No. __

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, respondent-appellees also include William Kimes, Individually and in his Official Capacity as General Manager of Ball State University's Banquet and Catering Department; Saundra Davis, Individually and in her Official Capacity as a Supervising Employee of Ball State University's Banquet and Catering Department; Karen Adkins, Individually and official capacity as the Assistant Director of Administration, Personnel, and Marketing for the Residence Hall Dining Service at Ball State University; and Connie McVicker, Individually.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit, App., *infra*, 1a, is reported at 646 F.3d 461. The district court's unpublished memorandum and order granting the respondent's motion for summary judgment, App., *infra*, 25a, is available at 2008 WL 4247836.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2011. On August 16, Justice Kagan granted an extension of time to file a petition for a writ of certiorari until October 31. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (a) to fail or refuse to hire or to discharge any individual, or to otherwise 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;

42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission ("EEOC") guidelines provide in pertinent part:

> An individual qualifies as an employee's "supervisor" if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee's daily work activities.

Equal Emp't Opportunity Com'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, App., *infra*, 81a.

STATEMENT

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that when an employee subject to severe or pervasive sex- (or race-) based workplace harassment sues her employer under Title VII, the employer is vicariously liable for the discriminatory conduct of the worker's "supervisors," but that liability for harassment by a "co-employee" requires proof of employer negligence. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Since then, the lower federal courts have staked out starkly divergent rules for when the *Faragher* and *Ellerth* vicarious liability rule applies. Following circuit precedent, the decision below held that it applies only to a subset of supervisors, those with authority to alter the victim's formal employment status, *i.e.*, to hire, fire, promote, or discipline, and that an individual who has the title of manager, functions as the plaintiff's boss, oversees her work, and assigns her daily tasks is, for these purposes, a mere "co-worker." While two other federal courts of appeals have adopted the Seventh

Circuit's rule, three others, along with numerous district courts and the United States Equal Employment Opportunity Commission, have squarely rejected it. Those courts (and the EEOC) have concluded that the restriction is unsupported by—and indeed irreconcilable with—the holding and reasoning of *Faragher* itself and, in the words of a Seventh Circuit judge, at odds with the concern for "workplace reality" that has been a touchstone of this Court's Title VII case law.

The Court should grant review here to settle the acknowledged conflict over this important question of federal law and correct the entrenched but spurious misreading of *Faragher* and *Ellerth*.

A. Statutory Background

Title VII protects employees from, *inter alia*, workplace discrimination on the basis of race or sex. 42 U.S.C. § 2000e-2(a). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), this Court first recognized that sex-based harassment in the workplace is actionable under Title VII. *Id.* at 67.[1] The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 66. In *Harris* v. *Forklift Systems, Inc.*, 510

[1] Although *Meritor* and subsequent cases involved sex-based discrimination, it explained that lower "[c]ourts [had] applied this principle to harassment based on race * * * [and] [n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited." 477 U.S. at 66; accord *Ellerth*, 524 U.S. at 767-768.

U.S. 17 (1993), and *Oncale* v. *Sundowner Offshore Services*, 523 U.S. 75 (1998), the Court laid out the principal requirements for a hostile work environment claim: (1) that the race- or gender-based harassment be "severe or pervasive"; (2) that a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) that the plaintiff perceived it as such. *Harris*, 510 U.S. at 21-22.

In *Faragher* and *Ellerth*, the Court considered the standards that should govern "employer responsibility" in such cases. The Court established three distinct rules. First, for cases where a supervisor's harassment of a subordinate is accompanied by a tangible adverse employment action, the Court held, in agreement with most of the lower courts, that strict liability should apply. *Faragher*, 524 U.S. at 790-791; *Ellerth*, 524 U.S. at 762-763. Second, for cases where no tangible action is taken and the harassing employee is the victim's co-worker, the Court likewise endorsed the view of most lower courts—that employer liability requires proof of negligence, a combination of "knowledge and inaction." *Faragher*, 524 U.S. at 789, 806-807; *Ellerth*, 524 U.S. at 760.

Third, and most notably, the Court held that a different rule governs when no tangible adverse action was taken but the harassment was that of the victim's "supervisor." *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. Rejecting lower court decisions that had imposed a negligence standard, the Court looked to the agency principles that Congress intended to inform Title VII generally, and, in particular, the "aided in authority" principle of the

Restatement (Second) of Agency § 219 (1957), and explained, "a harassing supervisor is always assisted in his misconduct by the supervisory relationship." *Faragher*, 524 U.S. at 802. Accordingly, in the absence of "tangible employment action," *id.* at 806, employers are "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over [her]"—but allowed to make out an affirmative defense "compris[ing] two necessary elements: (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." *Ibid.*

B. Facts and Proceedings Below[2]

This case arises from a decision of the Seventh Circuit holding, as a matter of law, that the employer respondent here, Ball State University, could not be liable for the racial harassment and intimidation to which petitioner Maetta Vance, the sole African-American employee in the University's

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[2] Because this case was decided on motions for summary judgment, the courts below were required (as this Court would be) to "draw all reasonable inferences in favor of the nonmoving party," *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); to disregard any evidence supporting Ball State that the jury would not be required to credit; and to refrain from "mak[ing] credibility determinations or weigh[ing] the evidence." *Ibid.*

Banquet and Catering Department, was subjected in her workplace.

In 2005 Saundra Davis, a salaried employee whom Ball State designated as a "supervisor," was assigned to the Catering Department and given authority to direct Vance's and other employees' work. App., *infra*, 54a. During a previous stint in the department, Davis had physically assaulted Vance, who had reported it to her supervisor at the time, but did not pursue a formal complaint when Davis was transferred out. *Id.* at 18a.

Davis and Connie McVicker, another white employee, created an environment of physical intimidation and racial harassment. Davis threatened Vance, cornering her on an elevator and telling her, "I'll do it again." App., *infra*, 30a. She used epithets like "Buckwheat" and "Sambo" to refer to Vance and felt comfortable doing so in the presence of Vance and other employees. *Id.* at 6a. For her part, McVicker regularly used the term "n****r" to refer to both Vance and African-American students at the University and openly boasted of her family's connections to the Ku Klux Klan. *Id.* at 3a. Both Davis and McVicker stared menacingly at Vance, leaving her afraid to be alone with them in the kitchen. *Id.* at 37a n.8.

As this behavior persisted, Vance lived and worked in a constant state of fear. She sought psychiatric treatment for anxiety and sleeplessness. Pet. Summ. J. Br. 7-8 (No. 1:06-cv-1452-SEB-JMS). The University's incident reports described Vance as "sitting on the edge of her seat" and "shaking violently" as she recounted her treatment by Davis

and McVicker. Pet. Summ. J. Br. Exh. 10 (No. 1:06-cv-1452-SEB-JMS).

When Vance reported particular instances of the harassment to the University's Compliance Office, that office repeatedly assigned Bill Kimes, the general manager of Vance's department, to investigate. Kimes had himself long mistreated Vance. The first time she had introduced herself to him, Kimes had refused to shake Vance's hand. App., *infra*, 3a. Kimes also regularly excluded Vance from workplace activities, waiting until she left to invite her white coworkers to lunch. *Ibid.* Indeed, respondents expressly conceded that Kimes was abusive, telling the Seventh Circuit that he was "very, very rude" and "ruled by intimidation." Resp. C.A. Br. at 6. They denied only that he singled out Ms. Vance for particularly harsh treatment. *Ibid.*[3]

Little was done as the result of Kimes's "investigations." Kimes never imposed discipline on Davis (who denied Vance's account of the elevator incident), instead counseling both Davis and Vance to "respect" each other in the workplace. App., *infra*, 6a. After numerous white employees corroborated Vance's reports about McVicker's racist tirades, the University issued McVicker, whom they concluded had repeatedly lied to investigators, a (confidential) letter of reprimand. *Id.* at 16a. Because the University had no formal policy concerning racial

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[3] Petitioner presented evidence—sworn statements of fellow employees—that Kimes's abuse of Vance in fact was worse than his mistreatment of the nonminority employees the University identified. Pet. C.A. Br. at 11.

harassment—unlike a lengthy and detailed "zero tolerance policy" addressed to sex-based harassment, Pet. C.A. Br. at 12—McVicker's letter referenced a generic rule prohibiting "conduct which is inconsistent with proper behavior." App., *infra*, 34a. Although the University had responded forcefully to previous incidents of gender- and sexual-orientation harassment, Pet. Summ. J. Br. 5 (No. 1:06-cv-1452-SEB-JMS), the University refused Vance's request that McVicker be assigned to another department and continued to schedule them to work together—though later explaining that Kimes had "tried" to avoid doing so. *Id.* at 36a.

Although the reprimand letter indicated that McVicker risked more serious sanctions if she continued to direct racist epithets at Vance, she called Vance a "monkey" the day the letter was issued. When Vance reported this to Kimes, he discouraged her from "proceeding further" with a complaint, explaining that a "she said-she said exchange * * * wouldn't result in anything positive." App., *infra*, 35a. This concern for corroboration did not obtain when Vance was accused: when Davis alleged that Vance had splashed pots and pans in her presence, Kimes issued Vance a verbal warning without further investigation. *Id.* at 8a. Indeed, email exchanges obtained in discovery showed University "investigators" fretting over whether Vance would enlist the aid of the NAACP or the Urban League or would form an "alliance" with other African-American employees. Pet. Summ. J. Br. Exh. 14 (No. 1:06-cv-1452-SEB-JMS).

The harassment did not abate even after Vance complained to the EEOC or after this action was

filed. Davis approached Ms. Vance, taunting her and saying, in a Southern accent, "you scared?" App, *infra*, 7a. Nor did McVicker relent: she cornered Vance and said, "payback." *Id.* at 37a. Still later (after motions had been filed), Davis and her daughter accosted Vance on the University campus, with the daughter saying: "You are a n****r, a f***ing n****r. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* at 44a. When Vance told Kimes about her encounter with Davis and her family, he told Vance to "get out of [his] face," *id.* at 45a, and did nothing.

When the University's newspaper posted articles describing Vance's lawsuit on its website, it occasioned numerous overtly racist and threatening comments. One commenter wrote that Vance should go "back to the east side and sell some crack," and another suggested that Davis should "[b]ait [Vance] into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self-defense." App., *infra*, 46a n.13. The University kept these offensive messages on the website after petitioner asked that they be taken down.

Vance sued, alleging hostile environment and retaliation claims under Title VII.[4] The district court granted Ball State's motion for summary judgment, concluding, *inter alia*, that the evidence

[4] The retaliation claim, which arose, *inter alia*, from the increasingly unpleasant and menial work assignments Vance was given after complaining, was dismissed below, and is not the subject of this petition.

raised no triable issue as to Title VII employer responsibility for Vance's work environment.

The court first concluded that, whether or not Davis "had authority to direct the work of [Vance and] other employees," App., *infra*, 54a, she lacked what the Seventh Circuit precedent established to be the *sine qua non* of "supervisor" status under *Farager* and *Ellerth*, "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 53a (citing *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)). The court then held that as a matter of law Vance's claim could not succeed under the negligence standard applicable to co-employee harassment.

In so holding, the court addressed a dispute between the parties as to whether evidence of post-filing incidents, such as the assault by the Davis family and the comments on the newspaper website, were properly before it. After expressly stating that "even if [the court] were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim," App., *infra*, 51a, the court agreed with Ball State that the submissions should be disregarded for failure to comply with Fed. R. Civ. P. 15(d), the rule governing supplemental pleadings.

The Seventh Circuit affirmed the judgment. The court assumed that Vance had carried her burden with respect to three of the four elements of her hostile environment claim: "(1) that [the employee's] work environment was both objectively and

subjectively offensive; (2) that the harassment was based on her race; and (3) that the conduct was either severe or pervasive." App., *infra*, 11a. But the Seventh Circuit upheld the district court as to the sufficiency of the "basis for employer liability." *Ibid.*

The court rejected the argument that Davis's conduct should attributed to Ball State under the *Faragher*/*Ellerth* standard, explaining that circuit precedent limited that rule to harassment by supervisors with the "authority * * * 'to hire, fire, demote, promote, transfer, or discipline [their victim].'" App., *infra*, 12a (quoting *Hall*, 276 F.3d at 355). The opinion acknowledged that this restrictive rule had been rejected by other circuits and the EEOC's Enforcement Guidance and had been subject to criticism within the Seventh Circuit. *Ibid.* But the court explained that it was nonetheless binding law in the circuit.

As to negligence, the court upheld the lower court's conclusion, but identified two errors in its analysis. The court first explained that the district court had erred in considering the harassment evidence against Davis and McVicker separately, emphasizing "that a hostile work environment claim requires a consideration of all the circumstances, because in the end it is the employer's liability that is at issue, not liability of particular employees." App., *infra*, 14a. Again emphasizing that a hostile work environment claim is premised on the "cumulative effect of individual acts," *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002), the court also rejected the conclusion that the post-filing evidence could be treated as "a disguised Rule

15(d) submission." App., *infra*, 9a. Despite this, the court declined to remand, observing that the district court had discretion to exclude the evidence "in the interest of keeping [the case] moving forward." *Id.* at 10a-11a.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and consequential question of federal law: whether *Faragher's* and *Ellerth's* rule that employers are vicariously liable under Title VII when "supervisors" engage in race- or sex-based workplace harassment applies only to misconduct by personnel who have power over their victim's formal terms of employment. Adhering to circuit precedent, the court below so held. In doing so, however, the court acknowledged that other courts and the EEOC reject this rule. App., *infra*, 12a-13a. This Court should review the decision to settle this broad and entrenched conflict and correct the Seventh Circuit's significant misreading of *Faragher* and *Ellerth*.

I. THE LOWER COURTS ARE SHARPLY DIVIDED AS TO WHEN THE FARAGHER/ ELLERTH VICARIOUS LIABILITY RULE APPLIES

Although *Faragher* and *Ellerth* announced that significantly different rules should apply to discriminatory harassment by "supervisors" and "co-employees" (and held the cases before the Court governed by the "supervisor" rule), they did not define "supervisor" or explicitly instruct lower courts as to when vicarious liability is triggered. "The definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts."

Browne v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 912 (E.D. Tenn. 2003); accord App., *infra*, 12a-13a (acknowledging circuit split); *Griffin* v. *Harrisburg Property Servs., Inc.*, 421 Fed. Appx. 204, 208 n.6 (3d Cir. 2011) (same); *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (same). The Seventh Circuit and others have held that only a subset of supervisors—those with the power over the formal employment status of the subordinate they harass—are governed by the *Faragher*/*Ellerth* rule. Other courts have expressly rejected that restriction as incompatible with the result and reasoning of this Court's decisions and have instead held that the *Faragher*/*Ellerth* rule governs when the harasser has authority to direct and oversee his victim's daily tasks, irrespective of whether he is empowered to take ultimate action on the company's behalf. This split is sharp and widespread and shows no sign of abating.

A. Three Circuits Have Held The "Supervisor" Rule Is Restricted To Harassment By Those With Power Over Their Victim's Formal Employment Status

Six months after *Faragher* and *Ellerth*, the Seventh Circuit gave their rule a restrictive reach, holding that employers would be vicariously liable only for race or sex harassment by those supervisors possessing authority of "a certain magnitude" over their victim's employment terms, namely to make "consequential employment decisions," "primarily * * * the power to hire, fire, demote, promote, transfer, or discipline [him or her]." *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034-

1035 (7th Cir. 1998). Although the *Parkins* opinion was somewhat unclear about how restrictive it meant this "supervisor" definition to be, subsequent Seventh Circuit decisions have relied on it to hold that a harasser who directed the victim's daily work was merely a "co-employee." In *Hall* v. *Bodine Electric Co.*, the court declared that "the fact that an employer authorizes one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship." 276 F.3d at 355; see also *Rhodes* v. *Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). These decisions make clear that only harassment by an individual who has power over the formal employment status of his or her victim implicates the vicarious liability rule.

In published opinions, the First and Eighth Circuits have adopted this "power over formal employment status" view, see *Noviello* v. *City of Boston*, 398 F.3d 76, 96 & n.5 (1st Cir. 2005) (rejecting the "broader" Second Circuit definition); *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (affirming district court's adoption of "the narrower standard of *Hall*"), as have the Third and Sixth Circuits in unpublished opinions, see *Griffin* v. *Harrisburg Property Servs., Inc.*, 421 Fed. Appx. 204, 209 (3d. Cir. 2011); *Stevens* v. *U.S. Postal Serv.*, 21 Fed. Appx. 261, 263-264 (6th Cir. 2001), and numerous district courts.[5]

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[5] See, *e.g.*, *Browne*, 286 F. Supp. 2d at 912-918; *McPherson* v. *HCA-HealthOne, LLC.*, 202 F. Supp. 2d 1156, 1169 (D. Colo. 2002); *Olsen* v. *H.E.B. Pantry Foods*, 196 F. Supp. 2d 436, 439 (E.D. Tex. 2002).

While acknowledging that the basis for *Faragher*/*Ellerth's* vicarious liability rule is that "acts of supervisors have greater power to alter the environment than acts of co-employees generally," *Parkins*, 163 F.3d at 1033 (quoting *Faragher*, 524 U.S. at 805), these courts have emphasized the need to exclude "low level supervisors" and those with only nominal supervisory roles, reasoning that only authority of a "substantial magnitude" can be said to aid in the commission of harassment. *Ibid.* In drawing this line, these courts have looked to pre-*Faragher*/*Ellerth* cases addressing whether a manager was the employer's "agent," which had limited that status to those empowered to make "consequential decisions" about the victim's employment status and concluded that the same test—whether the harasser has authority to affect the "hire, fire, demote, promote, transfer, or discipline" the victim—should determine vicarious liability. *Id.* at 1034. "Without some modicum of this authority, a harasser cannot qualify as a supervisor" under *Faragher* and *Ellerth*. *Noviello*, 398 F.3d at 96.

