Title VII — Employer Liability for Supervisor Harassment — Vance v. Ball State University

Title VII of the Civil Rights Act of 1964[1] prohibits employers from "discriminat[ing] 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."[2] In the landmark case of *Meritor Savings Bank, FSB v. Vinson*,[3] the Supreme Court recognized for the first time that workplace harassment creating a hostile or offensive work environment is an actionable form of discrimination under Title VII.[4] After the lower courts struggled for more than a decade to situate workplace harassment within the standard frameworks for assessing vicarious employer liability,[5] the Court intervened in *Burlington Industries, Inc. v. Ellerth*[6] and *Faragher v. City of Boca Raton*,[7] adapting traditional agency principles to find that an employer's vicarious liability for discriminatory harassment turns on the status of the harasser — supervisor or coemployee — in relation to the victim.[8] Last Term, in *Vance v. Ball State University*,[9] the Court squarely addressed a question that *Ellerth* and *Faragher* had left open — who qualifies as a "supervisor" for purposes of the vicarious liability rule. Upholding the Seventh Circuit's definition of a "supervisor" as one who is "empowered by the employer to take tangible em-

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011).

[2] *Id.* § 2000e-2(a)(1).

[3] 477 U.S. 57 (1986).

[4] To constitute actionable discrimination, such harassment must be so severe or pervasive as "to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (internal quotation marks omitted).

[5] The *Meritor* Court held that because Title VII defines "employer" to include any "agent" thereof, Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 72. To that end, the courts of appeals largely adopted Professor Catharine MacKinnon's distinction between quid pro quo harassment and hostile environment harassment, *see* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979) (defining quid pro quo harassment as that "in which sexual compliance is . . . proposed to be exchanged . . . for an employment opportunity" and hostile environment harassment as that in which "sexual harassment is a persistent *condition of work*"), subjecting employers to strict vicarious liability only in the case of the former. *See, e.g.*, Davis v. City of Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997).

[6] 524 U.S. 742 (1998).

[7] 524 U.S. 775 (1998).

[8] *See Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 807–08. Though *Ellerth* and *Faragher* both dealt with sexual harassment, the lower courts have applied the *Ellerth*/*Faragher* liability framework to harassment committed on the basis of the other protected categories. *See, e.g.*, Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 n.9 (4th Cir. 2001) ("[T]he holdings [in *Ellerth* and *Faragher*] apply with equal force to other types of harassment claims under Title VII.").

[9] 133 S. Ct. 2434 (2013).

ployment actions against the victim,"[10] the Court rejected the more expansive definition favored by the Equal Employment Opportunity Commission (EEOC) and the dissent,[11] according to which a "supervisor" is authorized to undertake or recommend tangible employment decisions or to direct the employee's daily work activities.[12] The Court had previously held that Congress intended the Court to look to traditional agency principles for guidance in formulating vicarious liability rules under Title VII.[13] Notably, however, the Court's choice of definition in *Vance* was largely unmoored from such principles. In particular, both the majority and the dissent neglected an area of agency law that bears on the question of supervisory status in the context of vicarious employer liability: the superior-servant exception to the fellow-servant rule. Had the Court engaged with the common law in this area, it would have found an approach more in keeping with the *Vance* dissent.

Maetta Vance, an African American server and catering assistant employed by Ball State University's Dining Services, filed a series of internal harassment complaints against several Ball State employees beginning in 2005.[14] Among her various complaints, Vance alleged that Saundra Davis, a white woman in her department, addressed her in a threatening manner on two occasions (including one incident where she asked Vance, "Are you scared?" while affecting a Southern accent) and that Davis stood by and laughed while Davis's husband and daughter taunted Vance with racial slurs.[15] Dissatisfied with Ball State's response to her complaints, Vance filed suit against the university in 2006 in the United States District Court for the Southern District of Indiana and alleged, inter alia, "that she had been subjected to a racially hostile work environment" by Davis, her purported supervisor, in violation of Title VII.[16]

The district court granted Ball State's motion for summary judgment and concluded that because Davis had no authority to "hire, fire, demote, promote, transfer, or discipline" Vance,[17] she was not her supervisor and thus Ball State could not be held vicariously liable for the

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[10] *Id.* at 2439.

[11] *Id.* at 2443.

[12] *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Compl. Man. (CCH) ¶ 3116, at 3249 (June 18, 1999) [hereinafter *EEOC Guidance*].

