NOTES

MINIMIZING SUBTLE RACISM IN THE WORKPLACE

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I. INTRODUCTION

How should an individual of a particular race or racial minority feel when subjected to blatant racial discrimination? It is understandable to believe that an overt display of racism would and should illicit a strong reaction, but what if the discrimination is more discreet? How should members of a racial minority working for an organization feel when repeatedly told by a coworker, "Sorry, you have to cover the night shift again," "Sorry I yelled at you again. I'm having another bad day," "Sorry, you can't come to the company retreat again because I under-booked the hotel rooms," or any similar excuse? Moreover, what if the members of that racial minority are the only ones continually subjected to such conduct?

Racial incivility, or "selective incivility," is a type of racial workplace discrimination that allows an individual to perpetuate racism by masking it in everyday acts, whether consciously or unconsciously.[1] Given that any form of racial discrimination in the workplace is no longer socially or legally tolerated, racial incivility has emerged as a method for the continuance of racism.[2]

Racial incivility should be ended for many reasons.[3] This can be accomplished with Title VII of the Civil Rights Act of 1964 ("Title VII"),

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1. Lilia M. Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACAD. MGMT. REV. 55 (2008).

2. *Id*.

3. Racism is morally wrong. In addition, racial incivility can hurt organizational efficiency. *E.g.*, Lilia M. Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence*

which primarily aims to avoid harm such as that associated with workplace discrimination.[4] Title VII enables plaintiffs to bring a racially hostile work environment claim, with the primary purpose to incentivize employers to implement sufficiently strong anti-discrimination policies.[5]

The Supreme Court, however, foreclosed one incentive for employers to prevent workplace racial incivility in *Vance v. Ball State University*. In *Vance*, the Supreme Court narrowed the instances in which an employer is vicariously liable for racially hostile workplace claims and broadened the instances in which a plaintiff has to prove the employer's negligence in dealing with the alleged racial discrimination (rather than burdening the employer with proving reasonableness as an affirmative defense).[6] Thus, this Note argues that by reducing employers' burden in potential litigation of racially hostile workplace claims, *Vance* has removed employers' incentive to prevent racial incivility in the workplace. Furthermore, if the Supreme Court had ruled differently in *Vance*, then racial incivility could be minimized or effectively eradicated from the workplace.

II. BACKGROUND

This Section sets forth the background law necessary to set up a framework for discussing racial incivility. It starts with the state of the law regarding Title VII and hostile work environment claims prior to *Vance*. This is followed by an overview of *Vance*, including the facts, procedural history, holding, and reasoning. Lastly, the effects and current treatment of the decision in *Vance* are analyzed.

A. PRIOR LAW

Title VII and Its Purpose

Under Title VII, an employer acts illegally by discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

and Impact, 39 J. MGMT. 1579 (2011) (stating that racial incivility is related to job turnover rates for racial minorities).

4. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)).

5. *Id*. at 806.

6. *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013).

religion, sex, or national origin."[7] Courts interpret this provision to prohibit "the creation or perpetuation of a discriminatory" work environment.[8]

Further, Title VII's primary objective is not to "provide redress, but to avoid harm."[9] Its secondary objective is to make victims whole again for the discrimination that they have suffered.[10] Consequently, the Equal Employment Opportunity Commission ("EEOC") has charged employers with an affirmative obligation to prevent workplace harassment and put mechanisms in place designed to encourage victims to report harassment.[11]

Establishing a Racially Hostile Work Environment Claim

An employer violates Title VII when a plaintiff establishes a hostile work environment claim.[12] To prevail on a hostile work environment claim, a plaintiff must show (1) that the plaintiff is part of a protected group; (2) that the plaintiff was subjected to unwelcome harassment; (3) that the harassment was "based on a protected characteristic of the employee, such as national origin"; (4) that the harassment was "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment"; and (5) "that the employer is responsible for such environment under either a theory of vicarious or of direct liability."[13] This Note focuses on only the fifth element of the claim: the employer's responsibility for the discrimination.[14]

Employer Responsibility in a Racially Hostile Work Environment Claim

Establishing that an employer is responsible for a racially hostile work environment requires a showing that the employer is liable under direct or

7. 42 U.S.C. § 2000e-2 (2014).

8. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (explaining that the language of Title VII evidences a congressional intent to define discrimination in "the broadest possible terms" in order to allow a liberal interpretation that will help eliminate the "inconvenience, unfairness, and humiliation of ethnic discrimination").

9. *Faragher*, 524 U.S. at 806.

10. *Id*. at 805–06.

11. *Id*. at 806 (reviewing regulations that the EEOC has adopted).

12. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). A racially hostile work environment claim is a judicial creation and is not stated within Title VII. Burlington Indus. V. Ellerth, 524 U.S. 742, 752 (1998). *See* 42 U.S.C. § 2000e-2 (2014).

13. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). *See also, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (stating that when the workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," then Title VII will be violated).

14. For an application and discussion of the other elements required for a racially hostile work environment claim, see Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 (4th Cir. 2001).

vicarious liability.[15] To be directly liable, an employee alleging a racially hostile work environment must prove negligence by showing his or her employer knew or should have known about the harassment and failed to remedy the situation.[16]

Independent from direct liability, an employer will be vicariously liable if a "supervisor" victimizes an employee.[17] If the "supervisor" takes a tangible employment action against the victim, then the employer will be vicariously liable.[18] A tangible employment action—"such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"—is a significant change in the employee's status.[19]

In the event, however, that the "supervisor" takes no tangible employment action, the employer may raise an affirmative defense.[20] To raise the defense, the employer must show (1) that the employer "exercised reasonable care to prevent and correct" any harassing behavior "promptly" and (2) that the "plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[21]

The Circuit Split on Interpreting "Supervisor"

The Supreme Court did not define "supervisor" for purposes of employer liability in hostile work environment claims until its decision in *Vance*.[22] Thus, since the Court's decision in two companion cases in

15. *Ellerth*, 524 U.S. at 768–69 (dissent opinion).

16. *Id.*

17. A supervisor has immediate or higher authority over subordinates. *Id*. at 765 (majority opinion).

18. *Id*. The court reasons that under agency principles, when a supervisor takes a tangible employment action against the victim, there is assurance that the injury could not have been inflicted but for the agency relationship in which the employer delegates to the supervisor the authority to take such actions. *Id*. at 761–62; Restatement (Second) of Agency § 219(2)(d) (1958) (stating that a master can be liable for the torts of his servants that acted outside the scope of their employment if the servants were aided in accomplishing the tort by the existence of the agency relationship).

19. *Ellerth*, 524 U.S. at 765.

20. *Id*. The employer must prove the affirmative defense by a preponderance of the evidence.

21. *Id*. Proof that an employer had an anti-harassment policy in place is not required by law, but may be addressed in any case. In addition, a demonstration of an employee's failure to fulfill its obligation of reasonable care will generally satisfy the employer's burden under the second prong of the defense.

22. *Vance*, 133 S. Ct. at 2443 (holding that a "supervisor" is only an employee empowered by the employer to take tangible employment actions).

1998,[23] circuits have been split over whether "supervisor" encompasses only those employees with the delegated authority to take tangible employment actions against subordinates,[24] or if "supervisor" more broadly encompasses the ability to direct an employee's daily work activities.[25]

Specifically, the First, Seventh, and Eighth Circuits endorsed the rule that a "supervisor" is only an employee with delegated authority to take tangible employment actions against others.[26] Whereas, the Second, Fourth, and Ninth Circuits adopted the broad definition of "supervisor," satisfied by some formulation of whether an employee possesses the authority to direct an employee's daily tasks.[27] In general, the circuits adopting this latter definition of "supervisor" reasoned that, while the ability to take tangible employment action is a strong indication of "supervisor" status, the absence of that ability is not dispositive because "some measure of supervisory authority over the victim" can suffice for the agency relationship between the employer and "supervisor" to have aided in the harassment.[28] They also based their decisions on the EEOC's guidance that a "supervisor" can also direct a subordinate's daily activities because, though the EEOC's guidance is not controlling, it constitutes "a body of experience and informed judgment."[29]

23. In *Ellerth* and *Faragher*, the Court held that a "supervisor" *can* be an employee delegated authority to take a tangible employment action against the victimized employee, but the decisions do not state a "supervisor" *must* be an employee delegated the authority to take tangible employment actions against subordinates. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

24. *See, e.g.*, Parkins v. Civil Constructors, 163 F.3d 1027, 1034 (7th Cir. 1998).

25. *See, e.g.*, Mack v. Otis Elevator Co., 426 F.3d 116, 127 (2nd Cir. 2003), *cert. denied*, 540 U.S. 1016 (2003).

26. *Parkins*, 163 F.3d at 1034; Noviello v. City of Bos., 398 F.3d 76, 96 (1st Cir. 2005); Jones v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004). In addition, the Third and Sixth Circuits followed this definition of "supervisor" in unpublished decisions. Griffin v. Harrisburg Prop. Servs., Inc., 421 F. App'x. 204, 209 (3d Cir. 2011); Stevens v. U.S. Postal Serv., 21 F. App'x. 261, 263–64 (6th Cir. 2001).

27. *Mack*, 325 F.3d at 126 (holding that "supervisor" status depends on "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). *See* McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1119 (9th Cir. 2004); Whitten v. Fred's, Inc., 601 F.3d 231, 246 (4th Cir. 2010) (case overruled by *Vance)*. In addition, the Tenth Circuit adopted a similar approach. *See* Smith v. City of Okla. City, 64 F. App'x. 122, 127 (10th Cir. 2003).