B. Three Circuits And The EEOC Have Rejected The Seventh Circuit's Rule

The Second, Fourth, and Ninth Circuits, the Tenth Circuit in an unpublished opinion, and district courts of the Fifth and Eleventh Circuits have rejected the Seventh Circuit's restrictive rule, holding that harassment by personnel overseeing the victim's daily work assignments and performance, not just power over her formal employment status, warrants vicarious employer liability. In *Mack* v. *Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), cert.

denied, 540 U.S. 1016 (2003), the Second Circuit became the first court of appeals to reject *Parkins*. Holding vicarious employer liability warranted for harassment committed by a "mechanic in charge" who "exercised the authority to make and oversee the daily work assignments of the mechanics and the mechanics' helpers," the court concluded that the Seventh Circuit's rule, simply focusing on "whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates," was too narrow. *Id.* at 126. Citing guidelines on the subject issued by the EEOC as persuasive authority, the *Mack* court held that the proper inquiry under *Faragher* and *Ellerth* is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates." *Id.* at 126-127.

The Fourth Circuit too has rejected *Parkins*. In *Whitten* v. *Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010), that court announced that "the absence of the ability to take tangible employment actions does *not* foreclose the possibility that the harasser is the plaintiff's supervisor." *Id.* at 234 (emphasis in original). The court then concluded that vicarious liability governed, because the harasser "directed [the victim's] activities, giving her a list of tasks he expected her to accomplish" and "controlled her schedule." *Id.* at 246 (citing *Mack* favorably).[6]

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[6] Although some courts and commentators had read language in an earlier Fourth Circuit decision, *Mikels* v. *City of Durham*, 183 F.3d 323 (4th Cir. 1999), as placing

The Ninth Circuit's definition of supervisor parallels that of the Second and Fourth Circuits. In *McGinest* v. *GTE Service Corp.*, 360 F.3d 1106, 1119 n.13 (9th Cir. 2004), the court held that "the authority to demand obedience from an employee" makes a harasser a supervisor under *Faragher*/*Ellerth*. Relying on *McGinest*, the court in *Dawson* v. *Entek International*, 630 F.3d 928, 937 (9th Cir. 2011), held that a "trainer and immediate manager" of the victim could be a supervisor, even if the employer did not vest him with authority over the victim's formal employment status. See *id.* at 940.

In an unpublished opinion, the Tenth Circuit implicitly adopted the "power to direct" approach as well. *Smith* v. *City of Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir. 2003). There, the court held that "[b]ecause [the harasser] directed [the victim's] daily tasks * * * a reasonable jury could conclude that [he] was [her] supervisor." District courts of the Fifth and Eleventh Circuits have also followed this approach. See *Anderson* v. *Ultraviolet Sys., Inc.*, No. Civ.A.H-03-2873, 2005 WL 1840155, at *7 (S.D. Tex. July 25, 2005); *Dinkins* v. *Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001).

These courts have observed that restricting vicarious liability to harassment by those with power over their victim's formal employment status "would

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that court on the "power over formal employment status" side of the divide, see, *e.g.*, *Mack*, 326 F.3d at 126 n.5, the subsequent holding in *Whitten* forecloses that interpretation.

be inconsistent with the outcome in *Faragher*," because one of the lifeguards deemed a supervisor by this Court in that case plainly lacked such power. *Whitten*, 601 F.3d at 245 n.6. And a supervisor without hiring or firing authority, these courts reason, can still possess the "power and authority that [make the victim] vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker [does] not.'" *Id.* at 246 (quoting *Mikels*, 183 F.3d at 333). Accordingly, "the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test." *Mack*, 326 F.3d at 126.

As these courts have also recognized, their interpretation is consistent with that of the EEOC, the agency vested with significant responsibility for enforcing Title VII, educating employers about their statutory obligations, investigating Title VII complaints, and promoting their consensual resolution. In this capacity, the EEOC issues guidelines interpreting Title VII, which are "entitled to great deference." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). These "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Indeed, this Court expressly relied on the EEOC Guidelines in holding in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986), that harassment is a prohibited form of discrimination.

For more than a decade, the EEOC has understood "supervisor" in *Faragher* and *Ellerth* to include one who "has authority to direct the

employee's daily work activities." App, *infra*, 90a. Like the courts that have rejected the Seventh Circuit definition, the EEOC explains that because an individual's harassment and abuse of a subordinate is bolstered by authority over her work assignments and performance, the harassing individual should be treated as a supervisor, not a mere co-employee. *Id.* at 91a-92a.

The EEOC has filed briefs successfully urging courts of appeals to reject the "artificially limited" Seventh Circuit rule. EEOC Amicus Br. at 22, *Whitten*, 601 F.3d 231 (No. 09-1265); EEOC Amicus Br., *Mack*, 325 F.3d 116 (No. 02-7056); EEOC Amicus Br., *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (No. 02-3732). The *Mack* and *Whitten* courts were both persuaded by the EEOC.[7]

Although the Seventh Circuit continues to reject the EEOC's understanding of *Faragher*, App., *infra*, 13a, its restrictive definition of "supervisor" has been the subject of internal criticism. In *Rhodes*, a panel held that circuit precedent required that sexual harassment by personnel responsible for "assembling crews and assigning tasks to employees," be treated under the co-worker rule, because they lacked the power to "hire, fire, transfer, promote, demote, or discipline" the victim or other employees. *Id.* at 502, 506. This outcome led two members of the three-

[7] The Eighth Circuit in *Weyers* was foreclosed from adopting the EEOC's definition by *Joens* v. *John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), decided one month earlier. *Weyers*, 359 F.3d at 1056-1057.

judge panel to urge reconsideration of *Parkins*. *Rhodes*, 359 F.3d at 509-510. One criticized the Seventh Circuit's definition as "particularly narrow" and doubted that it "comport[ed] with the realities of the workplace." *Ibid.* (Rovner, J., concurring).

* * * * *

The circuits are openly and deeply divided over the proper definition of supervisor and the domain for the vicarious liability rule. A harasser who directs and oversees the work of the victim but who lacks power over her formal employment status is a supervisor in some circuits but not in others.

II. THE SEVENTH CIRCUIT RULE IS WRONG

The Seventh Circuit has restricted the *Faragher* and *Ellerth* liability rule to harassment by only a subset of the individuals who are "supervisors" in common parlance—and in the eyes of their subordinates and employers—by excluding those with immediate responsibility for directing the day-to-day work of their victims unless they also have power to take "consequential employment" action against them. This arbitrary restriction of *Faragher* and *Ellerth* is unsupported by—and indeed contrary to—the holding and rationale of those decisions

The Seventh Circuit's narrow focus on high-level personnel wielding the power to take formal employment action is at odds with *Faragher*/*Ellerth's* formulation of the rule: the Court held an employer would be vicariously liable "for an actionable hostile environment created by a supervisor *with immediate (or successively higher)* authority over the employee."

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765 (emphasis added).

And as the EEOC and other courts have highlighted, the restrictive gloss that the Seventh Circuit has placed on *Faragher* cannot be reconciled with the result in *Faragher* itself. There, the Court held the City of Boca Raton vicariously liable for the hostile work environment created by David Silverman, who was "responsible for making [Faragher's] daily assignments, and for supervising [her] work and fitness training," but who had no authority to hire, fire, promote, demote, discipline, or transfer her. *Faragher*, 524 U.S. at 781. Indeed, the Court saw the liability issue as so clear that it directed that judgment be entered for the plaintiff on remand. *Id.* at 809.

But even if the specific facts underlying the Court's "supervisor" designation in *Faragher* could be disregarded, but see *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821) ("[G]eneral expressions, in every opinion are to be taken in connection with the case in which those expressions are used"), the restriction the Seventh Circuit has read into *Faragher* and *Ellerth* "[does] violence to the *rationale*" of those decisions. *Grozdanich* v. *Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (emphasis added).

In *Faragher* and *Ellerth*, the Court held that (subject to the narrow affirmative defense) employers are liable under Title VII for supervisors' actionable harassment. Grounding its reasoning in the "aided in authority" principle of the Restatement (Second) of Agency § 219 (1957), the Court identified

two principal ways in which supervisory authority aids harassers: (1) supervisory authority enables harassers "to keep subordinates in their presence while they make offensive statements," and (2) harassers can "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Faragher*, 524 U.S. at 801. In these ways, a supervisor's abusive behavior "necessarily draw[s] upon his superior position over the people who report to him, or those under them," such that "an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker." *Id.* at 803.

Both the primary concerns motivating the Court's adoption of the vicarious liability rule—the harasser's enhanced ability to command his victims' presence and to retaliate against victims who resist—are directly implicated when the harasser has the authority to direct his victim's daily work activities, whether or not he also has the authority to make formal employment decisions. Indeed, this is illustrated by the facts of *Faragher*. The Court held Boca Raton vicariously liable for Silverman's discriminatory misconduct because he had been "'granted virtually unchecked authority'" over the plaintiff and other female lifeguards, "'directly controlling and supervising all aspects of Faragher's day-to-day activities.'" 524 U.S. at 808 (quoting *Faragher* v. *City of Boca Raton*, 111 F.3d 1530, 1544 (11th Cir. 1997) (Barkett, J., concurring in part and dissenting in part)) (brackets omitted). Silverman's ability to retaliate against his victims in no way depended on his ability to make ultimate employment decisions, as illustrated by his

proposition to the plaintiff: "Date me or clean toilets for a year." *Faragher*, 524 U.S. at 780.

The Court did not consider this authority insufficient because Silverman lacked the power to make formal personnel decisions. *Faragher*, 524 U.S. at 808 (holding the defendant vicariously liable for Silverman's conduct). As *Faragher* demonstrates, "[a] supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees," but rather include "the day-to-day supervision of the work environment." *Meritor*, 477 U.S. at 76 (Marshall, J, concurring). Yet under the Seventh Circuit's restricted reading of *Faragher*, employers are insulated from liability for harassment by immediate supervisors like Silverman, who exert great employer-conferred authority over their victims' day-to-day work lives, but lack the ultimate authority to make the employment decisions required by *Parkins*. But "[i]n both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong." *Ibid.*

Strict application of the Seventh Circuit rule produces perverse consequences in a world in which large employers with "multiple worksites vest the managers of such sites with substantial authority and discretion to run them but reserve formal employment authority to a few individuals at central headquarters": the rule simply "does not comport with the realities of the workplace." *Rhodes*, 359 F.3d at 510 (Rovner, J., concurring). Not only does it produce "the practical, if unintended effect of insulating employers from liability for harassment perpetrated by" the managers who actually direct

most employees' daily activities, *ibid.*, but the Seventh Circuit rule also inexplicably reserves vicarious liability to those within internal personnel departments who, far from having special power to "keep subordinates in their presence," *Faragher*, 524 U.S. at 801, have almost no contact with the workers whose employment terms they are empowered to alter.

Such context-blind rigidity places the Seventh Circuit rule in plain tension with this Court's pragmatic approach to Title VII. The Court has long recognized that Title VII should be construed with "common sense," *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 70 (2006), and an eye toward workplace reality. Thus, there is more to Title VII's coverage than the "terms and conditions" of employment "in the narrow contractual sense," *Faragher*, 524 U.S. at 786, for "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, 523 U.S. at 81-82. In light of these considerations, the Court has repeatedly rejected unrealistic and mechanical bright-line tests for standards phrased "in general terms" where the "[c]ontext matters." *Burlington Northern*, 548 U.S. at 69; see, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997) (recognizing that employers may unlawfully retaliate against former as well as current employees); *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002) (recognizing that acts occurring outside the statutory time period may nevertheless contribute to a hostile

work environment that existed within the statutory time period).

Burlington Northern is especially instructive because, in dealing with the problem of retaliation—a central concern motivating the *Faragher* and *Ellerth* rule—the Court rejected rigid rules limiting application of the Title VII anti-retalition provision to "ultimate employment decisions," 547 U.S. at 67, and instead adopted a standard reaching those actions "a reasonable employee" would have found to be "materially adverse." *Id.* at 68. As the Court observed, "[c]ommon sense" indicates that abusing the authority to direct daily work activities—such as by "insist[ing] that [the victim employee] spend more time performing the more arduous duties and less time performing those that are easier or more agreeable"—is "one good way to discourage an employee * * * from bringing discrimination charges." *Id.* at 70-71. That same power can prevent a victim from effectively responding to her supervisor's harassment, just as it can be wielded to retaliate against a victim who has already reported discrimination.

The courts that have adopted the Seventh Circuit rule have failed to produce a convincing rationale for their restriction of *Faragher* and *Ellerth*. Some have raised concern that the Second Circuit and EEOC interpretations of *Faragher* and *Ellerth* are insufficiently determinate. See, *e.g.*, *Browne* v. *Signal Mountain Nursery*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003). But as the Second, Fourth, and Ninth Circuits, the EEOC (and this Court in *Faragher*) have demonstrated, it is certainly possible to determine whether a harasser is a supervisor

without resorting to an enumeration of formal personnel powers. And courts and employers in jurisdictions applying the *Parkins* test regularly determine supervisory status according to a multi-factor analysis for purposes of the National Labor Relations Act. See 29 U.S.C. § 152(11); *N.L.R.B.* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001). Such concerns, moreover, rest on the erroneous premise that designating fewer harassers as supervisors and more harassers as co-workers simplifies "employer responsibility" determinations. In fact, determining supervisory status under a broader test arguably reduces the complexity of determining employer liability under *Faragher* and *Ellerth* by enabling courts and employers to avoid the complex and fact-intensive co-worker negligence inquiry altogether.

Some proponents of the Seventh Circuit rule have speculated that a less restrictive definition of supervisor would erode employers' incentive "to engage in preventive forethought," see, *e.g.*, *Browne*, 286 F. Supp. 2d at 914—as if employers would respond to the prospect of vicarious liability for harassment by front-line managers by giving up on the project of combating workplace harassment altogether. Such an irrational response would not only place them in violation of longstanding EEOC policy—which requires employers to "take all steps necessary to prevent sexual harassment from occurring," 29 C.F.R. § 1604.11—but would also vastly increase their liability exposure, given the central role that implementation of preventive policies plays under both the co-employee and supervisor harassment regimes.

III. THIS CASE PROVIDES A DIRECT OPPORTUNITY TO SETTLE AN ISSUE OF FAR-REACHING IMPORTANCE

The issue presented here—whether a harasser must have power over the formal employment status of the victim to be a "supervisor"—is of large legal and practical significance. At present, whether an employee subjected to severe racial and sexual harassment by her direct supervisor is able to obtain relief under Title VII will often depend on the circuit in which the conduct occurred. For example, the harassers in *Rhodes*, responsible for "assembling crews and assigning tasks to employees," 359 F.3d at 502, could be supervisors in circuits that use the "power to direct" definition. "[W]hatever formal employment authority they lacked, a factfinder reasonably might conclude that the power * * * given [to] them to manage the Yard on a day-to-day basis enabled or facilitated their ability to create a hostile work environment for [the victim]." *Id.* at 510 (Rovner, J., concurring) (citing *Mack*, 326 F.3d at 126). And the harasser in *Mack*, who lacked "'the power to hire, fire, demote, promote, transfer, or discipline,'" 326 F.3d at 126 (quoting *Parkins*, 163 F.3d at 1034), would not be a supervisor in circuits such as the Seventh that demand this power.

These differing rules have important consequences. The plaintiff in *Rhodes* was unable to raise even a triable question under the negligence standard, 359 F.3d at 507, while the lower court decisions in *Mack*—and for that matter, *Faragher*—were reversed with instructions that plaintiffs be granted judgment as a matter of law. *Mack*, 326 F.3d at 127; *Faragher*, 524 U.S. at 810. Indeed, as

this case itself illustrates, establishing employer responsibility based on negligence can be especially difficult as a practical matter: the unrepresented and legally unsophisticated employee was faulted both for complaining too much and not enough, while the employer's administrators, well-versed in employment law litigation, were able to "build a record" of impressive-seeming but hollow "investigations." In contrast, Ball State would have no realistic prospect of prevailing under the limited affirmative defense *Faragher* provides for "supervisor" harassment cases: Ms. Vance reported instances of Davis's harassment numerous times, App., *infra*, 3a-7a, so any argument that she took insufficient steps to avoid harm would be very unlikely to succeed.

These issues are no small matter. During the twelve-month period ending September 30, 2010, 14,543 employment discrimination cases were filed in United States courts—the third-largest category of civil cases, behind prisoner petitions and asbestos claims. Table C-2. U.S. District Courts–Civil Cases by Jurisdiction and Nature of Suit, U.S. Courts, 146 (Sept. 2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02Sep10.pdf. And in 2010 alone, the EEOC received more than 30,000 harassment charges. EEOC, Charge Statistics–FY 1997 through FY 2010, available at http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm. Employers agree that this issue is "an important and recurring issue of federal law." Pet. for Cert., *Mack* v. *Otis Elevator Co.*, No. 03-229, at 12. In the modern workforce, where many acts of

discrimination are committed by intermediate-level individuals in a large hierarchical organization such as Ball State University, resolution of this issue will undoubtedly add clarity to a great many employment discrimination disputes.