[13] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

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

[15] Vance v. Ball State Univ., No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836, at *2, *5, *8 (S.D. Ind. Sept. 10, 2008). Davis filed a complaint of her own, alleging that Vance referred to her as "an evil fucking bitch" and splattered her with gravy. *Id.* at *2, *8.

[16] *Vance*, 133 S. Ct. at 2440.

[17] *Vance*, 2008 WL 4247836, at *12 (quoting Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)).

alleged harassment.[18] Under the *Ellerth* and *Faragher* framework, an employer's liability depends on the status of the harassing employee. When the harasser is the victim's coemployee, the employer is held to a negligence standard.[19] But when the harasser is the victim's supervisor, the employer is subject to vicarious liability. If such harassment culminates in a tangible employment action — including such acts as "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"[20] — the employer is strictly liable. If the harassment does not culminate in a tangible employment action, then the employer can avoid liability only by showing: (1) that it exercised reasonable care "to prevent and correct promptly" the harassment and (2) that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities" that the employer provided.[21] The Seventh Circuit affirmed the district court's decision, holding that even if Davis had the authority to "tell [Vance] what to do," Davis was not Vance's supervisor because the Seventh Circuit had "not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status."[22]

The Supreme Court affirmed. Writing for the majority, Justice Alito[23] began by rejecting Vance's contention that her preferred definition of "supervisor" accorded better with the commonplace understanding of supervisory status and its definition in other legal contexts.[24] Observing that the term "lacks a sufficiently specific meaning" in ordinary usage and that its meaning varies considerably across different statutes,[25] he concluded that any proposed definition for purposes of Title VII should be judged according to its ability to "fit[] within the highly structured framework" of *Ellerth* and *Faragher*.[26] Proceeding with that inquiry, Justice Alito argued that the Seventh Circuit's definition was consistent with the Court's characterization of the status of the alleged harassers in *Ellerth* and *Faragher*. He granted that the authority to direct an employee's daily tasks might assist the harasser in achieving his discriminatory ends. But because "most

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[18] *See id.*

[19] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998); *see also Vance*, 2008 WL 4247836, at *14.

[20] *Ellerth*, 524 U.S. at 761.

[21] *Id.* at 765; *Faragher*, 524 U.S. at 807–08.

[22] Vance v. Ball State Univ., 646 F.3d 461, 470 (7th Cir. 2011).

[23] Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Thomas also wrote a brief concurrence stating that although he believed that *Ellerth* and *Faragher* were wrongly decided, he had joined the majority opinion because it "provide[d] the narrowest and most workable rule." *Vance*, 133 S. Ct. at 2454 (Thomas, J., concurring).

[24] *Id.* at 2444 (majority opinion).

[25] *Id.*

[26] *Id.* at 2446.

workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation," the harasser's reliance on such assistance is not sufficient to establish vicarious liability.[27]

Pointing to language in *Ellerth* identifying supervisors as "a distinct class of agent" empowered "to make economic decisions affecting other employees under his or her control,"[28] Justice Alito drew the implication that "the authority to take tangible employment actions is the defining characteristic of a supervisor."[29] He then noted that because the *Ellerth*/*Faragher* rule was meant to be "workable" and to incorporate both the interests of employers and employees, the definition of "supervisor" the Court had adopted — "one that can be readily applied" — was preferable to the EEOC's.[30] The vagueness of the EEOC's alternative definition, he argued, was reflected in the fact that Vance and the Government disagreed over whether Davis actually satisfied it.[31] By contrast, the Court's standard would make it easier to resolve the issue of supervisory status as a matter of law and would present juries with a simpler inquiry.[32]

Justice Alito rejected the dissent's suggestion that the more restrictive definition would shield employers from liability, noting that they would still be held to a negligence standard in the case of a nonsupervisory harasser.[33] He further argued that the dissent's standard, which effectively presupposed a "highly hierarchical management structure," was out of touch with the reality of the modern workplace.[34] Responding to various real-world examples of workplace harassment on which the dissent relied, Justice Alito doubted that the outcome in those cases would turn on the supervisory status of the harassers.[35] Finally, with respect to the case at hand, Justice Alito held that Davis was not Vance's supervisor and that there was "no evidence" that Davis would satisfy even the more liberal EEOC standard.[36]

Justice Ginsburg dissented.[37] She began by arguing that the majority's standard failed to accord with the Court's precedent. In *Faragher*, for instance, the Court had characterized one of the harassers as a supervisor even though there was no evidence that his au-

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[27] *Id.* at 2447–48 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998)) (internal quotation marks omitted).

