The Faragher and Ellerth Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor"

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NOTES

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I. INTRODUCTION

Employment discrimination law in the United States changed drastically as a result of two Supreme Court decisions handed down in June of 1998. In both Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth, the Court held that employers should be held vicariously liable for the unlawful actions of supervisory employees in Title VII hostile environment sexual harassment cases. Although these decisions revised and clarified the proper standard of employer liability in hostile environment claims, they also have been a source of confusion for lower courts attempting to determine exactly which employees qualify as supervisors. Consequently, lower courts have inconsistently decided which employers should be held vicariously liable in hostile environment sexual harassment suits.

In early Title VII sexual harassment cases, federal courts articulated a distinction between quid pro quo and hostile environ-

3. Ellerth, 524 U.S. at 766; Faragher, 524 U.S. at 807. As several scholars have thoroughly addressed a harasser's individual liability in the Title VII context, this Note will not discuss that issue. See generally Cristopher Greer, "Who, Me? A Supervisor's Individual Liability for Discrimination in the Workplace, 62 FORDHAM L. REV. 1835 (1994).
4. Compare Parkins v. Civil Constructors, Inc., 163 F.3d 1027, 1033-34 (7th Cir. 1998) (holding that an employer should be held vicariously liable for the actions of employees who have the power to hire or fire the plaintiff, or significantly control other decisions affecting the plaintiff's employment), with Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (holding that an employer should be held vicariously liable for the harassing actions of a broader class of employees, even if the employees have authority only to delegate duties, prepare performance evaluations, or make recommendations to discipline the plaintiff).
5. Quid pro quo harassment is defined by an exchange between the victim and the harasser: "[T]he woman must comply sexually with the harasser's demands or forfeit an employment opportunity." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979).
ment sexual harassment. Despite the distinction between forms of sexual harassment, courts appropriately applied a uniform definition of the term supervisor. Nearly all cases defined a supervisor as a person retaining significant input into hiring or firing determinations or any other decisions affecting the conditions of the plaintiff's employment.

As sensible as this definition may seem, the Supreme Court did not employ it expressly in the Faragher and Ellerth decisions. Instead, the Court proffered an extremely ambiguous definition for the term supervisor. In both cases, the Court defined a supervisor as someone "with immediate (or successively higher) authority over the employee." This vague definition has sparked much confusion in subsequent hostile environment cases. Some courts believe that the Supreme Court's vague definition was not meant to overrule the previously articulated definition of supervisor. These courts have continued to apply the traditional "hiring, firing, or conditions of employment" definition. Other courts, however, have interpreted the Supreme Court's "immediate (or successively higher) authority" language as an intentional broadening of the traditional meaning of supervisor. These courts have effectively considered nearly any employee higher than the plaintiff on the company's organizational chart to be a supervisor.

At first glance, this debate seemingly involves mere word parsing, raising issues of perhaps little consequence. The definition of supervisor, however, could have important practical effects in

6. Hostile environment sexual harassment is defined by "unwanted sexual advancements ... like being constantly felt or pinched, visually undressed and stared at ... but never promised or denied anything explicitly connected with [conditions or terms of a] job." Id. at 40. This form of sexual harassment is also called "condition of work" harassment. See id.

7. These terms first appeared in academic literature. See id. at 32, 40. The Supreme Court acknowledged this distinction in Meritor Savings Bank, FSB v. Vincon, 477 U.S. 57, 65 (1986).

8. See, e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (applying the definition of supervisor used in both quid pro quo and hostile environment actions).

9. See, e.g., id.


11. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

12. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

13. See, e.g., Parkins v. Civil Constructors, 163 F.3d 1027, 1033-34 n.3 (7th Cir. 1998).


15. See, e.g., id.
future sexual harassment cases. If lower courts apply the Supreme Court's definition literally, corporations could be creating liability nightmares simply by appointing an employee as "team leader," even if the new title carries little or no additional responsibility. Additionally, applying a broader definition would be inconsistent with employment law claims arising under the Americans with Disabilities Act and the Age Discrimination in Employment Act, because cases decided under these similarly worded statutes have used the traditional definition of supervisor. Because the Supreme Court did not intend to overrule the traditional "hiring, firing, or conditions of employment" definition of supervisor, lower courts should apply this traditional definition in future Title VII cases.

This Note begins in Part II by providing an overview of Title VII, prior case law defining the term supervisor, and the Faragher and Ellerth cases. Part III will explain the current division among lower courts regarding the appropriate definition of supervisor to be applied in hostile environment claims. Part IV will then explore the benefits of using the traditional "hiring, firing, or conditions of employment" definition by examining the plain language of Title VII and the practical implications of this narrower definition. This Section will also explore the benefits of retaining the traditional definition for purposes of stare decisis, and it finally will discuss the reasons why the traditional definition is more consistent with case law decided under the American with Disabilities Act and the Age Discrimination in Employment Act.

16. Although Title VII uniformly applies to workplace discrimination based upon race, sex, and religion, the issue of what constitutes a supervisor has predominantly arisen in the hostile environment sexual harassment context. This issue arises in hostile environment cases more frequently than quid pro quo harassment cases. In the quid pro quo scenario, conditions of the victim's employment have been tangibly altered (or the victim has at least been threatened with such consequences). Therefore, courts can reasonably assume that the harasser does indeed occupy a supervisory position. Reasons why this issue has not frequently been litigated in the context of racial or religious discrimination are uncertain. This is not to say, however, that the issue will not be litigated in the future. See Alan R. Kabat et al., Racial and Sexual Harassment Employment Law, 1997 A.L.I.-A.B.A. COURSE OF STUDY 547, 601 (1999). Because Title VII clearly encompasses such a broad range of workplace discrimination, judicial determinations regarding the definition of supervisor are doubly important to employers.


II. LEGAL BACKGROUND

A. Title VII

Title VII of the Civil Rights Act of 196419 broadly prohibits discrimination in employment, including discrimination based upon sex.20 Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise 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."21

The text of Title VII does not specifically mention either quid pro quo or hostile environment sexual harassment. The Equal Employment Opportunity Commission,22 however, has issued a series of Title VII Interpretive Guidelines, which make clear that both forms of sexual harassment are actionable under the statute.23 Although the main purpose of Title VII is to prevent employers from discriminating against employees in the workplace, this Note will focus on the statute's definitional section. Section 2000e(b) defines the term "employer."

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more

21. Id.
22. The Equal Employment Opportunity Commission ("EEOC") is a federal agency responsible for a number of functions. First, the EEOC is responsible for reviewing all Title VII complaints and granting "right to sue" letters to those appearing to be valid. See 29 C.F.R. § 1604.19(a) (1997). Second, it has the power to develop uniform standards and policies defining the nature of discrimination based upon race, religion, or sex. See Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978). It is also responsible for issuing a series of Interpretive Guidelines intended to assist courts in interpreting federal discrimination statutes. See, e.g., 29 C.F.R. § 1604.11(a).
23. See id.; Misty L. Gill, Note, The Changed Face of Liability for Hostile Work Environment Sexual Harassment: The Supreme Court Imposes Strict Liability in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth, 32 CREIGHTON L. REV. 1651, 1669 (1999). Title VII does not expressly grant the EEOC the authority to issue guidelines interpreting its text. The EEOC, however, has nonetheless issued such Interpretive Guidelines, and some scholars have argued that Title VII impliedly grants the EEOC such authority. See, e.g., Rebecca Hanner White, The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation, 1995 UTAH L. REV., 51, 92-107 (1995).
calendar weeks in the current or preceding calendar year, and any agent of such person. 24

By including "agents" within the definition of employer, Congress expressly incorporated the principle of respondeat superior into the text of Title VII. 25 Accordingly, a harasser need not necessarily be an owner or president of a company in order for the company to be legally responsible for sexual harassment.

B. Pre-Faragher Case Law Defining the Term "Supervisor"

Although courts have generally held employers liable for their supervisors' quid pro quo harassment, courts did not always allow plaintiffs to recover for hostile environment sexual harassment. In Barnes v. Costle, the Court of Appeals for the D.C. Circuit was the first to hold that hostile environment sexual harassment is a form of discrimination against women that violates Title VII. 26 Since the Barnes decision, federal courts have consistently imputed liability to employers for both quid pro quo and hostile environment sexual harassment. 27 Traditionally, though, federal courts have treated the two types of claims differently. While holding employers vicariously liable for quid pro quo harassment in the workplace, 28 most courts have employed a negligence standard 29 in hostile envi-

25. See Cianci v. Pettibone Corp., No. 95-C-4906, 1997 WL 182279, at *4 (N.D. Ill. Apr. 8, 1997). Although the text of Title VII uses the term "agent," courts have instead utilized the word "supervisor." See, e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993). This Note will follow courts' leads and use the term "supervisor" rather than "agent." For Title VII purposes, however, the two terms are identical in meaning.
26. Barnes v. Costle, 561 F.2d 983, 993-94 (D.C. Cir. 1977). In Barnes, an administrative assistant for the Environment Protection Agency claimed the director repeatedly asked her for sexual favors at work. Id. at 984-85.
29. In practice, courts have used a variety of standards for hostile environment cases, ranging from an "aided by the agency relationship" standard to a negligence standard. See Elizabeth M. Brama, Note, The Changing Burden of Employer Liability for Workplace Discrimination, 83 MINN. L. REV. 1481, 1494-96 (1999); see also Michael J. Phillips, Employer Sexual Harassment Liability Under Agency Principals: A Second Look at Meritor Savings Bank, FSB v. Vincent, 44 VAND. L. REV. 1229, 1237-38 (1991). For reasons of clarity and simplicity, however, this Note will refer to the standard simply as one of negligence. In the hostile environment context, an employer is negligent only "if it knew or had reason to know of [a supervisor's] misconduct and failed to take appropriate corrective action." Daulo v. Commonwealth Edison, 938 F. Supp. 1398, 1403 (N.D. Ill. 1996) (applying this standard in the context of racial discrimination). An employer's knowledge that a supervisor had previously harassed other employees is highly rele-
vironment cases. These courts have generally reasoned that vicarious liability simply makes more sense in quid pro quo cases, where harassers rely upon their employer-given authority to hire, fire, or promote in order to harass subordinate employees. In the hostile environment context, however, harassers act outside the scope of their authority; they are acting in their own capacities rather than utilizing their employer-delegated authority to hire, fire, or promote other employees.