This case presents an excellent opportunity to settle this important issue. The definition of supervisor used by the Seventh Circuit determined the outcome below. The lower courts considered the employer's liability only under the negligence standard, and not under the vicarious liability standard. App., *infra*, 15a. Because the affirmative defense under *Ellerth* and *Faragher* will be unavailable to Ball State, Ms. Vance may prevail if Davis is determined to be a supervisor.

This issue is now ripe for review. Six courts of appeals have already defined supervisor in this context, and they remain committed to their differing positions, so nothing more would be gained by allowing further percolation of this issue. Resolution by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A
Seventh Circuit Opinion
In the
United States Court of Appeals
For the Seventh Circuit

No. 08–3568

MAETTA VANCE,

Plaintiff–Appellant,

v.

BALL STATE UNIVERSITY, *et al.*,

Defendants–Appellees.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division.

No. 1:06-cv-1452—**Sarah Evans Barker**, *Judge*.

ARGUED NOVEMBER 29, 2010—DECIDED JUNE 3, 2011

Before BAUER, WOOD, and SYKES, Circuit Judges.

WOOD, *Circuit Judge*. Maetta Vance was the only African–American working in her department at Ball State University ("Ball State") when racially

charged discord erupted. In 2005, Vance began filing complaints with Ball State about her coworkers' offensive conduct, which included the use of racial epithets, references to the Ku Klux Klan, veiled threats of physical harm, and other unpleasantries. In 2006 she filed two complaints with the Equal Employment Opportunity Commission ("EEOC") for race discrimination and, later, retaliation. After getting her right-to-sue letter, she filed this action in federal court alleging a range of federal and state discrimination claims. The district court granted summary judgment for the defendants and dismissed the case. On appeal, Vance pursues only her hostile work environment and retaliation claims against Ball State based on asserted violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*. Because she has not established a basis for employer liability on the hostile work environment claim or put forth sufficient facts to support her retaliation claim, we affirm.

I

Ball State prevailed on summary judgment, and so we recite the facts in the light most favorable to Vance, the non-moving. Vance began working for Ball State in 1989 as a substitute server in the Banquet and Catering Department of University Dining Services. In 1991, Ball State promoted Vance to a part-time catering assistant position, and in January 2007 Vance applied and was selected for a position as a full-time catering assistant. Between 1991 and 2007, Vance gained expertise as a baker and enjoyed the challenge of baking items from scratch. After she began work as a full-time employee, a position that included a modest raise

and a significant increase in benefits, her assignments changed. Her new work consisted of preparing food, including dinners for formal events, boxed lunches for casual engagements, and sides and salads, for the catering department's clients.

For many years things progressed uneventfully. But in 2001, Saundra Davis, a coworker, hit Vance on the back of the head without provocation. The two were discussing a work-related duty when Davis became aggressive, shouted at Vance, and slapped Vance as she turned away. Vance orally complained to her supervisors, but because Davis soon transferred to another department Vance did not pursue the matter. Also around that time, Bill Kimes became Vance's supervisor. According to Vance, Kimes gave her the cold shoulder, made her feel unwelcome at work, and treated other employees to lunch when she was not around. He refused to shake her hand when they first met in 2001, and he routinely used a gruff tone of voice with her.

Things took a turn for the worse in 2005. Davis returned to Vance's department, and on September 23, 2005, the two had an altercation in the elevator. Davis stood in Vance's way as she tried to get off the elevator and said, "I'll do it again," which Vance took to be a reference to the slap in 2001. A few days later, Vance heard from a fellow employee that another coworker, Connie McVicker, used the racial epithet "nigger" to refer to Vance and African–American students on campus. McVicker also boasted that her family had ties to the Ku Klux Klan. On September 26, 2005, Vance complained orally to her supervisor about McVicker's statements, and on October 17, 2005, she called

University Compliance to request a complaint form. While requesting the document, Vance again complained about McVicker's racially offensive comments and, for the first time, informed Ball State that Davis had slapped her four years earlier. In early November, Vance submitted a written complaint detailing McVicker's comments and the elevator incident with Davis.

Ball State began investigating Vance's complaint regarding McVicker immediately. Once Vance spoke to University Compliance on October 17, 2005, two supervisors, Lisa Courtright and Kimes, met to discuss how to handle the matter. Courtright sent Vance a letter to inform her that they were investigating. In the meantime, several people from Employee Relations became involved. Kimes's investigation corroborated Vance's account of what McVicker said, although the witnesses could not recall whether McVicker used the epithet generally or directed it at Vance. The Assistant Director of Employee Relations sent an email to the Director, stating: "I know we don't have the specifics on exactly what and when these utterances were ... but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the workplace." Ball State used a four-step process to handle employee discipline, starting with a verbal warning for the first infraction, followed by a written warning for the second, with escalating consequences for further violations. Within this context, the Assistant Director concluded, "I think we can justify going beyond our limited prior past history and issue a written warning ... we should also strongly advise her verbally when we issue this that

it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge."

Following this recommendation, Kimes gave McVicker a written warning on November 11, 2005, for "conduct inconsistent with proper behavior." The warning explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at coworkers." Kimes advised McVicker that additional violations would lead to further disciplinary action. Days later, Courtright met with McVicker to discuss the warning; Courtright reiterated that racially offensive comments would not be tolerated. She also suggested that McVicker should consider avoiding Vance and transferring to another department.

That same day, Vance complained to Courtright that McVicker referred to her as a "porch monkey." Courtright advised Vance to tell Kimes, which Vance did. Kimes investigated by speaking to another coworker whom Vance said witnessed the incident, but that coworker did not corroborate Vance's allegation. In turn, Kimes told Vance that without any witnesses he could not discipline McVicker, who denied making the comment. Kimes said that further action on this issue would devolve into a "she said-she said" exchange. Kimes did not discipline McVicker for the "monkey" comment, nor does the record suggest that Courtright mentioned it when she spoke to McVicker later that week. Kimes did, however, try unsuccessfully to schedule McVicker and Vance to work on alternating days. Over a year

later, McVicker voluntarily transferred to another department.

In response to Vance's complaint about the September 23, 2005, elevator incident with Davis, Ball State investigated but found conflicting accounts of what had happened. Before Vance filed her written complaint on November 7, 2005, Davis had filed a complaint alleging that Vance said to Davis: "Move, bitch ... you are an evil f– – – – – – bitch." Kimes discussed the situation with his supervisor, and they decided that counseling both employees about respect in the workplace was the best path to follow. Kimes spoke with Vance about how to communicate respectfully in the workplace, but it is unclear whether he had a similar conversation with Davis. No one was disciplined for the incident. Around this time, though the record is not clear about the date, Davis made references to "Sambo" and "Buckwheat" while having a conversation with another coworker in Vance's presence. Vance understood these words to be used in a racially derogatory way and thus felt offended by them, but she did not complain to Ball State at that time.

Conditions were not improving for Vance, and on December 22, 2005, she informed Kimes that she felt threatened and intimidated by her coworkers. The following week Vance filed a charge with the EEOC alleging race, gender, and age discrimination. Vance also complained that, throughout this period, Davis and McVicker gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her. In 2006, Vance filed a complaint identifying a variety of other instances

where she felt harassed, including being "blocked" on the elevator by Davis who "stood there with her cart smiling"; being left alone in the kitchen with Davis, who smiled at her; and being around Davis and McVicker, who gave her "weird" looks. She also filed a complaint alleging that Karen Adkins, a supervisor, "mean-mugged" her. Ball State investigated these incidents but found no basis to take disciplinary action.

On May 10, 2006, Vance filed a complaint with Ball State against her supervisor, (still) Kimes, alleging that he forced her to work through breaks. Ball State investigated but found no factual basis for the allegation. In August 2006, Vance filed a second complaint with the EEOC alleging that Ball State retaliated against her by assigning her diminished work duties, forcing her to work through breaks, denying her the chance to work overtime hours, and unequally disciplining her. She filed this lawsuit on October 3, 2006.

While her case was pending before the district court, Ball State promoted Vance to the position of a full-time catering assistant. Still, the strife did not abate. In April 2007, Vance filed a grievance against McVicker for saying "payback" to her. Three supervisors, including Kimes, investigated; McVicker countered that Vance had said to her: "Just the beginning bitch—you better watch your house." Both women denied the allegations against them, and Ball State did not discipline anyone. In August 2007, Davis said to Vance, "are you scared," in a Southern accent. Ball State investigated and warned Davis verbally not to engage in such behavior. That same month, Vance complained that during a routine day

of work Kimes aggressively approached her while repeatedly yelling the same question at her. When Ball State investigated, the witness identified by Vance did not corroborate her account of the incident. Instead, the witness supported Kimes's version of what had occurred and added that it was common for Kimes to repeat himself until he was sure the other person had heard him. In September 2007, Davis complained that Vance splattered gravy on her and slammed pots and pans around her. Vance denied the allegation but, even though no witnesses corroborated the event, Ball State warned Vance about its policies.

Vance also complains that Ball State retaliated against her for complaining about the racial harassment. Although she was promoted in 2007, Vance argues that Ball State reassigned her to menial tasks such as cutting vegetables, washing fruit, and refilling condiment trays. In her view, Ball State made her into a "glorified salad girl" even though she possessed a range of advanced skills that could have been better utilized baking or cooking complete meals.

II

A

Before reaching the merits of Vance's claim, we must resolve an evidentiary issue. After all dispositive motion deadlines had passed and both parties had submitted their summary judgment briefs, Vance sought to supplement the record with evidence of two incidents that took place in early 2008. The evidence included two affidavits testifying to a verbally abusive encounter with Davis's

daughter and husband. During that incident, Davis's kin insulted Vance and another coworker with racial epithets and physically threatened them on university property. The affidavits document this episode and Kimes's alleged failure to respond when Vance complained. Vance also submitted two articles published in an on-line Ball State forum that discussed Vance's discrimination claims against the university, along with scores of "comments," some racially offensive, posted in response to the articles. One of the articles was written by one of Vance's coworkers.

Vance submitted the evidence on March 12, 2008, and Ball State moved to strike. Ball State argued before the district court that Vance was attempting "an end run" around Federal Rule of Civil Procedure 15(d) by styling her submission as a supplement to the summary judgment record rather than a supplemental pleading. The district court concluded that Vance's supplemental evidence fell within the purview of Rule 15(d), analyzed it as if Vance had filed a Rule 15 motion, and granted Ball State's motion to strike. On appeal, Vance asserts that the court should have permitted her to supplement the record, while Ball State defends the district court's ruling on the ground that the contested evidence presents new factual allegations against persons not party to this lawsuit.

In our view, these materials are best viewed as supplemental to the summary judgment record rather than as a disguised Rule 15(d) submission. When a plaintiff initiates a hostile work environment lawsuit, as opposed to a suit claiming discrimination based on discrete acts, she usually complains of an

employer's continuing violation of Title VII "based on the cumulative effect of individual acts." See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (recognizing that hostile environment claims by their very nature involve repeated conduct). The continuing violation doctrine is usually invoked to defeat a statute of limitations bar for conduct that falls outside the relevant period, see *Dandy v. UPS, Inc.*, 388 F.3d 263, 270 (7th Cir. 2004), but we think the general concept is instructive in this context as well. That is, a Title VII hostile work environment claim is against the employer for the aggregate conduct of one or more of its employees. By adding more "individual acts" as evidence of a hostile work environment claim, a plaintiff does no more than strengthen her evidentiary record; this is not enough to allege a discrete new claim. See *Morgan*, 536 U.S. at 115, 122 S.Ct. 2061 ("Hostile environment claims are different in kind from discrete acts.").

Thus, Ball State misses the mark when it contends that these materials implicate persons not named as defendants in this lawsuit. Title VII regulates the conduct of employers, not individual employees. See 42 U.S.C. § 2000e–2(a). If admitted, Vance's supplemental evidence might have cast some light on her hostile work environment claim against Ball State. Whether Ball State is liable for the conduct of an employee's family member or statements in a university publication is a separate question we need not resolve, because the district court did not abuse its discretion in excluding the evidence. Vance moved to supplement the record after the deadlines for discovery and dispositive

motions had "long passed." We regularly affirm a district court's decision to exclude supplemental evidence in the interest of keeping cases moving forward. See, *e.g., Pfeil v. Rogers*, 757 F.2d 850, 858 (7th Cir. 1985).

B

Turning to the merits, we apply the well-known *de novo* standard of review to Vance's case. See *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 912 (7th Cir. 2010). Vance argues that the facts she has alleged and supported are sufficient to get her case before a jury, which would then determine whether her hostile work environment and retaliation claims are meritorious. We examine each of her arguments in turn.

Title VII prohibits employers from discriminating against a person with respect to her "compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e–2(a)(1). Ball State, however, is not liable to Vance under Title VII for a hostile work environment unless Vance can prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability. See *Dear v. Shinseki*, 578 F.3d 605 (7th Cir. 2009); *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1045 (7th Cir. 2002) ("*Cerros I*"). We emphasize, as we have before, that the third element of the plaintiff's *prima facie* case is in the disjunctive—the conduct must be *either* severe *or* pervasive. See *Cerros v. Steel Technologies, Inc.*, 398

F.3d 944, 950 (7th Cir. 2005) ("*Cerros II*"). The question whether there is a basis for employer liability depends on whether the alleged harassment was perpetrated by supervisors or coworkers. See *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004); see generally *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Employers are "strictly liable" for harassment inflicted by supervisors, but they can assert an affirmative defense when the harassment does not result in a tangible employment action. 361 F.3d at 1029 (citing *Ellerth*, 524 U.S. at 756, 118 S.Ct. 2257 and *Faragher*, 524 U.S. at 807–08, 118 S.Ct. 2275). If only coworkers were culpable for making a work environment hostile, the plaintiff must show that the employer has "been negligent either in discovering or remedying the harassment." *Id.* (internal citations omitted).

Vance argues that three supervisors, Kimes, Adkins, and Davis, harassed her on account of her race. To begin, Vance argues that there are disputed facts regarding whether Davis was her supervisor, making summary judgment inappropriate on this issue. We find no such ambiguity. Under Title VII, "[a] supervisor is someone with power to *directly* affect the terms and conditions of the plaintiff's employment." *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). That authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (internal quotation marks and citations omitted). We

have not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII. See *Rhodes*, 359 F.3d at 509 (Rovner, J., concurring) (arguing for a broader standard of supervisor liability based on EEOC guidelines). We conclude 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.

We can also summarily dispose of Vance's allegations against supervisor Adkins. Vance's brief says little about what Adkins may have done to make her work environment hostile. Before the district court, Vance argued that Adkins "mean-mugged" her and stared at her when they were in the kitchen together. Making an ugly face at someone and staring, while not the most mature things to do, fall short of the kind of conduct that might support a hostile work environment claim.

Vance's complaints about Kimes require a closer look, but this reveals that she has failed to establish that Kimes's conduct had a racial "character or purpose." See *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004). Although there is some indication in the record that Kimes was generally difficult to work with, we assume, favorably to Vance, that he picked on her. Still, even in that light, Vance's allegations do not establish that Kimes's unkind or aggressive conduct was motivated by Vance's race. Although a plaintiff does not need to identify an explicitly racial dimension of the

challenged conduct to sustain a Title VII claim, she must be able to attribute a racial "character or purpose" to it. See *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999). Vance has not put forth any facts to establish that any of Kimes's conduct was motivated by, or had anything to do with, race. To the contrary, in her deposition Vance conceded that she never heard Kimes say anything suggesting ill will towards her because of her race, nor did any other employee report to Vance that Kimes had uttered racially derogatory comments. The undisputed facts establish that there are no grounds for employer liability for violation of Title VII based on the conduct of Vance's supervisors.

This leaves Vance's treatment at the hands of her two coworkers, Davis and McVicker. When evaluating a hostile work environment claim, we consider "the entire context of the workplace," see *Cerros I*, 288 F.3d at 1046, not the discrete acts of individual employees. The district court analyzed Vance's allegations against Davis and McVicker separately, finding that summary judgment was proper based on the conduct of each woman independently. We stress that a hostile work environment claim requires a consideration of all the circumstances, because in the end it is the employer's liability that is at issue, not liability of particular employees. Thus, for example, if we had found that Vance's supervisors had contributed to a racially hostile work environment, that conduct would form part of the context for Vance's claim against Ball State, just as the actions of her coworkers would. The only reason we have divided our analysis between the conduct of supervisors and

employees is to ensure that we are respecting the standards for vicarious liability that apply. See *Williams*, 361 F.3d at 1029.

Assuming without deciding that Vance's allegations against her coworkers satisfy the first three elements of a Title VII hostile work environment claim, we conclude nonetheless that Vance cannot prevail because there is no basis for employer liability. See *Tutman v. WBBM–TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048–49 (7th Cir. 2000) ("We do not decide whether a hostile work environment existed because the question whether [the employer] took prompt and effective action is dispositive here."). For Ball State to be liable, Vance must put forth sufficient facts to establish that it was negligent in failing to "take reasonable steps to discover and remedy the harassment." *Cerros II*, 398 F.3d at 953. Once aware of workplace harassment, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (internal citations omitted). While it is unfortunate that Ball State's remedial measures did not persuade Davis or McVicker to treat Vance with respect, and we have nothing but condemnation for the type of conduct Vance has alleged, we find that Ball State satisfied its obligation under Title VII by promptly investigating each of Vance's complaints and taking disciplinary action when appropriate. See *Porter v. Erie Foods Int'l Inc.*, 576 F.3d 629, 636 (7th Cir. 2009) ("Our focus, therefore, is on whether [the employer] responded promptly and effectively to the

incident.").