[28] *Id.* at 2448 (emphasis omitted) (quoting *Ellerth*, 524 U.S. at 762).

[29] *Id.*

[30] *Id.* at 2449.

[31] *Id.*

[32] *Id.* at 2450.

[33] *Id.* at 2451.

[34] *See id.* at 2452 (observing that in many "modern organizations . . . it is common for employees to have overlapping authority with respect to the assignment of work tasks").

[35] *Id.* at 2452–53.

[36] *Id.* at 2453–54.

[37] Justice Ginsburg was joined by Justices Breyer, Sotomayor, and Kagan.

thority extended beyond assigning and overseeing daily work tasks.[38] Several years later, the Court treated as supervisors a group of employees who lacked the authority to discharge and demote the victim but oversaw the day-to-day operations of her workplace.[39] Justice Ginsburg noted that in each instance the Court had rested its determination on a uniform premise: a superior had "t[aken] advantage of the power vested in [him]" as an agent of the employer.[40] To "fortify [her] conclusion," Justice Ginsburg proceeded to describe the facts of four real-life examples,[41] where in each case "a person vested with authority to control the conditions of a subordinate's daily work life used his position to aid his harassment."[42] Under the Court's restrictive definition, Justice Ginsburg argued, none of those cases could give rise to vicarious liability.[43] The EEOC's standard, on the other hand, aptly encompassed such cases and was owed *Skidmore* deference.[44]

Justice Ginsburg then questioned the majority's claim to simplicity and administrability, noting that Justice Alito's frequent hedging and qualifying revealed a standard appreciably more intricate and fact-intensive than the majority suggested.[45] For instance, the Court included as "supervisors" at least some of those employees whose authority is limited to *recommending* a tangible employment decision.[46] In addition, an individual who has the authority to reassign an employee in a way that has possible economic consequences (such as "foreclosing . . . eligibility for promotion") might also qualify as a "supervisor."[47] Such hedging prompted Justice Ginsburg to question "just how 'clear' and 'workable' the Court's definition is."[48]

Justice Ginsburg predicted that the Court's definition of "supervisor" will "hinder efforts to stamp out discrimination in the workplace."[49] While she agreed that Davis probably would not qualify as

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[38] *Vance*, 133 S. Ct. at 2457–58 (Ginsburg, J., dissenting). The plaintiff in *Faragher* alleged that a lower-level supervisor had threatened her with yearlong toilet-cleaning duties unless she submitted to his advances. *See id.* at 2457.

[39] *Id.* at 2458 (citing Pa. State Police v. Suders, 542 U.S. 129, 140 (2004)).

[40] *Id.*

[41] *Id.* at 2459–60.

[42] *Id.* at 2460.

[43] *Id.*

[44] *Id.* at 2461.

[45] *Id.* at 2462–63.

[46] *See id.* at 2446 (majority opinion) (noting that a supervisor's authority to take tangible employment actions may be subject to "ministerial approval"); *id.* at 2446 n.8 ("[T]angible employment actions can be subject to . . . approval [by higher management]."); *id.* at 2452 (noting that an employer who delegates authority to take tangible employment actions to a small, centralized group of employees "may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies").

[47] *Id.* at 2447 n.9.

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

[49] *Id.* at 2464.

Vance's supervisor even under the EEOC standard,[50] she criticized the majority for placing the burden of proving employer negligence on victims of harassment whenever their harasser "lacks the power to take tangible employment actions."[51] Such a result is particularly troubling, in Justice Ginsburg's view, because vicarious liability serves to incentivize employers to "provide preventative instruction" to employees.[52] She concluded by inviting Congress to intervene in correcting the Court's error,[53] just as she had done six years earlier in *Ledbetter v. Goodyear Tire & Rubber Co.*[54]

Both the majority and the dissent acknowledged the importance of looking to agency law for guidance in formulating vicarious liability rules under Title VII.[55] But neither mentioned an agency law principle that offers relevant guidance: the superior-servant exception to the fellow-servant rule, the rule that limited employers' liability for injuries to a worker caused by the negligence of a coworker prior to the adoption of workers' compensation laws.[56] Had the Court examined the exception, it would have found that in most of the states that recognized it, an employee's status as a superior servant did not depend on whether that employee had the authority to hire and fire the injured party. Instead, courts looked to the facts and circumstances of each case to determine whether the tortfeasor had been granted the power to control the injured employee and whether that control was implicated in the tort. For this reason, the common law understanding of superior servants prefigures the dissent's context-sensitive inquiry, which asks whether the harassing employee's authority was "of a sufficient magnitude so as to assist [the employee] . . . in carrying out the harassment."[57] While the common law is by no means dispositive of the Court's choice, it does offer relevant guidance that both sides failed to address.