Traditionally, courts placed a heavier emphasis upon sexual harassment by an employer's agents or supervisors than harassment by a plaintiff's co-employees. Utilizing traditional agency principals to determine how much authority the employer delegated to the harasser, they ascertained the appropriate standard of liability accordingly. If a harasser was entrusted with enough authority to be considered a supervisor, plaintiffs benefited from a lower sexual harassment liability standard. Significantly, though, because neither Title VII nor the EEOC Guidelines had explained how much authority was necessary before an employee could be classified as a supervisor, courts were forced to make this determination themselves.


1. The “Hiring, Firing, or Conditions of Employment” Definition

Before the Supreme Court handed down the Faragher and Ellerth decisions, courts generally agreed that in order to qualify as a supervisor, an employee must exercise “significant control over the plaintiff’s hiring, firing, or conditions of employment.”\(^{37}\) The Fourth, Fifth, Sixth, Seventh, and Tenth Circuits expressly adopted this definition.\(^{38}\) Justice Marshall’s concurrence in the Supreme Court’s Meritor Savings Bank, FSB v. Vinson decision also implicitly adopted this definition.\(^{39}\)

An excellent illustration of courts’ application of this definition is the Daulo v. Commonwealth Edison case from the Northern District of Illinois.\(^{40}\) In Daulo, a mechanic employed by ComEd...
claimed another employee had harassed him because of his race.\textsuperscript{41} The alleged harasser held the title of "supervisor," which was the lowest management level position at ComEd.\textsuperscript{42} The district court noted that in order for ComEd to be held liable for the supervisor's actions, the supervisor "must be sufficiently 'high up' in the corporate hierarchy to be considered a part of its 'decision-making level.'"\textsuperscript{43} Applying the traditional definition of "supervisor," the court held that the mechanic had the burden of proving that the supervisor exercised significant control over his hiring, his firing, or the conditions of his employment.\textsuperscript{44}

The court held that the mechanic did not prove that the supervisor fit within the traditional definition.\textsuperscript{45} It noted that although the defendant held the title of supervisor, he did not have the powers of most supervisory employees.\textsuperscript{46} In particular, the supervisor did not have the authority to hire, fire, demote, or promote any other employee.\textsuperscript{47} While the supervisor did have the power to make recommendations regarding hiring and firing decisions, the court reasoned that such powers are an inherent part of virtually any supervisor's job responsibilities, and such power alone does not impute Title VII liability to employers.\textsuperscript{48} Finally, the court held that the supervisor's power to issue informal warnings to lower level employees did not qualify him as a supervisor for Title VII purposes.\textsuperscript{49} Therefore, the court refused to impose any liability upon ComEd.\textsuperscript{50}

The \textit{Daulo} case is just one of many that expressly adopted what is now known as the traditional definition of supervisor. Numerous other federal district and circuit courts have also adopted this definition.\textsuperscript{51}

\begin{thebibliography}{51}
\bibitem{41} Id. at 1392-94.
\bibitem{42} Id. at 1392.
\bibitem{43} Id. at 1401.
\bibitem{44} Id. (citing Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)).
\bibitem{45} Id.
\bibitem{46} Id. The court noted that the supervisor was "nothing more than the lowest cog in ComEd's managerial machine." \textit{Id}.
\bibitem{47} Id.
\bibitem{48} Id.
\bibitem{49} Id.
\bibitem{50} Id.
2. The Paroline v. Unisys Corp. Twist

Although nearly all pre-Faragher cases adhered to the traditional "hiring, firing, or conditions of employment" definition, a few courts arguably broadened this definition. The case most frequently cited for broadening the standard definition of supervisor is Paroline v. Unisys Corp. 52

In Paroline, a word processor sued Unisys after another employee, Moore, made improper sexual advances toward her both on and off of the job. 53 The court recognized that in order to hold Unisys vicariously liable for Moore's actions, the word processor first had to prove that Moore was a supervisor. 54 After acknowledging the traditional "hiring, firing, or conditions of employment" definition of supervisor, the Fourth Circuit clarified the definition in two respects. 55 First, it held that supervisory employees need not possess ultimate authority to hire or fire in order to be considered supervisors for Title VII purposes. 56 Secondly, it noted that an employee need not hold the title of supervisor as long as "the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff." 57

The court held that Moore could qualify as a supervisor for Title VII purposes. 58 It emphasized that although Moore did not have the ultimate power to make hiring and firing decisions, he did have significant input into such decisions. 59 For example, Moore participated in the word processor's interview, 60 recommended that she be hired, and personally gave her work assignments on at least one occasion. 61 Therefore, the court allowed the word processor to proceed in her suit against Unisys. 62

52. Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989). The main issue before the Paroline court was whether an employee (in addition to the employer) can be held individually liable in sexual harassment suits. This issue, however, is beyond the scope of this Note. See supra note 3.
53. Paroline, 879 F.2d at 102-03.
54. Id. at 104 (using the term "employer").
55. See id.
56. Id.
57. Id.
58. Id. (refusing to grant Unisys Corporation's motion for summary judgment).
59. Id.
60. The facts of the case show that Moore asked the word processor at least one question during her interview, thereby demonstrating that he was not a passive bystander in the interviewing process. Id. at 103.
61. Id. at 104.
62. Id. at 102.
The *Paroline* case arguably broadened the traditional definition of supervisor. While most courts have not expressly required that supervisory employees possess ultimate authority over hiring and firing, others have held that the power to merely recommend hiring or firing is not enough to qualify an employee as a supervisor for Title VII purposes. At first glance, then, *Paroline* appears to conflict with previous cases like *Daulo*. Under *Paroline*, an employee with the power to recommend that the plaintiff be hired or fired could be classified as a supervisor. Under *Daulo*, however, the power to make recommendations regarding hiring and firing is insufficient to establish supervisory status.

A closer examination of prior cases, however, indicates that *Paroline* did little to alter or expand the traditional “hiring, firing, or conditions of employment” definition of supervisor. Nearly all the cases decided prior to *Paroline* noted that the accused employee must simply exercise significant control over hiring and firing decisions regarding the plaintiff; ultimate authority over such decisions was not a requirement. In most cases, therefore, the phrase “significant control” was incorporated into the traditional definition of supervisor. Accordingly, the *Paroline* decision correctly focused not only upon the actual agency powers of the harasser, but also upon the harasser’s influence over other management-level employees. The *Paroline* court sought only to emphasize to the “significant control” portion of the traditional definition of supervisor, rather than to expand that definition. A careful review of the *Paroline* decision reinforces this argument: the opinion focused on Moore’s influence over other managerial employees by noting that Moore participated in the interviewing process, that he made a recommendation to hire the word processor, and importantly, that upper management followed his recommendation. The court decided that Moore’s responsibilities gave him significant control over the decision to hire.

63. E.g., *Daulo* v. Commonwealth Edison, 938 F. Supp. 1388, 1401 (N.D. Ill. 1996); see also text accompanying notes 44-47.
64. *Paroline*, 879 F.2d at 104; *Daulo*, 938 F. Supp. at 1401.
65. See, e.g., *Tafioya* v. Adams, 612 F. Supp. 1097, 1105 (D. Colo. 1985) (holding that an employee qualified as a supervisor even though he did not “have direct power to hire and fire personnel . . . [but] had control over the plaintiff’s employment conditions”) (emphasis added).
66. See, e.g., *Daulo*, 938 F. Supp. at 1401. In the *Daulo* case, for example, the court did not necessarily hold that the supervisor’s lack of hiring and firing power was the only reason it refused to impute liability to the employer. The court may have reasoned that the supervisor simply did not have significant control over the management level employees that retained ultimate authority over such decisions. The court vaguely alluded to this idea by noting that the power to make general recommendations regarding hiring and firing is “inherently part of virtually every supervisor’s responsibilities.” Id.
67. *Paroline*, 879 F.2d at 103.
the word processor; thus Moore qualified as a supervisor under the traditional definition. The *Paroline* case, therefore, did not change or broaden the traditional definition of supervisor. Instead, it merely clarified the importance of the "significant control" language within that definition.68

The Fifth Circuit expressly conformed to the *Paroline* court's reasoning in *Pfau v. Reed*.69 In *Pfau*, the plaintiff Pfau claimed that her audit team supervisor had sexually harassed her.70 The court held that the audit team supervisor did not qualify as a supervisor for Title VII purposes.71 While it emphasized that the audit team supervisor could not hire or fire other employees,72 the court also noted that he simply did not exercise any significant control over the terms of Pfau's employment.73 For example, the audit team supervisor's powers were limited to recommending subordinate awards or discipline74 and handling the procedural aspects of Pfau's

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68. The *Paroline* decision was widely critiqued in subsequent cases, but these criticisms focused mainly on the liability of the individual harasser. See, e.g., Griswold v. Fresenius USA, Inc., 964 F. Supp. 1166, 1168 (N.D. Ohio 1997) (stating that "the continuing viability of [the *Paroline*] holding has been called into doubt"); see also Bryant v. Locklear, 947 F. Supp. 915, 917 (E.D.N.C. 1996) (noting that the *Paroline* decision has caused much confusion at the district court level). The case, however, continued to be accepted for its explanation of the definition of supervisor. See, e.g., Reinhold v. Virginia, 135 F.3d 920, 934 n.4 (4th Cir. 1998). For example, the *Reinhold v. Virginia* case involved a school psychologist who was harassed by an employee who was informally called her "immediate supervisor." *Id.* at 923. The court decided to apply the law of *Paroline*, noting that "our discussion in *Paroline* concerning what constitutes supervisory authority under Title VII . . . has not been undermined by subsequent case law and remains good law." *Id.* at 934 n.4. Consequently, it held that the immediate supervisor fit within the definition of supervisor for Title VII purposes. *Id.* at 934-35. The court noted that the supervisor participated in interviewing and hiring staff members, could informally discipline subordinates, evaluated staff members' job performances, and met regularly with other employees regarding their work assignments and progress. *Id.* at 935. Therefore, even though the immediate supervisor did not have the ultimate authority to hire, fire, or change the conditions of the psychologist's employment, the Fourth Circuit held that the Commonwealth could be held liable for the immediate supervisor's actions. *Id.*

69. *Pfau v. Reed*, 125 F.3d 927, 937 (5th Cir. 1997), *cert. granted and vacated on other grounds*, 525 U.S. 801 (1998). This decision has been remanded to the district court level in order to determine, in part, whether an audit team supervisor qualifies as a supervisor under the *Faragher* and *Ellerth* definition. *Pfau v. Reed*, 167 F.3d 228 (5th Cir. 1999).

