COMMENT

NASSAR, *VANCE*, AND THE EROSION OF TITLE VII

BRIAN HINGSTON†

I. INTRODUCTION

When Congress passed the Civil Rights Act of 1991 ("the Act") they did so with the express purpose of providing more protections for victims of discrimination in the workplace.[1] In part, the Act was a response to decisions of the Supreme Court which Congress thought deteriorated the protections of Title VII.[2] The overall goal of the Act was to provide avenues of relief for victims of discrimination in order to eliminate all forms of illegal discrimination in the workplace.[3] Congress felt that the provisions in Title VII needed to be stronger in order to deter future conduct, as well as to make the victims of discrimination whole again.[4]

One of the key provisions of the Act is the anti-retaliation guarantee, which protects employees from suffering adverse employment actions for reporting unlawful employment practices.[5] In order for Title VII to be successful, there must be an

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1. *See* H.R. REP. NO. 102-40, pt. 1 (1991).

2. *Id.*

3. *See, e.g.*, Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2538 (2013) (Ginsburg, J., dissenting) ("The amendments were intended to provide 'additional protections against unlawful discrimination in employment,' . . . and to 'respond to a number of . . . decisions by this Court that sharply cut back on the scope and effectiveness' of antidiscrimination laws.") (quoting H.R. REP. NO. 102-40, pt. II, pp. 2–4 (1991)).

4. *See id.* at 2534–35.

5. *See* 42 U.S.C. § 2000e-3(a).

anti-retaliation provision which is strong and effective.[6] In addition, if Title VII is to have a sufficient deterrent effect, a plaintiff must have the ability to hold their employer vicariously liable for actions of their employees who engage in unlawful employment practices.[7]

In June 2013, the Supreme Court, in *University of Texas Southwestern Medical Center v. Nassar*[8] and *Vance v. Ball State University*,[9] struck a significant blow to the enforcement mechanisms of Title VII. Under *Nassar*, a plaintiff alleging retaliation must now prove "but-for" causation, instead of the much less rigorous "mixed motive" standard.[10] In *Vance*, the Supreme Court limited the definition of supervisor for purposes of vicarious liability to those employees who have the power to hire, fire, demote, etc.[11] These two decisions limited the ability of victims of unlawful discrimination to (1) hold their employers liable, and (2) obtain relief to make them whole.

This comment begins by discussing the two Supreme Court decisions in Part I. While the two cases are different, they evidence a move by the Court to a more employer-friendly environment. Taken together, they also allow an employer to avoid Title VII

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6. *See, e.g.*, NLRB v. Scrivener, 405 U.S. 117, 121–22 (1972) (discussing how the purpose of the anti-retaliation provision is to make sure that employees are "completely free from coercion against reporting" unlawful employment practices) (quoting Nash v. Florida Industrial Comm'n, 389 U.S. 235, 238 (1967)). The other provisions of Title VII would fail without a strong anti-retaliation provision because without it an employer would be free to fire anyone who complains of an unlawful practice. *See* Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167, 180–81 (2005) ("Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short circuited, and the underlying discrimination would go unremedied.").

7. One of the main goals of the Civil Rights Act of 1964, as well as the amendment in 1991, was to provide sufficient deterrence against future conduct. *See* H.R. REP, *supra* note 1. To this end, employers must be held liable for unlawful employment practices perpetrated by their subordinates. *See, e.g.*, Vance v. Ball State Univ., 133 S. Ct. 2434, 2463 (2013) (Ginsburg, J., dissenting) ("This realignment will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment.").

8. *Nassar*, 133 S. Ct. 2517.

9. *Vance*, 133 S. Ct. 2434.

10. *See generally* Kendall D. Isaac, *Is It "A" Or Is It "The"? Deciphering the Motivating-Factor Standard in Employment Discrimination and Retaliation Cases*, 1 TEX. A&M L. REV. 55 (2013); Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-Gross World (But Should)*, 64 ALA. L. REV. 1067 (2013) (discussing the mixed-motive and but-for standards).

11. *Vance*, 133 S. Ct. at 2443.

liability for actions of their employees. In Part II, the comment critiques the new legal standards under *Nassar* and *Vance* and suggests better alternatives. Finally, Part III analyzes the overall impact that the decisions will have on the elimination of discrimination in the workplace.

