals were not guilty of harassment. *Id.*

¹³⁶ *Id.* at 96.

¹³⁷ *Noviello*, 398 F.3d at 97.

¹³⁸ *Mikels v. City of Durham*, 183 F.3d 323, 332–34 (4th Cir. 1999). The parties argued the case before the Supreme Court issued its holdings in *Ellerth* and *Faragher*; the Fourth Circuit, however, decided the case after those cases. *Id.* The court noted that Mikels did not raise the issue of the *Ellerth* and *Faragher* standard of vicarious liability as “relevant intervening authority” as she could have done according to Federal Rules of Appellate Procedure 28(j); however, the court chose to address the matter sua sponte “in the interest of fairness.” *Id.* at 332.

¹³⁹ *Id.* at 326.

¹⁴⁰ *Id.* at 333 (internal quotation marks omitted).

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.*

victim's response.¹⁴³ Quoting the Supreme Court, the Fourth Circuit assessed whether the plaintiff "feel[s] free to 'walk away and tell the offender where to go,' or does she suffer the insufferable longer than she otherwise might?"¹⁴⁴

Although the court detailed its standard as partially subjective, it held that Mikels had no real prospect of proving her harasser was a supervisor.¹⁴⁵ Though he had a higher rank within the police department, he had no authority to take tangible employment actions against Mikels.¹⁴⁶ She also was not isolated from the protective power of other direct supervisors.¹⁴⁷ Finally, considering Mikels's conduct as indicative of her subjective view of her harasser, the Fourth Circuit decided that she "demonstrated [a] lack of any sense of special vulnerability or defenselessness deriving from whatever authority Acker's corporal rank conferred . . . [after the incident, she] rebuffed him in an obscenity-and profanity-laced outburst[,] rejected his immediately proffered apology, and the next day filed a formal grievance against him."¹⁴⁸ The court considered this conduct to demonstrate that the plaintiff perceived her harasser as a co-employee, not as a threatening and authoritative supervisor.¹⁴⁹ Although the Fourth Circuit ultimately decided that the harasser in *Mikels* did not rise to supervisory status, the addition of a subjective factor suggests a more moderate rule than the strictly objective definitions of the Seventh, Eighth, and First Circuits.¹⁵⁰

B. Broad Definition

Shortly after the Supreme Court issued its holdings in *Ellerth* and *Faragher*, the United States District Court for the District of Minnesota created a broader supervisory standard in *Grozdanich v. Leisure Hills Health Ctr., Inc.*¹⁵¹ The court relied heavily on the factual situation in

¹⁴³ See *id.* at 333–34.

¹⁴⁴ *Mikels*, 183 F.3d at 334 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998)).

¹⁴⁵ *Id.* at 334.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Cf. Whitten v. Fred's, Inc.*, 601 F.3d 231 (2010). The Fourth Circuit recently relied on its reasoning in *Mikels* to determine that a harasser qualified as plaintiff's supervisor, noting that the "critical question was 'whether the particular conduct was aided by the agency relation[.]'" *Id.* at 244 (citing *Mikels*, 183 F.3d at 332). The Fourth Circuit cited also to *Mack*, but did not explicitly weigh in on the circuit split. *Id.* Ultimately, however, the reasoning in *Whitten* suggests that the Fourth Circuit aligns with the Second Circuit in adopting a broad standard for the definition of supervisor.

¹⁵¹ *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998).

