"That gear stick is not your husband's p----." Why the Dissent in Vance v. Ball State University Got it Right, and a Comparison of the Law of Employer Vicarious Liability for Sexual Harassment in the United States and South Africa

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"THAT GEAR STICK IS NOT YOUR HUSBAND'S P----." WHY THE DISSENT IN VANCE v. BALL STATE UNIVERSITY GOT IT RIGHT, AND A COMPARISON OF THE LAW OF EMPLOYER VICARIOUS LIABILITY FOR SEXUAL HARASSMENT IN THE UNITED STATES AND SOUTH AFRICA

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I. INTRODUCTION

The above quote was allegedly said to truck driver Monika Starke by Bob Smith, her lead driver, during a training he was conducting with her.\(^1\) Smith additionally made comments regarding Starke's breast size, and even forced her to have unwanted sex with him on multiple occasions "in order to get a passing grade" in her truck driver training.\(^2\) Smith, however, lacked the power to promote, reassign, demote, or fire Starke.\(^3\) Thus, under the United States Supreme Court's June 2013 decision of *Vance v. Ball State University*,\(^4\) Smith's employer, CSRT, could not be held vicariously liable\(^5\) for Smith's actions, as Smith would not qualify as Starke's "supervisor."\(^6\)

This article discusses why *Vance* was incorrectly decided, and why Justice Ginsburg's dissent in *Vance* presented a much better reasoned conclusion than the majority opinion. This article then proposes an alternative to *Vance*, based in part on recent case law developments in South Africa. Section II gives an overview of Title VII, discussing the hostile work environment cause of action, and the different types of employer liability for sexual harassment. Section III addresses the Supreme Court's holding in *Vance v. Ball State University*, and the rationales behind the majority and dissenting opinions. Section IV discusses the sexual harassment laws of South Africa as compared with those in the United States, including statutory provisions and common law developments. Lastly, Section V discusses why South African case law presents a

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\(^1\) E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 665-66 (8th Cir. 2012). In a similarly disturbing interaction, Bob Filner allegedly made the comment "Wouldn't it be great if you took off your panties and worked without them on?" to Irene McCormack Jackson, his then Communications Director, just months into his term as the Mayor of San Diego. Complaint and Demand for Jury Trial, Jackson v. City of San Diego, 2013 WL 3810141, at ¶¶ 18-19 (Cal. Super. 2013).

\(^2\) *CRST Van Expedited, Inc.*, 679 F.3d at 666.

\(^3\) *Id.* at 665.


\(^5\) Defined as "[i]liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." Black's Law Dictionary (9th ed. 2009).

\(^6\) *Vance*, 133 S. Ct. at 2452 (Ginsburg, J., dissenting).
better reasoned approach than the Vance decision,\textsuperscript{7} based on the continuing need for strong protections of working women against sexual harassment.

\textbf{II. AN OVERVIEW OF TITLE VII, HOSTILE WORK ENVIRONMENTS, AND EMPLOYER VICARIOUS LIABILITY FOR SEXUAL HARASSMENT IN THE UNITED STATES}

Section II of this article gives an overview of Title VII, the hostile work environment cause of action, and employer liability for sexual harassment under Title VII. Subsection A discusses Title VII generally, including the history of how sexual harassment came to be interpreted as sex discrimination under Title VII. Subsection B addresses the Supreme Court's recognition of sexual harassment as sex discrimination and the hostile work environment cause of action under Title VII. Subsection C explains the different theories of employer liability for sexual harassment under Title VII. Finally, subsection D discusses the split among the federal circuit courts of appeals regarding the definition of "supervisor" for purposes of employer vicarious liability prior to the Supreme Court's decision in Vance. Before Vance, some of the circuits provided much needed protections for working women from sexual harassment,\textsuperscript{8} which were ultimately taken away by the Court's holding in Vance.

\textsuperscript{7} My thesis is not that the \textit{implementation} of the South African model is perfect. Rather, my suggestion is that the laws in South Africa provide the means for South African women to have better protection than women in the United States. Of note, South Africa's Constitution has been called a "model of progressive law reform, particularly with respect to gender equality." Julie Goldscheid, \textit{Gender Violence and Work in the United States and South Africa: The Parallel Processes of Legal and Cultural Change}, 19 Am. U. J. Gender Soc. Pol'y & L. 921, 944 (2011). However, as one scholar opined, "[i]n theory, South African law provides victims of sexual harassment with significant protection. In practice, however, women still remain extremely vulnerable. Women often find themselves subject to severe sexual abuse and even rape." Mohamed Alli Chicktay, \textit{Sexual Harassment and Employer Liability: A Critical Analysis of the South African Legal Position}, 54 J. Afr. L. 283, 296 (2008). By contrast, in comparing the outcome for those cases that do make it to the highest courts in the United States and South Africa respectively, another commentator argued that one court "is intent on protecting the vulnerable members of its society, and the other is skeptical of attempts by the legislature to do so through the creation of new rights." Christopher J. Roederer, \textit{The Constitutionally Inspired Approaches to Police Accountability for Violence Against Women in the U.S. and South Africa: Conservation Versus Transformation}, 13 Tulsa J. Comp. & Intl L. 91, 93 (2005). Addressing the U.S. Supreme Court's decision in \textit{Town of Castle Rock, Colo. v. Gonzales}, 545 U.S. 748 (2005), this scholar reasoned that "[o]n almost every conceivable view of democracy, the South African decisions and approach are better than the decision and approach taken in Castle Rock." \textit{Id.} at 96.

\textsuperscript{8} See Mack v. Otis Elevator Co., 326 F.3d 116 (2d Cir. 2003), \textit{abrogated by} Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) for an example of a circuit that used a broader definition of "supervisor" prior to the Vance decision.
A. Historical Developments in the Viability of Sexual Harassment Claims under Title VII

Title VII of the 1964 Civil Rights Act provides that it is unlawful "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." While the text of this statute discusses discrimination on the basis of sex, nowhere in the statute is sexual harassment expressly discussed. Accordingly, many of the initial sexual harassment lawsuits brought under Title VII were found to not constitute sexual discrimination.

In a 1974 lawsuit brought in the District Court for the District of Columbia, a plaintiff alleged "that she was discriminated against . . . because she refused to engage in a sexual affair with her supervisor." The court ultimately concluded that "[r]egardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex." Under comparable reasoning, the District Court for the District of Arizona granted a motion to dismiss allegations by two women of repeated sexual advances by one of their male supervisors, on the basis that "[n]othing in the complaint alleges nor can it be construed that the conduct complained of was company directed policy which deprived women of employment opportunities." The court thus reasoned that the plaintiffs "failed to state a claim for relief under Title VII of the Civil Rights Act." The District Court for the District of New Jersey similarly opined that while "[t]he abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social

10 See generally § 2000e-2(a)-(n).
13 Id.
15 Id. at 162.
experience," such conduct "is not, however, sex discrimination within the meaning of Title VII even when the purpose is sexual."\textsuperscript{16} All three of these district court opinions, however, were subsequently overturned or vacated.\textsuperscript{17}