II. THE CASES

A. University of Texas Southwestern Medical Center v. Nassar

The Supreme Court, in a 5-4 decision, held that Title VII does not allow for mixed motive retaliation claims.[12] Nassar, the plaintiff, was a doctor of Middle Eastern descent working for the defendants in both the university and hospital that the defendants owned and operated.[13] The defendant hired Beth Levine, who was the ultimate supervisor of Nassar. Nassar alleged that Dr. Levine was biased against him because of his religion and background.[14] Nassar complained that Levine had placed undeserved scrutiny on some of his work and had made comments such as "Middle Easterners are lazy."[15] Nassar eventually resigned from his position at the university.[16] Nassar then sent a letter to a Dr. Fitz, Levine's supervisor, who was upset by the allegations aimed at Levine.[17] Later, the hospital offered a job to Nassar as a staff physician, and Fitz protested to the hospital, arguing that Nassar could only work at the hospital if he also worked for the university.[18] The hospital then withdrew its offer.[19] Nassar then filed suit alleging that he was retaliated against by Fitz for complaining about the actions of Levine.[20]

Nassar prevailed in the District Court for the Northern District of Texas.[21] A jury awarded him $400,000 in back pay, as

12. *Nassar*, 133 S. Ct. at 2523.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 2523–24.
17. *Id.* at 2524.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

well as $3 million in compensatory damages.[22] The district court later reduced the compensatory damages award to $300,000.[23] The Court of Appeals for the Fifth Circuit affirmed in part and vacated in part.[24] The court of appeals affirmed the finding of retaliation under the theory that the claim only required a showing that retaliation was a motivating factor in the adverse employment decision.[25] Subsequently, the Supreme Court granted certiorari to determine the correct causation standard for retaliation claims under Title VII.[26]

At issue in *Nassar* was whether or not 42 U.S.C. § 2000e-2(m) encompassed retaliation claims.[27] The Court held that because that section did not specifically mention retaliation, Congress must not have intended it to cover those claims.[28] Next, the Court had to determine whether the anti-retaliation provision of Title VII allowed for mixed motive claims.[29] The majority held that the words "because of" in the statute meant that a plaintiff had to prove but-for causation in order to prevail on a retaliation claim under Title VII.[30] To justify its conclusion, the Court relied on Congressional intent in drafting §2000e-2(m). The Court reasoned that because the section had no reference to retaliation, Congress must have intended to remove those claims from its operation.

The dissent, written by Justice Ginsburg, strongly disputed the conclusions drawn by the majority. The dissent relied on the fact that the bans on retaliation and discrimination have always

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. 42 U.S.C. § 2000e-2(m) provides: "An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

28. *Nassar*, 133 S. Ct. at 2532–33.

29. *Id.* at 2528; 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

30. *Nassar*, 133 S. Ct. at 2528 ("[T]he proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.").

gone hand in hand.[31] The prohibition against discrimination depends, for its effectiveness, on the enforcement of the ban on retaliation.[32] The dissent also relied on Congress's intent in amending the Act in 1991 in disputing the conclusion of the majority.[33] Justice Ginsburg suggested that it was improper to take a provision which was adopted to strengthen Title VII, and turn it into a measure which significantly reduced the force of the ban on retaliation.[34]

Before *Nassar*, a plaintiff in a Title VII claim could prevail by showing that retaliation was a motivating factor in the adverse employment decision.[35] The major implication of *Nassar* is that a plaintiff in a retaliation claim must now prove but-for causation. In other words, a plaintiff must be able to prove that but-for the retaliatory motive, the employer would not have taken adverse action against the plaintiff. The Court, in discussing the mixed motive theory, stated that "if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision."[36] Significantly, the Court commented on the fact that Congress intended to eliminate all forms of discrimination, whether they were combined with legitimate purposes or not.[37]

B. Vance v. Ball State University[38]

In another 5-4 decision delivered on the same day as *Nassar*, the Supreme Court held that the definition of supervisor only covers those employees who have the power to "take tangible

31. *See id.* at 2535 (Ginsburg, J., dissenting) ("[T]his court has explained again and again that 'retaliation in response to a complaint about [proscribed] discrimination is discrimination' on the basis of the characteristic Congress sought to immunize against adverse employment action[.]") (quoting Jackson v. Bd. of Educ., 544 U.S. 167, 179 n.3 (2005)).