70. *Pfau*, 125 F.3d at 930.

71. *Id.* at 937.

72. *Id.* The court noted that the Fifth Circuit had previously declined to impute employer liability for the acts of supervisors lacking the ability to hire and fire subordinate employees. See *id*. The court, however, cited with approval more recent cases that have utilized *Paroline*'s "significant control" language. See *id*.

73. *Id.* The court expressly stated that "the minimal authority held by [the audit team supervisor] falls short of such significant control." *Id*.

74. *Id.*
termination. The court, again following the basic logic of Paroline, held that these powers alone were not substantial enough to hold the employer liable for the audit team supervisor's harassment.

In summary, before the Supreme Court decided the Faragher and Ellerth cases, courts generally attached Title VII liability to employers only for the acts of supervisors who exercised significant control over hiring, firing, or other conditions of the plaintiff's employment. The Paroline case did not alter or enhance the traditional definition; instead, it had the sole effect of directing the attention of subsequent courts to the "significant control" language in the original definition of supervisor.

C. Recent Decisions Affecting the Established Definition of "Supervisor"

Eventually, lower courts became confused as to the proper standard of employer liability in hostile environment sexual harassment cases. In order to avoid problems stemming from this uncertainty, many plaintiffs attempted to ensure a vicarious liability standard for employers by characterizing their lawsuits as quid pro quo claims or filing suit in more lenient jurisdictions. This push to broaden the definition of quid pro quo alerted the Supreme Court, which subsequently granted certiorari in Faragher and Ellerth, two pending sexual harassment cases.

1. Faragher v. City of Boca Raton

In the Faragher case, the plaintiff worked part time and during the summers as an ocean lifeguard for the City of Boca Raton. During her employment, the plaintiff claimed that two of her supervisors engaged in both quid pro quo and hostile work environment sexual discrimination.

The city's Marine Safety division was structured in a "paramilitary configuration" in which lifeguards, including the plaintiff,

75. Id. at 937 n.6. The court noted that handling the procedural aspects of the plaintiff's termination is quite different from participating in the substantive decision to fire her. Id.
76. See id.
77. See supra note 29.
79. Faragher, 524 U.S. at 780.
80. The plaintiff was employed by the city between 1985 and 1990. Id. at 780.
81. Id.
reported to lieutenants and captains, among them David Silverman and Robert Gordon. The lieutenants and captains were responsible for issuing the lifeguards' daily assignments and supervising their fitness training. Lieutenants and captains, in turn, reported to Bill Terry, the chief. The chief held the authority to hire new lifeguards, supervise all work assignments, engage in counseling, deliver oral reprimands, and make record of any disciplinary actions. Although the city adopted a sexual harassment policy in 1986, it neglected to disseminate this policy to the Marine Safety Division.

The plaintiff alleged that Terry repeatedly touched her and other female lifeguards without invitation. Additionally, Terry allegedly made crude gestures and demeaning comments directed at the female lifeguards. Silverman engaged in similar types of activities: on one occasion, he made sexual comments directed at the plaintiff, and he repeatedly made crude gestures and vulgar references within earshot of the female lifeguards.

The plaintiff did not file any complaints with the city regarding the behavior of Terry and Silverman. She spoke with Gordon about the harassment, but she did not consider these conversations to be formal complaints. Other female lifeguards had similar conversations with Gordon, but he did not report these conversations to Terry or any other city official.

Based upon these facts, the district court concluded that Terry and Silverman engaged in quid pro quo and hostile environment sexual harassment. The court held the city vicariously liable for Terry and Silverman's actions for three reasons. First, the harassment was pervasive enough to support an inference that the city

82. Id. at 781. Silverman held the title of lieutenant from 1985, until he was promoted to captain in June of 1989. Id.
83. Id.
84. Id.
85. Id.
86. Id. at 781-82.
87. Id. at 782. The plaintiff alleged that Terry repeatedly put his arm around her and touched her buttocks. Id.
88. Id. For example, Terry once made disparaging comments about the plaintiff's body, and he also asked a female interviewing for a position as a lifeguard whether she would be willing to have sex with male employees of the Marine Safety Division. Id.
89. Id.
90. Id.
91. Id.
92. Id. at 783.
93. Id.
had "knowledge, or constructive knowledge" of the harassment.94 Second, traditional agency principles supported the city's liability because Terry and Silverman were acting as its agents when the harassment occurred.95 Finally, Gordon's knowledge of the harassment, combined with his inaction, supported a decision to hold the city liable.96 The court then awarded Faragher one dollar in nominal damages for her Title VII claim.97

A panel of the Court of Appeals for the Eleventh Circuit reversed the judgment of the district court.98 The court of appeals concluded that although Terry and Silverman were obviously liable for quid pro quo and hostile environment sexual harassment, the city could not be held liable for their actions.99 The panel held that Terry and Silverman were not acting within the scope of their employment when they harassed the plaintiff; that their harassment was not aided by their agency relationship with the city, and that the city had no constructive knowledge of the harassment.100 The entire Eleventh Circuit, sitting en banc, adopted the panel's conclusions.101

The Supreme Court reversed the Eleventh Circuit's decision.102 It held that employers should be held vicariously liable for the acts of their supervisory employees in both quid pro quo and hostile environment sexual harassment cases.103 The Court reasoned that several theories supported this holding.104 First, when supervisors make decisions, they "merge" with their employers; the decisions then exist as if the employers had made them directly.105 The Court also found vicarious liability appropriate because supervisors act within the scope of their authority when making discriminatory decisions in hiring, firing and promoting other employ-

94. Id.
95. Id.
96. Id.
97. Id. The court held that Faragher was not entitled to any compensatory damages because the harassment took place before the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1564 (S.D. Fla. 1994). Faragher did not seek reinstatement or an injunction against the city. Id. at 1555. The court, however, did award Faragher $10,000 in compensatory damages for her claim under 42 U.S.C. § 1983. Id. at 1568.
98. Faragher, 524 U.S. at 783.
99. Id. at 784.
100. Id.
101. Id.
102. Id. at 810. Justice Souter wrote the majority opinion. Id. at 780.
103. Id. at 807.
104. See id. at 790.
105. Id.
Moreover, the Court emphasized that the agency relationship actually helps supervisors engage in sexual harassment. But for supervisors' authoritative positions, in other words, they might be unable to harass other employees at all.

Additionally, the Court looked to traditional agency standards articulated by the Restatement (Second) of Agency. Section 219(1) of the Restatement provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Courts of appeals have typically assumed that sexual harassment falls outside the scope of any supervisor's employment. The Court noted, however, that this reasoning is inconsistent with other cases dealing with the agency relationship between employers and their employees. Employers, for example, have been held vicariously liable for intentional torts such as battery because such acts are considered to be among "the normal risks to be borne by the business in which the servant is employed." The Court also noted that supervisors are responsible for maintaining a safe and productive work environment. Therefore, any actions taken by a supervisor to alter the work atmosphere, including harassing subordinates, can be considered to be within the scope of employment.

The Faragher Court further held that Section 219(2)(d) of the Restatement (Second) of Agency could be applied to sexual harassment claims. Section 219(2)(d) states that an employer is liable for torts committed by employees acting outside the scope of their employment if "the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." The Court noted that the comments accompa-

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106. Id. at 791. Importantly, the Court simply assumed that all employees considered supervisors under Title VII have the employer-given authority to hire, fire and promote. Id.
107. See id.
108. See id.
109. Id. at 793 (quoting and adopting RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958)).
111. See Faragher, 524 U.S. at 793.
112. Id. at 794-95.
113. E.g., Leonbruno v. Chaplain Silk Mills, 192 A.D. 858, 859 (1920) (holding an employer liable when one employee threw an apple at another employee and caused his eye to hemorrhage).
114. Faragher, 524 U.S. at 795.
115. Id. at 798.
116. See id.
117. Id. at 802.
118. RESTATEMENT (SECOND) OF AGENCY, supra note 110, at §219(2)(d).
nuing Section 219(2)(d) clearly state that the section applies to cases "in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship."119

By relying upon these agency principles, the Court reasoned that employers should be held vicariously liable when their employees abuse supervisory authority.120 Importantly, the Court defined a supervisor as someone "with immediate (or successively higher) authority over the employee."121

In an attempt to soften the blow to employers, the Faragher Court also set forth an affirmative defense for vicarious liability claims in which the supervisor's harassment did not result in a tangible employment action122 against the plaintiff.123 The Court held that the defense has two prongs: first, the employer must exercise reasonable care to prevent and correct any sexually harassing behavior; and second, the plaintiff must have unreasonably failed to take advantage of any opportunities offered by the employer or unreasonably failed to otherwise avoid harm.124

Applying this reasoning, the Court held the City of Boca Raton liable for Terry and Silverman's harassing conduct.125 The Court noted that both Terry and Silverman had "virtually unchecked authority" over the lifeguards, and that they directly controlled all of Faragher's day-to-day activities.126 Both men, there-

119. Faragher, 524 U.S. at 802 (citing Restatement (Second) of Agency § 219, Comment e, which states that an employer should be held liable when "the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons").
120. Id. at 807.
121. Id. This Note assumes that the Court used this language in order to define the word supervisor. Plausibly, however, the Court may not have been attempting to proffer a definition at all. Instead, the Court might have been attempting to articulate a test to determine when an employer is to be held liable for the harassing conduct of a supervisor or agent. This Note, however, argues that the Court was in fact attempting to define the term supervisor because the "immediate (or successively higher) authority" clause is placed directly after the term supervisor, indicating that the phrase simply modifies and explains that word. See id.
122. A tangible employment action includes any discriminatory employment act with tangible consequences, like the denial of a job, firing and demotion. Id. at 804-05. The Court expanded upon this definition in the Ellerth case. See infra text accompanying notes 161-69.
123. See Faragher, 524 U.S. at 807.
124. Id. This affirmative defense has been critiqued by some commentators as being inconsistent with agency principles. See, e.g. Jennifer T. De Witt, Note, Defining Employer Liability: Toward A Precise Application of Agency Principals in Title VII Sexual Harassment Cases, 29 Golden Gate U. L. Rev. 235, 273-74 (1999).
125. Faragher, 524 U.S. at 808.
126. Id.
fore, qualified as supervisors for Title VII purposes. The Court found that the degree of hostility within the Marine Safety Division had risen to an actionable level. The Court concluded that the city could not meet either prong of the affirmative defense because it had completely failed to disseminate the sexual harassment policies to the Marine Safety Division. Additionally, the city’s policy did not include any assurance that harassing supervisors could be bypassed when filing complaints. As a result, the Court remanded the case in order to reinstate the district court’s decision.