28. *E.g.*, *Whitten*, 601 F.3d at 244–45 (citing Mikels v. City of Durham, 183 F.3d 323, 332 (4th Cir. 1999)).

29. *Mack*, 325 F.3d at 127; Notice, EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisor*s, http://www.eeoc.gov/policy/docs/harassment.html.

B. VANCE V. BALL STATE UNIVERSITY

Facts

The facts of *Vance* are secondary to the rule of law established in the case: the narrow definition of "supervisor." For example, even the dissent in *Vance* conceded that the plaintiff would not satisfy the broader definition of "supervisor."[30] Nonetheless, for the purpose of clarity, this Note will briefly state the facts of *Vance*.

Maetta Vance, an African-American woman, started working for Ball State University ("BSU") in 1989 as a substitute server.[31] By 2007, she had become a full-time catering assistant.[32] Saundra Davis, a white woman, was a catering specialist for BSU in the same division as Vance.[33]

Between the end of 2005 and the beginning of 2006, Vance filed multiple internal complaints with BSU and charges with the EEOC that alleged racial discrimination, many of which Vance attributed to Davis' actions.[34] For example, Vance complained that Davis had (1) slapped her; (2) made references to "Sambo," (a derogatory word for African-Americans) in Vance's presence; (3) splattered gravy on Vance; (4) asked, in a southern accent, whether Vance was "scared;" and (5) blocked Vance on an elevator and stood there smiling.[35]

Because Vance filed several complaints with BSU, BSU intervened multiple times between Vance and her fellow employees.[36] For example, BSU warned Davis not to engage in discriminating behavior.[37] Despite BSU's interventions, Vance's conflicts with her fellow employees continued.[38]

Procedural History

After Vance filed two complaints for race discrimination and retaliation, she obtained a right-to-sue letter from the EEOC.[39] Next, Vance

30. *Vance*, 133 S. Ct. at 2453–54.
31. *Id*. at 2439.
32. *Id*.
33. *Id*.
34. *Id*.
35. Vance v. Ball State Univ., 646 F.3d 461, 465–68 (7th Cir. 2011), *aff'd*, 133 S. Ct. 2434 (2013).
36. *Id*. at 467–68.
37. *Id*.
38. *Vance*, 133 S. Ct. at 2434, 2440.
39. *Vance*, 646 F.3d at 465. Vance's retaliation claim, that BSU assigned her to menial tasks after she complained about racial harassment, will not be not be a main focus of this note. *Id.* at 468.

filed a lawsuit alleging, among other claims, that she had been subjected to a racially hostile work environment in violation of Title VII.[40] After both parties moved for summary judgment, the United States District Court for the Southern District of Indiana entered summary judgment in favor of BSU and dismissed the case.[41] The court reasoned that BSU could not be vicariously liable for Davis' actions because (1) Davis could not make tangible employment actions against Vance and (2) BSU was not negligent because it responded reasonably to the discriminatory incidents.[42] The Seventh Circuit Court of Appeals affirmed with the same reasoning as the district court.[43]

Holding

Post *Vance*, with respect to vicarious liability in racial hostile work environment claims under Title VII, the requirement that the perpetrator of the racial discrimination be a "supervisor" of the victim is limited to instances in which the perpetrator is empowered by the employer to take tangible employment actions against the victim.[44] A tangible employment action is the ability to affect "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[45]

The Supreme Court rejected a broader definition of "supervisor"[46] advocated by the EEOC,[47] multiple amici,[48] and multiple circuits,[49] and adopted a definition of "supervisor" requiring that the perpetrator posses

40. *Vance*, 133 S. Ct. at 2440.

41. *Id*. at 2440.

42. *Id.* The District Court used the Seventh Circuit's interpretation of "supervisor" for purposes of vicarious liability in racially hostile work environment, which requires that the perpetrator be able to make tangible employment actions against the victim, such as firing, firing, demoting, promoting, transferring, or disciplining.

43. *Id*. at 2441.

44. *Id*. at 2443.

45. *Id*. (citing Burlington Indus. V. Ellerth, 524 U.S. 742, 761 (1998)).

46. *Id*.

47. *See* Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, *supra* note 29.

48. *E.g.*, Brief for Equal Employment Advisory Council as Amici Curiae Supporting Respondent at 6, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556) (arguing for a definition of "supervisor" that includes individuals that the employer has "delegated substantial and meaningful control over the terms and conditions of employment of others").