32. *See id.* ("Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it.").

33. *Id.* at 2539 (Ginsburg, J., dissenting).

34. *Id.* at 2535.

35. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that a plaintiff can prevail on a Title VII claim by showing that gender played a motivating part in an adverse employment decision). This was later codified by the Civil Rights Act of 1991 in 42 U.S.C. § 2000e-2(m).

36. *Price Waterhouse,* 490 U.S. at 248.

37. *See id.* at 251.

38. Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

employment actions against the victim."[39] In this case, the plaintiff, Maetta Vance, worked as a substitute server in the Banquet and Catering Division of Dining Services at Ball State University.[40] During her employment, Vance began having issues with a fellow employee, Saundra Davis.[41] Vance alleged that Davis gave her a hard time at work and created a hostile working environment.[42] Despite filing numerous complaints with the university, the problems persisted, leading Vance to file suit in the District Court for the Southern District of Indiana.[43] The district court granted summary judgment for the defendant because Davis could not "hire, fire, demote, promote, transfer, or discipline" Vance.[44] The Seventh Circuit Court of Appeals agreed with the district court and affirmed summary judgment on the same grounds.[45]

The Supreme Court was asked to determine when an employer can be held vicariously liable for sexual harassment perpetuated by one of their employees.[46] Under previous Supreme Court decisions, an employee qualified as a supervisor if she was authorized to take tangible employment action or direct the employee's daily work activities.[47] The Supreme Court removed the second part of the definition and limited it to only those who had the power to take tangible employment action.[48] The majority felt that part of the definition was too nebulous and vague.[49] The Court was motivated by a desire to create a definition of supervisor which could be easily applied and would allow the issue of supervisor to be determined as a matter of law.[50]

The dissent, again written by Justice Ginsburg, strongly disagreed that supervisor is a definition that could be easily and

39. *Id.* at 2443.

40. *Id.* at 2439.

41. *Id.*

42. *Id.*

43. *Id.* at 2439–40.

44. *Id.* at 2440.

45. *Id.*

46. *Id.* at 2441.

47. *Id.* at 2443. This was the definition adopted and followed by the EEOC. *See* EEOC, Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 BNA FEP Manual 405:7654 (Feb. 2003).

48. *Vance*, 133 S. Ct. at 2443.

49. *Id.*

50. *Id.* at 2450.

mechanically applied.[51] The dissent mainly relied on the idea that an employee who controls the daily activities of his subordinates is no less aided in his harassment than someone who has the power to take tangible employment action.[52] In the words of Justice Ginsburg, "[e]ach man's discriminatory harassment derived force from, and was facilitated by, the control reins he held."[53] The dissent also argued that in order to determine whether someone is a supervisor, a court must look to the totality of the circumstances.[54] The workplace is not so black and white where the mechanical application of a definition can work correctly.

III. THE NEW STANDARDS ESTABLISHED BY NASSAR AND VANCE

A. But-For Causation

Requiring a plaintiff to prove but-for causation to succeed on a retaliation claim will significantly undermine the enforcement mechanisms of Title VII.[55] Retaliation is considered to be one of, if not the most important aspect of Title VII because without it, an employer would be free to fire anyone who complains about discrimination.[56] If this happened, no employee would be willing to come forward and report discrimination or participate in an investigation on behalf of a co-worker. For this reason, retaliation has always been considered to fall under the umbrella of illegal discrimination because it is essential to the overall enforcement of anti-discrimination laws.[57] Title VII will be

51. *Id.* at 2462 (Ginsburg, J., dissenting).

52. *Id.* at 2460.

53. *Id.*

54. *Id.* at 2463.

55. *See id.* at 2456 ("When more than one factor contributes to a plaintiff's injury, but-for causation is problematic."); *see, e.g.*, 1 Restatement (Third) of Torts § 27, cmt. a, p. 385 (2005) (discussing that there is almost universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist); Restatement of Torts § 9, cmt. b, p. 18 (1934) (legal cause is a cause that is a "substantial factor in bringing about the harm").

56. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Retaliation*, http://www.eeoc.gov/laws/types/retaliation.cfm (explaining that it is illegal to retaliate against an employee who files a Title VII claim).