Faragher to formulate its rule.¹⁵² In *Grozdanich*, the alleged harasser was a “Charge Nurse” at a nursing home where the plaintiff worked as a “Staff Float Nurse”; while working in his unit, the plaintiff was under the harasser’s authority.¹⁵³ According to the “Objectionable Behavior Policy,” a Staff Nurse should report to Charge Nurses unless the Charge Nurse was the harasser, in which case the victim should report to the Director of Nursing.¹⁵⁴ After suffering three instances of sexual misconduct in one day at the hands of the harasser, the plaintiff reported the misconduct to several superiors, including the Director of Nursing.¹⁵⁵

The District Court reiterated the vicarious liability standards of *Ellerth* and *Faragher* and decided against a narrow definition of supervisor.¹⁵⁶ The court observed that, while some courts decided a supervisory standard based on an ability to make “significant personnel decisions,” there was also “a more indulgent line of case authority [before *Ellerth* and *Faragher*] which maintained that a low-level superior, who retained something less than a plenary authority over hiring and firing could be considered a ‘supervisor’” for liability purposes.¹⁵⁷ Next, the court looked at the specific factual findings in *Faragher*, where the Supreme Court found both harassers to be supervisors despite their ultimate inability to hire or fire lifeguards.¹⁵⁸ Although one of the men, Terry, could make such decisions *subject to higher approval*, the other, Silverman, held only the power to make daily assignments and supervise work and fitness training.¹⁵⁹ Regardless of their job responsibilities, the Supreme Court held that both men were supervisors for the purpose of imputing liability to the city on the sexual harassment claims.¹⁶⁰

Finally, *Grozdanich* posited that a narrower, bright-line rule distinguishing those who “manage . . . daily activities” but may only “recommend significant personnel decisions” from those who “have plenary authority over all such matters” could cause a negative and

¹⁵² *Id.* at 972.

¹⁵³ *Id.* at 962.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 963.

¹⁵⁶ *Id.* at 973.

¹⁵⁷ *Grozdanich*, 25 F. Supp. 2d at 972 (citing a number of cases from the federal courts of appeals, as well as *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J., concurring) (“A supervisor’s responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions,” but contemplate “the day-to-day supervision of the work environment and with ensuring a safe, productive workplace.”)).

¹⁵⁸ *Id.* at 972–73.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

insulating effect on employers.¹⁶¹ The unintended consequence of such a narrow definition, the court reasoned, is that employers could relegate all personnel decisions to a specific department within the company and avoid liability completely.¹⁶²

The United States District Court for the Eastern District of Pennsylvania also defined supervisor more broadly than the Seventh Circuit.¹⁶³ The court proffered three considerations for its ultimate determination of a standard for supervisors.¹⁶⁴ First, the court considered a Third Circuit decision explaining that “the authority to act alone on the employer’s behalf, with no other controls, is not required for an employee to possess supervisory authority.”¹⁶⁵ The court then looked to the EEOC’s definition, which the agency had revised after *Ellerth* and *Faragher*. In its compliance manual, the EEOC defined a supervisor as “(1) the individual [who] has authority to undertake or recommend tangible employment decisions affecting the employee, or (2) the individual [who] has authority to direct the employee’s daily work activities.”¹⁶⁶ Finally, the court referenced the Seventh Circuit’s definition before rejecting that court’s narrow construct.¹⁶⁷ Ultimately, it decided that the test is whether the harasser had the “authority to hire, fire, re-assign, or demote her *or* set her work schedule or pay rate, *or* that [the harasser] had the power to take tangible employment action against her *or* affect her daily work activities.”¹⁶⁸ The additional factor of “affecting” daily activities substantially broadens the scope of supervisory authority and promotes a more fact-sensitive analysis, rather than relegating supervisory authority only to those who might affect serious employment changes on other employees.

The Middle District of Alabama also determined that a broad definition more adequately carries out the purposes of Title VII in *Dinkins v. Charoen Pokphand USA, Inc.*¹⁶⁹ This case involved several plaintiffs and a number of egregious allegations against various employees of the Charoen Pokphand live poultry plant in Alabama.¹⁷⁰ The male employees, supervisors by title, subjected the female plaintiffs

¹⁶¹ *Id.* at 973.

¹⁶² *Id.*

¹⁶³ *Kent v. Henderson*, 77 F. Supp. 2d 628, 634 (E.D. Pa. 1999).

¹⁶⁴ *Id.* at 632–33.