49. *Spriggs*, 242 F.3d at 186 (stating that "supervisor" is not limited to those employees that are able to make tangible employment actions against subordinates, but also if the employee is able to enable or materially augment the creation of a hostile work environment for subordinates).

the power to take tangible employment actions against the victim. In contrast, the EEOC advocated that the "supervisor" element should be satisfied by either (1) the perpetrator being empowered to make tangible employment actions against the victim or (2) the ability of the perpetrator to direct the daily work activities of the victim.[50]

Reasoning

The Supreme Court based its conclusion primarily on six arguments: (1) the definition of "supervisor" should be based on an interpretation that best fits within prior case law of hostile workplace environment claims; (2) the new definition of "supervisor" is consistent with previous Supreme Court jurisprudence; (3) a narrow definition of "supervisor" will be more efficient for courts; (4) plaintiffs can still succeed on a hostile work place claim even with the narrow definition of "supervisor"; (5) the narrow definition of "supervisor" adopted by the Court will not insulate employers from liability; and (6) the narrow definition of "supervisor" is consistent with modern organizations.[51]

First, the Supreme Court reasoned that the definition of "supervisor" should fit within prior case law because the term "supervisor" in general usage or other legal contexts lacks a "sufficiently specific meaning to be helpful" for the case.[52] For example, one definition of "supervisor" excludes the power to hire or fire employees, while another includes that power.[53] Additionally, the term "supervisor" does not appear in Title VII.[54] Because of this lack of guidance, the Court determined that the controlling definition of "supervisor" should be one that best fits within the case law that established the "supervisor" element for racial hostile work place environment claims.[55]

50. *See* Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, *supra* note 29.

51. *See Vance*, 133 S. Ct. at 2444–54.

52. *Id*. at 2444.

53. Here, the Supreme Court contrasted a general usage definition of "supervisor," excluding the power to hire or fire, with a legal definition of "supervisor," which included the power to take tangible employment actions. The Supreme Court makes more comparisons between different definitions of "supervisor," but they are unnecessary to state. *Id*.

54. *Id*. at 2446.

55. Here, the Court's reasoning has gaps. It reasons that because general, or legal, usage and Title VII cannot help in defining "supervisor," then it must rely on the framework it established in prior case law. In other words, the Court is implying that because relying on prior case law is its only option, it must rely on that option. *Id*. *See, e.g.*, Burlington Indus. V. Ellerth, 524 U.S. 742, 760 (1998) (identifying "supervisors" that take tangible employment actions, such as hiring, firing, promoting,

Second, the Court rejected Vance's argument that the narrower definition of "supervisor" was inconsistent with previous case law.[56] Rather, the Court reasoned that the new definition of "supervisor" was consistent with previous case law and that the parties in previous cases did not dispute whether the harasser was a "supervisor."[57]

Third, the Court stated that the narrow definition of "supervisor" will be more efficient for courts because it can be "readily applied."[58] By increasing the likelihood that a harasser's status as a "supervisor" can be decided as a matter of law prior to trial, the Court reasoned that the plaintiff will have foresight into whether he or she must prove the employer's negligence (if the harasser is not a "supervisor"), and the defense will have foresight into whether it needs to prove the affirmative defense (if the harasser is a "supervisor").[59] The narrow definition also simplifies the work of juries.[60] Likewise, the Court criticized the complications and ambiguity that would be created if the broader definition of "supervisor" was employed.[61]

Fourth, even with a narrow definition of "supervisor," a plaintiff can still succeed on a workplace discrimination claim by "simply" proving the employer's negligence.[62] Importantly, the Court noted that the jury should be instructed that the "nature and degree of authority" possessed by the harasser is a significant factor in determining the employer's negligence.[63]

Fifth, the Court stated that the broad definition of "supervisor" will not relieve potential defendants from liability because an employer will always be liable when its negligence leads to a hostile work environment.[64] The majority dismissed the argument that the new definition would

etcetera, against subordinates as an instance where the "supervisor's" delegated authority from the employer aids in the work place harassment).

56. *Vance*, 133 S. Ct. at 2446.

57. *See id*. at 2446–48 (stating that previous relevant Supreme Court decisions imply tangible employment actions is the defining characteristic of a supervisor).

58. *Id*. at 2449 (stating that in many cases, the status of a harasser as a "supervisor" will be determinable before litigation even commences, and consequently likely resolvable at summary judgment).

59. *Id*. at 2450.

60. *Id*.

61. *Id*. (stating that the complexity of the broader definition would lessen the likelihood of the issue being resolved before trial, and consequently, the parties would have to more often argue on "supervisor" status, which would further confuse a jury).

62. *Id*. at 2451–52.

63. *Id*. at 2451.