Beginning with *Meritor*, the Court has stressed the importance of looking to traditional agency principles in determining vicarious employer liability under Title VII: "Congress wanted courts to look to agency principles for guidance in this area," even though "such common-law principles may not be transferable in all their particulars

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[50] *Id.* at 2465.

[51] *Id.* at 2464.

[52] *Id.*

[53] *Id.* at 2466.

[54] 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).

[55] *See Vance*, 133 S. Ct. at 2441; *id.* at 2455–56 (Ginsburg, J., dissenting).

[56] *See generally* Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579 (1984) (tracing the historical genesis of the fellow-servant rule and the superior-servant exception).

[57] *Vance*, 133 S. Ct. at 2461 (Ginsburg, J., dissenting) (omission in original) (quoting *EEOC Guidance*, *supra* note 12, at 3248) (internal quotation marks omitted).

to Title VII."[58] To that end, the Court in *Ellerth* and *Faragher* invoked and adapted the "master-servant" rule embodied in § 219 of the Restatement (Second) of Agency,[59] which provides that a master is subject to liability for the torts of his servants committed in the scope of their employment but not for torts committed outside that scope unless, inter alia, the servant "was aided in accomplishing the tort by the existence of the agency relation."[60]

In relying on § 219 for guidance, however, the Court in *Ellerth* and *Faragher* ignored the fact that beginning in the mid-nineteenth century, courts rejected the master-servant rule when employees were injured by their coworkers.[61] Under the fellow-servant rule, which became "firmly entrenched in nearly every American jurisdiction" by 1880,[62] an employee could not recover against his employer for injuries caused by the negligence of a coworker arising out of the scope of the tortfeasor's employment.[63] But as the fellow-servant rule became settled law across the nation, some states recognized an exception to employer immunity when the tortfeasor was a servant who had been granted the authority to control other servants and the tort arose out of that control. This rule — known as the superior-servant or vice-principal exception — was adopted in one form or another by courts in at least twenty-two states at various times from the mid-nineteenth to the early twentieth centuries,[64] before the common law of workplace injury was supplanted by state workers' compensation statutes.[65]

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[58] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

[59] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758–60 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 797 (1998).

[60] RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

[61] Comment, *supra* note 56, at 579.

[62] *Id.*

[63] For the leading case, see *Farwell v. Boston & Worcester Railroad Corp.*, 45 Mass. (4 Met.) 49 (1842).

[64] *See* FRANCIS M. BURDICK, THE LAW OF TORTS 208–09 (3d ed. 1913) (collecting cases from fifteen states: Arkansas, Georgia, Illinois, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Carolina, Ohio, South Carolina, Tennessee, Texas, Utah, and Washington). Subsequent to the publication of this treatise, Oklahoma began recognizing the exception. *See* Ardmore Oil & Milling Co. v. Barner, 179 P. 932, 934 (Okla. 1919). Other states adopted a more restricted version of the exception, holding employers vicariously liable when an employee was injured in connection with a risk, *not incident to his employment*, imposed on him by a superior servant with authority to control his work. *See* 4 C. B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT 3994–98 (1913) (collecting cases from six states: Colorado, Indiana, Michigan, Rhode Island, Vermont, and Virginia).

[65] *See generally* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982). Workers' compensation statutes, adopted in every state by 1948, "fundamentally altered" the law of workplace injury by, inter alia, abolishing the fellow-servant rule for covered employees. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 70 (1967). Nonetheless, the fellow-servant rule continues to have some viability in industries (typically farming) not covered by the state's workers' compensation statute. *See* 27 AM. JUR. 2D *Employment Relationship*

Notably, most of the states that recognized the superior-servant exception held that an employee's status as a superior servant did not depend on whether that employee had the authority to hire or discharge the injured party.[66] Indeed, according to a treatise published in 1907, Texas was alone in requiring such authority.[67] The following principle emerges from the clear thrust of these cases: where an em-

§ 343 (2004). *But see* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1252 n.132 (1991) (observing that the fellow-servant rule is "looked upon with disfavor by courts even when it still might apply").