57. The Court has held multiple times that retaliation is just another form of intentional discrimination on the basis of an impermissible characteristic. *See* Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2541 (2013) (Ginsburg, J., dissenting); *see, e.g.*, Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167, 174 (2005). Interestingly, the Supreme Court has also discussed how "[w]ithout question, when a supervisor sexually

undermined by the *Nassar* standard for a few reasons. First, having two different causation standards that depend on which claim a plaintiff brings will cause significant jury confusion. Second, leaving the burden of persuasion with a plaintiff will, in many circumstances, be an impossible burden to overcome. Finally, further limits on employee rights under Title VII were not necessary to protect employers from frivolous claims.

There is no persuasive reason that explains why a plaintiff must prove but-for causation for a retaliation claim, while allowing the same plaintiff to use the mixed motive framework for a claim of discrimination based on race. The purpose of the two claims is exactly the same. They are intended to provide relief to victims of discrimination and deter future discrimination by employers.[58] Further, the different standards will inevitably cause confusion among jurors who are faced with both claims in the same case. For example, what happens when a plaintiff claims retaliation as well as mixed motive race discrimination? For one claim, the jurors will be instructed on but-for causation, and for the other, they will be instructed on motivating factor causation. To require a jury to wade through the murky waters of two different causation standards in the same case is likely to cause confusion.

Allowing a plaintiff to prevail on a mixed motive claim, instead of requiring but-for causation, is a better way to ensure that unlawful discrimination is remedied. A mixed motive claim allows a plaintiff to succeed by showing that the retaliatory motive was a motivating factor in the employment decision.[59] This causation standard recognizes that despite whether the employer also had a legitimate motive, allowing retaliation to motivate their decision still constitutes illegal discrimination.[60] Under a but-for standard, a plaintiff is required to eliminate all other possibilities and show that without the retaliatory motive the employer would

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harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

58. Justice O'Connor, concurring in *Price Waterhouse*, noted that the statutory torts created by Title VII have two main purposes. First, they were intended to deter conduct which had been identified as contrary to public policy and harmful to society. Second, they were intended to make persons whole for injuries suffered due to unlawful employment discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 264–65 (1989) (O'Connor, J., concurring).

59. *Id.* at 252–53.

60. *See id.* at 271 (discussing how in the implementation of employment decisions, it is clear that Title VII tolerates no discrimination, whether it is subtle or otherwise).

not have made the same decision. As the dissent recognized, this simply ignores the realities facing a retaliation plaintiff.[61] Plaintiffs are not privy to the discussions or thoughts of their supervisors who are making these decisions. It is difficult, if not impossible, for a plaintiff to discover what the specific motivations were for taking action against her.

The Act was passed in order to strengthen anti-discrimination laws, an intent which the Supreme Court seemingly dismisses.[62] Even during the original debates surrounding the passing of the Act in 1964, Senator Case expressed concerns that a "sole cause" standard would render the Act "totally nugatory."[63] Congress recognized the need for mixed motive claims by adding § 2000e-2(m) to the 1991 amendments. As Justice Ginsburg acknowledged, a "but-for" causation standard simply "lacks sensitivity to the realities of life at work."[64] It is hard to imagine a situation where an employer solely acts with a retaliatory motive. Even if an employer did only have illegal motives, it is not difficult to conjure up some legitimate reason for the adverse employment action. An employer could come up with a number of different reasons why it fired a certain employee. Simply stated, these decisions are very rarely, if ever, motivated by one single cause.

Even under a mixed motive theory, the employer still has the ability to avoid liability by establishing that it would have taken the same action regardless of the retaliatory motive. This strikes the correct balance between limiting employer liability and providing avenues of relief for plaintiffs.[65] The employer is in a much better position to understand the reasons surrounding an adverse employment decision.[66] The employee is not going to be present for discussions regarding the employment decision, and

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61. *Nassar*, 133 S. Ct. at 2546–47 (Ginsburg, J., dissenting).

62. *See* Civil Rights Act of 1991, § 2, 105 Stat. 1071; H.R. Rep. 102-40(II), at 18; *Nassar*, 133 S. Ct. at 2545 (Ginsburg, J., dissenting) ("Shut from the Court's sight is a legislative record replete with statements evincing Congress' intent to strengthen antidiscrimination laws and thereby hold employers accountable for prohibited discrimination.").