64. *Id*. at 2452.

encourage employers to empower only a handful of employees to take tangible employment actions, thereby insulating the employer from liability. The Court reasoned that a handful of employees would likely have to delegate power to other employees who could then take tangible employment actions.[65] The majority also dismissed the argument that employers would be insulated from liability in certain cases.[66] For example, the majority was "skeptical that there are a great number" of cases in which the employer could not be held negligent because a harasser could not take tangible employment action, even though the harasser still meaningfully directed the victim's work activities.[67]

Sixth, the Court reasoned that the narrow definition of "supervisor" is consistent with modern organizations which have abandoned a hierarchical structure. Employees now generally have overlapping authority with each other and are able to direct each other depending on the task.[68] By contrast, and which the Court majority rejected, the dissent argued that the narrow definition of "supervisor" is out of touch with the "realities" of the workplace because the victim may be deterred from blowing the whistle on a superior, due to the power that the superior can exert on the victim.[69]

C. EFFECT AND CURRENT TREATMENT OF *VANCE*.

New Rule Established by the Narrowed Definition of "Supervisor"

Since *Vance*, in order to establish employer responsibility in a racially hostile work environment claim, and consequently hold an employer vicariously liable for a harasser's conduct, the harasser must be a "supervisor" of the victim.[70] A "supervisor" is defined as an employee empowered by the employer to take tangible employment actions against subordinates, which is the ability to affect a "significant change in employment status, such as hiring, firing, failing to promote reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[71]

65. In other words, if there is only a handful of individuals that are delegated the ability to take tangible employment actions, they will likely lack the independent discretion to make all necessary decisions, and thus will likely have to delegate that power to other employees. *Id.*

66. *See id*. at 2453.

67. *Id*. at 2454.

68. Thus, the narrow definition of "supervisor" is appropriate because otherwise potentially every employee in a modern organization could be a "supervisor." *Id*. at 2452.

69. *Id.*

70. *Id*. at 2443.

71. *Id*.

If the "supervisor" does take tangible employment action, then there will be vicarious liability.[72] However, if the "supervisor" does not take tangible employment action, then the employer can raise an affirmative defense that it was not negligent and that the victim did not pursue a remedy with the employer.[73]

On the other hand, if the harasser is not a "supervisor" the employer can still be directly liable for negligence. To establish liability in this instance, the plaintiff must prove (1) that the employer knew, or reasonably should have known about the harassment and (2) failed to take remedial action.[74]

Treatment of Vance

The primary effect of the new narrow definition of "supervisor," is that, in a greater amount of racially hostile work environment claims, fewer harassers will qualify as "supervisors," and thus the plaintiff will carry the burden of proving that the employer was negligent in dealing with the harassment.[75]

Furthermore, the Supreme Court in *Vance* was correct in reasoning that the narrow definition of "supervisor" would lead to greater efficiency in the courts.[76] For example, now most opinions that consider the "supervisor" issue are able to resolve the issue as a matter of law, though there is still a minority that cannot do so because factual questions regarding whether the harasser is a "supervisor" remain.[77]

III. RACIAL WORKPLACE DISCRIMINATION IS ONGOING

This Section establishes the persistence and evolution of racial discrimination and, consequently, racial incivility in the workplace. First, the current state of blatant racial discrimination in the workplace is discussed. Second, an overview of racial incivility is provided, including its definition, effects, and evidentiary support.

72. *Id*. at 2443.

73. *Ellerth*, 524 U.S. at 765.

74. *Id*. at 768–69 (Thomas, J., dissenting).

75. *See Vance*, 133 S. Ct. at 2443.

76. *Id*. at 2450 (stating that the narrow definition of "supervisor" will allow the issue to very often be resolved as a matter of law before trial).

77. Upon review of cases citing *Vance*, his proposition is true as of October 20, 2014.

A. THE PERSISTENCE OF RACIAL WORKPLACE DISCRIMINATION.

During the fiscal year of 2012, racial workplace discrimination was the second most filed charge with the EEOC, at 33,512 claims.[78] In addition, charges filed under Title VII with the EEOC have increased by about twenty-two percent since 1997.[79] Moreover, substantially more minorities are employed in lower level positions while whites hold substantially more executive level positions.[80] For example, in 2012, out of about thirty-two million white workers in the private industry, there were about seven hundred thousand in executive or senior level positions, while out of about seventeen and a half million minority workers in the private industry, there were about one hundred thousand in executive or senior level positions (a ratio of 3.8:1).[81] Thus, unless all or a substantial number of plaintiffs that alleged race-based discrimination fabricated their allegations,[82] the frequency and increased amount of race-based claims with the EEOC indicate that racial discrimination is still a large issue.

By contrast, the persistence and frequency of blatant discrimination, has decreased over the past century.[83] For example, prior to the passage of the Civil Rights Act of 1964, a help wanted ad in the *Washington Post* requested a "colored" individual to drive "trash routes."[84] After the passage of the Civil Rights Act, newspapers no longer blatantly used race in their

78. Press Release, EEOC, EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012 (Jan. 28, 2013), *available at* http://eeoc.gov/eeoc/newsroom/release/1-28-13.cfm.