The first court to decide that Title VII discrimination encompasses sexual harassment was the District Court for the District of Columbia in the 1976 case of \textit{Williams v. Saxbe}.\textsuperscript{18} There, the court reasoned that "the [harassing] conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other," thus falling within the purview of Title VII.\textsuperscript{19} Then, in 1982, the Eleventh Circuit issued the opinion of \textit{Henson v. City of Dundee},\textsuperscript{20} which established what one scholar indicated was "the first prima facie case for sexual harassment under Title VII."\textsuperscript{21} \textit{Henson} laid out five elements that a sexual harassment plaintiff must allege to bring a lawsuit under Title VII.\textsuperscript{22} Specifically, the court explained that the plaintiff-employee must prove: 1) "[t]he employee belongs to a protected group," 2) "[t]he employee was subject to unwelcome sexual harassment," 3) "[t]he harassment complained of was based upon sex," 4) "[t]he harassment complained of affected a term, condition, or privilege of employment," and 5) "that the employer knew or should have known of the harassment in question and failed to take prompt remedial action," under the principle of

\begin{footnotesize}
\textsuperscript{17} Barnes v. Costle, 561 F.2d 983, 992 n.68 (D.C. Cir. 1977) ("When, as in the case before us, a woman is subjected to an employment condition by a superior who leaves all men completely free from that condition, it cannot be said that there is parity of treatment . . . or that there is not a sex-predicated discrimination . . . ."); Corne v. Bausch & Lomb, Inc., 562 F.2d 55 (9th Cir. 1977) (decision vacated and remanded without opinion); Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977) ("Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee . . . and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.").
\textsuperscript{18} DROBAC, \textit{supra} note 11, at 17; Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), \textit{vacated sub nom.} Williams v. Bell, 587 F.2d 1240, 1247 (D.C. Cir. 1978) (finding that the district court departed from the appropriate standard of review for decisions of administrative agencies).
\textsuperscript{19} \textit{Id.} at 657-58.
\textsuperscript{20} Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
\textsuperscript{21} DROBAC, \textit{supra} note 11, at 51.
\textsuperscript{22} \textit{Henson}, 682 F.2d at 903-905.
\end{footnotesize}
"[r]espondeat superior." These elements have been noted to have "provided the basis for the first Supreme Court opinion on the subject" of sexual harassment.

In sum, lower courts were unfortunately slow to recognize sexual harassment as a form of sex discrimination under Title VII. Moreover, it was not until over two decades after the Civil Rights Act of 1964 was passed that the Supreme Court weighed in on the issue.

B. The Supreme Court's Recognition of Sexual Harassment as Sex Discrimination and the Hostile Work Environment Cause of Action

Before the 1986 decision of *Meritor Sav. Bank, FSB v. Vinson*, the Supreme Court had not addressed whether sex discrimination encompasses sexual harassment, under Title VII. In *Meritor*, the Court endorsed the conclusion that sexual harassment constitutes sex discrimination, reasoning that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." In the underlying lawsuit, a bank employee sued the vice president of the bank, alleging that he made "repeated demands upon her for sexual favors," and additionally "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." Addressing the issue of hostile atmospheres in the workplace, the Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." In defining a "hostile work environment," the Court indicated that actionable sexual harassment is

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23 *Id.* (internal quotation marks and citations omitted). *Respondeat superior* is defined as "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Black's Law Dictionary* (9th ed. 2009).
24 DROBAC, *supra* note 11, at 51.
26 DROBAC, *supra* note 11, at 58.
27 *Id.*
29 *Id.* at 59-60.
30 *Id.* at 66.
that which is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." The Court reasoned that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination." The Court cited the guidelines issued by the Equal Employment Opportunity Commission (EEOC), explaining that:

Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic quid pro quo, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'

The Court additionally noted that lower court decisions since the issuance of the EEOC guidelines had consistently held hostile work environments to be actionable under Title VII. As applied to the bank employee's situation, the Court held that the findings of the District Court were not sufficient to be dispositive of the employee's hostile work environment allegation. The Meritor Court, however, decided not to rule on the issue of an employer's liability for the harassing actions of its employee, reasoning that it was unclear whether and to what extent the bank's vice president had made sexual advances to the plaintiff bank employee. But the Court did indicate that it agreed with the EEOC "that Congress wanted courts to look to agency principles for guidance in this area."

In 1993, the Supreme Court in *Harris v. Forklift Systems, Inc.* expanded the definition of the harm of the hostile work environment cause of action under Title VII, holding that "[s]o long

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31 Id. at 67 (alteration in original) (quoting Henson, 682 F.2d at 904).
32 Id. at 64.
33 Id. at 65 (quoting 29 CFR § 1604.11(a)(3) (1985)).
34 Id. at 66.
35 Id. at 73. The Court also held that the District Court "did not err in admitting testimony about respondent's sexually provocative speech and dress." Id.
36 Id. at 72.
37 Id.
as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious."\textsuperscript{38} There, the plaintiff-employee at an equipment rental company sued her manager for creating a hostile work environment, claiming that he insulted her because of her sex, made sexual innuendos to her and to other female employees, made her and other female employees remove objects from his pants pockets, and sometimes "threw objects on the ground in front of [the plaintiff] and other women, and asked them to pick the objects up."\textsuperscript{39} In reaching its decision, the \textit{Harris} Court reasoned that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."\textsuperscript{40} The Court ultimately held that the district court applied the incorrect standard for hostile work environment to the plaintiff's allegations, and remanded the case.\textsuperscript{41} The Court did not, however, address the issue of whether the employer could be held liable for the manager's actions.\textsuperscript{42}

In sum, the Supreme Court unfortunately did not recognize sexual harassment or hostile work environments as a form of sex discrimination under Title VII until 1986.\textsuperscript{43} This decision was quite belated, and insult has only been added to the injury of this delay by the \textit{Vance} Court's decision to remove a significant amount of protection against sexual harassment.

\textsuperscript{38} Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).
\textsuperscript{39} Id. at 19.
\textsuperscript{40} Id. at 22.
\textsuperscript{41} Id. at 23.
\textsuperscript{42} See generally id. at 18-23.
\textsuperscript{43} DROBAC, supra note 11, at 58.
C. Employer Liability for Sexual Harassment under Title VII: Distinctions between Negligence and Vicarious Liability

Prior to the passage of the Civil Rights Act of 1991,44 prevailing Title VII plaintiffs were only eligible for equitable relief, typically backpay.45 The Civil Rights Act of 1991, however, made compensatory and punitive damages available to successful Title VII plaintiffs who experience "intentional discrimination," defined as "not an employment practice that is unlawful because of its disparate impact."46 Punitive damages are limited, however, to situations where the "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."47 For vicarious liability purposes, in 1999 the United States Supreme Court in Kolstad v. American Dental Association held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"48

In Title VII sexual harassment litigation, the position of the harassing party determines the degree of liability to which the employer is held.49 Where the harasser is a co-worker, an employer may only be held liable in negligence for failing to control the working environment.50 By contrast, where the harassing party is a supervisor, an employer is held to strict liability for the harasser's actions if those actions result "in tangible employment action,"51 defined as "a

45 See Landgraf v. USI Film Products, 511 U.S. 244, 250-56 (1994) (discussing the history leading up to the Civil Rights Act of 1991, as well as some key provisions in that act regarding available relief to Title VII plaintiffs).
46 § 1981a(a)(1).
47 Id.
49 Vance, 133 S. Ct. at 2439.
50 Id.
51 Id.
significant change in employment status, such as discharge, demotion, or undesirable reassignment.\textsuperscript{52}

In \textit{Burlington Industries, Inc. v. Ellerth}, decided in 1998, an employee complained of multiple incidents where one of her supervisors, Slowik, made sexual comments that "could be construed as threats to deny her tangible job benefits."\textsuperscript{53} She ultimately quit as a result of his behavior, and filed a lawsuit against her employer, alleging constructive discharge under Title VII.\textsuperscript{54} The Supreme Court framed the issue before it as "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat."\textsuperscript{55} The Court ultimately concluded that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."\textsuperscript{56} The \textit{Ellerth} Court limited an employer's vicarious liability, however, holding that "[w]hen no tangible employment action is taken [by the harassing supervisor], a defending employer may raise an affirmative defense,"\textsuperscript{57} discussed below. As for the plaintiff in \textit{Ellerth}, the Court reasoned:

> Although \textit{Ellerth} has not alleged she suffered a tangible employment action at the hands of Slowik, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability.\textsuperscript{58}

In \textit{Faragher v. Boca Raton}, decided on the same day as \textit{Ellerth}, a lifeguard filed a lawsuit against two of her supervisors and the City of Boca Raton, Florida, alleging that her supervisors

\textsuperscript{52} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 744 (1998).
\textsuperscript{53} Id. at 747-48.
\textsuperscript{54} Id. at 748-49.
\textsuperscript{55} Id. at 754.
\textsuperscript{56} Id. at 765.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 766.
had subjected her to a hostile work environment. \(^{59}\) Specifically, the plaintiff claimed that these supervisors engaged in repeated offensive touching and remarks. \(^{60}\) One of the most outrageous of these remarks was the comment: "Date me or clean the toilets for a year." \(^{61}\) The plaintiff ultimately quit. \(^{62}\) Using the Restatement (Second) of Agency § 219(2)(d) for preliminary guidance in determining an employer's liability for sexual harassment under Title VII, the Supreme Court reasoned that "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority." \(^{63}\) The Faragher Court qualified this liability, however, by explaining that the affirmative defense, mentioned above, that can be raised absent tangible employment action has two components: 
"(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." \(^{64}\) As applied to the plaintiff's allegations, the Court held that "as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct," due to its failure to communicate a sexual harassment policy and formal complaint procedure to its departments. \(^{65}\)

\(^{60}\) Id.
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Id. at 802.
\(^{64}\) Id. at 807. The establishment of this affirmative defense received praise from both business representatives and the media, though as one scholar noted, some commentators argued that the defense opened the door to further litigation. See generally JOAN KENNEDY TAYLOR, WHAT TO DO WHEN YOU DON'T WANT TO CALL THE COPS, A NON-ADVERSARIAL APPROACH TO SEXUAL HARASSMENT, 40-41 (New York University Press, 1999) (discussing media reactions to the establishment of the Ellerth/Faragher affirmative defense).
\(^{65}\) Faragher, 524 U.S. at 808-09.
Thus, as illustrated by the Supreme Court's decisions in *Ellerth* and *Faragher*, the underlying facts of the harassment and the harassing party's status are of critical importance to the success of a Title VII plaintiff.66

**D. The Circuit Split Regarding the Definition of "Supervisor" Prior to the Supreme Court's Decision in Vance v. Ball State University**

Before the Supreme Court's June 2013 decision in *Vance*, there was an inter-circuit split over the definition of "supervisor" for the purposes of invoking employer vicarious liability under Title VII.67 The First, Seventh, and Eighth Circuits generally defined a supervisor based on the person's ability to hire, fire, and direct an employee's circumstances of employment.68 By contrast, the Fourth Circuit defined supervisor more broadly, focusing on other factors such as the worker's title, ability to dictate daily activities, and discipline other employees.69 The Second Circuit also used a broader definition of supervisor, based on a person's senior status and authority to "direct the particulars of [an employee's] work days."70 The definition used by the Second Circuit was guided in part by the EEOC's Enforcement guidelines.71 Under those guidelines, a person is a supervisor "if: a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or b. the individual has authority to direct the employee's daily work activities."72

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66 *See Vance*, 133 S. Ct. at 2439 (discussing the different standards of liability under Title VII depending on the status of the harassing party).
67 *See id.* at 2443 (discussing the circuit split regarding the definition of "supervisor" for purposes of vicarious liability under Title VII prior to the Court's decision in *Vance*).
68 Noviello v. City of Boston, 398 F.3d 76, 97 (1st Cir. 2005); Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1034 (7th Cir. 1998); Vance v. Ball State Univ., 646 F.3d 461, 470 (7th Cir. 2011), aff'd, 133 S. Ct. 2434 (2013); Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057-58 (8th Cir. 2004).
70 Mack, 326 F.3d at 125.
71 *Id.* at 127.
This section has given an overview of the law regarding an employer's liability for sexual harassment by his or her employee under Title VII, leading up to the Supreme Court's June 2013 decision in Vance. While the definitions of "supervisor" used by the Fourth and Second Circuits provided women with much needed protection against sexual harassment in the work place, as discussed below, the Vance decision ultimately took away a substantial amount of that protection.

III. THE SUPREME COURT'S DECISION IN VANCE v. BALL STATE UNIVERSITY

Section III of this article discusses the United States Supreme Court's decision in Vance v. Ball State University, to give context as to why the majority opinion was incorrect, and why the dissenting opinion by Justice Ginsburg presented a much better reasoned approach for protecting working women from sexual harassment. Subsection A addresses the factual background leading up to the underlying lawsuit in Vance. Subsection B summarizes the majority holding in Vance. Subsection C outlines the concurring and dissenting opinions, and Subsection D discusses the limited scholarly commentary on the Vance decision.

A. Factual Background

In Vance, an African-American woman, Maetta Vance, had worked for the catering department at Ball State University ("Ball State") for a number of years.73 In 2005 and 2006, she filed complaints with the EEOC and with Ball State, alleging racial harassment74 and discrimination.75 Significantly, a number of these complaints pertained to Saundra Davis, a white woman who worked with Vance, but had no power to "hire, fire, demote, promote, transfer

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73 Vance, 133 S. Ct. at 2439.
74 The Court in Vance indicated that the standards set forth in cases of Ellerth and Faragher, which both dealt with sexual harassment, would also apply to claims of racial harassment. Id. at 2442 n.3.
75 Id. at 2439.
or discipline Vance."76 Vance claimed that Davis made it difficult for Vance to work with her, by "slamming pots and pans around her" and "intimidating her."77 Vance also alleged an incident where Davis blocked her on an elevator78 with a threatening comment.79 Vance complained of another occasion where Davis said the words "Are you scared?" to Vance in a southern accent, after the elevator that Vance was on opened up at the floor where Davis was standing.80 Vance additionally asserted that on one occasion, Davis's daughter called Vance a "fucking nigger" to Vance's face, followed by Davis's husband calling Vance's co-worker a "backstabbing nigger lover," all while Davis stood by and laughed.81 While Vance did make allegations against other co-workers for using racial epithets against her, she made no such allegations against Davis herself.82 Vance did, however, allege that Davis once made a joke about Buckwheat and Sambo83 while looking at Vance.84 In response, the EEOC gave Vance a right-to-sue letter.85

In 2006, Vance filed a lawsuit in the United States District Court for the Southern District of Indiana, alleging that "she had been subjected to a racially hostile work environment in violation of Title VII."86 Following Seventh Circuit precedents for what constitutes a

76 Id.
77 Id.
78 Id. at 2439-40.
80 Id. at *5.
81 Id. at *8.
82 See generally Id. at *3-5.
85 Vance, 646 F.3d at 465. See Joni Hersch, Beverly Moran, He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science, 101 Ky. L.J. 753, 762 (2013) for an explanation of the process plaintiffs must follow with the EEOC prior to filing a lawsuit under Title VII.
86 Vance, 133 S. Ct. at 2440.
"supervisor" for purposes of vicarious liability, the district court granted summary judgment to Ball State, reasoning that "there is nothing in the record indicating that Ms. Davis had the ability to hire, fire, demote, promote, transfer, or discipline Ms. Vance . . . [F]or purposes of this Title VII analysis, Ms. Davis was Ms. Vance's co-worker, not one of her supervisors." Addressing the merits of Vance's hostile work environment claim, the district court held:

the harassment Ms. Vance alleges she was subjected to by her co-workers is neither sufficiently severe nor pervasive to be considered objectively hostile for the purposes of Title VII. Additionally, even if it were, we are unable to attribute liability to Ball State because we cannot find that it was negligent either in discovering or remedying the harassment.