2. Burlington Industries, Inc. v. Ellerth

On the same day it decided Faragher, the Supreme Court also handed down a second decision, Ellerth, with nearly identical reasoning. In Ellerth, the plaintiff worked as a salesperson for Burlington. The plaintiff claimed that one of Burlington’s mid-level managers repeatedly subjected her to both quid pro quo and hostile environment sexual harassment during the course of her employment.

Burlington organized its employees in a complicated corporate hierarchy. The entire corporation was divided into eight divisions, and each division was split into a number of business units. The plaintiff’s former division was separated into five business units.

Ted Slowik was the vice president of the plaintiff’s business unit. Slowik held the title of “mid-level manager.” He had the

127. Id. Terry had the authority to hire, discipline, and supervise Faragher’s activities; Silverman was responsible for giving Faragher daily assignments and supervising her fitness training. See supra text accompanying notes 82-83.

128. Id.

129. Id. at 808-09.

130. Id. at 808.

131. Id. at 810. Justice Thomas, joined by Justice Scalia, dissented. Id. In his opinion, Justice Thomas reasoned that an employer should be held to a negligence, rather than vicarious liability, standard for hostile environment harassment by supervisory employees. Id. Because Faragher’s employment was not tangibly affected by the harassment, Justice Thomas believed that the city should not have been held vicariously liable for Terry and Silverman’s actions. Id.

132. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 747 (1998). Burlington is a corporation that operates 50 plants and employs some 22,000 people across the United States. Id.

133. Id. The plaintiff worked for Burlington from March 1993 until May 1994. See id.

134. Id.

135. Id.

136. Id.

137. Id.
authority to make hiring and promotion decisions, subject to the approval of his supervisor. Slowik's position was "not considered an upper-level management position" and he was not part of the "decision-making or policy-making hierarchy." Slowik was not the plaintiff's immediate supervisor; instead the plaintiff answered to an office colleague in Chicago, and the colleague in turn answered to Slowik in New York.

The plaintiff claimed that Slowik repeatedly made offensive remarks and gestures in her presence. The plaintiff usually did not respond to Slowik's actions, but on one occasion she told Slowik that a comment he made was inappropriate. She did not report any of Slowik's conduct to any other authority figures at Burlington, despite her awareness of the corporation's sexual harassment complaint procedures.

The District Court for the Northern District of Illinois concluded that Slowik was a supervisor; it held that he created a hostile environment but did not engage in quid pro quo sexual harassment. Applying a negligence standard, it therefore held that Burlington neither knew nor should have known about Slowik's conduct. The court noted that the plaintiff had not taken the proper steps to report Slowik's behavior. Accordingly, it granted summary judgment in favor of Burlington.

The Court of Appeals for the Seventh Circuit, sitting en banc, reversed the district court's decision. Unable to agree upon a single line of reasoning, the court issued eight separate opinions, with a majority of the judges agreeing that the plaintiff's claim could be categorized as quid pro quo discrimination. Presumably, the judges also agreed that Slowik was a supervisor for Title VII

138. Id. Burlington required Slowik's supervisor to sign all paperwork involved with the hiring and promotion decisions. Id.

139. Id. Slowik's supervisor was the first to describe Slowik's job in these exact terms. See id.

140. Id.

141. Id. at 748. Slowik allegedly made comments about the plaintiff's breasts, threatened that he could "make [the plaintiff's] life very hard or very easy at Burlington," and told the plaintiff she was not "loose enough" during a promotion interview. Id.

142. Id. at 749.

143. Id. at 748-49.

144. See id. at 748. The court recognized that the plaintiff's claim did have a quid pro quo "component," but held that the component was merely one part of her hostile environment claim. Id.

145. Id.

146. Id.

147. Id.

148. Id.

149. See id. at 749-50.
purposes. The judges disagreed, however, on the proper standard of employer liability.

The Supreme Court affirmed the Court of Appeals' decision. As in Faragher, the Court held that employers should be held vicariously liable for the acts of their supervisors in both quid pro quo and hostile environment cases. The Court also utilized the "immediate (or successively higher) authority" definition articulated in Faragher.

The Court reasoned that "quid pro quo" and "hostile environment," the two categories of sexual harassment, were no longer controlling on the issue of vicarious liability. Instead, the Court reasoned that all harassment should be controlled by a vicarious liability standard.

As in the Faragher case, the Court quoted the Restatement (Second) of Agency § 219(2)(d) for the proposition that employers should be held vicariously liable for the acts of their employees when the employee "was aided in accomplishing the tort by the existence of the agency relation." The Court also noted that apparent authority analyses are irrelevant in the Title VII context.

150. See Jansen v. Packaging Corp. of Am., 123 F.3d 490, 496 (7th Cir. 1997), aff'd sub nom. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). None of the opinions expressly discussed the definition of supervisor or whether Slowik constituted a supervisor for Title VII purposes. Because they discussed and applied only the standards of liability for harassment by supervisory employees, however, the opinions implied that Slowik was, in fact, a supervisor. See id. at 496 (noting, in the majority opinion, that "employers [are] strictly liable for the quid pro quo harassment perpetrated by their supervisory employees" (emphasis added)).

151. Ellerth, 524 U.S. at 750. Judges Flamm, Cummings, Bauer, and Evans generally agreed that vicarious liability was the proper standard, because the case involved quid pro quo sexual harassment. See Jansen, 123 F.3d at 503. Judges Wood and Rovner applied agency principals to impose vicarious liability on employers for almost all sexual harassment, whether it be in quid pro quo or hostile environment form. Id. at 566. Judge Kanne held that the plaintiff did state a quid pro quo claim, but he applied a negligence standard because the harassment involved only threats and not tangible job detriments. Id. at 505. Judge Easterbrook held that Slowik's actions did not constitute quid pro quo harassment and applied the controlling state law to hold Burlington liable. Id. at 555. Chief Judge Posner, joined by Judge Manion, concurred in part and dissented in part, holding that the plaintiff had not established a case for quid pro quo sexual harassment. See id. at 515. Posner therefore applied a negligence standard. Id. at 515. Finally, Judge Coffey concurred in part and dissented in part, rejecting all of the above approaches and holding that a negligence standard should be consistently used both in quid pro quo and hostile environment claims. Id. at 546-47.

152. Ellerth, 524 U.S. at 766. Justice Kennedy wrote the majority opinion. Id. at 746.

153. Id. at 764-65.

154. Id. at 765.

155. Id. at 754, 765.

156. Id. at 765.

157. Id. at 759.

158. Id. at 769-60.
parent authority problems arise when supervisors exercise powers they do not have. Title VII cases, in contrast, occur when supervisory employees misuse power they actually do have.\textsuperscript{159} Therefore, the court noted that the agency relation rule, not apparent authority analysis, is appropriate in Title VII cases.\textsuperscript{160}

In the context of agency analysis, the Court articulated two common types of sexual harassment scenarios: one in which the harassment results in a tangible employment action, and one in which the harassment does not culminate in a tangible employment action.\textsuperscript{161} The Court defined a tangible employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”\textsuperscript{162} It recognized that only an employee acting within the authority of the company can cause a tangible employment injury.\textsuperscript{163} Such actions require an official act of the enterprise, such as documentation in company records, as well as review and approval by higher-level supervisors.\textsuperscript{164} Accordingly, the Court held that a supervisor’s harassment that culminates in a tangible employment action automatically results in vicarious liability for the employer.\textsuperscript{165}

In the second harassment scenario, in which harassment does not result in a tangible employment injury, the Court noted that employer liability is less certain.\textsuperscript{166} For example, in some situations supervisors may automatically be aided by the agency relationship because their power and authority make their threats particularly powerful.\textsuperscript{167} In other situations, however, where supervisors simply act as co-workers, their supervisory powers might not play any role in the harassment.\textsuperscript{168} Accordingly, the \textit{Ellerth} Court held that when the supervisor’s harassment does not result in a

\textsuperscript{159} See id. at 759.
\textsuperscript{160} Id. at 760.
\textsuperscript{161} Id. at 763.
\textsuperscript{162} Id. at 761. The Court’s definition of a tangible employment action resembles the definition of quid pro quo sexual harassment. See supra note 5. Although the Court claimed to have shifted away from the quid pro quo/hostile environment distinction, the adjustment in analysis arguably did not result in any practical differences.
\textsuperscript{163} Ellerth, 524 U.S. at 762.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 762-63. The Court noted that this decision is consistent with its ruling in the case. Id. at 763.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
tangible employment action, the employer may raise the two-prong affirmative defense articulated in Faragher.\footnote{169. Id. at 765. The defense has two elements: 1) the employer took reasonable care to prevent and correct any harassment, and 2) the plaintiff unreasonably failed to take advantage of any of these preventative or corrective opportunities. See id. at 765; see also supra text accompanying notes 122-24.}

Applying this holding to the case at hand, the Ellerth Court affirmed the Seventh Circuit's decision.\footnote{170. Ellerth, 524 U.S. at 766.} The Court noted that because Ellerth did not allege that Slowik had taken any tangible employment actions against her, Burlington would presumably be entitled to raise the newly articulated affirmative defense.\footnote{171. Id.} Recognizing that the Faragher and Ellerth holdings constituted a significant shift in Title VII case law, the Court remanded the case to the district court to determine whether Ellerth should have the opportunity to amend her pleadings or engage in more discovery.\footnote{172. Id.}

As a result of the Faragher and Ellerth holdings, quid pro quo and hostile environment sexual harassment cases now exist on essentially level playing fields: in both types of cases, employers are held vicariously liable for the harassing actions of their supervisory employees. As subsequent decisions have revealed, however, these cases have not completely eliminated the confusion and uncertainty in sexual harassment case law.