Between October 2005 and October 2007, Vance filed numerous complaints about her troublesome encounters with Davis and McVicker. Ball State took reasonable corrective action as Vance lodged each complaint. In response to Vance's complaint that McVicker used the racial epithet "nigger" and bragged about her family connections with the Ku Klux Klan, Ball State promptly investigated, involved the appropriate supervisory personnel, and issued a written reprimand to McVicker. According to Ball State policy, McVicker technically should have received a stage-one oral warning because she had no prior complaints on her record, yet the university concluded that a more serious measure was in order. The written warning conveyed to McVicker that her racially offensive language would not be tolerated, and two supervisors met with McVicker separately to discuss the matter. Meanwhile, a supervisor remained in contact with Vance and assured her that they were investigating her complaint.

Vance lodged two additional complaints against McVicker during this period, one in November 5, 2005, for referring to her as a "porch monkey" and one in April 2007 for saying "payback." In response to the 2005 complaint, Ball State again promptly investigated, but a witness identified by Vance could not corroborate that McVicker used the offensive term to refer to Vance. Similarly, Ball State uncovered competing versions of what took place in connection with Vance's 2007 "payback" complaint. When Ball State questioned McVicker about the incident, she counter-complained that Vance said:

"Just the beginning bitch—you better watch your house."

Again, we are taking the view of these facts that favors Vance; we express no opinion about what "really" happened. From that perspective, we assume that McVicker made the alleged statements. On the issue of employer liability, however, we must look at the employer's response in light of the facts it found in its investigation. See *Porter*, 576 F.3d at 636 (observing that, "taken as a whole," the employer "took appropriate steps to bring the harassment to an end"). It may be commonplace that an employee accused of verbally abusing or intimidating a coworker denies the allegation. But Ball State did what it could and did not stop by accepting a simple denial. Moreover, the record does not reflect a situation in which all ties went to the discriminator; if it did, we would be inclined to send this case to a jury. Ball State, however, calibrated its responses depending on the situation. Sometimes when it was unsure who was at fault it counseled both employees; sometimes it warned alleged wrongdoers to take care or desist.

Vance complained to her supervisors several times about Davis's conduct. The two most serious allegations relate to the elevator incident in 2005 and the "are you scared" comment in 2007. We note that Vance conceded at her deposition that she did not complain to Ball State about Davis's use of the terms "Sambo" and "Buckwheat." We take Vance at her word that, in context, the terms "Sambo" and "Buckwheat" were used as explicit racial slurs that would require remedial measures from an employer under Title VII. See *Daniels v. Essex Group, Inc.*, 937

F.2d 1264, 1266 (7th Cir. 1991) (noting "Buckwheat" is a racial taunt); *Boyd v. State Farm Ins. Co.*, 158 F.3d 326 n.1 (5th Cir. 1998) ("[I]n the context of employment discrimination law, the term 'Buckwheat' is generally considered to be a racial slur or epithet."). Under Title VII, however, an employer's liability for coworker harassment is not triggered unless the employee notifies the employer about an instance of racial harassment.

Ball State first learned of the September 23, 2005, altercation from Davis, when she filed a complaint against Vance for saying, "Move, bitch ... you are an evil f– – – – – – bitch." Later, Vance complained that Davis had said, "I'll do it again," referring to, according to Vance, the time in 2001 when Davis slapped her. Ball State investigated, but both women stuck to their stories and denied saying anything offensive to the other. Ball State's response to this altercation was reasonable. We have said that Title VII is "'not ... a general civility code' and we will not find liability based on the 'sporadic use of abusive language.'" *Ford v. Minteq Shapes and Services, Inc.*, 587 F.3d 845, 848 (7th Cir. 2009) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). Faced with competing complaints, the first of which was lodged against Vance, Ball State pursued a reasonable course of action by counseling *both* employees about civility in the workplace. Finally, after Vance complained that Davis said "are you scared" to her in a Southern accent, Ball State again investigated. Although Davis denied making the statement, Ball State again formally warned Davis orally to refrain from such actions. This response

was reasonable in light of the circumstances.

The catering department was undoubtedly an unpleasant place for Vance between 2005 and 2007. Yet the record reflects that Ball State promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct. As we have said before, prompt investigation is the "hallmark of reasonable corrective action." *Cerros II*, 398 F.3d at 954. This is not a case where the employer began to ignore an employee's complaints as time went on. Ball State investigated Vance's complaint against Davis in 2007 with the same vigor as it did her complaint in 2005. Of course, the ideal result of an employee's complaint would be that the harassment ceases. But Title VII does not require an employer's response to "successfully prevent[ ] subsequent harassment," though it should be reasonably calculated to do so. *Cerros II*, 398 F.3d at 954 (quoting *Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999)). In this case, we conclude that the undisputed facts demonstrate that there is no basis for employer liability.

C

Vance also alleges that Ball State retaliated against her for complaining about the racial harassment by reassigning her to menial tasks, denying her overtime hours, and unequally disciplining her. Employers may not punish employees for complaining about workplace conduct that even arguably violates Title VII. 42 U.S.C. § 2000e–3(a); *Sitar v. Indiana Dep't of Transp.*, 344

F.3d 720, 727 (7th Cir. 2003). To establish a *prima facie* case of retaliation, a plaintiff may use either the direct or indirect method of proof. Vance is proceeding only under the indirect method, which requires her to show that (1) she engaged in a statutorily protected activity; (2) she performed her job according to the employer's expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly situated employee. *Stephens v. Erickson*, 569 F.3d 779, 787 (7th Cir. 2009). Once the plaintiff establishes her *prima facie* case, the burden shifts to the defendant to establish a non-invidious reason for the action. The burden then shifts back to the plaintiff to show that the defendant's reason was pretextual. *Id.* Ball State concedes that Vance engaged in a protected activity and does not claim Vance's work performance was sub-par. Our focus is thus on the final two elements of Vance's *prima facie* case.

It is possible for a plaintiff to establish a claim of retaliation based on a change of work responsibilities, "depend[ing] on how much of a change, and how disadvantageous a change, took place." *Sitar*, 344 F.3d at 727; see also *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744–45 (7th Cir. 2002) (listing cases). In order to succeed, " 'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.' " *Lapka v. Chertoff*, 517 F.3d 974, 985 (7th Cir. 2008) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). Generally, if the challenged action would discourage other employees from complaining about employer conduct that violates Title VII, it

constitutes an adverse employment action. See *Burlington,* 548 U.S. at 57, 68, 126 S.Ct. 2405.

Vance's strongest argument depicts an unusual instance of retaliation, in which Ball State simultaneously promoted her and assigned her to diminished work duties in 2007. The district court observed that whether Vance suffered a materially adverse employment action was a close call, but it concluded that a jury could conclude that her reassignment was materially adverse. Still, the district court concluded that Vance's theory fails because she did not establish that she was treated less favorably than a similarly situated employee. We agree with the district court, and conclude in addition that Vance cannot show that she suffered a materially adverse employment action.

Vance concedes that her promotion included a modest pay raise and a significant increase in benefits. She argues, however, that once promoted she was assigned to more menial tasks. In particular, she asserts that Ball State assigned her to cut vegetables and refill condiments, while entrusting her coworker, Brad Hutson, with more complicated tasks such as preparing complete meals. We recognize that it is possible for an employer to retaliate clandestinely against an employee while formally promoting her, but the record cannot be stretched to support such a theory here. Vance personally sought out the new full-time position; it was her choice to leave the part-time position where she baked often and was generally content with her work assignments. Her new job included some of the tasks about which she is complaining, but it also included a range of other tasks including preparing

more complicated dishes. While Vance may have been disappointed with her new assignments, considering the entire context of her promotion we conclude that no rational jury could find that she experienced a materially adverse employment action.

Put another way, we find that a reasonable person would not be dissuaded from complaining about race discrimination by witnessing the treatment Vance received: a promotion to a full-time position with accompanying benefits, a raise in pay, and—taking all of Vance's allegations as true—a change in work assignments that included basic salad preparation. This case does not present the problem we encountered in *Washington v. Illinois Dep't of Revenue*, 420 F.3d 658 (7th Cir. 2005), where we reversed a grant of summary judgment based on the notion that a change in work schedule that did not affect salary or duties could not constitute an adverse employment action. In *Washington,* we observed that while a reassignment that does not affect pay or opportunities for promotion will "by and large" not be actionable for a retaliation claim under Title VII, " 'by and large' differs from 'never.' " *Id.* at 662. When, as in that case, the employer exploits a known vulnerability of an employee—the plaintiff there relied on her previously established flex-time schedule so she could care for her son, who had Down syndrome—an altered work schedule can constitute an adverse work action. *Id.* Even though a change in assignments, like an altered work schedule, conceivably might amount to an adverse employment action, Vance must allege more than a dislike for her new assignments or a preference for her old ones for her case to go forward.

Approaching the issue as the district court did, by asking whether there was a similarly situated employee, leads to the same result. Only two employees held the position of a full-time catering assistant at the time of this dispute, Vance and Hutson. Both employees were promoted to that position on the same day, and for the most part both were assigned to the same range of duties. We accept Vance's allegation that their work assignments were not identical, but the record reflects that they were assigned to a substantially similar set of tasks. Thus, even if Vance had established that Ball State subjected her to a materially adverse action, her claim would fail because she has not satisfied the final element of the *prima facie* analysis.

Vance also alleges that Ball State retaliated by offering her fewer opportunities to work overtime hours. We said in *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007), that the loss of opportunity to work overtime can amount to an adverse employment action. The parties agree that Vance worked fewer overtime hours than Brad Hutson in 2007. Ball State defends by arguing that Hutson is not similarly situated to Vance because he worked significantly more regular hours than her, which, as a consequence, made him available to work more overtime hours. This is in part because Ball State has a "work continuation" policy, which mandates that the employee who began a task that is unfinished at the end of a shift must stay and get the task completed.

The record indicates that Vance often took FMLA leave, called in sick unexpectedly, and left work early for health reasons. Vance does not dispute that she

worked fewer regular hours than Hutson. Instead, she argues that, because she was the more senior employee, she should have been offered more opportunities to work overtime. She adds, without citation or support, that the work continuation policy Ball State relies on is "void." Neither of these arguments is availing. Even if Vance had seniority over Hutson, the undisputed facts establish that they did not work a comparable number of regular hours. Thus, the two are not similarly situated for the purpose of this analysis. Vance's assertion that the work continuation policy is void, without citing evidence in the record, is unhelpful. We have repeatedly said that a "nonmoving party cannot defeat a motion for summary judgment with bare allegations." *de la Rama v. Illinois Dep't of Human Services*, 541 F.3d 681, 685 (7th Cir. 2008).

Finally, Vance argues that Ball State retaliated against her by issuing her a verbal warning for allegedly splattering gravy on Davis and slamming pots and pans on the counter. Although we give the concept of an adverse employment action a generous construction, it is not this broad. Vance appears to concede as much, altering her argument slightly on appeal to claim that Ball State's warning to Vance amounts to taking the side of those who harassed her, which she sees as retaliation through the creation of a more hostile work environment. No reasonable jury could find that the delivery of a verbal warning, based on a complaint from a coworker, constitutes an adverse employment action or creates an objectively hostile work environment.

The judgment of the district court is AFFIRMED.

APPENDIX B

District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MAETTA VANCE,	)	
	)	
Plaintiff	)	
	)	1:06-cv-1452-SEB-JMS
vs.	)	
	)	
BALL STATE UNIVERSITY, WILLIAM KIMES, in his individual and official capacity as General Manager of Ball State University's Banquet and Catering Department, SAUNDRA DAVIS, in her individual and official capacity as a supervising employee of Ball State University's Banquet and Catering Department, KAREN ADKINS, in her individual and official capacity as the Assistant Director of Administration/Personnel/ Marketing for Residence Hall	)	

Dining Service at Ball State University, and CONNIE MCVICKER,	)
Defendants.	)

ENTRY ON PENDING MOTIONS

This cause is before the Court on cross-motions for summary judgment. Defendants Ball State University ("Ball State"), Bill Kimes, Saundra Davis, Karen Adkins, and Connie McVicker, filed a Motion for Summary Judgment [Docket No. 54] on November 1, 2007. Subsequently, on November 30, 2007, Plaintiff, Maetta Vance, filed a Motion for Partial Summary Judgment [Docket No. 74] on her hostile environment claim. Ms. Vance also filed a Request for Oral Argument on Cross Motions for Summary Judgment [Docket No. 77] on that date.[1] After the cross-motions were fully briefed, on March 12, 2008, Ms. Vance filed supplemental affidavits and evidence in support of her motion for summary judgment and opposing Defendants' motion for summary judgment. On March 17, 2008, Defendants filed a Motion to Strike [Docket No. 125] Ms. Vance's additional submissions.

For the reasons detailed in this entry, we **GRANT** Defendants' Motion to Strike, **GRANT** Defendants' Motion for Summary Judgment in its

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[1] Plaintiff's Request for Oral Argument is hereby **DENIED**. The briefings in this cause are both thorough and prolix. Therefore, we are able to reach our decision based upon these pleadings, and oral argument on the issues before us is unnecessary.

entirety and **DENY** Plaintiff's Partial Motion for Summary Judgment.

Factual Background

In August 1989, Plaintiff, Ms. Vance, an African American female, began working for Ball State as a substitute server in the University Banquet and Catering ("UBC") division of University Dining Services ("Dining Services"). Compl. ¶¶ 12-13; Rubrecht Aff. ¶ 3. Dining Services employs approximately 850 individuals across seven residence hall dining units and other restaurants on campus in such positions as food preparation, wait staff, catering assistant in January 2007, which is the position she currently holds.[2] Vance Dep. at 21. Jon Lewis acts as the Director of Dining Services and heads the entire operation. Rubrecht Aff. ¶ 2. He is assisted by the Assistant Director of Personnel, Training, and Administration, Karen Adkins, who directly reports to Mr. Lewis. *Id.* Both Mr. Lewis and Ms. Adkins supervise Bill Kimes, who serves as the General Manager of UBC (one division of Dining Services) and also oversees the operation of Cardinal Crossing, a food court that serves both students and employees. Kimes Dep. at 8-9. Overall, Mr. Kimes supervises nearly 140 employees – eighty from Cardinal Crossing, and sixty from UBC, including Ms. Vance. *Id.* at 26; Rubrecht Aff. ¶¶ 4-5. Mr. Kimes has supervised Ms. Vance since 1999, when he first began working for Ball State. Kimes Dep. at 26.

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[2] The parties dispute whether this selection constitutes a promotion or a demotion. We address this issue more fully below.

The instant suit arose as a result of Ms. Vance's allegations that, from 1999 through April 2006, she has been subjected to discrimination and harassment on the basis of her race (African-American) by various individuals in the workplace. Compl. ¶ 14. She further contends that Ball State has done nothing to rectify the harassing environment, and instead, has retaliated against her for reporting the behavior. *Id.* ¶ 51.

Plaintiff's Complaints to Defendants Regarding Alleged Racial Discrimination

Ball State bargaining unit employees, such as Ms. Vance, have a number of avenues available to them to log complaints. All complaints of discrimination or harassment that are made by Ball State employees are forwarded to Ball State's Office of Compliance, which coordinates the investigation and resolution procedure. Courtright Aff. ¶ 2. The Office of Compliance maintains a record of all communications to and from the office; phone calls are initially documented at the time the phone conversation occurs and are also logged through an automated electronic filing system and all written documentation is similarly logged upon receipt or dispatch. *Id.* ¶ 3. The Director of the Office of Compliance is Sali Falling, an attorney, who oversees, among other employees, Gloria Courtright, the Assistant Director of the Office of Compliance. *Id.* ¶ 1. Ms. Courtright was the primary individual from the office involved with the investigation and supposed resolution of Ms. Vance's claims of discrimination, harassment, and retaliation, in coordination with Dining Services, UBC, and Employee Relations. *Id.* ¶ 4.

Although all complaints get forwarded to the Office of Compliance, Employee Relations provides an additional avenue for bargaining unit employees, such as Ms. Vance, to bring initial complaints. Rubrecht Aff. ¶ 6. Melissa Rubrecht, who was the Assistant Director of Employee Relations for fifteen years and has acted as the Director since July 1, 2006, coordinated Employee Relations' efforts to address Ms. Vance's complaints with the efforts of the Office of Compliance. *Id.* ¶ 1, ¶ 6.

On November 7, 2005,[3] Ms. Vance filed her first complaint with Ball State, alleging that on September 23, 2005, fellow employee Saundra Davis[4] threatened her and that Connie McVicker, another co-worker, called her racially derogatory names. BSU 0050-0051.

Service Elevator Incident

In the November 7, 2005, complaint, Ms. Vance claimed that Ms. Davis stopped her as she was getting on the UBC service elevator and asked her, "When is this going to stop?" Vance Dep. at 48-49. Ms. Vance reported that although she did not know what Ms. Davis actually meant by that comment, she took it as a threat. *Id.* at 49. Ms. Vance also

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[3] Ms. Vance dated her handwritten complaint October 20, 2005, but the Office of Compliance did not receive it until the day on which it is date stamped, November 7, 2005. BSU 0050-0051.

[4] The parties dispute whether Ms. Davis is a co-worker or a supervisor. We address this issue further below.

contends that Ms. Davis told her, "I'll do it again."[5] BSU 0045. Ms. Vance's complaint was not Ball State's first notice of this incident, however, because approximately six weeks earlier, on the very day of the alleged incident, Ms. Davis was the one who logged her own grievance with BSU regarding the elevator exchange with Ms. Vance. *See* BSU 0044. In her complaint, Ms. Davis alleged that it was Ms. Vance who had acted in a threatening manner in the service elevator and had stated to Ms. Davis, "Move, bitch. You are an evil fucking bitch." BSU 0045.