[66] *See, e.g.*, *Illinois*: Wilson v. Counsell, 182 Ill. App. 79, 82–85 (1913) (holding that an employee with authority to direct injured employees "as to all matters relating to the manner in which the work should be done, and what work should be done," *id.* at 84, but with "no power to hire or discharge," *id.* at 82, qualified as a superior servant or vice principal); *Kansas*: Atchison & E. Bridge Co. v. Miller, 80 P. 18, 24 (Kan. 1905) ("[W]henever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties above mentioned [all involving the provision of a safe work environment] . . . then such officer, agent, or employé stands in the place of the master, . . . and the master is liable for his acts or his negligence . . . ." (quoting Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632, 644 (1883))); *Louisiana*: Evans v. La. Lumber Co., 35 So. 736, 738 (La. 1903) ("[T]he master is liable when the work in which he is employed requires that one of the employés shall have the direction and control of the servant placed under him, although he may not have the independent power . . . to employ and discharge."); *Missouri*: Smith v. Am. Car & Foundry Co., 99 S.W. 790, 791 (Mo. Ct. App. 1907) ("There is no ironclad rule by which to determine [whether an employee is a fellow servant or a vice principal]. Its solution does not depend upon [the employee's] rank, his power to hire and discharge employés, or the fact that he occasionally worked with the men, but upon the authority, if any, he had over the workmen, and their duty to obey his orders and follow his directions . . . ."); *Nebraska*: Union Pac. Ry. Co. v. Doyle, 70 N.W. 43, 46 (Neb. 1897) ("[N]or does it follow that one employé is not a vice principal, as to his co-employés, because he is not vested with authority to hire and discharge them. The most satisfactory evidence that one is, as to his co-employés, a vice principal, is that his co-employés are under his supervision and his control, — subject to his order and direction."); *North Carolina*: Lamb v. Littman, 44 S.E. 646, 647 (N.C. 1903) (noting that "[i]t is not absolutely necessary for a vice principal to have the authority to hire and discharge" so long as the employee reasonably believes that failure to comply with his superior's orders will result in discharge); *Oklahoma*: *Barner*, 179 P. at 934 ("[I]f it were a fact that he never employed any laborer and never discharged any, and had no authority to hire or discharge any, or that he was forbidden to exercise any such authority, the fact remains undisputed that he was foreman of the work in charge and directed the manner of the work, and that the master itself, the milling company, spoke through him in giving directions to the laborers."); *Rhode Island*: Hanna v. Granger, 28 A. 659, 660 (R.I. 1894) ("[A] servant is a vice principal only when he stands in place of the principal with reference to the principal's duty [to ensure workplace safety], or in the exercise of the principal's functions."); *Washington*: O'Brien v. Page Lumber Co., 82 P. 114, 115 (Wash. 1905) ("It is true there is no evidence that the sawyer had power to hire men or to discharge them except as above stated; but we held . . . that 'the power of superintendence and control is the test' in such cases." (quoting Allend v. Spokane Falls & N. Ry. Co., 58 P. 244, 248 (Wash. 1899))).

[67] J. Breckinridge Robertson & Clark A. Nichols, *Master and Servant*, *in* 26 CYCLOPEDIA OF LAW AND PROCEDURE 941, 1308 n.50 (William Mack ed., 1907) ("In [Texas] the rule is different from that in any other state in that a superior servant is a fellow servant unless he has the power to employ and discharge the injured servant."). North Carolina, although not requiring that superior servants have the power to discharge, did require that the injured employee reasonably believe that failure to comply with the superior's orders would result in discharge. *See Lamb*, 44 S.E. at 647.

ployer's vicarious liability depends on the tortfeasor's "superior" status, as defined *in relation to the injured employee*,[68] that status does not depend on the tortfeasor's having the authority to hire or discharge the injured employee.

What mattered, according to courts applying the exception, was whether the tortfeasor had employer-conferred control over the injured employee and whether that control was implicated in the tort. *Allend v. Spokane Falls & Northern Railway Co.*[69] provides an illustrative example. A railway laborer sustained injuries in an explosion allegedly caused by the negligence of his foreman, who had been vested with the "power to direct his work, labor, and movements."[70] The court found that the employer, by granting the foreman the power to direct and control the employee, had effectively offloaded its duty "to provide a reasonably safe place in which the respondent was to work."[71] For this reason, the employer was vicariously liable for the foreman's torts committed in the exercise of his supervisory authority, even though the foreman lacked the authority "to discharge or employ workmen."[72] The court's reasoning bears a notable resemblance to Justice Ginsburg's in *Vance*, who for purposes of vicarious liability in the harassment context would look to the harasser's "authority to control the conditions of a subordinate's daily work life" and whether the harasser used that control "to aid his harassment."[73]