63. *See* Cong. Rec. 2728, 13837 (1964).

64. *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting).

65. Justice Breyer, dissenting in *Gross* agreed that the burden-shifting framework under a mixed motive theory is neither "unfair or impractical." *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 192 (2009) (Breyer, J., dissenting).

66. *See id.* at 191 ("All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision.").

will likely be simply informed of the decision. Under a mixed motive theory, the plaintiff only has to provide proof that the unlawful motive played a factor in the decision.[67] Then, the defendant must come forward with evidence to show they had a legitimate non-discriminatory reason for taking adverse employment action against the plaintiff. If the defendant had a legitimate reason for taking adverse action against the plaintiff, the defendant can avoid liability. This standard provides the defendant with an avenue to avoid liability even under the easier burdens of the mixed motive theory. Instead, the defendant should be required to explain their decision once the plaintiff has shown an unlawful factor played a part.

Leaving the burden of persuasion on a plaintiff to prove but-for causation undermines the deterrent purposes of Title VII.[68] Generally, requiring a plaintiff to prove but-for causation does not cause problems.[69] However, there are certain situations where it is extremely difficult, if not impossible, to apply correctly. When there are multiple causes at play, each of which could have brought about the ultimate injury, it is very difficult for a jury to determine which one is the but-for cause. This inquiry becomes even more problematic when you are dealing with not physical forces, but thought processes.[70] Even under a mixed motive theory, the plaintiff is being required to delve into the mind of those making these decisions in order to show that they acted with unlawful motives.[71] This is difficult enough on its own. This hurdle becomes nearly impossible when the plaintiff is asked to prove

67. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

68. *See id.* at 263 (O'Connor, J., concurring) ("The law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of the duty of care."). Justice O'Connor goes on to discuss how in "multiple causation" cases, the law shifts the burden of proof to the defendants to show that their actions were not the but-for cause of the injury. *Id.*

69. *See id.* at 264; *Gross*, 557 U.S. at 190 (Breyer, J., dissenting) ("It is one thing to require a typical tort plaintiff to show 'but-for' causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of but-for causation comparatively easy to understand and relatively easy to apply.").

70. Justice Breyer, dissenting in *Gross*, continued his discussion of the but-for standard by stating that "it is an entirely different matter to determine a 'but-for' relation when we consider, not physical forces, but the mind-related characteristics that constitute motive." *Gross*, 557 U.S. at 190 (Breyer, J., dissenting).

71. *See* Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2546 (2013) (Ginsburg, J., dissenting).

that the unlawful motive was the reason for the decision, and not just a motivating factor.[72]

While the *Nassar* Court was concerned with limiting employer liability, the statistics show that such a limitation was unnecessary. According to statistics from the Equal Employment Opportunity Commission ("EEOC"), only 4.3 percent of retaliation claims in 2012 resulted in a cause finding.[73] This number was the lowest recorded by the EEOC since 1997.[74] Retaliation claims are also the most common charge filed with the EEOC, which considers retaliation as a "direct affront to its law enforcement obligations."[75] Further, these statistics were taken before the *Nassar* decision, when the retaliation environment was considerably more plaintiff friendly.[76] These statistics suggest that it was unnecessary for the Court to further limit a plaintiff's ability to succeed on a retaliation claim by removing mixed motive claims.

Eliminating mixed motive retaliation claims was also unnecessary because a plaintiff was already limited in her remedies under such a claim. A successful plaintiff in a mixed motive case can get equitable relief, such as an injunction or declaratory judgment, but is not entitled to monetary damages.[77] This suggests that Congress intended a trade-off between the rights of the employer and the employee. A plaintiff alleging retaliation would be able to succeed by showing that it was a motivating factor in the employment action. This causation standard is much easier to satisfy, which is why the remedies for prevailing on such a claim are more limited. The trade-off between an employer and employee serves a very important function in employment discrimination. It provides an avenue for a plaintiff to hold her employer liable for illegal discrimination, while, at the same time, it prevents an employer from being vulnerable to monetary damages for every mixed motive claim that succeeds.

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72. *See Gross*, 557 U.S. at 190.

73. David Long Daniels, *Risky Business: Litigating Retaliation Claims*, 28 ABA J. LAB. & EMP. L. 437, 438 (2013).

74. *Id.*

75. *Id.*

76. *See id.* at 448 (discussing how the law favors plaintiffs who assert retaliation claims).