On the day Mr. Kimes received Ms. Davis's complaint, in September 2005, he interviewed Ms. Davis and Ms. Vance, as well as Betty Skinner, another co-worker whom Ms. Vance identified as a witness. After completing the interviews, Mr. Kimes concluded that his findings were inconclusive, as Ms. Davis and Ms. Vance had conflicting accounts and Ms. Skinner could not corroborate either employee's version of the events because she had not been present during the exchange. *See* BSU 0046. Thus, on September 28, 2005, Mr. Kimes contacted the

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[5] According to Ms. Vance, this statement is in reference to a prior altercation she had with Ms. Davis in either 1999 or 2001, in which Ms. Vance alleges that Ms. Davis slapped her. However, Ms. Vance does not necessarily attribute the slap to racial motivation, as she testified that, "I don't know what provoked her to hit me." Vance Dep. at 96. Ms. Vance further contends that she reported the incident to her supervisors, Mr. Kimes and Ms. Adkins, when it happened, but that they took no disciplinary action. Mr. Kimes and Ms. Adkins deny seeing or hearing about it.

then-Director of Dining Services, Ann Talley, by e-mail, detailing the results of his investigation and requesting guidance as to how to resolve the situation. BSU 000114. After consulting other members of management, Ms. Talley advised Mr. Kimes via e-mail that:

> I believe we can only *counsel* both employees as to showing proper respect for one another, never using unacceptable language, and taking problems to management for solution. I do not believe we can apply policies subject to discipline because there were no witnesses and Vance denied saying words attributed to her by Davis. There seems to be insufficient evidence of wrongdoing on the part of both women.

BSU 000113. Consequently, in October 2005, Mr. Kimes spoke with Ms. Vance and told her that the use of inappropriate language was not to be directed against another person, but did not institute any discipline against her. BSU 0058. It is unclear whether Mr. Kimes had a similar conversation with Ms. Davis following the incident, but we assume so since that would have been consistent with Ms. Talley's directive.

Racial Epithets

Ms. Vance's November 7, 2005, complaint, also contained allegations that her coworker, Ms. McVicker, had made racially derogatory comments about her. Ms. Vance's written complaint was not the first time Ms. Vance had reported Ms. McVicker's behavior. Two months prior, on September 26, 2005, Ms. Vance reported to her then-super-visor, Dave

Ring, that she had heard that she had been called a "nigger" by her coworker, Ms. McVicker. BSU 0060. On that same day, Mr. Ring told Mr. Kimes about Ms. Vance's allegations and Mr. Kimes immediately began an investigation. Ms. Vance identified co-workers Jim Hiday, Amy Geesaman, Maria Julius, Brad Hutson, and Julia Murphy as potential witnesses, all of whom were subse-quently interviewed by Mr. Kimes. Although neither Ms. Vance nor any of the witnesses accused Ms. McVicker of using a racial epithet directly toward Ms. Vance, or otherwise in her presence, various witnesses stated that Ms. McVicker had previously used the word "nigger" in reference to African-American co-workers and Ball State students in the presence of other employees at Ball State and had on prior occasions told co-workers that she had "Klan" members in her family. *See* BSU 0060-0064.

Up to this point, Mr. Kimes's investigation had been based solely upon Ms. Vance's verbal complaint. However, on October 17, 2005, Ms. Vance requested a complaint form from Katie Skinner, an employee of University Compliance, which Ms. Vance later submitted on November 7, 2005, as described above. *See* BSU 0047. In her report following the conversation, Ms. Skinner noted that, when requesting the form to make a written complaint, Ms. Vance stated that an employee had hit her a number of years before, but that she had never before reported it. She also told Ms. Skinner that a co-worker "keeps saying she doesn't like 'niggers' and that she has relatives in the clan." *Id.* Further, Ms. Vance stated that she "feels intimidated and feels that it is racial and she's afraid to be at work." *Id.*

On October 20, 2005, two days after Ms. Vance's request for a written complaint form, Ms. Courtright and Mr. Kimes met again with Ms. Vance to discuss the verbal complaint she had made to Ms. Skinner. Following that meeting, Ms. Courtright sent a letter to Ms. Vance assuring her that Mr. Kimes was currently investigating her complaints and would continue to do so. BSU 0049. After receiving Ms. Vance's written complaint on November 7, 2005, Ms. Courtright sent another letter to Ms. Vance, acknowledging receipt of the complaint and advising that, if Ms. Vance had any new information to bring forward as the investigation continued, she should feel free to do so. BSU 0057.

On November 11, 2005, then-Assistant Director of Employee Relations, Ms. Rubrecht, sent an e-mail to Gary Kramer, the Director of Employee Relations, and to Ann Talley, Director of Residence Dining Services, recommending that Ms. McVicker receive a written warning[6] as discipline for her conduct. In the e-mail correspondence, Ms. Rubrecht stated that:

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[6] According to Ball State's Employee Handbook, employees are generally subject to a four-step, progressive disciplinary policy that ranges from a verbal warning to discharge. Ball State University Employee Handbook § 5.11. Although a written warning, such as Ms. Rubrecht recommended, is generally a second-step disciplinary action, the Handbook provides that supervisors have discretion to determine which step to apply, based on the seriousness of the infraction or other extenuating circumstances. Additionally, the Handbook explicitly provides that "threatening anyone, fighting, or the theft of employee, student, or university property are particularly

> I know we don't have specifics on exactly what and when these utterances were, just general complaints and time frames, but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the work place. Therefore, I think we can justify going beyond our limited prior past history and issue a written warning . . . . I think we should also strongly advise her verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge.
>
> BSU 00148.

In accordance with Ms. Rubrecht's recommendation, on November 11, 2005, Mr. Kimes issued Ms. McVicker a written warning for "conduct which is inconsistent with proper behavior." BSU 0066. The written warning provided that Ms. McVicker was being disciplined because "[s]everal witnesses attested to [her] use of the word 'N*****' in verbal reference to African-American students and co-worker[s]; [her] verbal reference to family association with the Ku Klux Klan; and glaring, looking intently, or staring for prolonged periods at co-workers, all which are unacceptable behaviors." *Id.* In the warning, Ms. McVicker was instructed to "[i]mmediately cease unacceptable behaviors" and was put on notice that "[f]uture violations of

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serious offenses and may result in the immediate discharge of the offending party." *Id.*

University rules or regulations will result in further disciplinary action." *Id.*

On that same day (November 11, 2005), Ms. Vance told Ms. Courtright that Ms. McVicker had also referred to her (Ms. Vance) as a "monkey." BSU 00132. Ms. Courtright advised Ms. Vance to tell Mr. Kimes, which Ms. Vance did. However, Mr. Kimes was unable to corroborate Ms. Vance's account of the incident because Betty Skinner, a co-worker whom Ms. Vance said had overheard the racial slur, denied knowledge of any exchange. As a result, Mr. Kimes informed Ms. Vance that, without any witnesses, "proceeding further would diminish this to a she said-she said exchange that wouldn't result in anything positive, but that he would continue if [Ms. Vance] wanted him to." BSU 00133. Ms. McVicker was not given additional discipline based on this alleged incident. Resp. to Request for Admission No. 10.

On November 15, 2005, Ms. Courtright met with Ms. McVicker to discuss the written warning she had received from Mr. Kimes. In that meeting, although Ms. McVicker again denied the allegations, Ms. Courtright informed her that, "while she might not intend anything by her comments, they are perceived by co-workers in a very negative way and they are very inappropriate in the workplace." BSU 00136. In that meeting, Ms. Courtright also suggested that Ms. McVicker consider other available positions at BSU and in order to remove herself from the "charged" environment at UBC. *Id.* Finally, Ms. Courtright advised Ms. McVicker "not to talk to or make comments about [Ms. Vance] and to stay as far away as possible." BSU 00137. In an effort to maintain

distance between Ms. Vance and Ms. McVicker, Mr. Kimes testified that, in 2005, he attempted to schedule alternating weekends for Ms. Vance and Ms. McVicker to work, although he concedes that, "[s]ometimes it didn't work out, but we tried." Kimes Dep. at 50-51.

Ms. McVicker eventually bid on a different job in 2007, and was transferred from UBC to Cardinal Crossing, effective April 22, 2007, approximately a year and five months after the conversation between herself and Ms. Courtright. Exh. W (Transfer Agreement). Even though Ms. McVicker has switched departments, Ms. Vance contends that she still would encounter Ms. McVicker on a regular basis while fulfilling her duties collecting food product. Vance Aff. ¶ 9. Donn Knox, one of Ms. Vance's co-workers, concurred with Ms. Vance, testifying that Ms. Vance encounters Ms. McVicker "almost on a daily basis as much, probably more, as if she would if [Ms. McVicker] was driving the truck." Knox Dep. at 31.

Subsequent Complaints

On December 28, 2005, Ms. Vance filed a claim for race discrimination[7] with the EEOC. Since that date, Ms. Vance has reported to her supervisors subsequent com-plaints of harassment, intimidation, and threats involving, among other individuals, Ms. McVicker, Mr. Kimes, and Ms. Davis.

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[7] Ms. Vance's EEOC charge also included allegations of gender and age discrimination. However, these claims have not been pursued in this litigation.

On April 23, 2007,[8] Ms. Vance filed a grievance against Ms. McVicker, alleging that, on April 21, 2007, as Ms. Vance was getting on the elevator in the basement, Ms. McVicker was exiting the elevator and, as the doors were closing, Ms. McVicker remarked, "Payback." Exh. II (April 23, 2007, IDF Form). BSU officials, including Mr. Kimes, Ms. Adkins and Mr. Lewis, investigated this incident by interviewing both Ms. Vance and Ms. McVicker. Ms. McVicker denied that the alleged exchange on the elevator took place. Further, when Ms. Adkins, Ms. Lewis, and an union representative, Lee Richardson, met with Ms. McVicker on April 26, 2007, Ms. McVicker reported that, on April 23, 2007, (the day that Ms. Vance reported the "payback" incident), Ms. Vance came down the stairs in Cardinal Crossing[9] and stated, "Just beginning bitch – you better watch your house." Exh. OO (April 26, 2007, IDF Form).

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[8] Ms. Vance also filed a complaint on May 10, 2006, in which she alleged a variety of other instances in which she felt she had been harassed. Some of those include being "blocked" on the elevator by Ms. Davis, who allegedly "stood there with her cart smiling"; being left alone in the kitchen with Ms. Davis, who was smiling; being around Ms. McVicker and Ms. Davis "with 3 gals of milk looking at me weird"; and being intimidated by Ms. Adkins who was "mean mugging and following [Ms. Vance] into the dishroom starring [sic]." BSU 0013-15. BSU's Office of Compliance investigated these incidents but ultimately took no disciplinary action.

[9] As mentioned above, Ms. McVicker was transferred to Cardinal Crossing (a separate department from UBC, where Ms. Vance works) effective April 22, 2007.

When asked whether she had made such a comment, Ms. Vance denied the allegation. There were no witnesses to either alleged event and it does not appear that either employee was disciplined in connection with it.

On August 13, 2007, Ms. Vance called Ms. Rubrecht in Employee Relations to report that, on August 10, 2007, she was on the elevator when the doors opened on the third floor and Ms. Davis and another co-worker, Sondra Spears, were standing there. According to Ms. Vance, Ms. Davis asked her, "Are you scared?" BSU 001993. Ms. Rubrecht told her to file a complaint, which Ms. Vance did on August 14, 2007. She listed Patsy Amos, who had been on the elevator with her at the time, as a witness. Ms. Amos confirmed that she recalled hearing Ms. Davis ask the question and that it was "like she had a southern accent." Exh. PP. However, Ms. Amos could not confirm whether the question was intended to be intimidating or even whether it was directed at Ms. Vance because the elevator door was only partially open when she heard Ms. Davis's voice, so she was uncertain whether Ms. Davis "was alone or speaking to someone else." *Id.* Although Ms. Davis denied the allegation, because Ms. Amos was able to substantiate that Ms. Davis had made the comment, Mr. Lewis issued Ms. Davis a verbal warning on September 24, 2007, directing her to "maintain appropriate workplace conversations and conduct [herself] appropriately so as not to disrupt the workplace/aggravate co-workers." BSU 002043.

Also on August 14, 2007, Ms. Vance filed a complaint against Mr. Kimes, alleging that, on August 7, 2007, he came into the kitchen and asked

her if she could ship an order at an earlier time. She responded that she could, but according to Ms. Vance's written grievance, "he continued walking toward me saying that's not what I asked you . . . his eyes were big [and] he kept asking me the same question over and over saying I'll take that as a yes . . . saying I don't understand what you said . . . getting louder and scary looking." BSU 001997. When asked about the incident, Mr. Kimes stated that he stood across the room from Ms. Vance and asked her about the shipment. He alleges that she did not respond even though she heard him, and so he asked her again. When she did not reply a second time, he said that he would take her silence as a yes. BSU 001951. Mr. Kimes denied moving toward Ms. Vance or speaking in a loud and aggressive tone.

Brad Hutson, a co-worker whom Ms. Vance indicated had witnessed the incident, largely confirmed Mr. Kimes's account. He said that, although Ms. Vance nodded in response to Mr. Kimes's inquiry about the shipment, "it is common for Kimes to repeat a request to make certain an order change is properly acknowledged." BSU 001952. Mr. Hutson also stated that Mr. Kimes stood in the same place throughout the exchange, that he did not appear to be aggressive, and that he was not speaking in a loud voice. Based on this investigation, coupled with the facts that there was no evidence of racial overtones, nor was Ms. Vance negatively impacted in terms of pay or job assignment, the Office of University Compliance determined that "no reasonable basis exists to support the allegation made by Vance that Kimes subjected her to unlawful discrimination." *Id.*

Plaintiff's Allegations of Retaliation

On August 10, 2006, Ms. Vance filed a second EEOC charge, this time alleging retaliation. Subsequent to filing this charge, Ms. Vance has alleged instances of retaliatory behavior, including suffering diminished duties, being required to work through breaks and lunches without compensation, failing to be offered overtime hours, and being subject to unfair discipline.

Scheduling and Compensation

On May 10, 2006, Ms. Vance filed a complaint against Mr. Kimes, alleging various instances of retaliation. According to her complaint, on a number of occasions, she was required to work through her break and lunch periods, but in some instances, failed to get compensated for that extra time.[10] BSU 00163-65; Vance Dep. 85-86. Ms. Vance, testified that, although she did not make any official complaints at the time, she notified Mr. Kimes about the discrepancies and then, assuming he would take care of it, she "let it go." Vance Dep. at 92. According to BSU, its investigation revealed that Ms. Vance had not been required to work through significantly more breaks that any other employee in UBC and that Ms. Vance received corrected compensation, just

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[10] When an employee skips a break or works through lunch, he or she is asked to notify a supervisor in order to be paid for the extra time worked that day. Kimes Dep. at 41-42. Ms. Vance contends that she followed the established procedure, by notifying UBC's chef and Mr. Kimes.

as many other employees have received, when a payroll mistake had been made. BSU 00165.

In that same complaint, Ms. Vance also claimed that Mr. Kimes did not give her the opportunity for overtime hours such as he gave other employees. Mr. Kimes responded that Ms. Vance has refused overtime hours that he had offered her in the past and, as a part-time employee (which she was at the time), she was not guaranteed a set number of hours per week. BSU 00164. BSU's Office of University Compliance determined that Ms. Vance had made prior complaints about overtime hours that predated the filing of her EEOC charge and had "expressed the she has a limited number of hours per week that she prefers to work, and many times the overtime opportunities that exist fall outside her preferred work hours." BSU 0016.

Diminished Kitchen Duties

The kitchen staff at Ball State is divided into three levels – substitute (first level), part-time (second level) and full-time (third level). Kimes Dep. at 22. As mentioned previously, when she first began working at Ball State, Ms. Vance was hired as a substitute and was subsequently promoted to part-time, and most recently, was selected for a full-time position by Ms. Adkins. According to Mr. Kimes, although the duties as a kitchen staff employee vary (e.g., baking, prep work, event preparation), the nature of an individual's duties is not necessarily based on the employee's level. Kimes Dep. at 23.

Currently, UBC's chef, Shannon Fultz, is responsible for assigning the kitchen staff daily tasks. *Id.* She gives the kitchen staff employees prep

lists each day, which list their duties for the day, but Mr. Kimes retains the authority to switch employees' duties if the need arises. *Id.* at 23-24. Additionally, when UBC was without a chef in April 2006 and again between September 2006 and December 2006, Mr. Kimes was solely responsible for creating the daily prep lists. *Id.* at 35. Mr. Kimes is also responsible for the kitchen staff scheduling. *Id.* at 38-39. Employees may request a particular day off during the week, but all employees, even those that work full-time, do not always work the same schedule from week to week. *Id.* at 39.

According to Ms. Vance, before she bid on and received the full-time catering position, she had performed most of the baking duties at UBC for approximately seven years. *See* Vance Dep. at 31-35. However, Ms. Vance contends that, since she received the full-time position in January 2007 (and after she filed her EEOC charges), she has not been asked to perform baking duties, despite the fact that she has more experience with baking than any other UBC employee and she routinely received compliments from her clients and co-workers when she had been allowed to bake. Vance Aff. ¶¶ 29-30. Ms. Vance contends that, once she received the full-time position, Mr. Kimes told her that, from then on, she would "never come in at 5:00 in the morning, and [would] not do[] any baking . . . and now [her] job is over in the salad area." Vance Dep. at 33. Ms. Vance further testified that, in line with what Mr. Kimes told her, instead of being "in the bakery area, doing two and three pages of work," her duties now consist of "just putting salads in a bowl and putting dressings in a container." *Id.* Her co-worker, Mr.