III. COURTS’ CONFUSION FOLLOWING THE FARAGHER AND ELLERTH DECISIONS

Although Faragher and Ellerth resolved the conflict regarding the proper standard of employer liability in hostile environment cases, they have potentially created a separate problem. In subsequent cases, lower courts have struggled to determine whether the Supreme Court, by defining a supervisor as someone “with immediate (or successively higher) authority over the employee,” intended to overrule and broaden the traditional “hiring, firing, or conditions of employment” definition. In the context of determining an em-
ployer's liability for punitive damages under Title VII, the Court has indicated that it did not intend to broaden the traditional definition. Accordingly, most courts have responded by applying the "hiring, firing, or conditions of employment" definition of supervisor. A number of notable district court decisions, however, have employed the new definition, holding that the Supreme Court did in fact intend to broaden the traditional definition.

A. Courts Applying the Traditional Definition

One year after the Faragher and Ellerth decisions, the Supreme Court indicated that it did not intend to overrule the traditional definition of supervisor. In Kolstad v. American Dental Association, the Court held that punitive damages may be awarded in Title VII cases even when an employer has not engaged in "egregious" discrimination. Although this holding is seemingly irrelevant in the determination of supervisory status, the Court noted in its reasoning that an employer should be held liable for punitive damages when the harasser acts in a "managerial capacity." The Court expressly recognized that "no good definition of what constitutes 'managerial capacity' has been found." It noted that in determining managerial or supervisory status, courts should examine an employee's actual authority, avoiding mere reliance upon his or her job title alone. Here the Court made no mention of the "immediate (or successively higher) authority" language of Faragher and Ellerth. Even though the Court did not expressly adopt the "hiring, firing, or conditions of employment" definition, it seemingly

173. Technically, the Court decided when punitive damages are appropriate under 42 U.S.C. § 1981, a part of Title VII. See Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 538 (1999); see also supra note 19.

174. See Kolstad, 527 U.S. at 544; see also infra notes 177-81 and accompanying text.

175. See, e.g., Parkins v. Civil Constructors, Inc., 163 F.3d 1027, 1033-34 (7th Cir. 1998). At least one legal source has argued that the Faragher and Ellerth definition does not change the standard of employer liability for its supervisors' sexual harassment. See Jules L. Smith & Harry B. Bronson, Avoiding and Litigating Sexual Harassment Claims Under the 1993 Supreme Court Decisions: Ellerth, Faragher, and Oncale, 606 P.L.I. Litig. 289, 316 (1999) (noting that "no matter what nomenclature is used . . . [s]upervisory authority includes: (i) the authority to take or take part in employment action for or against the employee; . . . (iii) the ability to alter the terms or conditions of the employee's employment").


177. See Kolstad, 527 U.S. at 543.

178. Id. at 538.

179. Id. at 543.

180. Id. (citing JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 24.05 (1998)).

181. Id.
advocated this type of inquiry when determining supervisory status. Accordingly, a majority of courts, including the Fifth, Sixth, and Seventh Circuits, have continued to utilize the traditional “hiring, firing, or conditions of employment” definition of supervisor.182

In Parkins v. Civil Constructors, Inc., a truck driver claimed she had been harassed by two of Civil Constructors’ foremen.183 The Seventh Circuit first recognized that in order to hold the company liable, the foremen must qualify as supervisors for Title VII purposes.184 The court noted that before Faragher and Ellerth, the Seventh Circuit had “made an effort to maintain a line between low-level supervisors who were the equivalent of coworkers and supervisors whose authority and power was sufficient to make consequential employment decisions affecting the subordinate.”185 In those prior cases, an employee’s ability to significantly control hiring, firing or other conditions of the plaintiff’s employment was sufficient to establish a supervisory relationship in the Title VII context.186 The court noted that circuit court cases subsequent to Faragher and Ellerth have also focused upon the strength and extent of the employee’s power.187 As a result, the court held,

[I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim’s employment. This authority primarily consists of the power to hire, fire, promote, transfer, or discipline an employee. Absent an

183. Parkins, 163 F.3d at 1031. The foremen allegedly brought a pornographic picture to work, made inappropriate comments, and touched the plaintiff on two separate occasions. Id.
184. Id. at 1033.
185. Id.
186. See id. at 1031 n.1.
187. Id. at 1034 (citing Deffenbaugh-Williams, 156 F.3d at 592); Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 181-82 (4th Cir. 1998); Phillips v. Taco Bell Corp., 156 F.3d 884, 888 (8th Cir. 1998). In fact, only one of these cases actually supports the court’s proposition. The Deffenbaugh-Williams v. Wal-Mart Stores, Inc. case addressed the supervisor issue and subsequently held that the defendant was a supervisor because of his authority to fire the plaintiff. Deffenbaugh-Williams, 156 F.3d at 593. Although the Deffenbaugh-Williams court did not cite any pre-Faragher cases for that proposition, the Parkins court could have reasonably concluded that the Fifth Circuit intended to adopt the traditional “hiring, firing, or conditions of employment” definition. The other two cases, Phillips v. Taco Bell Corp. and Lissau v. Southern Food Service, clearly do not adopt this position. For example, in Phillips, whether or not the alleged harasser was the plaintiff’s supervisor was not even an issue in the case, because “there [wa]s no question that [the harasser] was [the plaintiff’s] supervisor at the time the alleged harassment occurred.” Phillips, 156 F.3d at 886, 888. The Parkins court’s citation to Lissau is even more tenuous, because the Lissau case did not even address or mention the alleged harasser’s relationship to the plaintiff. Instead, the court simply assumed that the harasser was a supervisor. Lissau, 159 F.3d at 181-82.
entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes of imputing liability to the employer.\textsuperscript{193}

The Parkins court thus articulated a definition of supervisor nearly identical to the traditional "hiring, firing, or conditions of employment" definition.

Under the traditional definition, the court found that the foremen were not supervisors.\textsuperscript{189} The court reasoned that because each foreman rotated between acting as a foreman and performing ordinary labor duties, neither of the men performed the work of a traditional "foreman" on a regular basis.\textsuperscript{190} Additionally, one of the foremen was not even employed full-time by Civil Constructors: he worked only six or seven months per year.\textsuperscript{191} The court also recognized that a traditional "foreman" simply did not possess enough authority to be considered a supervisor for Title VII purposes.\textsuperscript{192} Foremen were merely union workers who told truck drivers where to dump or pick up new loads; they did not decide the work to be done at a site or assign employees to their crews.\textsuperscript{193} The court also found persuasive the fact that the plaintiff did not even work exclusively at the two foremen's sites, so "any authority they had over [the truck driver] was tenuous at best."\textsuperscript{194}

Although three circuits have addressed this issue,\textsuperscript{195} a determination of whether an employee is or is not a supervisor for Title VII purposes is usually determined at the district court level.\textsuperscript{196} The Gordon v. Southern Bells, Inc. case offers what is perhaps the most explicit adoption of the traditional definition of supervisor by a district court.\textsuperscript{197} In Gordon, an advertising representative claimed that two people within Southern Bells Corporation, a co-owner and

\textsuperscript{188} Parkins, 163 F.3d at 1034 (emphasis added).
\textsuperscript{189} Id.
\textsuperscript{190} Id. One of the alleged harassers testified that he acted as a foreman when enough work was available, otherwise he acted as an non-supervisory worker. Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} See supra note 182.
\textsuperscript{196} See Brian C. Baldrate, Note, Agency Law and The Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton, 31 CONN. L. REV. 1149, 1176 (1999). Presumably, this phenomenon exists because district courts are charged with factual determinations. Once a court decides exactly what powers an alleged harasser possesses in the workplace, the determination whether the harasser is or is not a supervisor logically follows.
\textsuperscript{197} Gordon v. Southern Bells, Inc., 67 F. Supp. 2d 966, 980-81 (S.D. Ind. 1999) (stating that an employee is not a supervisor absent the entrustment of at least some authority to hire, fire, discipline, etc.).
a district manager, had sexually harassed her.\textsuperscript{198} The district court held that while the co-owner qualified as a supervisor for Title VII purposes, the district manager did not.\textsuperscript{199} In its analysis, the court first articulated \textit{Faragher} and \textit{Ellerth}'s "immediate (or successively higher) authority over the employee" definition of supervisor.\textsuperscript{200} In interpreting this definition, though, the court subsequently noted that "[t]he touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor [and] the essence of this examination is to determine... 'the power to hire, fire, demote, promote, transfer, or discipline the employee.'"\textsuperscript{201} In applying the traditional definition of supervisor, the court held that the co-owner clearly qualified as a supervisor because he had complete authority to affect all terms of the advertising representative's employment.\textsuperscript{202} In contrast, the court held that the district manager could not be considered a supervisor because he had no authority to significantly control any actions adverse to the advertising representative, including an evaluation or review of her job performance.\textsuperscript{203} Thus, the \textit{Gordon} case clearly interprets the language in \textit{Faragher} and \textit{Ellerth} as neither changing nor broadening the traditional definition of the term supervisor.\textsuperscript{204}

The majority of circuit and district courts recently charged with determining the appropriate definition of supervisor have agreed that the traditional "hiring, firing, or conditions of employment" definition still applies in Title VII cases.\textsuperscript{205} A number of