77. 42 U.S.C. § 2000 (2012).

B. Supervisor Definition Under Vance

The definition of supervisor adopted by the Supreme Court in *Vance* is too restrictive and will lead to employers being able to avoid liability for harassment perpetrated by their employees. Under *Vance*, an employer can only be held liable for the actions of those employees who have the power to take "tangible employment action."[78] The *Vance* decision dispensed with the previous definition of supervisor, which also covered those with the power to control the daily activities of their subordinates.[79] This new definition of supervisor creates a number of issues with enforcement of anti-harassment laws. First, it creates a disincentive for employers to train their supervisors, and does not serve as a sufficient deterrent against future conduct. Second, even though it may be easily applied, it does not account for the realities of the workplace, and will lead to injustice.

The new definition of supervisor does not recognize the realities facing victims of harassment in the workplace and will leave many of them without a remedy. Under the previous standard adopted in 1998, employers could be held vicariously liable for actions of a supervisor who has "immediate authority" over the employee.[80] The Supreme Court held that it is fair to hold an employer liable for actions of supervisors who are "aided in" their harassment by virtue of their power.[81] Whether the supervisor has the power to fire an employee, or to control their daily activities, it is their power over the employee that aids them in their harassment.[82] In other words, the simple fact that the supervisor has been given authority over other employees allows them to use that power to harass, or otherwise create a hostile

78. Vance v. Ball State Univ., 133 S. Ct. 2434, 2454 (2013).

79. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); *see also* EEOC Guidance, *supra* note 47.

80. *Faragher*, 524 U.S. at 807; Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

81. *Faragher*, 524 U.S. at 802–03.

82. Justice Stevens, concurring in *Meritor*, expounded on the ideas behind the "aided in" standard. In his view, a supervisor is that person who "is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 76 (Stevens, J., concurring). He went on to state that "it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Id.* at 76–77.

work environment.[83] For example, while it would be easy for someone to ignore a co-worker who has no authority over her, it is not so easy to ignore those who have control over her employment conditions. A supervisor still has power over their subordinates regardless of whether or not they choose to engage in harassing behavior. The victim must choose either to acquiesce to it in order to retain her job or object to it with the potential consequence of being subject to an even more abusive work environment.[84] Put simply, it is the authority vested in the supervisor which allows him to harass his subordinates, whether it be authority to take tangible employment action or otherwise.

Under this new definition, employers will not be incentivized to properly screen and train their supervisors. Employers are simply in a better position to guard against misconduct by supervisors by properly screening them, and providing sufficient training.[85] By holding employers liable for actions of their supervisors, employers are incentivized to make sure that they hire supervisors who they know will not engage in discriminatory misconduct.[86] Without such an incentive, the employer will not engage in rigorous screening, and has no further incentive to train those whom they do hire.[87]

While the definition adopted by the majority in *Vance* can be easily applied, this issue should not be decided by a judge as a matter of law.[88] As acknowledged by the dissent in *Vance*, the definition adopted by the majority ignores the realities of the

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83. *See id.* at 77.

84. Justice Souter, writing for the majority in *Faragher*, recognized this issue. He stated that "when a fellow employee harasses, the victim can walk away." However, it is not so simple when it is a supervisor whose power "does not disappear when he chooses to harass through insults and offensive gestures." *Faragher*, 524 U.S. at 803.

85. *See id.*

86. *See id.*

87. Vance v. Ball State Univ., 133 S. Ct. 2434, 2464–65 (2013) (Ginsburg, J., dissenting) ("If vicarious liability is confined to supervisors formally empowered to take tangible employment actions, however, employers will have a diminished incentive to train those who control their subordinates' work activities and schedules, i.e., the supervisors who 'actually interact' with employees.").