Knox, concurs that, after she moved to a full-time position, Ms. Vance was no longer involved in the preparation for "big dinners" but instead was assigned entry level duties, such as "cutting up celery sticks." Knox Dep. at 34-35.

Unequal Discipline

On September 28, 2007, Ms. Vance was issued a verbal warning for inappropriate behavior that she allegedly engaged in on September 4, 2007, (slamming a pan down behind other employees) and on September 14, 2007 (splattering chicken noodles and gravy on Ms. Davis). Exh. 41. Ms. Vance claims that she was issued this warning even though she was not asked about the alleged gravy splatter-ing incident until four days after it happened, and she denied splattering gravy on Ms. Davis, and no witnesses saw her do so. Vance Aff. ¶ 33, ¶¶ 35-36. In contrast, Ms. Vance contends that, when she reported incidents of harassment under similar circumstances (e.g., no witnesses, allegations denied, etc.) against employees who had not filed EEOC charges, her supervisors failed to implement discipline against them.

Plaintiff's Allegations Subsequent to the Briefing of the Cross Motions

On March 12, 2008, following the filings by both parties in their briefings on the cross-motions, Ms. Vance filed supplemental affidavits and additional evidence in support of her motion for partial summary judgment and in opposition to BSU's

motion for summary judgment.[11] In her supplemental affidavit, Ms. Vance testified that, on March 1, 2008, she was on a break with fellow employee, Mr. Knox, when she encountered Ms. Davis and Ms. Davis's daughter, Amanda, outside BSU's student center. According to Ms. Vance, Amanda asked her, "What the fuck are you looking at?" Vance Second Supp. Aff. ¶ 5. Ms. Vance contends that when she did not respond, Amanda stated, "You are a nigger, a fucking nigger. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* ¶ 7. At that point, Ms. Vance testified that Richard, Ms. Davis's husband, who had been waiting in the car, got out of the car and told Mr. Knox that he was a "backstabbing nigger lover." *Id.* ¶ 9. Ms. Vance claims that Ms. Davis stood by throughout these exchanges and laughed. Although Mr. Knox testified in his affidavit that he did not hear everything that Amanda said to Ms. Vance, he corroborated Ms. Vance's account insofar as he testified that Amanda called Ms. Vance a "fucking nigger" and that Mr. Davis had behaved as Ms. Vance had described.

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[11] On March 17, 2008, Defendants filed a Motion to Strike Plaintiff's March 12, 2008, submissions [Docket No. 125], denying all the allegations contained therein and contending that the submissions "are allegations about recent events which involve unnamed defendants who are not parties to this lawsuit; these new allegations thus concern events which do not appear in Vance's complaint and which have not been subject to response, discovery, or motion." Def.'s Br. at 2. For the reasons detailed more fully below, we **GRANT** Defendants' Motion to Strike.

Knox Aff. ¶¶ 7, 9-10. According to their affidavits, both Ms. Vance and Mr. Knox reported the incident to Mr. Kimes and to the Ball State Police Department. Ms. Vance claims that, rather than addressing the incident, Mr. Kimes told her to "get out of [his] face." Vance Second Supp. Aff. ¶ 12.5.

Ms. Vance's March 12, 2008, submissions also contain two articles and accompanying reader comments that appeared in the Ball State Daily News Online, the online version of Ball State University's student news-paper. The first article, "BSU employee offers view on Dining racism," originally appeared on February 18, 2008, in the "Forum" section of the newspaper. It is written by one of Ms. Vance's co-workers, Sarah Oakes,[12] and in it Ms. Oakes shares her view that, based upon her experiences working with Ms. Vance in the University's catering department, it is Ms. Vance who is a racist. Exh. 53 (Oakes Article). The second article, captioned, "BSU employee claims she was threatened," was published on March 5, 2008, in the "News" section. The article contains basic

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[12] In her supplemental affidavit, filed on March 12, 2008, Ms. Vance alleged that, in addition to writing the article, on March 1, 2008, Ms. Oakes was "lurking in [her] work area, banging things loudly, and acting to intimidate [her]." Vance Supp. Aff. ¶ 14. According to Ms. Vance, when she reported this behavior to her supervisor, Ana Lisa Padron, Ms. Padron told her that, "this is a common kitchen." *Id.* ¶ 15. Ms. Vance contends that it was only after she told Ms. Padron that she [Ms. Vance] was going to call the police that Ms. Padron escorted Ms. Oakes out of the kitchen. *Id.* ¶¶ 16-17.

information regarding Ms. Vance's report to the Ball State Police Department that she and a co-worker had been involved in a verbal altercation with two other people not affiliated with the University. Exh. 54 (Rush Article). Ms. Vance also submitted the comments readers posted in response to these articles – some of which are sympathetic to Ms. Vance, while others are openly racist and even threatening.[13] Ms. Vance contends that the fact that the University has allowed the comments appearing on the newspaper's electronic billboard to remain posted for its employees, its students, and the public to see has only exacerbated her hostile work environment.

Legal Analysis

I. Standard of Review

Summary judgment is appropriate when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether genuine issues of

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[13] For example, one reader advises Ms. Oakes to "[b]ait [M]s. Vance into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self defense." Exh. 53 (Oakes Article Comments). Another states that "[V]ance needs to go back to the east side and sell some crack." *Id.*

material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. *See id.* at 255. However, neither the "mere existence of some alleged factual dispute between the parties," *id.* at 247, nor the existence of "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing an absence of evidence to support the non-moving party's case. *Id.* at 325.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Thus, after drawing all reasonable inferences from the facts in favor of the non-movant, if genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *See Shields Enter., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to

establish her case, summary judgment is not only appropriate, but mandated. *See Celotex*, 477 U.S. at 322; *Ziliak v. AstraZeneca LP*, 324 F.3d 518, 520 (7th Cir. 2003). Further, a failure to prove one essential element "necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

Courts often confront cross-motions for summary judgment because Rules 56(a) and (b) of the Federal Rules of Civil Procedure allow both plaintiffs and defendants to move for such relief. "In such situations, courts must consider each party's motion individually to determine if that party has satisfied the summary judgment standard." *Kohl v. Ass'n. of Trial Lawyers of Am.*, 183 F.R.D. 475 (D.Md. 1998). Thus, in determining whether genuine and material factual disputes exist in this case, the Court has considered the parties' respective memoranda and the exhibits attached thereto, and has construed all facts and drawn all reasonable inferences therefrom in the light most favorable to the respective non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

II. Motion to Strike

On March 18, 2008, Defendants moved to strike Ms. Vance's March 12, 2008, submissions, contending that her supplemental filings consist of new factual allegations unrelated to her summary judgment motion and involving individuals not named as defendants. Defendants assert that if Ms. Vance wishes to supplement her complaint allegations, she is required to move to supplement her pleadings pursuant to Federal Rule of Civil

Procedure 15(d),[14] rather than attempting "an end run" around the rule in order to prevent Ball State from defending against the new allegations. Ms. Vance rejoins that she is not attempting to supplement her complaint with additional claims or parties; rather, she claims that she is merely providing new evidence directly relevant to her hostile environment claim already briefed on summary judgment.

We agree with Defendants that Ms. Vance's supplemental submissions lay out facts pertaining to events that allegedly occurred at a time after her complaint was filed and, in fact, after the pending summary judgment motions were fully briefed, even though they arguably relate to a claim (hostile environment) advanced in the original pleading. Thus, as Defendants contend, we find that these supplemental submissions come within the purview of Rule 15(d).[15] It is within the district court's

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[14] Rule 15(d) provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed. R. Civ. Pro. 15(d).

[15] Accordingly, rather than merely filing the materials as additional evidence, Ms. Vance's counsel should have moved to supplement the pleadings pursuant

discretion to either allow or deny a supplemental pleading. *Twin Disc, Inc. v. Big Bud Tractor*, 772 F.2d 1329, 1338 (7th Cir. 1985). When a supplemental pleading facilitates the efficient administration of justice, a court should allow it. *Griffin v. County Sch. Bd. of Prince Edwardy County*, 377 U.S. 218, 226-27 (1964). However, a supplemental pleading is properly denied under Rule 15(d) when there is "any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Harris v. Shuman*, 1998 WL 967588, at *3 (7th Cir. 1998) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Glatt v. Chicago Park District*, 87 F.3d 190, 194 (7th Cir. 1996)).

We find that, if we were to allow Ms. Vance to supplement her pleadings with these additional allegations at this point in the proceedings, it would serve to substantially delay the progress of this litigation and prejudice Defendants, as the deadlines for dispositive motions and discovery relating to liability issues have long passed.[16] Furthermore, as

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to Rule 15(d). However, for purposes of this entry, we will proceed with the Rule 15(d) analysis as if Ms. Vance's counsel had done so.

[16] Although the deadline for discovery relating to damages was extended to July 25, 2008, the deadline for discovery relating to liability issues passed on October 12, 2007.

we discuss more fully below, the majority of her new allegations of additional harassment are not even attributable to Ball State, and those that are do not reach the level of significance required to entitle Ms. Vance to relief under Title VII. Thus, even if we were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim. For the foregoing reasons, we **GRANT** Defendants' Motion to Strike Ms. Vance's supplemental affidavits and supporting evidence, filed on March 12, 2008.

III. Title VII Claims

Title VII provides that "it shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Ms. Vance makes two related arguments – that she was subjected to a hostile work environment and that she was retaliated against for complaining about unlawful discrimination. We address each of Ms. Vance's claims in turn below.

A. Hostile Work Environment

Ms. Vance contends that Ball State subjected her to a hostile work environment in violation of Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981, due to her supervisors' direct behavior towards her as well as her supervisors' failure to take prompt remedial action to address her co-worker's alleged harassing behavior and her supervisors' failure to respond to her complaints regarding harassment she allegedly suffered at the hands of third parties. Ball State denies all aspects of this claim, arguing that the alleged conduct by its employees was not objectively hostile, that it was neither severe nor pervasive, that Ball State was not negligent in discovering or remedying the alleged harassment, and that there is no evidence, save for Ms. McVicker's conduct, that the alleged harassment was directed at Ms. Vance because of her race.

In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court clarified that the "terms, conditions, or privileges of employment" language in Title VII encompasses *environmental* conditions of employment, and that the scope of the prohibition "is not limited to 'economic' or 'tangible' discrimination." *Id.* at 64. Therefore, a plaintiff may establish a violation of Title VII by proving that discrimination based on her being a member of a protected class has created for her a hostile or abusive work environment. In order to rise to the level of a hostile work environment that is violative of Title VII, a plaintiff must show: "(1) that the work environment was both subjectively and objectively offensive; (2) that the harassment was based on membership in a protected class; (3) that the conduct was severe or pervasive; and (4) that there is a basis for employer

liability." *Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 691 (7th Cir. 2005).

In order to determine whether a working environment is hostile in this sense, courts may consider factors including "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463 (7th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). Conduct that is unpleasant, but is not severe or pervasive, will not constitute a hostile work environment prohibited by Title VII. *See Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 533 (7th Cir. 1993).

1. Whether Ms. Davis Is Ms. Vance's Supervisor

We begin our Title VII ~~analysis with a preliminary issue.~~ ~~As mentio~~ned above, the parties dispute whether Ms. Davis was a supervisor or merely a co-worker of Ms. Vance. Because part of our subsequent analysis turns on this distinction, we address it at the outset of our discussion. For Title VII purposes, "[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment." *Rhodes v. Illinois Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). That authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (citing *Parkins v. Civil*

Constructors of Illinois, Inc., 163 F.3d 1027, 1034 (7th Cir. 1998)).

Here, Ms. Vance makes no allegations that Ms. Davis possessed any such power. Instead, Ms. Vance contends only that Ms. Davis is "part of management because she doesn't clock in." Vance Dep. at 35.17 Beyond that assertion, Ms. Vance concedes that she does not actually know whether Ms. Davis was one of her managers because "one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent." *Id.* at 84. Even assuming, as Ms. Vance contends, that Ms. Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for purposes of Title VII, as there is nothing in the record indicating that Ms. Davis had the ability to "hire, fire, demote, promote, transfer, or discipline" Ms. Vance.

It is well established under Seventh Circuit law that "[a]n employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor in the Title VII context." *Rhodes*, 359 F.3d at 506; see also *Hall*, 276 F.3d at 355 ("[T]he fact that an employer authorized one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship."). In

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[17] BSU asserts that Ms. Davis is not currently, nor has she ever been, a supervisor. Rubrecht Aff. ¶ 9 ("At all pertinent times she has been an hourly employee serving as a catering specialist.").

both *Rhodes* and *Hall*, the harassers in question were determined not to be supervisors, despite having much more authority over other employees than Ms. Davis is alleged to have had here, including the power to direct the plaintiffs' work duties, provide input into their performance evaluations, recommend discipline, and train the plaintiffs and other less-experienced employees. For the foregoing reasons, we find that, for purposes of this Title VII analysis, Ms. Davis was Ms. Vance's co-worker, not one of her supervisors. On that premise, we address Ms. Vance's allegations against her.

2. Supervisor Harassment

We first consider Ms. Vance's allegations against those persons who actually were her supervisors. Defendants contend that the harassment Ms. Vance alleges she was subjected to by her supervisors was neither sufficiently severe nor pervasive to be actionable and that none of the alleged harassment was racial in character or purpose. We agree. For the reasons detailed below, we find that the incidents attributed to Ms. Vance's supervisors, Ms. Adkins and Mr. Kimes, are not sufficiently connected to Ms. Vance's race so as to satisfy the second element of the hostile environment analysis, nor are they sufficiently severe or pervasive to be considered objectively hostile.

In order for Ms. Vance to demonstrate that the harassment she alleges she experienced was based on her membership in a protected class, the conduct in question "must have a racial character or purpose to support a hostile work environment claim." *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004)

(citing *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999)). Our review of Ms. Vance's allegations that directly implicate Ms. Adkins leads us to conclude that the only complained-of incident was not of a racial character. The only concrete allegation made by Ms. Vance against Ms. Adkins is that she (Ms. Adkins) "mean-mugged" and stared at Ms. Vance on one occasion while they were both in the kitchen. Although it is obvious that Ms. Vance found this alleged behavior unwelcome, no reasonable jury could find that this incident was racial in character or purpose. Further, neither this event nor the others complained of by Ms. Vance was sufficiently severe or pervasive to be actionable. There is no evidence in the record to suggest that Ms. Adkins consistently engaged in this sort of behavior, nor can we in any event conclude that the making of an unkind face is either physically threatening or humiliating.

The same holds true for the alleged harassment by Mr. Kimes. Ms. Vance contends that on one occasion Mr. Kimes physically stood in front of a doorway to keep her from leaving a room and on another occasion, when he did not hear her answer a question he had asked, he walked toward her and repeated the question over and over in a threatening manner. Vance Dep. at 100; BSU 001997. Although Ms. Vance was no doubt upset by these encounters, she has presented no evidence to support the conclusion that Mr. Kimes engaged in these behaviors because of her race. Ms. Vance also contends that Mr. Kimes consistently treats her more poorly than her co-employees by yelling at her, giving her less desirable shifts, and simply treating

her differently. However, the factual record adduced here does not support the conclusion that, if true, such treatment is due to the fact that she is African-American. There appears to be agreement among Ms. Vance's co-workers that Mr. Kimes is often a difficult supervisor for whom to work and sometimes plays favorites among employees. Some of Ms. Vance's co-workers testified that Mr. Kimes's treatment of Ms. Vance resulted in "tension" in the work place (Amos Statement ¶ 11; Murphy Statement ¶ 20) and a "stressful work environment" (Ring Statement ¶ 9). However, they never attributed Mr. Kimes's treatment of Ms. Vance to her race. In fact, Ms. Amos specifically testified that she has "never heard or seen Bill Kimes do or say something that indicates he is a racist, and I do not believe he is a racist." Amos Aff. ¶ 5.

Additionally, the facts before the Court demonstrate that Ms. Vance (for that matter, other African-American employees as well) are not Mr. Kimes's only targets. Butch Parker, one of Ms. Vance's former co-workers (who is also African-American), testified that, although Mr. Kimes has an "intimidating bullying type" personality and that "he seemed to have favorites" of which Ms. Vance was not one, Mr. Kimes treated a number of other employees equally badly regardless of race, including himself, Patsy Amos, David Ring, and Julie Murphy. Parker Dep. at 16-17, 19-24. Another of Ms. Vance's co-workers, Ms. Amos, testified similarly, stating that "Bill Kimes has favorites among the employees and picks on others. I believe he picks on Maetta Vance, me, and others. . . . He could pick on anyone depending on the day. This has caused a number of

employees to leave, including Teresa Pickett, Denel Anderson, Deb Whitney, and Andrea, whose last name I do not recall." Amos Aff. ¶ 4, ¶ 6. While we obviously do not condone Mr. Kimes's difficult demeanor, it appears that he is an example of an "equal opportunity harasser" and, as such, his behavior falls outside the reach of Title VII. *See, e.g.*, *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) ("Because Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on [all races], or is inflicted regardless of [race] is outside the statute's ambit.") (addressing sexual harassment).

Ms. Vance does attribute one comment to Mr. Kimes that has a racial character. She alleges that, on one occasion, Mr. Kimes told Ms. Courtright that his new employee (Butch Parker) is African-American and that he was "concerned that Maetta Vance will attempt to create an alliance with him." Parker Dep. at 32-33. However, this solitary comment, allegedly uttered on a single occasion outside the presence of Ms. Vance is insufficient to establish a hostile work environment, especially considering that there has been no allegation that Ms. Vance was even aware of the comment before she commenced this litigation.