The Seventh Circuit affirmed this decision, following its precedents that had held that a supervisor "is someone with power to directly affect the terms and conditions of the plaintiff's employment." Applying this definition to its review of the district court's granting of summary judgment, the court reasoned that "Vance has not revealed a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she did not clock-in like other hourly employees. This means that we must evaluate her claim against Davis under the framework for coworker conduct." Applying the affirmative defense from Ellerth and Faragher, the Seventh Circuit concluded that "the undisputed facts demonstrate that there is no basis for employer liability," since the "record reflects that Ball State promptly investigated each complaint that [Vance] filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." The Supreme Court granted Vance's petition for certiorari, in order to resolve the difference among the federal circuit courts of appeals regarding the

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87 See supra Part II.D.
88 Vance, 2008 WL 4247836, at *12.
89 Id. at *17.
90 Vance, 646 F.3d at 470, 475 (quoting Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 506 (7th Cir. 2004)).
91 Id. at 470.
92 Id. at 473.
93 Vance v. Ball State Univ., 133 S. Ct. 23 (2012).
definition of "supervisor" for purposes of vicarious liability for sexual harassment claims under Title VII.\(^4\)

\(\text{B. The Majority Holding in Vance}\)

\(Vance\) presented a typical Roberts Court 5-4 ideological split,\(^5\) with Justice Alito writing the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Kennedy.\(^6\) Justice Thomas also wrote a brief concurring opinion.\(^7\) Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan.\(^8\) The majority held:

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\text{[A]n employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect 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.}^{9}
\]

The \(Vance\) Court rejected "the nebulous definition of a 'supervisor' advocated in the EEOC Guidance,"\(^10\) as a "highly case-specific evaluation of numerous factors."\(^11\) The Court reasoned that "the Ellerth/Faragher framework is one under which supervisory status can be readily determined, generally by written documentation."\(^12\) The Court indicated that the attribute that defines a supervisor is "the authority to take tangible employment actions."\(^13\)

Providing practical justifications for this definition, the Court reasoned that an alternative

\(^{94}\) \(Vance, 133\) S. Ct. at 2443.
\(^{95}\) Of all of the Supreme Court's 5-4 decisions in the October 2012 term, 43% split the exact same way as the \(Vance\) Court. SCOTUSblog Stat Pack, October Term 2012, Final State Pack, Thursday, June 27, 2013, 5-4 Case Majorities, SCOTUSblog (June 27, 2013), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/5-4-majorities_OT122.pdf. During the October 2011 and October 2010 terms, 33% and 63% of the Court's 5-4 decisions also split this way, respectively. \(\text{Id.}\)
\(^{96}\) \(\text{Id.}\) at 2439-54.
\(^{97}\) \(\text{Id.}\) at 2454 (Thomas, J., concurring).
\(^{98}\) \(\text{Id.}\) at 2454-66 (Ginsburg, J., dissenting). Notably, all of the women justices dissented. \(\text{See id.}\) at 2454.
\(^{99}\) \(\text{Id.}\) at 2443 (citing \(Ellerth, 524\) U.S. at 761).
\(^{100}\) \(\text{See supra}\) Part II.D.
\(^{101}\) \(Vance, 133\) S. Ct. at 2443.
\(^{102}\) \(\text{Id.}\)
\(^{103}\) \(\text{Id.}\) at 2448.
definition "would frustrate judges and confound jurors." The Court articulated that its definition of supervisor "can be readily applied." The Court explained:

In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment.

Additionally, the Court reasoned that, even without a finding that a harasser is a supervisor, "a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place." Applying these principles to Vance's case, the Court affirmed the decision of the Seventh Circuit, reasoning that there was "no evidence that [Ball State] empowered Davis to take any tangible employment actions against Vance." The Court additionally acknowledge that, even under the dissent's proposed alternative definition of "supervisor," discussed in greater detail in Subsection C, Davis still would not have been Vance's supervisor, as she did not direct Vance's daily activities.

C. Concurring and Dissenting Opinions

In his brief concurrence, Justice Thomas indicated his belief that the Ellerth and Faragher decisions were "wrongly decided," without explaining why. Nevertheless, he joined the majority's opinion "because it provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment."

104 Id. at 2444.
105 Id. at 2449.
106 Id.
107 Id. at 2453. The Court explained that in the situation of negligence, "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant." Id.
108 Id. at 2454.
109 Id.
110 See id. (Thomas, J., concurring).
111 Id.
By contrast, Justice Ginsburg criticized the majority's definition of "supervisor" in her dissent, explaining that this definition "ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces." She also disputed that the majority's definition is "clear" and "workable," and cautioned that this definition would "hinder efforts to stamp out discrimination in the workplace." Illustrating her point, she discussed four actual cases of sexual and racial harassment under Title VII that she thought should be cognizable under the theory of employer vicarious liability, but would fail under the majority's definition of "supervisor." Justice Ginsburg believed a better course of action would be to follow the EEOC's definition of a

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112 Notably, Justice Ginsburg helped found the Women's Rights Project at the American Civil Liberties Union, and prior to her confirmation as a Supreme Court Justice, had been called "the mother of all sex discrimination litigators." Anna Quindlen, Public & Private; Ban the Bollix, Bill, N.Y. Times (June 16, 1993), http://www.nytimes.com/1993/06/16/opinion/public-private-ban-the-bollix-bill.html.

113 Vance, 133 S. Ct. at 2455 (Ginsburg, J., dissenting).

114 Id. at 2462, 2464.

115 Id. at 2459-60. In Mack, an African-American plaintiff's site mechanic told her that she had a "fantastic ass," "luscious lips," "beautiful eyes," and in one particularly troubling instance, told her that "that spics and niggers did not belong in the business, and that he did not know why women are on this job anyway." 326 F.3d at 120-21 (internal citations and quotation marks omitted). He additionally changed his clothes in front of her. Id. at 120. The Second Circuit held that the site mechanic was the plaintiff's supervisor, despite his lack of authority to hire or fire her. Id. at 125-26. Likewise, in Whitten, the plaintiff sued her former employer, under allegations that store manager she worked under called her "dumb" and "stupid," told her to "be good to him and give him what he wanted," and on one occasion pressed his genitalia against her. 601 F.3d at 236 (internal citations and quotation marks omitted). Similar to the Second Circuit in Mack, the Fourth Circuit concluded that the store manager was the plaintiff's supervisor, despite his lack of authority to take tangible employment action against the plaintiff. Id. at 244-47. By contrast, in Rhodes, the lead lead worker at the Illinois Department of Transportation where the plaintiff worked allegedly made threats to strangle her when she asked to be assigned to a shorter route. 359 F.3d at 501-02. The plaintiff also complained that this person called her a "bitch" and "cunt," and that pornography was common at her worksite. Id. at 502-03. As the lead lead worker had no ability to promote, demote, discipline, hire, or fire the plaintiff, however, the Seventh Circuit held that he was not her supervisor for purposes of vicarious liability under Title VII. Id. at 506. Lastly, as mentioned in the introduction to this article, the plaintiff in CRST Van Expedited, Inc. was unable to recover against her lead driver under the vicarious liability theory, as he had no ability to take employment action against her. 679 F.3d at 684.
supervisor, arguing that "the authority to direct an employee's daily activities establishes supervisory status under Title VII."  

In sum, though Justice Ginsburg's dissenting opinion was better-reasoned than that of the majority, her opinion ultimately did not carry the day.