In addition, courts applying the superior-servant exception typically relied on context, not bright-line rules, to determine whether an employee qualified as a superior servant.[74] This fact-intensive inquiry

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[68] Some jurisdictions recognized versions of the superior-servant or vice-principal exception but did not define the status of "superior servant" or "vice principal" in relation to the injured employee. In *Northern Pacific Railroad Co. v. Peterson*, for instance, the Supreme Court held that "the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department . . . .'" 162 U.S. 346, 355 (1896) (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 381 (1893)). But this decision has little relevance to *Vance*. For one, because *Peterson* involved the creation of general federal common law before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the case now stands as one source of guidance rather than binding precedent. *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4518 (2d ed. 1996). In addition, the *Peterson* holding offers no guidance in resolving the central dispute in *Vance* since Justices Alito and Ginsburg agreed that supervisory status must be defined *in relation to* the injured employee.

[69] 58 P. 244.

[70] *Id.* at 244.

[71] *Id.* at 248.

[72] *Id.*

[73] *Vance*, 133 S. Ct. at 2460 (Ginsburg, J., dissenting).

[74] *See, e.g.*, Jolly v. Smith, 65 S.W.2d 908, 909 (Ark. 1933) (noting that the vice-principal exception is "wholly dependent upon the facts and circumstances in each particular case"); Radtke v. St. Louis Basket & Box Co., 129 S.W. 508, 515 (Mo. 1910) (noting that under Illinois law, the question of whether an employee acted as a fellow servant or vice principal is "a question for the jury to decide from all the circumstances of the case"); Union Pac. Ry. Co. v. Doyle, 70 N.W. 43, 44 (Neb. 1897) ("Whether one of several employés of the same master is a vice principal . . . is a mixed

seems to prefigure the *Vance* dissent's preferred approach to determining supervisory status under Title VII. Noting that the question of supervisory status is "not susceptible to mechanical rules and on-off switches,"[75] Justice Ginsburg argued that the answer "depends on a constellation of surrounding circumstances, expectations, and relationships"[76] and that "context is often key."[77]

To be sure, the superior-servant exception contemplates negligent acts whereas harassment is an intentional tort. But that limitation says less about the inner logic of the superior-servant exception and more about its role under traditional common law: an exception to the fellow-servant rule, which itself was framed in terms of negligence.[78] The theoretical basis for the superior-servant exception, however, does not depend in any deep sense on a determination of negligence: what matters is whether the tort arises out of the tortfeasor's authorized control over the details of the injured employee's work, control that is the touchstone of the master-servant relationship.[79]

Of course, nothing in the common law pertaining to the superior-servant exception compels a choice of definition in *Vance*. For one, the superior-servant exception contemplates acts arising out of the scope of the tortfeasor's employment, while harassment arguably falls outside (or at least not straightforwardly within) that scope.[80] More importantly, Congress has directed the Court to look to traditional agency principles for *guidance*, not controlling precedent, and those principles must be considered in tandem with relevant policy concerns.[81] Still, the superior-servant exception provides a useful starting point for analysis. Had the Court addressed the common law in this area, it would have found an approach that supports the *Vance* dissent.

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question of law and fact; and . . . we are not prepared to lay down any set rule as a test for determining when two or more employés are fellow servants, or one of them a vice principal. The relationship . . . is to be determined by the particular facts and circumstances in evidence . . . .").

[75] *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).

[76] *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)) (internal quotation marks omitted).

[77] *Id.* at 2462.

[78] *See* Comment, *supra* note 56, at 579 ("[The fellow-servant rule] relieved employers of liability for injuries negligently inflicted by any employee upon a 'fellow servant.'").

[79] *See* LABATT, *supra* note 64, at 4204–05 ("[T]he power of controlling the details of the work to be done is . . . the very element which serves to distinguish one who is, from one who is not, a master as regards the injured person.").

[80] *But see* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 141–43 (1995) (arguing that harassment can in fact fall within the scope of one's employment on traditional agency principles); *see also* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 855 (1991) (noting that supervisors are responsible for "defin[ing] the acceptable working conditions of the workplace").

[81] *But see* Phillips, *supra* note 65, at 1268 (arguing that policy issues ought to weigh more heavily than agency principles in this context).