88. *See id.* at 2450 ("Under the definition of supervisor that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial."). In Faragher, the majority opinion recognized that the proper analysis of this issue should not depend on a mechanical application of factors, but rather an "enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment." *Faragher*, 524 U.S. at 797.

workplace.[89] The inquiry should not depend on the mechanical application of a definition. Instead, it should focus on the working relationship between the supervisor and employee.[90] A supervisor with the power to control the daily activities of their subordinates is no less aided in their illegal motives than someone who has the power to take tangible employment action. There is no persuasive reason for choosing to limit "supervisor" to those who can take tangible action against an employee, other than to simply limit employer liability for acts of their employees. However, the defendant in *Vance* did not advance or argue for the restrictive definition that was adopted by the Supreme Court.[91] So, why did the Supreme Court feel it was necessary to adopt a definition of supervisor not advanced by either party and at odds with that established by the EEOC? The majority attempted to justify its decision by referring to the previous definition as "nebulous" and "a study in ambiguity."[92] However, this line of reasoning ignores the fact that the employment relationship cannot be properly characterized by mechanical definitions.[93] The complexity of the employment relationship is exactly why the previous definition was difficult to apply. By sacrificing employee rights for the sake of efficiency, the Supreme Court again ignored the fact that this is not what Congress intended in passing the Act in 1991. Difficulty in application of a standard is not a sufficient reason to allow unlawful harassment to go unpunished.

IV. ANALYSIS OF THE EFFECT ON TITLE VII ENFORCEMENT

As a general proposition, these two decisions will lead to more unlawful discrimination going unpunished. The effect will be two-fold. First, fewer legitimate victims of employment discrimination will be able to hold their employer liable and obtain relief. Second, fewer victims will be willing to file

89. *See Vance,* 133 S. Ct. at 2463 (Ginsburg, J., dissenting) ("One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim.").

90. *See id.*

91. In fact, Ball State agreed with the plaintiff that the EEOC definition was the correct one to apply and did not argue for adoption of the more restrictive one that the Court adopted. *Id.* at 2465–66 (Ginsburg, J., dissenting).

92. *See id.* at 2449.

93. *See id.* at 2463 (Ginsburg, J., dissenting).

complaints, initiate lawsuits, or even participate in proceedings on behalf of co-workers.

The *Nassar* decision will inevitably result in more victims of retaliation being unable to obtain any relief. While previous retaliation plaintiffs were able to get at least some form of relief under a mixed motive theory, that avenue is now closed. Though the mixed motive theory did not allow for monetary damages, it at least allowed a plaintiff to hold the employer liable and recover something for her injury. Under *Nassar*, the only avenue available to a retaliation plaintiff is to try and prove but-for causation in order to recover monetary damages. Even where a plaintiff has proven she was subjected to unlawful retaliation, she may still be unable to prevail on her claim.[94] In other words, under the new causation regime established by *Nassar*, proven retaliation will go unpunished.[95] This result undermines the overriding purposes of Title VII. The enforcement, deterrent, and remedial aspects of Title VII are all left with less bite after *Nassar*.[96]

Under *Vance*, even if a plaintiff proves she was a victim of harassment in the workplace, she may still be left without a remedy. The plaintiff will not prevail unless she was harassed by a supervisor with the power to take tangible employment action. Thus, a plaintiff who was subjected to harassment by an immediate supervisor who lacked power to take tangible employment action will be unable to hold her employer vicariously liable. This result leads to the unacceptable conclusion that plaintiffs with legitimate claims of harassment will be unable to obtain relief from the courts.

Moreover, this restrictive definition of supervisor removes from its operation those who have significant contact with their subordinates. A supervisor who controls day-to-day operations will typically have more contact with their employees than someone higher up in management. For example, consider the problem

94. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2544 (Ginsburg, J., dissenting) ("The Court's but-for causation standard does not mean that the plaintiff has failed to prove she was subjected to unlawful retaliation. It does mean, however, that proof of a retaliatory motive alone yields no victory for the plaintiff.").

95. *Id.*

96. The EEOC Compliance Manual suggests that removing retaliation from the operation of 42 U.S.C. § 2000e-2(m) would permit proven retaliation to go unpunished, and would "undermine[] the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism." EEOC, 2 EEOC COMPLIANCE MANUAL § 8-II(E)(1), p. 614:0008, n.45 (May 20, 1998).

presented by a supervisor who controls day-to-day operations but does not have power to take tangible employment action. This supervisor has regular contact with their subordinates, and is in control of their overall work conditions. Despite being aided in his harassment by virtue of the supervisory status conferred on him by his employer, the victim will not be able to hold the employer vicariously liable. Previously, an employer would have been held vicariously liable if their supervisor engaged in harassment of their subordinates. However, under *Vance*, if that supervisor has no power to take tangible employment action, the employer cannot be held liable.[97]