\textsuperscript{198} Id. at 970, 972.
\textsuperscript{199} Id. at 981.
\textsuperscript{200} Id. at 980.
\textsuperscript{201} Id. (citing \textit{Parkins v. Civil Constructors, Inc.}, 163 F.3d 1027, 1034 (7th Cir. 1998)).
\textsuperscript{202} Id. at 981.
\textsuperscript{203} See id.
\textsuperscript{204} The \textit{Gawley v. Indiana University} case also explicitly adopted the traditional definition of supervisor. \textit{Gawley v. Indiana Univ.}, No. IP 96-0466-C-M/S (S.D. Ind. 1998). In \textit{Gawley}, a police officer claimed that a lieutenant assigned to another department had sexually harassed her. \textit{Id.} at 4. The district court held that the lieutenant could not be considered the plaintiff's supervisor. \textit{Id.} As in \textit{Gordon}, the court first articulated the "immediate (or successively higher) authority" definition of supervisor articulated by the \textit{Faragher} and \textit{Ellerth} cases. \textit{Id.} at 3. Next, the court noted that this definition was really just another way of phrasing the traditional "hiring, firing, or conditions of employment" definition. \textit{Id.} Applying the traditional definition to the facts, the court refused to hold Indiana University liable for the lieutenant's actions. \textit{Id.} at 4. The court noted that the lieutenant "could not hire, fire, or discipline Plaintiff... never evaluated Plaintiff's performance...[and] was not even in Plaintiff's chain of command." \textit{Id.}
\textsuperscript{205} The cases mentioned thus far are certainly not an exhaustive list. See \textit{Bullman v. Penske Truck Leasing Co.}, No. IP 99-0158-C-T/G, 2000 U.S. Dist. LEXIS 9527, at *25 (S.D. Ind. June 23, 2000) (citing \textit{Parkins} for proposition that a supervisor is an employee with the power to "hire, fire, demote, promote, transfer, or discipline [the victim]"); \textit{Jackson v. T & N Van Serv.}, 86 F. Supp. 2d 497, 501 (E.D. Pa. 2000) (noting that "[a]lthough the Supreme Court has not specific-
courts, however, dispute this holding, applying a more expansive definition of supervisor in the wake of *Faragher* and *Ellerth*.

B. Courts Applying a Broader Definition of “Supervisor”

Some courts have interpreted the dicta in *Faragher* and *Ellerth* as broadening the traditional definition of supervisor. Their opinions suggest that the “immediate (or successively higher) authority” definition of supervisor has effectively overruled, or at least significantly broadened, the traditional definition. Accordingly, these courts have purported to consider a larger number of employees to be supervisors for Title VII purposes. To date, no circuit court has adopted this broader definition; it is a position taken only by a few district courts.

In *Grozdanich v. Leisure Hills Health Center, Inc.*, for instance, the court expressly adopted a broader definition of the term supervisor. In *Grozdanich*, a staff nurse claimed that a “charge nurse” at Leisure Hills had sexually harassed her. The court held that the charge nurse qualified as a supervisor for Title VII purposes. The court first examined the traditional “hiring, firing, or conditions of employment” definition of supervisor and noted that under this definition, the charge nurse could not be considered a supervisor because he could not hire, fire, promote, or increase wages of other staff nurses.

The court held, however, “it is evident that the Supreme Court views the term ‘supervisor’ as more expansive than including those employees whose opinions are dispositive on hiring, firing,
As support for this proposition, the court noted that in Faragher, the city was held vicariously liable for the acts of Silverman, who acted as a "captain" in the Marine Safety Division. The court noted that Silverman did not have the sole authority to hire or fire the plaintiff in Faragher; instead, he had the power only to issue her daily assignments and supervise her fitness training.

The Grozdanich court reasoned that a more expansive definition would also have favorable policy implications. Absent such a broad definition, for instance, an employer could "effectively insulate itself from the application of Faragher, and Ellerth, simply by directing all critical personnel decisions to be effected by a personnel department, which may have no direct, and only infrequent contact with the employee subject to the harassment." The court therefore rejected the traditional "hiring, firing, or conditions of employment" definition, instead adopting the broader "immediate (or successively higher) authority" language employed in Faragher and Ellerth.

Applying this broader definition, the court noted several reasons why the charge nurse should be considered a supervisor for Title VII purposes. First, the charge nurse was responsible for "direct[ing] the day-to-day activities of the Staff Nurses[,] delegat[ing] duties to the Staff Nurses; . . . prepar[ing] employee performance evaluations; and mak[ing] recommendations to the Director of Nursing concerning the discipline of subordinate employees." Also, the charge nurse used his supervisory status to isolate the plaintiff from other employees so that he could assault her. The court therefore held that the charge nurse qualified as a supervisor for Title VII purposes, even though he did not have the authority to "hire, fire, demote, promote, transfer, or discipline"

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211. Id.
212. Id.; see also supra text accompanying notes 125-31.
213. See Grozdanich, 25 F. Supp. 2d at 972; see also supra text accompanying note 83.
215. Id.
216. See id.
217. Id. at 961.
218. Id. at 973.
219. Id.
the staff nurse. It refused to grant Leisure Hills’s summary judgment motion.

Several flaws exist in the Grozdanich court’s reasoning. First, the court incorrectly applied and misinterpreted the traditional “hiring, firing, or conditions of employment” definition. Cases decided prior to Faragher and Ellerth did not require employees to have the ultimate authority to make hiring and firing decisions in order to qualify as supervisors; instead, the employees merely needed to exercise significant control over such decisions. Second, the Faragher Court’s application of the “immediate (or successively higher) authority” definition is not as significant as the Grozdanich court would suggest. In Faragher, Silverman had control over the plaintiff’s work schedule and her fitness training. Although he did not have the power to fire the plaintiff, he likely would have been considered a supervisor under the traditional “hiring, firing, or conditions of employment” definition nonetheless. Pre-Faragher cases such as Paroline clearly indicated that the power to control work assignments will give an employee supervisory status under some circumstances. The Faragher Court’s application of the “immediate (or successively higher) authority” definition, therefore, does not necessarily indicate that the Court intended to overrule the traditional definition. Finally, because the Grozdanich court misinterpreted the traditional definition, its policy reasons for expanding the definition are unpersuasive. It would be economically unwise for employers to place all supervisory employees on a personnel committee with limited oversight of other employees. If lower-level employees are aware that higher-level employees are not regularly monitoring their daily performance, they will be tempted to work less diligently. Widespread job shirking and the resulting decline in production would likely cost companies much more in the long run than the occasional Title VII claim. Thus, for economic reasons, companies would be unlikely to organize their employees in the manner the Grozdanich court suggests.

Another decision interpreting the Supreme Court’s “immediate (or successively higher) authority” language to have broadened the traditional definition of supervisor is Corcoran v. Shoney’s Co-

220. Gordon v. S. Bells, Inc., 67 F. Supp. 2d 966, 980 (S.D. Ind. 1999). These are the criteria that the Southern District of Indiana noted were essential in determining supervisory status. See supra text accompanying note 201.
221. Id. at 969.
222. See, e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); see also supra text accompanying note 65.
223. See Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989).
In *Corcoran*, the plaintiff, a dining room manager, claimed that the restaurant's assistant manager sexually harassed her. The court observed that "[i]t is not always clear when a co-worker becomes a supervisor." It then noted the vague "immediate (or successively higher) authority" definition articulated by *Faragher* and *Ellerth*. The court did not mention any cases prior to *Faragher* and *Ellerth*, nor did it acknowledge the traditional "hiring, firing, or conditions of employment" definition of supervisor. Even though the plaintiff offered very little evidence that the assistant manager had any significant control over the terms of her employment, the court considered the assistant manager to be a supervisor for summary judgment purposes. The court found that the plaintiff's claim that the "defendant discussed the work performance of a Shoney's employee with her" was enough to establish a genuine issue of material fact regarding the assistant manager's supervisory status. The *Corcoran* decision is a prime example of a court intentionally broadening the traditional definition, because one conversation about another employee certainly would not have been sufficient to establish supervisory status under the traditional "hiring, firing, or conditions of employment" definition.

A significant number of district courts have held that the Supreme Court intentionally broadened the definition of supervisor with the *Faragher* and *Ellerth* decisions. As a result, these courts have held a larger number of employees to be supervisors for Title VII purposes. The reasoning employed by these cases is problematic, however, because the *Faragher* and *Ellerth* decisions did not reject the traditional definition of supervisor.

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225. *Id.* at 603.
226. *Id.* at 605.
227. *Id.*
228. *Id.*
229. *Id.* at 605 & n.4.
IV. APPLYING THE BETTER DEFINITION: WHY THE TRADITIONAL DEFINITION MAKES MORE SENSE IN THE TITLE VII CONTEXT

Courts should continue to use the traditional "hiring, firing, or conditions of employment" definition of supervisor for several reasons. First, the traditional definition leads to extremely positive results: it fulfills the plain language of Title VII, and it furthers beneficial public policy. Second, applying the traditional definition demonstrates a commitment to the doctrine of stare decisis. Third, the "hiring, firing, or conditions of employment" definition is more consistent with case law decided under the textually similar Americans with Disabilities Act ("ADA") and Age Discrimination in Employment Act ("ADEA").

A. Positive Implications of Retaining the Traditional Definition

Application of the traditional definition of supervisor will have two practical benefits in future Title VII sexual harassment cases. First, the traditional definition best fulfills legislative intent by preserving the plain meaning of the term "agent" as used in the statutory definition of employer. In addition, the traditional definition will ensure equal treatment for all types of employers, and it will not deter employers from developing formal, practical employee organizational schemes.

1. The Traditional Definition Better Fulfills Legislative Intent

The traditional "hiring, firing, or conditions of employment" definition more closely adheres to the plain language of Title VII's text. In Title VII, Congress expressly defined an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." Title VII's definition of employer is important because it explains which companies can be held liable under the statute. By including the term agent, it also delineates the category of employees whose actions may ultimately expose businesses to liability for sexual harassment.