¹⁶⁵ *Id.* (citing *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 at 154–55 (3d Cir. 1999)).

¹⁶⁶ *Id.* (quoting EEOC Enforcement Guidance on Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 633–34 (emphasis added).

¹⁶⁹ *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254 (M.D. Ala. 2001).

¹⁷⁰ *Id.* at 1257–60.

to continuous unwanted physical contact and verbal sexual harassment.¹⁷¹ In determining vicarious liability, the court rejected the *Parkins* definition.¹⁷² While it presents “simple rules for complex cases,” it “improperly truncates the Supreme Court’s holdings in *Faragher* and *Ellerth*.”¹⁷³ Those cases suggested that analyzing employment relationships “involves multifactorial analysis rather than simplistic taxonomy.”¹⁷⁴ Based on this reasoning, the court decided that an employee is a Title VII supervisor “if he has the actual authority to take tangible employment actions, or to recommend tangible employment actions if his recommendations are given substantial weight by the final decisionmaker, or to direct another employee’s day-to-day work activities in a manner that may increase the employee’s workload or assign additional or undesirable tasks.”¹⁷⁵

The court furthered its analysis by referencing “unusual situations” where a harasser deceives the victim into believing that a supervisory relationship exists, when in fact it does not.¹⁷⁶ Mindful of apparent authority, the court encouraged an approach that examines “the totality of circumstances,” or “the overall work environment, the structural rigidity of the workforce hierarchy, and the relationship among all employees, supervisors, and managers.”¹⁷⁷ This included looking at an employee’s reasonable beliefs about the harasser’s authority, thereby adding a subjective element into the court’s analysis of supervisory status.¹⁷⁸

The district courts’ decisions precede the Second Circuit’s decision, *Mack v. Otis Elevator Company*,¹⁷⁹ which created the split among the courts of appeals. In this case, the plaintiff, an African American woman, worked as a mechanic’s helper.¹⁸⁰ The company assigned her to assist six mechanics in a New York City building, and the collective bargaining agreement between Otis and the union designated one employee as “mechanic in charge” in situations with more than five mechanics at one site.¹⁸¹ James Connolly was the building’s mechanic in charge.¹⁸² The

¹⁷¹ *Id.*

¹⁷² *Id.* at 1266.

¹⁷³ *Id.* (“[*Faragher v. City of Boca Raton*, 524 U.S. 775, 797 (1998)] (eschewing ‘mechanical application’ of factors”); [*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 768 (1998)] (same).”).

¹⁷⁴ *Id.*

¹⁷⁵ *Dinkins*, 133 F. Supp. 2d at 1266 (citations omitted).

¹⁷⁶ *Id.* (citing *Ellerth*, 524 U.S. at 769).

¹⁷⁷ *Id.* at 1267.

¹⁷⁸ *See id.*

¹⁷⁹ 326 F.3d 116 (2d Cir. 2003).

¹⁸⁰ *Id.* at 120.

¹⁸¹ *Id.*

collective bargaining agreement gave the mechanic in charge the authority to schedule and assign work, direct the employees, assure the quality of the work, and monitor safety practices at the sites.¹⁸³ Indeed, Connolly did assign work and overtime hours to the other mechanics and helpers at the building, including the plaintiff.¹⁸⁴ The plaintiff alleged that Connolly regularly made comments about her appearance, often changed out of his uniform in front of her, and once grabbed her and subjected her to uninvited touching and a kiss.¹⁸⁵ The plaintiff complained to Connolly's supervisor about the conduct, asked for a transfer, and complained to a union steward.¹⁸⁶ Ultimately, the plaintiff met with several upper-level employees and union representatives, and the group promised to investigate the situation and to transfer her; however, the plaintiff did not return to work.¹⁸⁷