D. The Limited Scholarly Commentary on Vance

Given how recent the Supreme Court's decision in Vance is, scholarly commentary on the case has been limited. One article reasoned that the majority and dissent in Vance overlooked a common law doctrine that would have provided guidance: "the superior-servant exception to the fellow-servant rule, the rule that limited employers' liability for injuries to a worker caused by the negligence of a coworker prior to the adoption of workers' compensation laws." This exception looks less to the ability of the supervisor to fire or hire employees, and more "to the facts and circumstances of each case to determine whether the tortfeasor had been granted the power to control the injured employee and whether that control was implicated in the tort." The article ultimately concluded that "[h]ad the Court addressed the common law in this area, it would have found an approach that supports the Vance dissent."  

Another scholar very correctly argued that Vance's impact will be that it creates incentives for employers to have fewer "supervisors" so as to avoid liability, reasoning:

At the end of the day, the Court's holding in Vance means that employees who want to take advantage of the Ellerth/Faragher framework must now show that the harasser had the authority to make significant changes in the employee's employment status or benefits - or that such authority had been delegated to the

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116 As discussed in Part III.D, under the EEOC guidelines, a person is a supervisor if either: "a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or b. the individual has authority to direct the employee's daily work activities." Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors, 1999 WL 33305874, at *4.
117 Vance, 133 S. Ct. at 2455 (Ginsburg, J., dissenting).
119 Id.
120 Id. at 407.
harasser. The more practical impact of Vance is that employers have a new incentive to artificially remove Title VII supervisory status from a large swath of employees. . . . Instead of addressing this possibility head-on, the Court suggested that the possibility of negligence liability mitigates this concern - with no explanation as to why that would be the case.121

This author thus reasoned that based on the lack of success of employment discrimination claims under Title VII, "it seems unlikely that the risk of negligence liability will offset employer incentives to reduce the number of Vance supervisors."122 Consistent with this reasoning, another commentator called the Vance decision "a major victory for businesses."123

This section has provided an overview of the Supreme Court's closely decided June 2013 decision in Vance v. Ball State University. While the reasoning in Justice Ginsburg's dissent ultimately would have afforded greater protection for working women against sexual harassment, five justices ultimately joined the majority opinion in redefining what constitutes a "supervisor" under Title VII.124 Given that the Vance Court was badly split, as were the circuits prior to the decision in Vance, it is helpful to consider recent legal developments in other countries such as South Africa. South Africa has, in some circumstances, provided a better answer to the issue of when employer vicarious liability for sexual harassment is appropriate.

IV. A DISCUSSION OF SOUTH AFRICAN SEXUAL HARASSMENT LAW

Given the significant split in the Supreme Court and the federal circuits prior to Vance, Section IV of this article discusses the sexual harassment laws of South Africa as a proposed alternative model. The reason for selecting South Africa is that the case law addressing sexual harassment in that country has, in some circumstances, taken a much more pro-women approach.

122 Id. at 172. Moreover, the author posited that "lower courts will struggle to determine where the new supervisory line lies." Id. at 173.
124 Vance, 133 S. Ct. at 2438.
than the Supreme Court's decision in Vance. Subsection A gives an overview of women's economic positioning in that country, showing that women make up a substantial percentage of the measureable work force. Subsection B discusses South African statutory provisions for sexual harassment at the workplace, as well as case law interpretation of South Africa's Constitution as providing a remedy for sexual harassment plaintiffs. Subsection C discusses the Cape High Court's decision in Grobler, which held an employer vicariously liable for sexual harassment perpetrated by his employee, as well as the subsequent appeal of that decision to the Supreme Court of Appeal of South Africa. Subsection D explains the jurisdictional effect of the Grobler decision, as contrasted by the Supreme Court's decision in Vance. Finally, Subsection E discusses the mixed scholarly review Grobler. Ultimately, as the Grobler decision was based on sound policy considerations as opposed to arbitrary definitions of what constitutes a "supervisor," my contention is that the Cape High Court's opinion in that case was better reasoned than the United States Supreme Court's decision in Vance.

A. The Economic Position of South African Women

South Africa has recently maintained strong economic growth. Specifically with regard to providing women with access to available resources in the country, South Africa has recently fared well as compared with other countries. The World Economic Forum's Global Gender Gap Index 2013 rankings rank "gender-based gaps in access to resources and

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125 See, e.g., Grobler v. Naspers Bpk & 'n ander 2004 (4) SA 220 (CHC) (S. Afr.). The author also had the tremendous privilege of spending two weeks in South Africa in 2004.
126 Grobler 2004 (4) SA 220.
127 Media 24 Ltd & Another v. Grobler 2005 (6) SA 328 2 (SCA) at para. 79 (S. Afr.).
128 See Grobler 2004 (4) SA 220 at 441 para. E.
129 NARIMAN BEHRAVESH, SPIN-FREE ECONOMICS: A NO-NONSENSE, NONPARTISAN GUIDE TO TODAY'S GLOBAL ECONOMIC DEBATES, 109-10 (McGRAW HILL, 2009).
opportunities in individual countries” on the bases of economic participation and opportunity, education attainment, health and survival, and political empowerment. This index gave South Africa a global ranking of 17, with the United States trailing behind at 23, indicating that South Africa fares better than the United States at providing women with access to available resources. Iceland, Finland, and Norway ranked first, second, and third, respectively.

According to recent measurable employment statistics, as of the third quarter of 2013, South Africa's female population for the age range of 15-64 was 17,140,000. Of that population, only 50% participated in the labor force. During the same time period, South Africa's male population for the age range of 15-64 was 16,324,000. Of men in that age range, 61.6% participated in the labor force. Of the 14,029,000 employed members of the work force in South Africa between the ages of 15-64 during the third quarter of 2013, women made up 6,287,000, as compared to 7,742,000 for men. Based on these statistics, of the measurable employed members of the work force in South Africa during the third quarter of 2013, 44.8%...
were women, and 55.2% were men.\textsuperscript{140} These statistics are important because they show that women make up nearly half of the measurable work force in South Africa. South Africa, however, still has one of the highest rates of reported violent crimes against women in the world.\textsuperscript{141} Specifically, some scholars indicate that 68% of working women in South Africa have experienced sexual harassment at work.\textsuperscript{142} Accordingly, ensuring workplace environments free from sexual harassment is vital to the South Africa's labor force as a whole.

\textbf{B. South African Statutory Provisions for Sexual Harassment in the Workplace, and an Interpretation of South Africa's Constitution as Providing a Remedy for Sexual Harassment Plaintiffs}

South Africa's "Employment Equity Act, No. 55 Of 1998" ("the Act") was passed in part "to achieve equity in the work place by . . . promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination."\textsuperscript{143} Under the Act, "[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex."\textsuperscript{144} Additionally, unlike Title VII, which does not discuss harassment as a form of discrimination,\textsuperscript{145} under the Act, "[h]arassment of an employee is a form of unfair discrimination and is prohibited on any one."\textsuperscript{146} The Act states that "]e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."\textsuperscript{147}

\textsuperscript{140} See id. (percentages calculated by author based on employment population numbers). The equivalent percentages in the United States for employed persons ages 16 and over in February 2014 were 47.1% women, and 52.9% men. See U.S. DEPARTMENT OF LABOR, supra note 136 at Table A-1 (percentages calculated by author based on employment population numbers). These numbers show that the Vance decision will have an large impact on working women, who make up nearly half of the working population in the United States who are over 16.

\textsuperscript{141} Chicktay, supra note 7, at 283.

\textsuperscript{142} Id. (citing Y Geyser, "We became the bad women: We created all of the chaos", August HR Highway 48, 48 (2007)).

\textsuperscript{143} Employment Equity Act, No. 55 Of 1998 § 2(a) (S. Afr.).