If a plaintiff fails to establish the supervisor element, the only option left for her would be to try and prove negligence on the part of the employer.[98] She would have to show that a complaint moved up the "chain of command" and that the employer negligently failed to do anything about it.[99] This is simply not a sufficient safety net. Once someone files a complaint with her employer, the rest is out of her hands. She cannot control whether the complaint ever gets passed on to someone with actual power. Further, under the *Vance* decision, the plaintiff will hold the burden of proving negligence if the harasser does not have power to take tangible employment action.[100] Thus, a plaintiff is left to attempt to gather evidence regarding how the employer dealt with the complaint and whether or not they actually had notice of it.[101] Under this approach to harassment, many victims will be left without a remedy and the deterrent purposes of Title VII will be undermined.

Another major issue in *Vance* is that employers are now on notice that they will not be held liable for actions of those who do not have the power to take tangible employment action. In *Vance*, the Supreme Court stated that, for the most part, the question of

97. *Vance*, 133 S. Ct. at 2443.

98. *Id.* at 2464 (Ginsburg, J., dissenting).

99. An employer is negligent in this regard if they knew or should have known about the harassment but failed to take appropriate action to correct it. *Id.* at 2463–64 (Ginsburg, J., dissenting). However, if the complaint fails to make its way up the chain of command to those with power to take tangible employment action, the employer will escape liability under this standard. *See id.* at 2464.

100. *See id.* at 2464 (Ginsburg, J., dissenting).

101. *See id.* at 2464 ("An employer has superior access to evidence bearing on whether it acted reasonably to prevent or correct harassing behavior, and superior resources to marshal that evidence.").

supervisor status could be answered by simply looking at the job description of a particular employee.[102] In theory, the employer could make it clear in the job description of every employee whether they would qualify as a supervisor. Imagine a situation where an employer has two offices. One is a factory with the vast majority of their employees, and the other is a headquarter office for management. If the employer keeps all those with supervisor status at the headquarter office, the employer could completely insulate themselves from liability for harassment perpetrated by an employee at the factory. The law should not allow an employer to avoid liability simply by being smart enough to control who has supervisor status and who does not. The law should hold employers liable for harassment that is perpetrated by employees who they hire and who are aided by their power.

The most concerning aspect of the *Nassar* decision is the potential it has to create a "chilling effect" on victims of unlawful discrimination.[103] If employees do not believe that they will be protected from retaliation for reporting discrimination, they will not be willing to come forward. Further, those who do have the courage to come forward may find little support from co-workers who do not want to testify on their behalf. For this reason, the anti-retaliation provisions of Title VII need to be strong safety nets for victims. When a victim knows she is protected from retaliation, she will not be afraid to come forward against their employer. However, the prospect of losing her job for complaining about unlawful employment practices is likely to deter a significant amount of victims from doing so.

V. CONCLUSION

The *Nassar* and *Vance* decisions will inevitably result in unlawful discrimination going unpunished. Victims of retaliation and harassment in the workplace will be left without a remedy. Even more concerning is the potential to deteriorate the deterrent

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102. *See id.* at 2465 (Ginsburg, J., dissenting) ("[T]he supervisor-status inquiry should focus on substance, not labels or paper descriptions . . . .").

103. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2540 (Ginsburg, J., dissenting) (quoting EEOC, EFFECT OF DESERT PALACE, INC. V. COSTA, 539 U.S. 90 (2003), ON REVISED ENFORCEMENT GUIDANCE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY (July 14, 1992), 20, n.14 (Jan. 16, 2009), *available at* http://www.eeoc.gov/policy/docs/disparat.html (last visited Oct. 14, 2014)).

effects of Title VII, leading to more cases of discrimination in the future. Instead of deterring the employer, these decisions will deter future victims from filing suit. While the previous Title VII landscape was more plaintiff friendly, it was also a balancing act between the rights of the employer and employee. It was easier for a plaintiff to succeed on her claim, but her remedies were limited, and employers had affirmative defenses available to avoid liability. Now, a victim of discrimination faces a difficult challenge in a world where "heads the employer wins, tails the employee loses."[104]

104. *See id.* at 2545 (Ginsburg, J., dissenting).