In determining a standard for supervisory status, the Second Circuit rejected the *Parkins* definition and aligned itself with the contrary district court holdings.¹⁸⁸ The court reasoned that the narrow *Parkins* definition focused on the traits of an employee that enable the person to make personnel decisions; the Supreme Court held, however, that employers may be vicariously liable for conduct not involving tangible employment actions.¹⁸⁹ Therefore, the Second Circuit decided that whether an employer gives an employee "the authority to make economic decisions concerning his or her subordinates" is not dispositive.¹⁹⁰ Rather, the appropriate question in determining supervisory authority is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates."¹⁹¹

The Second Circuit, like the District Court of Eastern Pennsylvania, relied on the EEOC's enforcement guidelines to support its definition of supervisor.¹⁹² The court emphasized that the guidelines are not binding, but they are "entitled to respect to the extent that they are persuasive."¹⁹³ This rule continues to operate in the Second Circuit, as both the circuit

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 121.

¹⁸⁵ *Mack*, 326 F.3d at 120.

¹⁸⁶ *Id.* at 121.

¹⁸⁷ *Id.* at 121–22.

¹⁸⁸ *Id.* at 126 (citing *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254 (M.D. Ala. 2001); *Kent v. Henderson*, 77 F. Supp. 2d 628 (E.D. Pa. 1999)).

¹⁸⁹ *Id.* (referring to the *Ellerth* and *Faragher* decisions).

¹⁹⁰ *Id.*

¹⁹¹ *Mack*, 326 F.3d at 126.

¹⁹² *Id.* at 127.

¹⁹³ *Id.*

court and district courts have persisted in applying the broad definition of supervisor to establish vicarious liability within hostile work environment sexual harassment cases.¹⁹⁴

V. THE BROADER DEFINITION IS FUNDAMENTALLY MORE FAIR

While the majority of the federal circuit courts that have addressed this issue have chosen the narrower definition of supervisor, the Second Circuit and several district courts have provided a definition that promotes more fundamental fairness in the workforce. The cases demonstrate that hostile work environment claims demand fact-sensitive inquiries, but this need intensifies as employment structures deviate from simple hierarchies with clear labels. Employers are currently moving toward organizational schemes such as “flattened hierarchies,” or work environments with fewer differentials between the executive and the low-level employee.¹⁹⁵ This model works to maintain loyalty, trust, and motivation by establishing a “psychological contract” in which the logical impetus for employees is to work toward the employer’s goal.¹⁹⁶

In some ways, minorities benefit from the “new workplace.”¹⁹⁷ There may be new opportunities that would not have sprung out of the old, formalistic job ladders; similarly, a flattened hierarchy might create jobs that are inherently more equal.¹⁹⁸ Still, problems such as invisible authority and the power of “cliques” (i.e. peer-based decision making) may affect women and minorities negatively.¹⁹⁹ All of these implications demand a judicial definition of supervisor that the chain of command employment scenario may not provide. Moreover, the phenomenon of the “new workplace” suggests that the clear line of the narrow definition will not slice so neatly through the matrices of authority that have superseded the traditional job ladder.

To support a bright-line rule separating supervisors from co-employees without considering the reasonable belief of the victim or the extent of the harasser’s actual authority is to sacrifice equity for a small amount of judicial efficiency. Should the Supreme Court resolve the split, or should any other circuits weigh in, the broader, multi-factor

¹⁹⁴ See *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427, 442 (S.D.N.Y. 2009) (“There is a genuine issue of material fact as to whether Messina’s authority over Plaintiff, bestowed upon him by Entergy, enabled him or materially augmented his ability to impose a hostile work environment.”).

¹⁹⁵ See Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 571 (2001).

¹⁹⁶ *Id.* at 570–71.

¹⁹⁷ *Id.* at 605.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

approach is preferable. The broad definition aligns with the guidelines of the enforcing governmental agency, provides for a more thorough and fair inquiry to the litigants, better serves the purpose of Title VII, and better suits the developing workplace. Moreover, the criticisms and potential pitfalls of a broad definition have not come to fruition in the Second Circuit. Therefore, the rule in *Mack* provides a superior standard of vicarious liability in hostile work environment sexual harassment claims.