\textsuperscript{144} Employment Equity Act, No. 55 Of 1998 § 6(1).

\textsuperscript{145} See generally § 2000e-2(a)-(n).

\textsuperscript{146} Employment Equity Act, No. 55 Of 1998 § 6(3).

\textsuperscript{147} Employment Equity Act, No. 55 Of 1998 § 5. One commentator, however, argues that the Act "falls short in its failure to give employers an affirmative duty to act in a preventative manner against potential sexual harassment."
Moreover, the Act provides that "[w]henever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."\(^{148}\)

Where there are allegations that an employee violated the Act, it provides that "the alleged conduct must immediately be brought to the attention of the employer," who "must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act."\(^{149}\) If the employer does not do so and its employee is found to have violated the Act, it provides that "the employer must be deemed also to have contravened that provision."\(^{150}\) Similar to the negligence standard in the United States\(^{151}\) however, "an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."\(^{152}\)

South Africa's "Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace" ("Amended Code") defines sexual harassment as "unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace," and sets forth four factors for assessing whether conduct amounts to sexual harassment.\(^{153}\) The Amended Code additionally places a obligation on employers to "adopt a sexual harassment policy," that "should be communicated effectively to all employees."\(^{154}\)


\(^{149}\) Employment Equity Act, No. 55 Of 1998 § 60(1)-(2).

\(^{150}\) Employment Equity Act, No. 55 Of 1998 § 60(3). In this way, the Act could be viewed as imposing vicarious liability for an employer's failure to remediate allegations of sexual harassment by one of its employees.

\(^{151}\) See supra Part II.C.

\(^{152}\) Employment Equity Act, No. 55 Of 1998 § 60(4).

\(^{153}\) Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, No. 27865 of 2005 §§ 4.1-4.4 (S. Afr.). The factors include "whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; whether the sexual conduct was unwelcome; the nature and extent of the sexual conduct; and the impact of the sexual conduct on the employee." Id.

\(^{154}\) Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, No. 27865 of 2005 §§ 7.1-7.2.
Amended Code further mandates an employer to take certain actions when notified of an instance of sexual harassment.¹⁵⁵

In addition to the Employment Equity Act and the Amended Code, South African victims of sex discrimination in the workplace have statutory remedies for unfair dismissal under the Labour Relations Act ("the LRA").¹⁵⁶ The LRA provides:

A dismissal is automatically unfair . . . if the reason for dismissal is . . . that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.¹⁵⁷

Notably, the LRA contains far more protected classes than Title VII, which is limited to discrimination based on "race, color, religion, sex, or national origin."¹⁵⁸ A 2004 decision by the Labour Court¹⁵⁹ allowed a plaintiff to recover under this section of the LRA where she alleged unfair dismissal due to her refusal to accept sexual advances by her manager, and was subsequently fired.¹⁶⁰

¹⁵⁵ Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, No. 27865 of 2005 §§ 8.2.1-8.3.3.
¹⁵⁶ Labour Relations Act, No. 66 of 1995 § 185-88 (S. Afr.); see Chicktay, supra note 7, at 293-95 (discussing the statutory remedies available to victims of sexual harassment in the workplace under the Labour Relations Act).
¹⁵⁸ § 2000e-2(a)(1).
¹⁶⁰ Christian v. Colliers Properties 2004 C23/2004 1 (LC) at 4 (S. Afr.) ("The instant matter illustrates precisely the type of situation which the legislature has so firmly set its face against. An employee was sexually victimised and lost her employment as a consequence of such victimisation."). See Chicktay, supra note 7, at 293-95 for a discussion of decisions from the Labour Court addressing the issue of unfair dismissal for sexual harassment under the LRA.
Sexual harassment also contravenes South Africa's Constitution.\textsuperscript{161} The 2005 Labour Court decision of \textit{Piliso v Old Mutual Life Assurance Co (S A) Ltd and Others}, held that relief was available under section 23(1) and 38 of South Africa's Constitution\textsuperscript{162} for employees who had experienced sexual harassment.\textsuperscript{163} The Court explained that

The conduct suggested being in my mind a fair exposition of what, very broadly speaking, would constitute the minimum fair labour practices on the part of an employer where an employee of it has been traumatised by improper conduct, such as sexual harassment, even by an unknown perpetrator, I am of the view that it follows that, if the employer failed to meet these minimum fair labour practices, if the employee cannot obtain relief through any statutory or common-law remedies, and his/her constitutional right to fair labour practices is found to have been violated, then such employee may approach this Court, in appropriate circumstances, for relief in terms of Sections 23(1) and 38 of the Constitution for appropriate relief.\textsuperscript{164}

Providing the rationale for giving such employees relief under the South African Constitution, the Court reasoned that "[a]n employer is obliged to provide its employee's [sic] with a safe working environment and to take all reasonable steps to avoid unfair discrimination against its employees by any person who comes onto the workplace."\textsuperscript{165}

Arguably, the above mentioned statutory provisions and case law interpretations are at least facially more plaintiff-friendly than the analogous provisions in the United States, as they directly address sexual harassment, and cover more classes of individuals.

With regard to employer vicarious liability for sexual harassment, the Cape High

\textsuperscript{161} Chicktay, \textit{supra} note 7, at 295.
\textsuperscript{162} Section 23(1) states that "everyone has the right to fair labour practices." S. Afr. Const., 1996. Section 38 provides that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief . . . ." \textit{Id}.
\textsuperscript{163} \textit{Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others} 2005 C32/2005 (LC) at para. 80 (S. Afr.).
\textsuperscript{164} \textit{Id}.
\textsuperscript{165} \textit{Id}.
Court's decision in *Grobler* provides guidance for why the United States Supreme Court's decision in *Vance* was wrongly decided.

C. The Case of *Grobler v. Naspers Bpk & ‘n ander*

In addition to the statutory and Constitutional provisions available to victims of sexual harassment in South Africa, plaintiffs have the option to sue for sexual harassment under the common law, as was the case in *Grobler v. Naspers Bpk & ‘n ander*. The Cape High Court's decision in *Grobler* has been called "the most relevant and topical case dealing with liability for sexual harassment yet heard in South Africa." In *Grobler*, a secretary who worked for Nasionale Tyskrifte LTD brought sexual harassment claims against her employer and trainee manager for sexual harassment by the manager which allegedly took place over five months. The plaintiff sued her employer for the manager's actions under the theories of vicarious liability and negligence. She brought her lawsuit in the Cape High Court alleged five separate incidents of sexual harassment, which she stated caused her "severe shock, anger, anguish, fear and anxiety." One of these incidents allegedly involved a firearm, while she was showing her apartment to her trainee manager. Grobler contended that as a result of this harassment, she

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166 South Africa's High Courts serve as appellate courts for the Magistrate Courts in their jurisdictional area, but lawsuits may also be brought in the High Courts. *The Law Society of the Northern Provinces, supra* note 159, at 12.

167 See Chicktay, *supra* note 7, at 288-91 (discussing the common law options available to victims of sexual harassment in the workplace).

168 *Grobler* 2004 (4) SA 220; see Chicktay, *supra* note 7, at 290-91 (using the Supreme Court of Appeal's decision in *Grobler* as an example in a discussion of the common law options available to victims of sexual harassment in the workplace).


171 *Id.* at para. 4.

172 *Grobler* 2004 (4) SA 220 at 440 para. C. As the Cape High Court's decision is only available in Afrikaans, citations to this decision reference the thorough English case summary at the beginning of the opinion.

173 *Grobler* 2005 (6) SA 328 at para. 7, 12.