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232. See infra text accompanying notes 272-80.
234. See supra part II.A.
235. See id.
According to the Restatement (Second) of Agency, to be an “agent,” one must have the power to “alter the legal relations between the principal and third persons.”

No legislative history exists to further clarify Title VII’s definition of employer, but the traditional definition of supervisor best fulfills legislative intent by preserving the true meaning of the term agent. Under this definition, supervisors must have the power to affect the employer’s legal relations with other employees. By exercising the power to hire (or to make hiring recommendations), supervisors, as traditionally defined, can not only oversee the day-to-day activities of lower level employees, but can also bind an employer into a legal employment relationship with a third party. A traditionally-defined supervisor can also terminate the employer’s legal employment relationships by firing (or recommending the firing of) other employees. The “immediate (or successively higher) authority” definition, however, is not necessarily limited in application to those employees holding the power to legally bind the employer. In fact, it may implicate supervisory employees that will never have this power. The traditional “hiring, firing, or conditions of employment” definition at least ensures that employers will be held liable only for the actions of employees who may properly be described as “agents.”

By choosing the word “agent” rather than “employee,” Congress expressly included a vicarious liability standard within the text of Title VII. Congress clearly envisioned one of two possible scenarios: courts would either hold employers liable only for the acts of their agents, or they would hold employers more exactly liable for the acts of their agents. If courts adopted the former choice, employers would never be held liable for co-worker sexual harassment. If courts adopted the latter choice, however, employers would face potential liability for sexual harassment by both co-workers and supervisors, but plaintiffs would encounter an easier burden of proof when suing for harassment by supervisors. Courts have clearly chosen the latter of these two interpretations, because employers can be held liable for the acts of the plaintiff’s co-workers, as long as the plaintiff satisfies a negligence standard.

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236. RESTATEMENT (SECOND) OF AGENCY, supra note 110, § 12.
Meanwhile, courts have imposed more exacting liability, through vicarious liability, for the acts of supervisory employees, or true "agents." 239

Both congressional intent and previous court decisions support a clear demarcation between the standards of liability for co-worker harassment and harassment by supervisors, or "agents." Courts should not begin to blur this distinction by including a broader range of employees within the definition of supervisor. Because it more clearly fulfills the plain language of Title VII and is consistent with subsequent case law interpreting the statute's definition of employer, the traditional definition should be retained. 240

2. Practical Implications of the Traditional Versus a More Expansive Definition

The traditional "hiring, firing, or conditions of employment" definition is also more desirable from a policy perspective. Broadly construing the "immediate (or successively higher) authority" definition of supervisor exposes employers to an excessive, and perhaps

Guard Against, 7 WM. & MARY BILL RTS. J. 801, 811 (1999). Although this is the law in most circuits, the Second Circuit has held that employers are vicariously liable for co-worker harassment under certain circumstances. In Quinn v. Green Tree Credit Corp., the Second Circuit held that an employer could be held strictly liable for co-worker harassment if a supervisor's "inaction" furthered the harassment. Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766-67 (2d Cir. 1998) (finding for defendant corporation because plaintiff failed to show inaction on the corporation's behalf). This is not a significant departure from other circuits because those courts would presumably hold employer "inaction" to be a form of negligence. The Second Circuit's law is thus more a departure of form than of substance.


240. This Note asks courts to narrowly interpret Title VII but to broadly interpret the language of Faragher and Ellerth. However, such interpretations are supported in part by the direct language of Faragher, where the Court at one point simply assumes that supervisors have the authority to hire, fire, and promote other employees. Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998); see also supra note 106. Looking broadly at the Faragher and Ellerth opinions, the Court clearly takes the position that the employer is not necessarily liable for all sexual harassment. Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 765. For example, the employer is not vicariously liable for co-worker harassment; instead, the plaintiff must establish employer negligence. Additionally, employers are not liable for supervisory sexual harassment if they can establish the two-prong affirmative defense. See Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 765; see also supra text accompanying notes 122-24. Thus, the Court recognizes that some forms of harassment are simply beyond the employer's control and should not lead to employer liability. This underlying theme in Faragher and Ellerth supports the use of the traditional "hiring, firing, or conditions of employment" definition of supervisor. The traditional definition recognizes that the employer can control, and therefore be held liable for, only certain forms of sexual harassment.
unfair, threat of liability. A broader definition would also deter employers, especially those with large numbers of employees, from adopting the types of formal employee organizational schemes needed to maximize profits.

A more expansive definition of supervisor would effectively punish employers for implementing such organizational schemes. For example, assume hypothetically that Company X employs 2,000 people. Five hundred of these employees can be clearly classified as upper-management possessing the ability to significantly impact hiring, firing, promotion, and demotion decisions. The remaining 1,500 employees work on a production line. Although each employee may have a different task to accomplish each day, these 1,500 employees can safely be considered "co-employees," with no one employee possessing the ability to affect the employment terms of another.

Suppose that Company X's management has noticed some problems with intra-company communication. For example, several pieces of production equipment have malfunctioned, but management-level employees are not notified about the problems until several days later. Management-level employees suspect the cause of this delay is that line workers either do not know who to notify, or are intimidated by management and therefore do not want to approach them. To improve communication, Company X decides to restructure its employee organizational system. Management decides to divide the line workers into groups of 50, and appoints one "Team Leader" for each group. If an employee experiences complications with equipment, they should consult their Team Leader, who in turn is expected to report the problem to management. Team Leaders do not gain any additional powers or responsibilities; their new role entails only the obligation to report problems to management.

If, in the above scenario, a Team Leader sexually harasses another worker in his or her group, Company X's standard of liability depends upon which definition of supervisor a court employs. Under the "immediate (or successively higher) authority" definition,


242. See Starkman, supra note 17, at 325 (noting that under a broader definition of supervisor, employers may be held vicariously liable for co-workers with actual and apparent authority, employees with fancy job titles like "group leaders", and managers with actual "dotted line" responsibilities over the victim).
Company X would probably be held vicariously liable for the Team Leader's actions. Even though the Team Leader clearly has no influence over terms of the victim's employment, the Team Leader can be considered to be an employee with "immediate (or successively higher) authority" over the victim. Under the traditional "hiring, firing, or conditions of employment" definition, however, the Team Leader's actions would not result in vicarious liability. Because the Team Leader does not have the power to hire, fire, or affect the conditions of the victim's employment, Company X will instead be subject only to a negligence standard of liability.

This hypothetical situation raises a significant concern: companies considering an organizational restructuring will be torn between improving production and communication—and thereby increasing profits—and limiting exposure to Title VII liability. To avoid liability, companies will be forced to approach such restructuring in an informal manner. Using the above hypothetical, Company X may simply ask a few production line employees to report any problems around the plant, rather than dividing the entire production force into teams and appointing formal Team Leaders. Treating employers with formal employee organizational structures differently from employers with informal organizational structures is logically inconsistent and plainly unfair. Courts do not need to apply an inconsistent standard, though, because the traditional definition of supervisor is an established, available alternative. The traditional definition looks at the authority granted to employees (i.e. substantial influence over hiring, firing, promoting, or demoting) instead of their positions in the corporate hierarchy. The traditional definition thereby treats all employers equally, regardless of their choices of internal corporate structure.

Critics may argue that the broader definition is desirable because more plaintiffs will be able to recover for sexual harassment, and it will encourage employers to take additional affirmative steps to prevent sexual harassment. Even under the traditional "hiring, firing, or conditions of employment" definition, however, plaintiffs with strong co-worker sexual harassment suits will continue to prevail under Title VII. Admittedly, these plaintiffs will encounter a negligence, rather than a vicarious liability, standard. Case law subsequent to Faragher and Ellerth has proven, however, that plaintiffs can overcome a negligence standard in co-worker sexual

243. See Mackay, 1999 U.S. Dist. LEXIS 21108, at *19 (reasoning that employees may not be directly responsible for lower-level employees, but may still have influence over job-related decisions affecting those employees).
harassment cases. Because employers still face potential liability for either co-worker or supervisory harassment, they will be also be encouraged to implement and maintain sexual harassment policies and training. The traditional "hiring, firing, or conditions of employment" definition, therefore, strikes an even balance: it provides employers equal judicial treatment and freedom to run profitable businesses, yet it still allows plaintiffs to prevail in strong sexual harassment cases.

B. Importance of Adherence to the Doctrine of Stare Decisis

Another reason for retaining the traditional "hiring, firing, or conditions of employment" definition of supervisor is the principle of stare decisis. Adhering to previous decisions, especially those that remain logically sound, serves several purposes in the American legal system. First, when Supreme Court follows precedent, it ensures that employers striving to comply with Title VII are treated fairly. If employers were not liable for the actions of certain non-supervisory employees before the Faragher and Ellerth decisions, it would be inconsistent and unjust to suddenly classify those same employees as supervisors today. Second, the doctrine of stare decisis ensures predictability. Employers should be able to rely on past decisions that have clearly explained who is and who is not a supervisor for Title VII purposes, allowing them to structure their corporate hierarchies accordingly and preventing them from "foreseeing only the unknown." If courts give employers clear notice of the law, they will be more likely to follow it. Third, adhering to the traditional definition of supervisor ensures judicial efficiency. Case law interpreting and explaining the traditional definition is abundant and easy to find. Developing and explaining a new, broader definition of supervisor would essentially force courts to "start again from scratch" resulting in a needless waste of judicial resources. Moreover, by following precedent, the Supreme Court retains legitimacy as a decision-making institution. As Justice Powell once noted, "elimination of constitutional stare decisis would

244. See, e.g., Williamson v. City of Houston, 148 F.3d 462, 466 (5th Cir. 1998); see also Starkman, supra note 17, at 326.
246. See id. at 175-76.
247. Id. at 175.
248. See id. at 178-79.
249. See supra Part II.B.
250. See HANKS, supra note 245, at 179-80.
represent explicit endorsement of the idea that the Constitution is nothing more than what [judges] say it is. This would undermine the rule of law.”\textsuperscript{251} Finally, maintaining the traditional definition of supervisor will ensure public respect for future Title VII decisions.\textsuperscript{252}

Of course, critics will correctly argue that courts do not and should not always comply with the doctrine of \textit{stare decisis}. Few scholars would argue that judges should blindly adhere to clearly erroneous precedent.\textsuperscript{253} The traditional “hiring, firing, or conditions of employment” definition of supervisor, however, cannot be considered clearly erroneous precedent. As stated above, the traditional definition not only better fulfills legislative intent, but it also results in more favorable policy outcomes than a broader definition.