A. The Broad Definition Aligns with the EEOC Guidelines

The EEOC is the federal agency with the responsibility to enforce the federal laws that make discrimination illegal in employment on the basis of race, color, national origin, sex, age, religion, or disability.²⁰⁰ The agency also enforces the laws against retaliation, helping to protect those who complain, file a charge, or participate in a lawsuit based on discrimination.²⁰¹ Antidiscrimination laws cover most public employers with fifteen or more employees, as well as labor unions and employment agencies.²⁰² Moreover, the EEOC is responsible for investigating charges of discrimination as well as working to prevent discriminatory harm with “outreach, education, and technical assistance programs.”²⁰³

The EEOC also promulgates guidelines in the form of regulations, which clarify and instruct on various areas of antidiscrimination law.²⁰⁴ As defined by the regulations, sexual harassment violates Section 703 of Title VII, and it includes submission to verbal or physical sexual conduct which: (1) impliedly or overtly is a term or condition of employment; (2) is used as a basis for personnel decisions affecting the victim; or (3) has the purpose of “unreasonably interfering” with the victim’s work performance or “creating an intimidating, hostile, or offensive working

²⁰⁰ *About the EEOC: Overview*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited November 24, 2010); *see generally* 42 U.S.C. § 2000e-4(a), (g), (j) and (k) (2006) (creating the EEOC and granting authority to assist others in complying with 42 U.S.C. 2000e (Title VII)). The law also gives the EEOC authority to “carry out educational and outreach activities,” establish a “Technical Assistance Training Institute,” and the law establishes an EEOC Education, Technical Assistance, and Training Revolving Fund “to pay the cost . . . of providing education, technical assistance, and training relating to laws administered by the Commission.” *Id.*

²⁰¹ *See* 42 U.S.C. § 2000e-4(a), (g), (j) and (k) (2006).

²⁰² *Id.* The threshold number for employers under the Age Discrimination in Employment Act, however, is twenty or more employees. *See* 29 U.S.C. § 630(b) (2006).

²⁰³ *Id.*

²⁰⁴ 29 C.F.R. § 1604.11(a) (2009).

environment.”²⁰⁵ Until the Supreme Court issued its holdings in *Ellerth* and *Faragher*, the guidelines provided a standard of employer liability for supervisory harassment; after those decisions, however, the EEOC rescinded the provision and instead directs readers to its Compliance Manual for the relevant policy.²⁰⁶

In its manual, the EEOC supplies the definition of supervisor adopted by the Second Circuit and classifies potential supervisory authority without being limited to the “Supervisory Chain of Command.”²⁰⁷ Inside the chain of command, the EEOC’s definition embraces both the authority to make tangible employment decisions and the authority to direct the employee’s daily activities.²⁰⁸ Explaining the former, the EEOC refers to *Ellerth* to clarify that authority to take employment action subject to a superior’s review will still qualify an individual as a supervisor if his or her “recommendation is given *substantial weight* by the final decision maker(s).”²⁰⁹ The EEOC also elucidates the “direct activities” standard, explaining that such authority enhances an individual’s “ability to commit harassment” by assigning either more or unpleasant work.²¹⁰ This type of standard reflects the “aided in” reasoning of agency law, upon which *Ellerth* and *Faragher* relied. The EEOC states that the Supreme Court categorized harassers as supervisors despite an inability to effect personnel action.²¹¹ Finally, the Compliance Manual includes harassment by those whom an employee might reasonably believe to be a supervisor.²¹² In situations where the structure of the workplace makes a chain of command unclear or where the victim in good faith believes a “superior” has the ability to effect a significant employment decision, the harasser may be a supervisor for the purposes of vicarious liability.²¹³

Ultimately, the question is whether (and to what extent) courts should defer to the EEOC’s various statutory interpretations. The Supreme Court has established tiers of deference, depending on whether Congress has delegated law-interpreting power to the agency.²¹⁴ “*Chevron* deference” applies to interpretations of silent or ambiguous

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ EEOC Enforcement Guidance on Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

²⁰⁸ *Id.*

²⁰⁹ *Id.* (emphasis added)

²¹⁰ *Id.*

²¹¹ *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998)).