174 Rochelle Le Roux, *Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?*, 1 University of Cape Town, Law, Democracy & Development 49, 50 (2006). This was referred to as "the flat incident." *Grobler* 2005 (6) SA 328 at para. 12 (internal quotation marks
was "humiliated, degraded and disturbed in her mental tranquility and emotional integrity, and suffered severe psychological and psychiatric trauma, manifesting as post-traumatic stress syndrome."\(^{175}\) She additionally was no longer able to work as a result of this conduct.\(^{176}\) In response, the employer raised a jurisdictional defense, arguing that any duties or obligations he owed to Grobler arose from the statutes mentioned above, and that a lawsuit for a violation of those statutes could only be brought in the Labour Court.\(^{177}\)

The Cape High Court found this jurisdictional defense to be without substance, and held the employer vicariously liable for the trainee manager's harassment, relying in part on the vicarious liability laws of other countries, including those in the United States.\(^{178}\) The court additionally looked to developments from New Zealand, Australia, the United Kingdom, and Canada.\(^{179}\) Specifically discussing American and Canadian jurisdictions, the court noted that in those jurisdictions, the employer in this case would be held vicariously liable for the trainee manager's conduct, because the trainee manager was Grobler's supervisor.\(^{180}\) The court ultimately held, however, that vicarious liability was warranted due to policy considerations.\(^{181}\) The court reasoned that the nature of Grobler's employment relationship with her trainee manager made it more likely that such harassment could take place, and that in this instance, the harassment occurred in the context of that relationship.\(^{182}\) Alternatively, the court reasoned that

\(^{175}\) Grobler 2005 (6) SA 328 at para. 7.
\(^{176}\) Grobler 2004 (4) SA 220 at 440 para. C.
\(^{177}\) Grobler 2005 (6) SA 328 at para. 9.
\(^{178}\) Grobler 2005 (6) SA 328 at para. 16-17. The irony is not lost on the author that I advocate that the Grobler decision was better reasoned than the United States Supreme Court's decision in Vance, even though Grobler was actually persuaded in part by the vicarious liability law of the United States.
\(^{179}\) Grobler 2004 (4) SA 220 at 440 para. F-J.
\(^{180}\) Grobler 2004 (4) SA 220 at 441 para. D (S. Afr.).
\(^{181}\) Grobler 2004 (4) SA 220 at 441 para. E (S. Afr.)
\(^{182}\) Grobler 2004 (4) SA 220 at 441 para. D-E (S. Afr.).
it was mandated by section 173 of the South African Constitution\textsuperscript{183} to develop common law applications of vicarious liability in order to protect working women in South Africa.\textsuperscript{184}

On review, the South African Supreme Court of Appeal\textsuperscript{185} dismissed both the employer and employee's appeals from the judgment of the Cape High Court.\textsuperscript{186} The Supreme Court of Appeal expressly stated, however, that it would not answer the question of whether the employer should be held vicariously liable for the harassment by the trainee manager, because the court was content that the plaintiff had stated a successful cause of action against her employer in negligence.\textsuperscript{187} In affirming the judgment against the employer and trainee manager on the basis of negligence, the court reasoned that sexual harassment is "a serious matter which does require attention from employers," noting that sexual harassment "creates an intimidating, hostile and offensive work environment . . . . Work performance may suffer and career commitment may be lowered."\textsuperscript{188} The court ultimately concluded that "the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obligated to compensate the victim for harm caused thereby should it negligently fail to do so."\textsuperscript{189} As discussed in subsection D, however, despite affirming the Cape High Court's finding of liability only on the basis of negligence, as a result of the Supreme Court

\textsuperscript{183} Under section 173 of the South African Constitution, "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice." S. Afr. CONST., 1996.

\textsuperscript{184} Grobler 2004 (4) SA 220 at 441 para. E-H.

\textsuperscript{185} The Supreme Court of Appeal is South Africa's highest court of last resort on all matters except those involving constitutional issues. The Law Society of the Northern Provinces, supra note 159, at 9.

\textsuperscript{186} Grobler 2005 (6) SA 328 at para. 79.

\textsuperscript{187} Grobler 2005 (6) SA 328 at para. 63, 74. In holding that the employer could be held liable in negligence for the actions of the trainee manager, however, the Supreme Court of Appeal noted that the employer "was clearly vicariously liable for his failure to act" in response to the harassing conduct of the trainee manager, which had been brought to his attention. Id. at para. 71. One scholar commented that it is "in this context that the doctrine of vicarious liability resurfaces" in the Supreme Court of Appeal's opinion. Le Roux, supra note 174, at 54.

\textsuperscript{188} Grobler 2005 (6) SA 328 at para. 67.

\textsuperscript{189} Grobler 2005 (6) SA 328 at para. 68. In the related case of NK v. Minister of Safety and Security, South Africa's Constitutional Court held an employer vicarious liability for a sexual assault perpetrated by on-duty police officers against a non-employee third party. 2005 SA 52/04 1 (CC) (S. Afr.).
of Appeal's decision, the ruling from the Cape High Court regarding vicarious liability remains the law in parts of South Africa.\textsuperscript{190}

\textit{D. The Jurisdictional Effect of Grobler}

There are ten High Courts in South Africa, along with three local divisions, and judgments from the High Courts are mandatory on the Magistrates' Courts in their respective jurisdictions.\textsuperscript{191} Lawsuits may be brought in High Courts, and these courts also "operate as a court of appeal for the Magistrate's Court within its area of jurisdiction."\textsuperscript{192} By contrast, judgments from the Supreme Court of Appeal have a binding effect in every jurisdiction in South Africa.\textsuperscript{193} As discussed above, the Supreme Court of Appeal in \textit{Grobler} "left open the question as to whether the [employer] is vicariously liable for the actions of the [trainee manager]."\textsuperscript{194} Accordingly, even though the Supreme Court of Appeal of South Africa did not decide \textit{Grobler} based on vicarious liability, as one scholar pointed out, the Cape High Court's decision regarding vicarious liability "remains binding in the Cape Provincial Division."\textsuperscript{195} Thus, while not the law in all of South Africa, working women living in the Cape Provincial Division have potential protections against sexual harassment in the workplace through vicarious liability of their employers that women in other South African jurisdictions do not.\textsuperscript{196} They also potentially have greater protection than working women in the United States have under \textit{Vance}, though as

\textsuperscript{190} See \textit{Le Roux}, \textit{supra} note 174, at 55-56.
\textsuperscript{192} \textit{The Law Society of the Northern Provinces}, \textit{supra} note 159, at 12.
\textsuperscript{193} \textit{id.} at 9.
\textsuperscript{194} \textit{Grobler} 2005 (6) SA 328 at para. 74. One scholar asserted that the Supreme Court of Appeal "upheld the conviction" of the employer "of being vicariously liable as the employer of the manager to whom the victim reported the incidents and who failed to take positive steps to prevent further incidents." Constantine Ntanyu Nana, \textit{Sexual Harassment in the Workplace in South Africa: The Unlimited Vicarious Liability of Employers?}, 52 J. Afr. L. 245, 251 (2008). A closer reading of \textit{Grobler}, however, shows that the Supreme Court of Appeal made its decision based on negligence, not vicarious liability. \textit{Grobler} 2005 (6) SA 328 at para. 74. Other scholarly commentary supports the proposition that \textit{Grobler} was not decided on vicarious liability principles. \textit{See} \textit{Le Roux}, \textit{supra} note 174, at 62.
\textsuperscript{195} \textit{Le Roux}, \textit{supra} note 174, at 55-56.
\textsuperscript{196} \textit{See id.}
discussed in subsection E, some scholars wonder to what extent vicarious liability remains an option for South African's female workforce.\textsuperscript{197}