79. These charges include all types of discrimination under Title VII, not just pertaining to minorities. EEOC, *Title VII of the Civil Rights Act of 1964 Charges (Includes Concurrent Charges with ADEA, ADA, and EPA) FY 1997-2013* (last visitedOct. 20 2014), http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

80. *See* EEOC, *2012 Job Patterns for Minorities and Women in Private Industry* (last visited Oct. 20, 2014), http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2012/index.cfm#select_label (to access source enter the url, and then select "National Aggregate, All Industries" in the drop-down menu and click "Go").

81. *Id*.

82. For example, an African American waitress alleged that a customer wrote "nigger" on the total line of a receipt and left no tip, but investigators later discovered that the waitress wrote "nigger" on the receipt herself. In addition, although this is not an instance of employer-employee racial discrimination, this example is only meant to evidence that fake racial discrimination allegations do occur. Brian Anderson, *Wave of Fake Discrimination Sweeps the Restaurant Industry*, DOWNTREND.COM (Nov. 26, 2013), http://downtrend.com/71superb/wave-of-fake-discrimination-sweeps-the-restaurant-industry.

83. William A. Darity & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63, 63–64 (1998).

84. *Id*. at 66.

help wanted ads.[85] In addition, as an indication of lessened racial discrimination, but not necessarily workplace racial discrimination, the earnings gap between blacks and non-blacks narrowed significantly after the passage of the Civil Rights Act up until about 1975, when progress halted.[86] Thus, though there has been a decrease in blatant racial discrimination, numerous authorities propose that discriminatory practices have evolved and continue in less recognizable forms.[87]

B. THE RISE OF INCIVILITY.

Incivility has emerged as a prevalent form of subtle racism.[88] Incivility has multiple definitions, but one study defines it as encompassing "low-intensity conduct that lacks a clear intent to harm but nevertheless violates social norms and injures targeted employees."[89] Importantly, while "incivility" may be unambiguously attributed to an individual's objective to injure a victim, it can often also be attributed to a plethora of other factors, such as "ignorance, oversight, or personality."[90] "Incivility" is said to have emerged as a result of society's intolerance of blatant discrimination, reinforced by laws such as Title VII, which has forced individuals to mask their discrimination through everyday acts.[91] Consequently, "incivility," but not necessarily racial incivility, may be one of the "most pervasive" forms of antisocial behavior in the workplace.[92]

There are at least three theories for why racial incivility exists.[93] Under the first theory, for example, a reasonable white individual who is opposed to racism might unknowingly direct incivility towards out-group members, such as African-Americans, in order to maintain social dominance over the out-group, or simply because he or she prefers in-group members.[94] Another theory posits that invicility occurs when nonracist individuals are "uncivil" towards a minority because their

85. *Id*. at 65.

86. Peter Gottschalk, *Inequality, Income Growth, and Mobility: The Basic Facts*, 11 J. ECON. PERSP. 21, 28–29 (1997) (this study only measures until 1994).

87. *See, e.g.*, Darity & Mason, *supra* note 89, at 65.

88. *See* Cortina, *supra* note 1, at 55.

89. *Id.* at 65. (for example, ignoring an employee, interrupting an employee, or failing to include the employee). This study aggregates the definition of "incivility" from multiple other studies. *Id*. at 55.

90. *Id*. at 56.

91. Racial incivility may not be an absolutely new type of racism, but rather more visible because of the intolerance and lessening of blatant discrimination. *Id.* at 56, 59.

92. *Id*. at 56 (reviewing multiple studies in which about three quarters of respondents to a survey reported being subjected to uncivil conduct).

93. *Id*. at 63.

94. *Id*. at 64.

coworkers are racist and they do not want to be left out of their peer group.[95] Under either of these theories, it would seem that minorities are more likely to experience "incivility" within organizations that have weak discrimination policies.[96] The third theory states that individuals may consciously experience dislike for minorities and hide their racist actions behind "incivility."[97] The study theorizes that this situation is most likely to occur when an organization has strong antidiscrimination policies in place.[98]

In one study, racial minorities experienced more uncivil behavior than whites.[99] Notably, the disparity in uncivil behavior experienced between racial minorities and whites was "particularly large" for very ambiguous behaviors.[100] These behaviors, such as ignoring another employee, withholding information from another employee that the employee needs in order to do his work correctly, or doubting another employee's judgment, were particularly experienced by employees who were members of a racial minority.[101] However, racial minorities and whites equally experienced blatant racial behavior.[102] Thus, the prevalence of racially uncivil behavior in comparison to the absence of blatant racial behavior suggests that incivility is a means by which employees display prejudice while preserving their nonracist image and avoiding sanctions from employers or the judicial system.[103] Other studies have affirmed that racial minorities experience "significantly" more incivility than other groups in the workplace."[104]