²¹² *Id.*

²¹³ EEOC Enforcement Guidance on Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

²¹⁴ ZIMMER ET AL., *supra* note 9, at 520–21.

statutes if Congress has delegated law-interpreting authority to the agency.²¹⁵ Such delegation arises if Congress has “explicitly left a gap for the agency to fill,”²¹⁶ and therefore may apply to agency regulations.²¹⁷ In *Chevron*, the Court held that agency interpretations are “given controlling weight” if the agency has been delegated law-interpreting power.²¹⁸ For those agency interpretations that are not as authoritative as regulations, the Court granted *Skidmore* deference.²¹⁹ In *Skidmore*, the Court held that agency interpretations that lack the authority of legislative delegation may still be persuasive.²²⁰ *Skidmore* deference allows the agency’s interpretation to hold authority based on the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²²¹

The Compliance Manual qualifies for *Skidmore* deference, but not for *Chevron* deference.²²² The EEOC’s guidance is therefore not binding, but it controls to the extent that it is persuasive.²²³ Thus, the EEOC’s definition of supervisor, like other interpretive guidance in the manual, “constitutes an informed judgment to which some deference ordinarily is due.”²²⁴ For employers, however, the EEOC is certainly an authoritative source of information and guidance.²²⁵ Because of the power and funding to provide both private and federal employers with equal employment education, employers should act as though the definitions from the EEOC will align with those of the courts. Ultimately, the courts should lean towards the broader definition of supervisor based on the recognition that the EEOC is afforded a certain level of deference and because the agency promulgates its guidance to employers and employees according to its federal administrative authority.

²¹⁵ *Id.*; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843–44 (1984).

²¹⁶ *Chevron*, 467 U.S. at 843–44.

²¹⁷ ZIMMER ET AL., *supra* note 9, at 521.

²¹⁸ *Chevron*, 467 U.S. at 843–44.

²¹⁹ *Id.*; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²²⁰ *Skidmore*, 323 U.S. at 140.

²²¹ *Id.*

²²² *Noviello v. City of Boston*, 398 F.3d 76, 90 n.3 (1st Cir. 2005).

²²³ *Id.* at 90.

²²⁴ *Id.*

²²⁵ *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986).

B. The Broad Definition is More Applicable to a Variety of Employment Situations

Because the broad definition relies on several factors and presents a more holistic view of the employment situation, its application better suits the numerous employment structures that exist. First, the broad definition ensures that employers cannot avoid liability by delegating the authority to take tangible employment actions to specific departments within its organization.²²⁶ Critics of the narrow *Parkins* definition worry that employers will allow only human resources directors to hire, fire, promote, or demote employees; therefore, the bright-line rule would unfairly classify actual supervisors as mere co-employees for liability purposes.²²⁷ With the broad rule, courts may consider a number of employment situations and complicated fact scenarios while balancing the objective and subjective portions of the standard. This ensures a fundamentally more equitable result for the employee while still protecting the employer from *automatic* liability.

In a later Seventh Circuit decision, Judge Rovner concurred in the judgment to suggest that the narrow view is potentially “troubling” in some cases.²²⁸ She suggested that such a standard “does not comport with the realities of the workplace,” specifically where employers run a number of worksites and reserve “formal employment authority” to individuals at a central office.²²⁹ Such a hypothetical employment situation is a simplistic but effective way to consider the fit of a bright-line rule in structures that are not so clear-cut. As the world of employment becomes more creative and complicated in its structure, the practicability of a bright-line rule loses its appeal.