Because there is no evidence allowing a jury to find that Ms. Adkin's and Mr. Kimes's alleged behavior was based on race or was sufficiently severe and pervasive to be considered objectively hostile, no issue of material fact exists as to whether one of Ms. Vance's supervisors contributed to the hostile environment of which she complains and this part of her Title VII claim must be dismissed. We proceed

next to address the harassment Ms. Vance contends she suffered at the hands of her co-employees.

3. Co-Employee Harassment

Ms. Vance attributes various instances of race-based harassment to her co-workers, Ms. Davis and Ms. McVicker, which allegations we address below.

Allegations Against Ms. Davis

The majority of the incidents of alleged harassment on the part of Ms. Davis have no racial character or purpose, including, *inter alia*, Ms. Davis's alleged comment that she would "do it again"18 and various other allegations of staring, laughing, and banging pots and pans in a noisy, irritating fashion. Ms. Vance alleges only two incidents that could arguably be related to race. On one occasion, Ms. Vance contends, she overheard Ms. Davis making a joke about Buckwheat and Sambo while looking at her (Ms. Vance). Another time, Ms. Vance reports that Ms. Davis asked, in a Southern accent, "Are you scared?" However, assuming the

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[18] Ms. Vance contends that this statement is in reference to a prior alleged altercation that took place either in 1999 or 2001 between Ms. Vance and Ms. Davis in which Ms. Vance alleges that Ms. Davis hit her. Putting aside the statute of limitations problem (Ms. Vance filed her first EEOC charge on January 5, 2006, meaning that her actionable claims had to have occurred within 300 days prior to that filing, on or after February 8, 2005), there is no indication that, even if true, either of these incidents occurred because of Ms. Vance's race.

truthfulness of these facts as we must, these two incidents are not sufficiently severe or pervasive to support a hostile environment claim. Further, even if they were, Ms. Vance must still meet the fourth prong of the hostile environment analysis, to wit, that there is a basis for employer liability. That she is unable to do.

Employer liability "turns on whether the alleged harasser was the plaintiff's supervisor, instead of a mere co-worker." *Rhodes v. Illinois Dep't of Transp.*, 359 F.3d 498, 505 (7th Cir. 2004). Employers are "essentially strictly liable if the employee's supervisor created the hostile work environment." *Mason v. Southern Illinois University at Carbondale*, 233 F.3d 1036, 1043 (7th Cir. 2000). However, when the harasser is a co-employee, an employer can be held liable only if it has "been negligent either in discovering or remedying the harassment." *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998) (quoting *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997)). Once an employer is made aware of the problem, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (quoting *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000)).

There is no basis for employer liability based on either the Buckwheat and Sambo remarks or the allegedly racially-based comment. Ms. Vance concedes that she probably did not mention that she had overheard the Buckwheat and Sambo references

in any of her complaints, nor does she allege that Ball State was negligent in discovering the incident. However, Ms. Vance did report the altercation during which Ms. Davis asked her if she was scared. After investigating, Ball State determined that Ms. Vance's account was largely corroborated by the witness named by Ms. Vance. Although the University did not consider the statement to be related to race, it nevertheless issued Ms. Davis a warning as a sanction for her conduct. In light of the relatively innocuous nature of the encounter, we find that Ball State's discipline was reasonably calculated to foreclose subsequent harassment. For the above reasons, we are unable to find that Ms. Vance has adduced any issue of material fact concerning whether Ms. Davis contributed to the hostile environment to which she contends she was subjected.

Allegations Against Ms. McVicker

Ms. Vance contends, and Defendants concede, that Ms. McVicker used racially derogatory language, including referring to African-American employees and Ball State students as "niggers," and commenting about her [Ms. McVicker's] family's ties to the Ku Klux Klan. There is no doubt that Ms. McVicker's comments were and are clearly offensive; however, we find that, while deplorable, her behavior does not rise to the level of actionable harassment as defined under Title VII.

The Seventh Circuit recognizes that the use of the word "nigger" can be extremely disturbing to the listener and that, "while there is no 'magic number' of slurs that indicate a hostile work environment,

[the use of] an unambiguously racial epithet falls on the 'more severe' end of the spectrum." *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674-75 (7th Cir. 1993)). Thus, "a plaintiff's repeated subjection to or hearing that word could lead a reasonable factfinder to conclude that a working environment was objectively hostile." *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477 (7th Cir. 2004).

In determining the severity of racial epithets, the Seventh Circuit also considers whether they were directed at or uttered in the presence of the plaintiff. Although still relevant to the hostile work environment analysis, the Seventh Circuit has held that "when harassment is directed at someone other than the plaintiff, the impact of [such] 'secondhand harassment' is obviously not as great as the impact of harassment directed at the plaintiff." *Smith v. Northeaster Illinois University*, 388 F.3d 559, 567 (7th Cir. 2004). Here, Ms. McVicker did not direct her comments at Ms. Vance, nor did Ms. Vance personally hear Ms. McVicker utter the word "nigger" or refer to her [Ms. McVicker's] family's connections with the Ku Klux Klan. Instead, she heard of those things only through her co-workers. As such, Ms. Vance was not repeatedly subjected to hearing that term directed at her, nor did she personally hear it uttered by Ms. McVicker.

Beyond the above allegations, Ms. Vance contends that Ms. McVicker called her a monkey on one

occasion[19] and engaged in other unwelcome behavior, including staring, laughing, and making the remark "payback." While Ms. McVicker's behavior is obviously offensive and unacceptable, we cannot find that these incidents, taken together, are sufficiently severe or pervasive to have created an objectively hostile working environment.

Further, even if we had concluded that the harassment Ms. Vance suffered at the hands of Ms. McVicker was sufficiently severe or pervasive to be objectively hostile, we would still have to find a basis for attributing liability to Ball State. No such basis exists here. After learning that Ms. McVicker was using racially derogatory language and verifying that allegation through an investigation, Ball State took disciplinary action against Ms. McVicker. As discussed above, Ball State utilizes a four-step progressive discipline plan according to which a verbal warning is normally the first step. Not only did Ball State decide that Ms. McVicker's behavior was sufficiently severe to warrant a second-step written warning, but Ms. Courtright also took Ms. McVicker aside to talk to her further about her conduct and suggest that Ms. McVicker consider

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[19] One of Ms. Vance's co-workers, Ms. Amos, testified that she heard Ms. McVicker call Ms. Vance a "porch monkey" on another occasion. Amos Aff. ¶ 7. However, Ms. Amos did not report this incident to any of her supervisors. Additionally, it is unclear from the record exactly when Ms. Amos heard Ms. McVicker make this statement or whether Ms. Vance was aware of this statement before the commencement of the instant litigation.

bidding on a different job so that she and Ms. Vance could remain separated.[20] Additionally, although not always successful, Mr. Kimes undertook to try to schedule Ms. McVicker and Ms. Vance on separate shifts so that their contacts with one another would be further limited.

Ms. Vance contends that, even after the discipline, Ms. McVicker continued to harass her (staring and laughing at her, saying "payback" on the elevator, and calling her a monkey) and that Ball State should have taken additional corrective action, such as separating her from Ms. McVicker sooner or terminating Ms. McVicker for her behavior in order to prevent future harassment. However, Ball State is not held to such a standard in avoiding liability under Title VII. As the Seventh Circuit has ruled, "Title VII does not require that the employer's responses to a plaintiff's complaints of . . . harassment successfully prevented subsequent harassment, only that the employer's actions were reasonably likely to check future harassment." *Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999) (citations omitted) (addressing sexual

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[20] Ball State contends that it transferred Ms. McVicker to another department in order to address the problems with Ms. Vance. However, Ms. Vance's original complaint was made in 2005 and Ms. McVicker did not transfer to Cardinal Crossing until 2007. Additionally, it appears that transfer was instigated by Ms. McVicker's decision to bid on the job, rather than on any action taken by Ball State. Therefore, we do not include the fact of Ms. McVicker's transfer in our analysis of the disciplinary measures taken by Ball State.

harassment). On the basis of the evidence adduced here, we find that Ball State's preventative measures were reasonably calculated to foreclose subsequent harassment.

Ms. Vance contends that she continued to complain about additional harassment inflicted by Ms. McVicker after she [Ms. McVicker] received the written warning and Ball State failed to address her concerns. However, the factual record does not support such a factual finding. Ms. Vance claims that Ms. McVicker called her a monkey at some time subsequent to her initial complaint and that she reported the incident the same day that Ms. McVicker received her written warning, but Ball State never issued Ms. McVicker further discipline and apparently did not take her complaint seriously. However, the record reflects that Mr. Kimes investigated the incident and interviewed the witness whom Ms. Vance had identified, but when inquired of, the witness could not corroborate Ms. Vance's account. Mr. Kimes reported back to Ms. Vance that, because there were no witnesses to substantiate her claim, it was merely a "she said-she said exchange." Nevertheless, he offered to continue to pursue the issue if she wanted him to do so. Ball State took similar actions with respect to the remainder of Ms. Vance's complaints (none of which involved racial epithets or racially derogatory language), thoroughly investigating the alleged incidents and interviewing the named witnesses. Ms. McVicker denied the later allegations and in response levied her own set of accusations against Ms. Vance. Because Ball State could not corroborate either Ms. Vance's or Ms. McVicker's accounts, no

further disciplinary action appears to have been taken against Ms. McVicker. Under these facts, there is but one conclusion: Ball State properly investigated the incidents and, when possible and as necessary, took prompt and appropriate action reasonably calculated to prevent the harassment from recurring.

For the foregoing reasons, we hold that 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.[21] Thus,

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[21] In her March 12, 2008, submissions, Ms. Vance set forth various allegations of harassment against third parties, including Ms. Davis's family members and a number of anonymous individuals who posted racially derogatory comments on the website of Ball State's online student newspaper, contending that Ball State should be held liable for its failure to take action to address these incidents. Although we have stricken those submissions from the record for reasons previously discussed, even had we considered them in our analysis, they would have had no affect on the result reached.

According to the EEOC guidelines, an employer may be responsible for the acts of non-employees, with respect to racial discrimination in the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action, *depending on the control and other legal responsibility the employer may have over such non-employees*. *See* 29 C.F.R. § 1604.11(e) (emphasis added). Here, Ball State

we DENY Plaintiff's Partial Motion for Summary Judgment and GRANT Defendants' Motion for

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could not be held liable for the third party actions alleged by Ms. Vance because the University had no control over the alleged perpetrators.

Although Ms. Vance claims that Ms. Davis was present when the incident involving Ms. Davis's family occurred, the racially derogatory language was allegedly uttered, not by Ms. Davis or another Ball State employee, but by private citizens over whom the University apparently had no control. Additionally, the alleged confrontation took place outside of the workplace, while Ms. Vance was on a break, with none of Ms. Vance's supervisors present. Ms. Vance has made no allegation that, by the time Ms. Vance reported the incident to Mr. Kimes, she was still being harassed by Ms. Davis's family, or even that Ms. Davis's husband and daughter were still on the premises. As Judge Hamilton recognized in *Fulmore v. Home Depot, U.S.A., Inc.*, "While the racial harassment of employees by [third parties] is deplorable and not to be tolerated, neither this court nor any other has imposed upon employers the obligation to reprimand or otherwise punish [third parties] over whom they have no control for harassing behavior when the employee is no longer being subjected to the harassment." 2006 WL 839464, at *17 (S.D. Ind. March 30, 2006).

The same analysis applies to the anonymous online posters. Ball State has no effective control over what anonymous individuals post on an electronic billboard. In addition, efforts to impose such controls would clearly implicate First Amendment concerns. In short, such comments are not attributable to Ball State, and the University is not liable under Title VII merely for its failure to remove the offending material.

Summary Judgment on Ms. Vance's hostile environment claim.[22]

B. Retaliation

Ms. Vance also claims that Ball State unlawfully retaliated against her, when she received less significant kitchen duties, fewer opportunities for overtime hours, and was subject to unequal discipline subsequent to her having filed her EEOC charges. Under Title VII, it is unlawful "for an employer to discriminate against any of [its] employees ... because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). A plaintiff has two methods of proof available to him or her to demonstrate retaliation. A plaintiff may prove retaliation either through the direct method of proof or the indirect method, also called the "burden-shifting" method. *See Tomanovich v. City of Indianapolis and Indiana Dep't of Transp.*, No. 05-1653, slip op. at 6 (7th Cir. Aug. 8, 2006); *Moser v.*

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[22] Under the same facts relied upon for her hostile environment claim, Ms. Vance brought suit against Defendants, Ms. Adkins, Mr. Kimes, Ms. Davis, and Ms. McVicker, in their individual capacities, pursuant to § 1983. Because claims brought pursuant to § 1983 generally follow the contours of Title VII claims, the Seventh Circuit holds that such claims "should be analyzed in the same way and the same standard of liability should be imposed." *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 751 n.2 (7th Cir. 2006) (citations omitted). Therefore, we also **GRANT** Defendants' Motion for Summary Judgment on the § 1983 individual capacity claims.

Ind. Dep't of Corr., 406 F.3d 895, 903 (7th Cir. 2005). The parties appear to have addressed only the indirect framework in their briefs, so we shall follow their lead and proceed solely with that analysis.

Under the burden-shifting method, an employee must establish a *prima facie* case of retaliation by proving that she: "(1) engaged in a statutorily protected activity; (2) met her employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees who did not engage in statutorily protected activity." *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585 (7th Cir. July 24, 2008) (citing *Nichols v. Southern Illinois University-Edwardsville*, 510 F.3d 772, 784-85 (7th Cir. 2007)). If the plaintiff can establish the existence of these four factors, the burden of production shifts to the employer to demonstrate a valid non-discriminatory reason for the action it took against the plaintiff. *Id.*

If the employer can demonstrate such a valid reason, the burden of production shifts back to the plaintiff to demonstrate that the reason given was merely a pretext for the unlawful retaliation. *Tomanovich* at 7 (citing *Moser*, 406 F.3d at 904). "A plaintiff can establish pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1145 (7th Cir. 1994). As this Court has noted previously, "A 'pretext' is not merely a mistake or an imprudent reason; it is a false reason or a dishonest explanation, which, because of its falseness or dishonesty, raises a question as to whether the employer is hiding a

discriminatory motive." *Rice v. Indiana State Police*, 149 F.Supp.2d 573, 581 (S.D. Ind. 2001).

1. Diminished Kitchen Duties

Ms. Vance contends that in retaliation for the charges she filed with the EEOC, when she became a full-time employee in January 2007, her supervisors reassigned her to tasks in the kitchen that were menial and less significant compared to her prior duties. Since that time, Ms. Vance asserts that Mr. Hutson, who has the same position and job description as Ms. Vance, is consistently asked to direct the preparation of entire meals even though he does not have as much experience as Ms. Vance.[23] Ball State rejoins that Ms. Vance is unable to make a *prima facie* case of retaliation because she has not shown that she suffered an adverse employment action, nor has she identified a similarly situated employee who received more favorable treatment.

Initially, Defendants assert that Ms. Vance is unable to cite any termination, reduction in pay, demotion, failure to promote, or any other such material change in her employment that would constitute an adverse employment action. Instead, Ball State highlights the fact that, in the midst of

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[23] Ms. Vance also claims, quite cursorily, that Ms. Davis has been given the baking duties that were previously hers. Even if this argument had been fully developed, we are unable to find that Ms. Vance and Ms. Davis are sufficiently similar for Title VII purposes because they do not hold the same position (Ms. Vance is a Catering Assistant, while Ms. Davis is a Catering Specialist).

Ms. Vance's allegations that she was being subjected to harassment based on her race, she bid on and received a full-time catering position (she had previously been part-time), which included approximately $9,492.00 in annual benefits that she had not received as a part-time employee. Ms. Vance does not dispute these facts, but contends that, despite receiving the full-time position, she has nevertheless suffered an adverse employment action because she was reassigned from complex baking tasks to entry level work.

It is true that the Seventh Circuit recognizes that "reassignment with significantly different responsibilities" can be an actionable adverse employment action. *See Stutler v. Illinois Dep't of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001). However, the Supreme Court has made it clear that "reassignment of job duties is not automatically actionable." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006). The determination is fact-specific and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998)). Although a close call, we find that a jury could reasonably conclude that the kind of complete reassignment of responsibilities Ms. Vance has described would have been materially adverse to a reasonable employee, considering that baking duties likely require more qualifications and would be considered more prestigious than the entry level work to which Ms. Vance contends she was assigned.

However, we are unable to find that Ms. Vance has met the fourth prong of the *prima facie* analysis, to wit, that she was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity. Although Ball State appears to concede that Ms. Vance and Mr. Hutson are similarly situated for purposes of this claim, it contends that Ms. Vance is nevertheless unable to demonstrate that Mr. Hutson received more favorable treatment than she, since they both received the same types of assignments in the kitchen. Ms. Vance alleges that she had been relegated to cutting vegetables and preparing salads, while Mr. Hutson was given the responsiblity for preparing entire meals; however, the documentary evidence in the record does not support this contention. The chef, Shannon Fultz, prepares daily "prep sheets" for every employee for each work day, detailing the assignments. Our review of the prep sheets prepared by Ms. Fultz for Ms. Vance and Mr. Hutson from February 2007 to August 2007 reveals no significant differences. While it is true that Ms. Vance and Mr. Hutson were not always assigned identical tasks each day, both were given substantially similar responsibilities that included a combination of easier and more complex tasks to complete on a daily basis.[24] For example, both Ms.