Other critics may ask why, if the Supreme Court wanted to adhere to \textit{stare decisis}, it used the “immediate (or successively higher) authority” language in \textit{Faragher} and \textit{Ellerth}. Although the Court failed to offer justification for its departure from the traditional language, this departure is more likely the result of judicial carelessness than a conscious desire to overturn the traditional definition of supervisor. Several arguments support this opinion. For one, the definition of supervisor was not at issue before the Court in either \textit{Faragher} or \textit{Ellerth}.\textsuperscript{254} The Court simply assumed that the harassers in both cases were, in fact, the plaintiffs’ supervisors, and it perhaps did not even review existing case law articulating the traditional definition. Undoubtedly, the Supreme Court had little incentive to fully investigate lower courts’ holdings regarding the definition of supervisor. Additionally, the holdings of both \textit{Faragher} and \textit{Ellerth} utilized the proper standard of liability for employers in hostile environment sexual harassment cases, and the “immediate (or successively higher) authority” language is best viewed merely as dicta clarifying that holding. Although it is ar-

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\textsuperscript{251} These remarks by Justice Powell were made off-the-bench, not in a court opinion. \textit{See id. at 179.}

\textsuperscript{252} Importantly, courts are less bound by \textit{stare decisis} for constitutional questions than they are for statutory issues. \textit{See} \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490, 518 (1989) (noting that “\textit{stare decisis} is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this court is the only body able to make needed changes”).

\textsuperscript{253} \textit{See}, \textit{e.g.}, \textit{HANKS, supra note 245, at 171-74}. For example, one would be hard-pressed to find anyone presently willing to argue that the Supreme Court should have relied upon the reasoning of \textit{Plessy v. Ferguson} rather than handing down the watershed \textit{Brown v. Board of Education} decision. \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954); \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).

guably persuasive, this language technically is not binding upon lower courts. The Court's failure to discuss the "immediate (or successively higher) authority" definition is also telling. When any court makes a conscious effort to overrule prior precedent, it usually does so expressly and offers lucid reasons for doing so.255 In both Faragher and Ellerth, however, the new definition appeared only once. Because the definition was not at issue, and because the Court did not discuss the new definition or previously articulated definitions in any detail, chances are slim that the Supreme Court intended to overrule the existing, traditional definition of supervisor.

C. Consistency with Case Law Decided Under Similar Employment Discrimination Statutes

The traditional "hiring, firing, or conditions of employment" definition of supervisor is not only consistent with precedent sexual harassment cases, but it is also consistent with other influential case law. For example, other employment discrimination statutes, such as the ADA and the ADEA, include definitions of "employer" closely resembling those in Title VII.256 Because previous ADA and ADEA cases have utilized the traditional definition of supervisor, those cases are influential in determining the proper definition to be employed in Title VII cases.257

1. The Americans with Disabilities Act

The ADA defines an employer as "a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person."258 The ADA language, of course, is nearly identical to the definition provided in Title VII and notably, both statutes utilize the term "agent."259 Although few ADA cases have

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255. For example, in 1989, the Supreme Court held in Pennsylvania v. Union Gas Co. that Congress could abrogate states' immunity under the Eleventh Amendment when acting pursuant to the Commerce Clause. Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989). In 1996, the Supreme Court overruled that holding. See Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996). In Seminole Tribe, the Court spent roughly eight pages analyzing its holding in Union Gas Co., then explained why that holding was incorrect. Id. at 59-68.
256. See, e.g., EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995).
257. See Frank S. Ravitch, Beyond Reasonable Accommodation: The Availability and Structure of A Cause of Action for Workplace Harassment under the Americans with Disabilities Act, 15 CARDOZO L. REV. 1475, 1476-77 (1994) (arguing that the ADA claims should be tried much like hostile environment cases under Title VII).
259. See Butler v. Prairie Village, 172 F.3d 736, 744 (10th Cir. 1999).
addressed the statutory definition of the term, at least one court has held that an agent under the ADA is defined as an employee having "significant control over the plaintiff's hiring, firing, or conditions of employment."260

In Haltek v. Park Forest, the plaintiff sued the Village of Park Forest after the chief of police discriminated against her at work.261 The court noted that "the ADA's definition of employer mirrors the definition in Title VII."262 The court then looked to the Fourth Circuit's Title VII decision in Paroline in order to determine which employees possess a level of authority sufficient to justify holding the employer vicariously liable for their discriminatory conduct.263 The court adopted the traditional "hiring, firing, or conditions of employment" definition articulated in Paroline, and it held the village liable for the police chief's discriminatory actions against the plaintiff.264

Because the ADA is an employment discrimination statute with a definition of employer nearly identical to the definition articulated in Title VII, ADA case law discussing the definition of supervisor or "agent" is not only relevant but also persuasive in the Title VII context. Since most ADA cases have expressly adopted the traditional definition of supervisor, courts interpreting Title VII should continue to use that definition as well.

2. The Age Discrimination in Employment Act

The ADEA also includes a definition of "employer" closely resembling the definition of the same term adopted in Title VII.265 Under the ADEA, an employer is defined as "a person engaged in an industry affecting commerce who has twenty or more employees . . . The term also means (1) any agent of such a person."266 As with

261. Id. at 803.
262. Id.; see also 29 C.F.R. § 1630 app. (1999) (noting that the definitions listed in the ADA and Title VII are nearly identical and should be given the same meaning).
264. Id. at 804-05; see also Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n., 37 F.3d 12, 17 (1st Cir. 1994) (noting that the defendants in the case would constitute an "employer" if they exercised significant control over an important aspect of the plaintiff's employment).
265. See EEOC v. AIC Sec. Investigations, Ltd., 65 F.3d 1276, 1279-80 (7th Cir. 1995). The ADEA is occasionally interpreted differently than Title VII. See id. at 1280 n.1. The ADEA has incorporated some provisions of the Fair Labor Standards Act ("FLSA"), a statute that varies greatly from Title VII. See id. The ADEA does not, however, incorporate the FLSA's definition of employer. See id. (quoting Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 n.3 (9th Cir. 1993)). The ADEA's definition of employer can therefore be used interchangeably with Title VII. See id.
cases arising under the ADA, ADEA case law rarely addresses the definition of "agent" or "supervisor." At least one case, however, has adopted the traditional "hiring, firing, or conditions of employment" definition to define an agent under the ADEA.267

In Goodman v. Board of Trustees, an assistant dean claimed that a college president passed her over for a promotion, instead appointing a younger male with inferior qualifications.268 The assistant dean then sued the college under both Title VII and the ADEA.269 The court held that the president was, in fact, a supervisor for purposes of Title VII because he had been specifically authorized to make hiring recommendations.270 The court also held that the president was an employer or agent for ADEA purposes, and it therefore refused to dismiss the assistant dean's lawsuit against the college.271 Because courts interpreting both the ADEA and ADA have adopted the traditional definition of supervisor, Title VII cases should similarly continue to apply that definition. The three statutes have virtually identical definitions of employer, and no logical reason exists for interpreting the three definitions differently.

V. CONCLUSION

In recent years, sexual harassment law has changed drastically. Prior to the Supreme Court's watershed decisions in Faragher and Ellerth,272 courts held employers vicariously liable only for the quid pro quo harassment of supervisory employees.273 When supervisors engaged in workplace hostile environment sexual harassment, courts held their employers to a simple negligence standard.274 In such harassment cases, courts consistently defined a supervisor as an employee with significant input into hiring or firing determinations or any other decisions affecting the conditions of the plaintiff's employment.275

268. Id. at 1331.
269. Id.
270. Id. at 1332.
271. Id. at 1336.
275. See, e.g., id. at 1401.
The Supreme Court altered the existing standards of employer liability in its *Faragher* and *Ellerth* decisions. The Court disregarded the quid pro quo and hostile environment labels, and it held that employers can be held vicariously liable for sexual harassment by supervisory employees. 276 Several subsequent decisions have suggested that the Court may have changed more than just the standards of employer liability; they argue that the Court also re-defined the term supervisor by characterizing it as employees with “immediate (or successively higher) authority.” 277

Because the Supreme Court did not intend to overrule the traditional “hiring, firing, or conditions of employment” definition of supervisor, most courts have correctly continued to apply this definition. 278 Other courts have utilized the expansive language of *Faragher* and *Ellerth*. 279 To resolve this apparent conflict, and for a number of legal and practical reasons, courts should continue to apply the traditional definition. By defining the term supervisor more narrowly, courts best effectuate the plain language of Title VII. The traditional definition also limits employer liability and ensures consistent application of Title VII. Moreover, the “hiring, firing, or conditions of employment” definition clearly adheres to the important doctrine of *stare decisis*. Finally, cases decided under other influential employment statutes with definitions of employer closely paralleling the definition articulated in Title VII have similarly applied the traditional definition.

Although questions regarding the appropriate definition of supervisor have traditionally arisen in sexual harassment cases, the issue could easily appear in other employment discrimination cases arising under Title VII, including racial and religious discrimination cases. 280 Courts’ resolution of this issue could therefore have potentially far-reaching implications in employment discrimination law in general. By using a more precise “hiring, firing, and conditions of employment” definition, courts treat employers fairly and equally. The traditional definition also provides employers with a clearer picture of the current standards of liability. If employers obtain a clearer understanding of employment discrimination law,

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277. See, e.g., Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (ignoring the traditional definition and applying the “immediate (or successively higher) authority” definition introduced by *Faragher* and *Ellerth*).
278. See, e.g., Parkins v. Civil Constructors, Inc., 163 F.3d 1027, 1034 (7th Cir. 1998).
279. See, e.g., Grozdanich, 25 F. Supp. 2d at 973.
280. See supra note 16.
they will be more likely to follow that law. This result can only place us one step closer toward achieving equality in the workplace.

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