C. The Broad Definition More Effectively Ensures the Prevention of Harassment

The broad definition also better serves the purposes of Title VII, to prevent sexual harassment before it occurs and to thereby encourage employers to create anti-harassment policies by which employees may redress grievances.²³⁰ Critics of the broad definition maintain that it will leave employers vulnerable to an excessive risk of liability and dissuade

²²⁶ See Keith Muse, Note, *Seeking Supervision: An Analysis of Recent Trends in the Definition of ‘Supervisor’ Argument and a Recommendation for the Eleventh Circuit*, 22 GA. ST. U.L. REV. 491, 501 (2005).

²²⁷ *Id.*; see *Rhodes v. Ill. Dep’t of Transp.* 359 F.3d 498, 509–10 (7th Cir. 2004) (Rovner, J., concurring).

²²⁸ *Rhodes*, 359 F.3d at 509 (Rovner, J., concurring).

²²⁹ *Id.* at 510.

²³⁰ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998).

employers from creating more complex, yet beneficial, organizational schemes.²³¹ This reasoning is flawed. The broad definition of supervisor does not impute automatic liability to the employer; the Court has dealt with this issue sensitively by creating the *Ellerth/Faragher* affirmative defense.²³² By expanding the definition of supervisor, the disparity of power between employers and harassed victims levels out. Creating more “supervisors” does not unfairly subject employers to more liability; it simply increases the pressure on employers to strengthen the affirmative defense. In this way, the broad rule satisfies the preventive purposes of Title VII.

The effects of this theory have already been manifested in the Second Circuit. Various law firms and other companies have issued articles and client letters to ensure that organizations understand the implications of the court’s decision.²³³ The messages, concise and simplified, advise employers to prepare themselves accordingly to avoid litigation or liability.²³⁴ Though critics of the broad rule might construe the need for a warning as “severe,” a large part of the power for prevention lies in the hands of employers. The court created the defense

²³¹ Stephanie A.H. Blackman, Note, *The Faragher and Ellerth Problem: Lower Courts’ Confusion Regarding the Definition of “Supervisor”*, 54 VAND. L. REV. 123, 155–56 (2001).

²³² See *Burlington Indus., Inc.*, 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

²³³ See generally Jonathan C. Sterling, *New “Supervisor” Definition Expands Employer Liability for Sexual Harassment*, CONNECTICUT EMPLOYMENT LAW LETTER, Vol. 11, Issue 7 (July 2003) (“This new decision makes it even more important that your company have an established sexual harassment policy containing alternate reporting procedures and that the policy be distributed to all employees and followed.”); Linda B. Katz & Daniel Turinsky, *Co-Worker or Supervisor? The Answer Is Not As Obvious As It Seems*, THE METROPOLITAN CORPORATE COUNSEL, (July 2003) Northeast Edition, Sills Cummis Zuckerman; p. 20 (“The potential that employees who were not previously perceived as supervisors may now be held to be supervisors should factor prominently in formulating anti-harassment policies and in defining the scope, breadth, content and level of training employers provide to prevent harassment in the workplace. Training must reach as far as necessary to encompass all employees who may be defined as supervisors and should be geared appropriately for each level of employees to be trained.”); Lawrence Peikes, *Do You Know Who Your “Supervisors” Are?* CONNECTICUT LAW TRIBUNE (August 18, 2003), available at <http://www.wiggin.com/showarticle.aspx?show=4708>; Robert Kilroy (“This provides just one more reason for employers to train all of their employees regarding appropriate workplace behavior . . .”); *The Expanding Definition of “Supervisor” Creates Increased Risk of Liability to Employers*, LABOR AND EMPLOYMENT, Testa, Hurwitz & Thibeault, LLP (Fall 2003) (“As a practical matter, employers should view those employees who have control over other employees’ daily work as ‘supervisors,’ and ensure that such employees, along with traditional supervisors, receive adequate training to minimize the risk of errant and inappropriate behavior.”).