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[24] Additionally, even if, as Ms. Vance claims, the prep sheets did not always reflect the work that actually wound up being done (because tasks can be reassigned by Mr. Kimes and Ms. Fultz), the fact that Ms. Vance and Mr. Hutson may occasionally receive different assignments is not sufficiently significant to alter our analysis.

Vance's and Mr. Hutson's daily prep sheets included entry level tasks such as preparing salads and cutting fruit or vegetables, but they also both received assignments to prepare more complicated entrees and side dishes. *See* Exh. JJJ and Exh. LLL. On the whole, we see no meaningful differences that could lead a reasonable jury to conclude that Mr. Hutson received more favorable assignments than Ms. Vance.

Because our review of the record does not disclose any genuine issues of material fact regarding whether Ms. Vance received less favorable treatment than did Mr. Hutson, we **GRANT** Defendants' Motion for Summary Judgment on Ms. Vance's claim that Ball State retaliated against her by reassigning her to more menial tasks in the kitchen.

2. Overtime Hours

Ms. Vance next claims that Ball State retaliated against her by giving her fewer overtime hours than her co-worker, Mr. Hutson.[25] Ball State does not dispute that there is a discrepancy between Ms. Vance's and Mr. Hutson's overtime hours. However, the University contends that this is due, not to retaliation, but to the fact that Ms. Vance was often unavailable to work overtime hours. Ball State also asserts that, because Ms. Vance was absent from work significantly more often than Mr. Hutson, the

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[25] Ms. Vance also alleges that, on a number of occasions, she worked through her lunch hour or breaks but was not compensated for that time. However, after a careful review of the record, we find no substantiation for this contention.

two cannot be considered similarly situated. We agree that Ms. Vance's claim that Ball State retaliated against her by affording her fewer overtime hours than Mr. Hutson fails because Ms. Vance is unable to demonstrate that Mr. Hutson is similarly situated to her, as required by the fourth prong of the indirect analysis.[26] Additionally, even if Ms. Vance had made out a *prima facie* case of retaliation, she has been unable to show that Ball States's proffered explanation for the hours discrepancy between Ms. Vance and Mr. Hutson is mere pretext.

In order for an employee to be similarly situated to a plaintiff for purposes of proving a Title VII retaliation claim, a plaintiff "must show that there is someone who is directly comparable to her in all

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[26] The parties do not address the issue of whether a denial of overtime constitutes an adverse employment action sufficient to implicate Title VII. Although it does not appear that this issue has been directly addressed by the Seventh Circuit, the Court of Appeals has held "that a denial of a raise can be an adverse employment action while the denial of a 'more transient' payment such as a bonus is not." *Lewis v. City of Chicago*, 496, F.3d 645, 653 (7th Cir. 2007) (citations omitted). Further, the Seventh Circuit recognizes that, "[d]epending on the type of work, overtime can be a significant and recurring part of an employee's total earnings similar to a recurring raise or it could be insignificant and nonrecurring like a discretionary bonus." *Id.* at 654. It appears in this case, that Ball State's overtime opportunities are more similar to a recurring raise than a discretionary bonus, and therefore, we assume for purposes of this motion that Ms. Davis has suffered an adverse employment action.

material respects." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). While "[a] similarly situated employee need not be 'identical,' . . . the plaintiff must show that the other employee dealt with the same supervisor, [was] subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish [her] conduct or the employer's treatment of [her]." *Caskey*, 535 F.3d at 585 (citations omitted). There is no dispute that Ms. Vance and Mr. Hutson shared the same supervisor and were subject to the same standards in the workplace.

However, unlike Mr. Hutson, Ms. Vance was often either absent from work or unavailable to work certain hours. It is undisputed that Ms. Vance took fairly frequent leave, pursuant to the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("FMLA"), sometimes leaving unexpectedly in the middle of the day, other times calling in to report that she would not be able to work that day.[27] Although the University is obviously prohibited from using Ms. Vance's exercise of her statutorily protected leave against her (Ball State approved the FMLA leave in each instance), if she is absent at times when overtime is needed, it follows that she would not have the opportunity to be offered the hours on those instances if she were not present at

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[27] For example, between January 1, 2007, and October 29, 2007, Ms. Vance took FMLA time (either a full day or a number of hours) on 70 different work days, out of approximately 215 possible days she could have worked. Exh. DDD (Absence Record).

work or was unavailable to work the necessary hours. There is no allegation that Mr. Hutson was similarly absent or unavailable at times when overtime was offered. The fact that Ms. Vance was unavailable to work certain hours and absent from work significantly more often than Mr. Hutson differentiates Mr. Hutson from Ms. Vance, rendering them dissimilar for any relevant comparison. Thus, because Ms. Vance is unable to identify a similarly-situated employee who received more favorable treatment and had not engaged in statutorily protected activity, she is unable to make out a *prima facie* case of retaliation.

Even if we had concluded that Ms. Vance had established an entitlement to proceed past the *prima facie* stage on her overtime hours claim, the burden would then shift to Ball State to provide a legitimate, nondiscriminatory reason for the discrepancy. Here, the University has done so, contending that the reason Mr. Hutson received more overtime hours than Ms. Vance is that he was present at work and available to take the hours on a more consistent basis. Ms. Vance rejoins that Ball State's explanation is merely pretext for retaliation because even on the days when she has been available and not on FMLA leave, she did not receive the first offer to take overtime, despite having significantly fewer over-time hours than Mr. Hutson.[28]

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[28] Ball State keeps equalization charts of its employees' overtime hours because it is required to distribute overtime "as equitably as possible." Rubrecht Supp. Aff. ¶ 7 (citing Section 4.A of Ball State's Overtime Agreement).

However, Ball State introduced evidence of an "Overtime Agreement" between the University and the union, which contains, *inter alia*, a "work continuation" provision. Under this provision, when over-time is needed to complete a specific task, the bar-gaining unit employee who originally started the task during normal hours must be the employee who finishes that task, if it requires overtime hours. Rubrecht Supp. Aff. ¶ 8 (citing Section 4.F of the Overtime Agreement). It is only in situations when the work continuation provision does not apply that employees with fewer overtime hours receive priority. Therefore, because Mr. Hutson was available for work more regularly than Ms. Vance, Mr. Hutson was more likely to be the only full-time catering assistant on duty on a given day, which often invoked the work continuation provision in Mr. Hutson's favor, affording him more opportunities for overtime. Additionally, even on the days when Ms. Vance was at work and could take the overtime, if the work continuation provision applied in favor of Mr. Hutson, she still could not be offered the overtime over Mr. Hutson, regardless of how many fewer hours she had.

Furthermore, as Ball State argues (and Ms. Vance does not dispute), Ms. Vance initially raised the issue of her lack of overtime hours before she ever filed charges with the EEOC, which further bolsters the University's claim that its unequal distribution of overtime hours was not, in fact, in retaliation for Ms. Vance having engaged in a statutorily protected activity. In short, we find that a reasonable fact-finder could not conclude that Ms. Vance's having received fewer overtime hours than

Mr. Hutson was more likely motivated by discriminatory reasons than by Ball State's legitimate nondiscriminatory reason. Thus, for the foregoing reasons, we **GRANT** Defendants' Motion for Summary Judgment on Ms. Vance's retaliation claim pursuant to the overtime hour discrepancy.

3. Unequal Discipline

Ms. Vance also fails to make out a *prima facie* case for retaliation on her theory that she was subject to unequal discipline following the filing of her EEOC charges. In support of this theory, Ms. Vance points to the fact that, on September 28, 2007, she was issued a verbal warning for allegedly slamming a pan down behind another employee and splattering gravy on Ms. Davis, even though Ms. Vance denied throwing gravy and no witnesses saw her do so. In contrast, Ms. Vance contends that, when she reported incidents of harassment under similar circumstances (*e.g.*, no witnesses, allegations denied, etc.) against employees who had not filed EEOC charges, her supervisors failed to implement discipline against them.

Initially, we note that we are not convinced that BSU treated the complaint against Ms. Vance differently than it treated complaints brought by Ms. Vance against other employees. However, even if the complaint against Ms. Vance were treated more favorably on this occasion than her complaints against others, we cannot find that Ms. Vance has suffered an adverse employment action sufficient to evoke Title VII protections and remedies. "An 'adverse employment action' is an employment action that is likely to dissuade a reasonable worker from

making or supporting a charge of discrimination." *Matthews v. Wisconsin Energy Corp.*, ___ F.3d ___ , 2008 WL 2639152, at *9 (7th Cir. July 7, 2008) (citations omitted). The Seventh Circuit has made it clear that "not everything that makes an employee unhappy will suffice to meet the adverse action requirement. . . . Rather, an employee must show that material harm has resulted from . . . the challenged actions." *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002) (internal quotations omitted). In other words, "the challenged action must result in some significant change in employment status." *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir. 2000). In the Seventh Circuit, a plaintiff must demonstrate that he or she was subject to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly responsibilities, or a decision causing a significant change in benefits." *Mackenzie v. Potter*, 219 Fed. Appx. 500, 503 (7th Cir. 2007).

Here, Ms. Vance received only a verbal warning regarding the alleged behavior; she was not terminated or demoted, nor were her pay or benefits affected. In short, Ms. Vance is unable to show that she suffered any material harm as a result of receiving a single verbal warning and consequently she is unable to satisfy the second prong of the indirect analysis, to wit, that she suffered an adverse employment action. It is well established that, "[f]ailure to satisfy any one element of the prima facie case is fatal to an employee's retaliation claim." *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 740 (7th Cir. 2006) (quoting *Hudson v. Chicago Transit Authority*, 375 F.3d 552, 560 (7th Cir. 2004)).

Because Ms. Vance was unable to demonstrate that the verbal warning she received constituted an adverse employment action, we shall **GRANT** Defendants' Motion for Summary Judgment as to Ms. Vance's claim that the unequal discipline she faced was retaliatory.

V. Conclusion

For the reasons detailed above, we **DENY** Plaintiff's Motion for Oral Argument; **GRANT** Defendants' Motion to Strike; **DENY** Plaintiff's Partial Motion for Summary Judgment; and **GRANT** Defendants' Motion for Summary Judgment in its entirety. Final judgment will be entered accordingly.

IT IS SO ORDERED.

Date: 09/10/2008

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

Equal Employment Opportunity Commission Enforcement Guidance

1999 WL 33305874 (E.E.O.C. Guidance)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDANCE

ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS

June 18, 1999

Number 915.002

1. SUBJECT: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

2. PURPOSE: This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 615 of Volume II of the Compliance Manual.

Ida L. Castro, Chairwoman

I. **Introduction**

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the

same basic standards apply to all types of prohibited harassment.[1] Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. (See section II, below.)

Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. The number of racial harassment charges rose from 4,910 to 9,908 charges in the same time period.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment.[2] The new affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear statutory

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[1] *See, e.g.*, 29 C.F.R. § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025 ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees").

[2] *See* 1980 Guidelines at 29 C.F.R. § 1604.11(f) and Policy Guidance on Current Issues of Sexual Harassment, Section E, 8 FEP Manual 405:6699 (Mar. 19, 1990), *quoted in Faragher*, 118 S. Ct. at 2292.

policy and complement[ing] the Government's Title VII enforcement efforts."[3]

The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes. Furthermore, the anti-discrimination statutes are not a "general civility code."[4] Thus federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious."[5] Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."[6] The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.[7] Existing

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[3] *Faragher*, 118 S. Ct. at 2292.

[4] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

[5] *Faragher*, 118 S.Ct. at 2283. However, when isolated incidents that are not "extremely serious" come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. See Section V(C)(1)(a), below.

[6] *Oncale*, 118 S. Ct. at 1003.

[7] Some previous Commission documents classified harassment as either "quid pro quo" or hostile environment. However, it is now more useful to distinguish between harassment that results in a tangible

Commission guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment remains in effect.

This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors.[8] The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect -- an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.[9] The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered.[10]

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employment action and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability. Guidance on the definition of "tangible employment action" appears in section IV(B), below.

[8] The guidance in this document applies to federal sector employers, as well as all other employers covered by the statutes enforced by the Commission.

[9] 29 C.F.R. § 1604.11(d).

[10] The Commission will rescind Subsection 1604.11(c) of the 1980 Guidelines on Sexual Harassment, 29 CFR § 1604.11(c). In addition, the following Commission guidance is no longer in effect: Subsection D of the 1990 Policy Statement on Current Issues in Sexual Harassment("Employer Liability for Harassment by Supervisors"), EEOC Compliance Manual (BNA) N:4050-58 (3/19/90); and EEOC Compliance Manual Section 615.3(c) (BNA) 6:15-0007 - 0008.

II. The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases

The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature[11]), religion, national origin, protected activity,[12] age, or disability.[13] Thus,

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The remaining portions of the 1980 Guidelines, the 1990 Policy Statement, and Section 615 of the Compliance Manual remain in effect. Other Commission guidance on harassment also remains in effect, including the Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, EEOC Compliance Manual (BNA) N:4071 (3/8/94) and the Policy Guidance on Employer Liability for Sexual Favoritism, EEOC Compliance Manual (BNA) N:5051 (3/19/90).

[11] Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature. *See* 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4) ("sex-based harassment - that is, harassment not involving sexual activity or language - may also give rise to Title VII liability … if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex").

[12] "Protected activity" means opposition to discrimination or participation in proceedings covered by the anti-discrimination statutes. Harassment based on protected activity can constitute unlawful retaliation. *See* EEOC Compliance Manual Section 8 ("Retaliation") (BNA) 614:001 (May 20, 1998).

employers should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.[14]

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[13] For cases applying *Ellerth* and *Faragher* to harassment on different bases, *see Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race); *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). *See also Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled after Title VII claims), *cert. denied*, 119 S. Ct. 1141 (1999).

[14] The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. *See Faragher*, 118 S. Ct. at 2283 (in determining appropriate standard of liability for sexual harassment by supervisors, Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 118 S. Ct. at 2268 (Court imported concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). *See also* cases cited in n.13, above.

III. Who Qualifies as a Supervisor?

A. Harasser in Supervisory Chain of Command

An employer is subject to vicarious liability for unlawful harassment if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee."[15] Thus, it is critical to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant.

The federal employment discrimination statutes do not contain or define the term "supervisor."[16] The statutes make employers liable for the discriminatory acts of their "agents,"[17] and supervisors are agents of their employers. However,

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[15] *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

[16] Numerous statutes contain the word "supervisor," and some contain definitions of the term. *See, e.g.,* 12 U.S.C. § 1813(r) (definition of "State bank supervisor" in legislation regarding Federal Deposit Insurance Corporation); 29 U.S.C. § 152(11) (definition of "supervisor" in National Labor Relations Act); 42 U.S.C.. § 8262(2) (definition of "facility energy supervisor" in Federal Energy Initiative legislation). The definitions vary depending on the purpose and structure of each statute. The definition of the word "supervisor" under other statutes does not control, and is not affected by, the meaning of that term under the employment discrimination statutes.

[17] *See* 42 U.S.C. 2000e(a) (Title VII); 29 U.S.C. 630(b) (ADEA); and 42 U.S.C. §12111(5)(A) (ADA) (all defining "employer" as including any agent of the employer).

agency principles "may not be transferable in all their particulars" to the federal employment discrimination statutes.[18] The determination of whether an individual has sufficient authority to qualify as a "supervisor" for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law.[19] Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

The Supreme Court, in *Faragher* and *Ellerth*, reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them.[20] Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on

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[18] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher*, 118 S. Ct. at 2290 n.3; *Ellerth*, 118 S. Ct. at 2266.

[19] *See Faragher*, 118 S. Ct. at 2288 (analysis of vicarious liability "calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement … but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment … ") and at 2290 n.3 (agency concepts must be adapted to the practical objectives of the anti-discrimination statutes).

[20] *Faragher*, 118 S. Ct. at 2290; *Ellerth*, 118 S. Ct. at 2269.

his or her job function rather than job title (e.g., "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "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.

1. Authority to Undertake or Recommend Tangible Employment Actions

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. "Tangible employment decisions" are decisions that significantly change another employee's employment status. (For a detailed explanation of what constitutes a tangible employment action, see subsection IV(B), below.) Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee. As the Supreme Court stated,"[t]angible employment actions fall within the special province of the supervisor."[21]

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the

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[21] *Ellerth*, 118 S. Ct. at 2269.

final say. As the Supreme Court recognized in *Ellerth*, a tangible employment decision "may be subject to review by higher level supervisors."[22] As long as the individual's recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor.

2. Authority to Direct Employee's Daily Work Activities

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training.[23] There was no question that the Court viewed them both as

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[22] *Ellerth*, 118 S. Ct. at 2269.

[23] *Faragher*, 118 S. Ct. at 2280. For a more detailed discussion of the harassers' job responsibilities, see *Faragher*, 864 F. Supp. 1552, 1563 (S.D. Fla. 1994).

"supervisors," even though one of them apparently lacked authority regarding tangible job decisions.[24]

An individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

B. Harasser Outside Supervisory Chain of Command

In some circumstances, an employer may be subject to vicarious liability for harassment by a

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[24] *See Grozdanich v. Leisure Hills Health Center*, 25 F. Supp.2d 953, 973 (D. Minn. 1998) ("it is evident that the Supreme Court views the term "supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion"; thus, "charge nurse" who had authority to control plaintiff's daily activities and recommend discipline qualified as "supervisor" and therefore rendered employer vicariously liable under Title VII for his harassment of plaintiff, subject to affirmative defense).

supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power.[25] The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

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[25] See *Ellerth*, 118 S. Ct. at 2268 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuit Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").