Further, although isolated instances of racial incivility may seem insignificant, their aggregate effect should not be understated.[105] In other words, there is a weighty difference between a supervisor using racial incivility to force a subordinate to work an extra shift once and a supervisor

95. *Id*. at 65.
96. *Id*.
97. *Id*. at 64.
98. *Id*. at 64-65.
99. *Id*. at 67.
100. *Id*.
101. *Id*.
102. *Id*.
103. The study notes that many of the ambiguous responses, however, could have been due to the instigator's oversight or the individual being hypersensitive. In addition, the study only considers the target's perceived experience of uncivil behavior, not whether there was actually uncivil behavior. *See id*.
104. *See, e.g*., Cortina et al., *supra* note 3, at 1596.
105. *See* Cortina, *supra* note 1, at 56, 57.

forcing a subordinate to work an extra shift five nights a week. Repeated instances of racial incivility can cause victims to be worn down psychologically, to feel hopeless, and to struggle to control the unwanted conduct.[106] Those effects can cause victims to desire to leave an organization. Consequently, victims of racial incivility have significantly higher rates of job turnover than other non-racial minority groups.[107]

Therefore, although blatant discrimination is on the decline, racial incivility in the workplace is substantial and should be addressed.

IV. BROADLY DEFINING "SUPERVISOR" WILL MINIMIZE RACIAL INCIVILITY.

The Court paid no mind to racial incivility in *Vance*.[108] In addition, none of the briefs submitted for consideration in *Vance* focused on racial incivility, though some did lightly analyze the psychological effects a narrowed definition of "supervisor" would have in comparison to a broad definition.[109] Further, the opinion of *Vance* assigns very little attention to the possibility that the narrow definition of "supervisor" might contravene the purpose of Title VII,[110] which is not primarily to provide redress to victims of discrimination, but rather to prevent workplace discrimination.[111] In *Vance*, the Court's only reasoning that the narrow definition will not leave employees unprotected from psychological injury is that a victim can "simply" prove the employer's negligence and there is "no reason" why the negligence standard cannot provide adequate protection.[112] Thus, because the decision in *Vance* primarily focused on issues like increased efficiency in the courts,[113] rather than the prevention

106. *Id*. at 56.

107. *See* Cortina et al., *supra* note 3, at 1596.

108. *See Vance*, 133 S. Ct.

109. *E.g*., Brief of National Partnership for Women & Families et al. as Amici Curiae Supporting Petitioner at 19-22, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556) (stating that victims are likely to "suffer psychological trauma because they lack control over their ability to remove the unwelcome harassment").

110. *See Vance*, 133 S. Ct. at 2454.

111. *Faragher*, 524 U.S. at 806 (1998) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

112. Interestingly, the majority phrases their reasoning in the negative by stating that their approach "will not leave employees unprotected," instead of stating their approach in the affirmative and thus stating, for example, "employees will be protected." *Vance*, 133 S. Ct. at 2451.

113. For example, the majority primarily focused on creating an efficient rule and arguing that the new definition of "supervisor" fit within prior Supreme Court jurisprudence. *See id*. at 2450.

of workplace discrimination and racial incivility or its effects,[114] the Court missed a significant consideration.[115]

A broad definition of "supervisor" that includes the harasser's ability to direct the victim's daily tasks and the ability to take tangible employment actions against subordinates will lessen racial incivility because the increased likelihood of being subjected to an affirmative defense will incentivize employers to implement sufficiently strong anti-discrimination policies. In other words, because the current definition of "supervisor" only covers tangible employment actions, an employer will not be incentivized to prevent racial incivility through anti-harassment policies because a harasser's incivility towards a victim will not make the employer more likely to be vicariously liable.

This Section reasons first that the narrow definition of "supervisor" precludes recognition of racial incivility for purposes of an employer's vicarious liability because instances of racial incivility will never fall within a "supervisor's" authority to take tangible employment actions against victims. Second, the narrow definition of "supervisor" will not incentivize employers to prevent racial incivility simply because they will not be required to. Lastly, employers can prevent racial incivility in the workplace by sufficiently encouraging victims to report unwanted conduct and implementing preventative measures.

A. *VANCE* PRECLUDES RECOGNIZING RACIAL INCIVILITY FOR AN EMPLOYER'S VICARIOUS LIABILITY.

Racial incivility is unlikely to ever constitute a tangible employment action and rather is likely only to fall under the harasser's ability to direct the victim's daily tasks, which many authorities advocated to be included in the definition of "supervisor."[116] Remember that a tangible employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[117] For example, in *McCafferty v. Preiss Enterprises*, the court concluded as a matter of law under *Vance* that the harasser was not a "supervisor" because

114. The majority states as a matter of fact that the negligence standard is sufficient to prevent psychological injury without establishing a nexus between the negligence standard and psychological injury. *See id.* at 2451–52.