²³⁴ See, e.g., Jonathan C. Sterling, *New “Supervisor” Definition Expands Employer Liability for Sexual Harassment*, CONNECTICUT EMPLOYMENT LAW LETTER, Vol. 11, Issue 7 (July 2003).

with the intent that it would hold employees and employers more accountable for averting inappropriate conduct and the litigation that follows.²³⁵ The existence of an employer's preventive policy, however, is an element in both prongs of the defense; the employee's responsibility to reasonably take advantage of corrective opportunities depends on the employer's creation of such opportunities.²³⁶ Therefore, these warnings are useful; efforts to communicate the law to those who must follow it are paramount to effectuating the law's purpose.

While preventing harassment is unarguably beneficial to all parties, one author posits that the means available to employers in strengthening their affirmative defense are unrelated to the ultimate preventative purpose.²³⁷ In her article, Anne Lawton argues that the lower federal courts have allowed employers to use the *Ellerth/ Faragher* escape hatch by simply distributing policies and procedures and offering minimal training.²³⁸ Lawton calls this "file cabinet compliance," and provides empirical evidence suggesting that such adherence does nothing to actually prevent workplace harassment.²³⁹ The heart of harassment prevention, she argues, lies in changing the "organization's culture and the job gender context."²⁴⁰ This incongruous effect is not the employer's fault; instead, Lawton suggests that the blame lies with the Supreme Court for articulating the defense without foreseeing its ill effects, and with the lower federal courts for continuing to implement it as such.²⁴¹ Regardless of where the blame lies, this evidence renders the affirmative defense much less threatening to employers. If an employer can satisfy its burden with a procedurally sufficient yet substantively ineffective policy, this ultimately places the employee at a disadvantage once again.

Initially, this information seems to cut against the preventive arguments for the broad definition of supervisor; however, the definition and the results of Lawton's studies are not causally connected. It is not the finding of more supervisors that drives employers toward superficial compliance; in her opinion, it is the affirmative defense itself. Her evidence of misguided incentives therefore speaks more to the ultimate playing field of employee versus employer. That playing field, like any with inherent power disparities, must undergo a deeper cultural change in an effort to prevent the ills of harassment. Considering the employer

²³⁵ *Burlington Indus., Inc.*, 524 U.S. at 763.

²³⁶ *Id.* at 765.

²³⁷ Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004).

²³⁸ *Id.*

²³⁹ *Id.* at 198–99.

²⁴⁰ *Id.* at 198.

²⁴¹ *Id.*

versus employee context at large, the broad definition serves as the best counterbalance to the employer's ability to abuse its affirmative defense. Therefore, until the underlying standard or the courts' application of the defense shifts to an understanding of societal gender theory instead of rewarding mere "filing cabinet compliance," the courts should use their interpretive tools to construe supervisor broadly and ensure fairness.

VI. CONCLUSION

When sexual harassment occurs in modern employment scenarios, a broad definition of supervisor is necessary to properly allocate the burden onto the employer to defend itself from liability. The concerns of judicial efficiency and the prevention of yet-unseen abuses of the system should not outweigh the paramount goal of judicial fairness. Arguably, the presence of a circuit split on the question of what defines a supervisor in this context begs for ultimate resolution in the fairest and most efficient way. While a bright-line rule to clearly differentiate between supervisors and co-employees might ameliorate the difficulty of deciding harassment cases, a broad standard with a powerful incentive for prevention will keep such cases largely off the docket. Following a standard that more closely comports with both the Supreme Court and the EEOC's intentions, the lower federal courts can ensure uniformity and administrability even without adhering to a simplistic rule. Furthermore, a broader definition of supervisor may inspire employers to go beyond superficial "filing cabinet" compliance towards an effort to improve the employment context in a more socially responsible way.

Consider again the law school library's secretary. If she becomes a victim of sexual harassment, justice demands an analysis of her work relationships. What power did her harasser hold? And what bearing did that power have on the victim's mind? The court should not find the answer to liability in a negative response to a singular question. Therefore, any subsequent federal case should adopt the broader, multi-faceted definition of supervisor in determining vicarious liability for hostile work environment sexual harassment claims.