\textbf{E. Scholarly Commentary on Grobler}

Given that the Supreme Court of Appeal in Grobler affirmed the decision of the Cape High Court to hold the employer liable on the basis of negligence and not vicarious liability, one commentator posited that it is unclear whether an employer can "still be vicariously liable even though it has met this common law duty" of providing "a safe working environment free from sexual harassment."\textsuperscript{198} This commentator took the viewpoint, however, that "[s]exual harassment in the workplace and elsewhere is a sad reality of our time," and that, in the absence of common law developments in sexual harassment law in South Africa, "there is a danger that vulnerable employees, particularly women, will continue to be marginalized."\textsuperscript{199}

One commentator criticized the Grobler decision, and more broadly vicarious liability, arguing:

\begin{quote}
[T]he desirability of affording victims commensurate damages for harm suffered and the need to use legal remedies to incite employers to take active steps to prevent their employees from harming co-employees and members of the community are valid reasons for imposing liability on employers, but are not principles on which the doctrine of vicarious liability should be based.\textsuperscript{200}
\end{quote}

Instead, the author posited that in an "employer should simply be directly liable by virtue of the fact that the [Employment Equity Act] imposes liability on the employer for the conduct of

\textsuperscript{197} See id. at 49.
\textsuperscript{198} Id. By contrast, in discussing the effect of Grobler, another commentator posited that an employer can be held "vicariously liable for its employees' conduct in the course of their employment or conduct which is closely linked to their employer's business, having regard to the purpose and spirit of the constitution." Chicktay, supra note 7, at 291. This scholar did not specify, however, whether this liability could only take place in the Cape Provincial Division, where the judgment of the Cape High Court in Grobler remains binding. See generally id.
\textsuperscript{199} Le Roux, supra note 174, at 67. Le Roux posits, however, that "even failing such development, all is not necessarily lost. For instance, exploring the possible use of forgotten common law remedies and the synergy between the common law and legislation may present unexpected answers." Id.
\textsuperscript{200} Nana, supra note 194, at 258. As discussed in supra, note 194, however, Dr. Nana incorrectly states in his article that in Grobler, South Africa's Supreme Court of Appeal upheld the Cape High Court's decision on the basis of vicarious liability. Id. at 251. This incorrect conclusion likely affects the remainder of his commentary on the Grobler opinion.
an employee that contravenes the provisions of the statute and also because the employer has nevertheless failed to prevent the sexual misconduct.” He argued that "if fault can be proved against the employer, there is no need to invoke the principle of vicarious liability," particularly "where the unlawful act committed by the employee was an intentional act based on personal motives that in no way furthers the interest of the employer." Additionally, he noted that the "validity of holding one person liable for the intentional act of another is subject to ultimate questions that often push judges to indulge in judicial activism and reveal more about their personal values than about the prescriptions of the law." By contrast, another scholar argued "the positive aspect [of the common law vicarious liability doctrine in South Africa] is that the employer cannot escape liability due to its efforts in reducing harassment."

This section of the article has summarized South African statutes and recent case law developments regarding employer liability for sexual harassment in the workplace. Ultimately, while the statutory laws in South Africa are relatively analogous to their counterparts in the United States, if not more protective, the Cape High Court's decision in Grobler was a much better-reasoned opinion than that of the majority in Vance. That decision - to hold employers vicariously liable based on policy considerations rather than supervisory status - is vital to working women, as discussed below.

V. WHY HOLDING EMPLOYERS VICARIOUSLY LIABLE FOR SEXUAL HARASSMENT PERPETRATED BY THEIR EMPLOYEES IS VITAL TO WORKING WOMEN

The Cape High Court's decision to hold Grobler's employer vicariously liable for the actions of his trainee manager incorporated policy considerations that were lost on the Vance

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201 Id. at 261 (footnote omitted).
202 Id. at 263.
203 Id. at 267.
204 Lawlor, supra note 169, at 47.
205 See Grobler 2004 (4) SA 220 at 441 para. D-E.
Court. Sexual harassment is a very serious issue for working women, and as articulated by Ginsburg’s dissent, the Vance majority was "blind to the realities of the workplace." Where there is a risk of sexual harassment occurring at the workplace by one employee on another, vicarious liability should be warranted, as was reasoned by the Cape High Court in Grobler. It matters not whether the harassing employee has the power to hire, fire, demote, or promote the victim of the harassment. What matters is that the sexual harassment victim has been placed in a situation by her employer where she is vulnerable to harassment, and for that reason alone vicarious liability is warranted. Moreover, from a preventive standpoint, vicarious liability of employers for sexual harassment perpetrated by their employees is sound policy. As Justice Ginsburg articulated in her dissent in Vance, if employers are aware that they will be held liable for sexual harassment by their employees, they have stronger motivations to prevent such harassment from occurring.

To illustrate the impact of the Vance decision, imagine a scenario where Employer hires Employee A after running a background check on Employee A that comes up clean. Employer then puts Employee A through sexual harassment prevention training. Employer makes Employee A the overseer of Employee B, but despite his ability to direct her daily activities, Employee A lacks any ability to fire, demote, or promote Employee B. Employee A then sexually harasses Employee B. Employee B wants to file a lawsuit under Title VII, but Employee A is judgment proof. In this scenario, despite being the victim of sexual harassment, Employee B has no legal recourse. Under Vance, Employee A is not Employee B's supervisor, so vicarious liability would not be an option, and a court would likely find that Employer was not negligent in preventing the harassment.

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206 Vance, 133 S. Ct. at 2457 (Ginsburg, J., dissenting).
207 See Grobler 2004 (4) SA 220 at 441 para. D-E.
208 Vance, 133 S. Ct. at 2464 (Ginsburg, J., dissenting).
This scenario will become increasingly common as a result of *Vance*, because as one commentator pointed out, employers will now be able to avoid the issue of vicarious liability altogether by taking away an employee's ability to hire and fire other employees.\(^{209}\) This is the unfortunate result of *Vance*. This reality was either overlooked, or was of no importance to the *Vance* majority. Either explanation is inexcusable.

VI. CONCLUSION

Monika Starke was ultimately able to recover $50,000 from her employer for Bob Smith's harassment during her training.\(^{210}\) For those women who are not able to prove harassment under Title VII outside of employer vicarious liability, however, *Vance* significantly limits their ability to recover against their employers for the harassing conduct of one of their fellow employees, as discussed above. Justice Ginsburg warned of this in her dissent: "As a consequence of the Court's truncated conception of supervisory authority, the *Faragher* and *Ellerth* framework has shifted in a decidedly employer-friendly direction. This realignment will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment."\(^{211}\) Ultimately, weak cases make bad law, and that's precisely what happened in *Vance*.\(^{212}\)

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\(^{209}\) Hirsch, *supra* note 121, at 172. Another scholar similarly posited that the effect of the Court's decision in *Vance* is that "in many more cases an employee can recover for harassment only by proving negligence by the employer." Erwin Chemerinsky, *The Court Affects Each of Us the Supreme Court Term in Review*, 16 Green Bag 2d 361, 375 (2013).

\(^{210}\) *Vance*, 133 S. Ct. at 2453. The Eighth Circuit held that Starke's employer, CSRT, could not be held vicariously liable for Smith's actions, as he was not her "supervisor," under the same definition that the court adopted in *Vance*. *CRST Van Expedited, Inc.*, 679 F.3d at 684. The court did, however, allow for the EEOC to sue on Starke's behalf for harassment against Starke and two other employees by CSRT. *Id.* at 682.

\(^{211}\) *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).

\(^{212}\) See *id.* ("Regrettably, the Court has seized upon Vance's thin case to narrow the definition of supervisor, and thereby manifestly limit Title VII's protections against workplace harassment.").