115. *See, e.g.*, Cortina et al., *supra* note 3, at 1596.

116. *See, e.g.*, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, *supra* note 29.

117. *Ellerth*, 524 U.S. 742, 762 (1998).

he could not take tangible employment actions against the victim despite being able to direct the victim's "day-to-day assignments," such as having employees "cover an extra shift," "stay beyond a scheduled shift, or send[ing] an employee home."[118]

Assuming, for the sake of argument, that actions such as ordering employees to stay beyond a scheduled shift are motivated by racial incivility,[119] then the definition of "supervisor" *Vance* created does not and will not ever recognize racial incivility. Racial incivility is unlikely to ever manifest in a tangible employment action, a blatant form of discrimination,[120] because racial incivility is a subtle expression of racism.[121] In other words, when an individual is acting incivilly to another, such as in *McAfferty*, the harasser is not effecting a significant change in employment status or assigning significantly different responsibilities, but is instead insignificantly affecting the victim's employment status or job responsibilities.[122]

As stated before, however, although each isolated incident of incivility may be insignificant, the cumulative effects of multiple instances of incivility can effect an aggregate negative change and affect the subordinate's employment status.[123] But, that aggregate effect of insignificant actions is not in the same realm of tangible employment actions, such as hiring and firing. In fact, the opposite is much more likely: incivility is an effective way for a harasser, who is at least empowered to direct an employee's daily tasks, to cause a subordinate to quit on his own behalf or cause counter-productive behavior in the workplace, rather than face sanctions for being racist.[124] Thus, *Vance* seems to create an effective mask for harassers who wish to be incivil, especially racially incivil, towards subordinates, as racial incivility is unlikely to satisfy a definition

118. McCafferty v. Preiss Enter., 534 F. App'x 726, 731 (10th Cir. 2013).

119. This assumption is necessary because racial incivility can be attributed to other factors, such as ignorance or oversight. *See* Cortina, *supra* note 1, at 56.

120. *Ellerth*, 524 U.S. at 761-62 ("A tangible employment decision requires an official act of the enterprise, a company act.").

121. *See* Cortina, *supra* note 1, at 55.

122. *See id.*

123. *See id.* at 57.

124. Incivility can lead to intentions to leave a job, which is the highest predictor of job turnover rates. Cortina et al., *supra* note 3, at 1596; Jeannie Trudel & Thomas G. Reio Jr., *Managing Workplace Incivility: The Role of Conflict Management Styles—Antecedent or Antidote?*, 22 HUM. RES. DEV. Q. 395, 398 (2011).

of "supervisor" that only imposes vicarious liability on an employer where the harasser is able to take tangible employment action.[125]

On the other hand, the opposite instance can also occur: an individual who may not seem to qualify as a supervisor could fall within the definition of "supervisor" that the *Vance* court adopts.[126] For example, in *Faragher*, in which male lifeguards asked a subordinate female to either date them or clean toilets for a year, the lifeguards were held to be supervisors.[127] One of the lifeguards had "oversight and assignment responsibilities," or in other words, the ability to assign a subordinate's daily tasks, such as punishing the plaintiff in *Faragher* with the task of cleaning toilets all day because she would not date the lifeguard. But, "there was no evidence that he had authority to take tangible employment actions" against the subordinate.[128] Thus, there exists the possibility that even though the Supreme Court in *Vance* attempted to remove ambiguity in hostile work environment claims by only allowing those individuals able to take tangible employment actions to be "supervisors," the Supreme Court created a rule which actually creates ambiguity as to what exactly a "tangible employment action" is."[129]

The possibility of getting past the rule set out in *Vance*, however, is unlikely given post-*Vance* decisions interpreting the rule, such as *McCafferty*, which is discussed above.[130] Consequently, in instances of racial incivility the employer will not be required to prove the affirmative defense that it was not negligent in dealing with the workplace discrimination.[131] Instead, a victim of racial incivility will be burdened with proving the employer's negligence because the "supervisor" requirement will not be satisfied, which is like deepening an already existing laceration because of what victims of incivility already have to endure.[132]

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

126. *See Faragher*, 524 U.S. at 780. Although *Faragher*_is a sexual harassment case, the framework for sexual and racial hostile work environment claims are the same.

127. *Id*. at 780–81.

128. *Vance*, 133 S. Ct. at 2458 (Ginsburg, J., dissenting).

129. *See id*.

130. *See* McCafferty v. Preiss Enter., 534 F. App'x 726, 731 (10th Cir. 2013).

131. *See id*.; *Ellerth*, 524 U.S. at 765.

132. *Vance*, 133 S. Ct. at 2443; *See Ellerth*, 524 U.S. at 768–69 (dissenting opinion) (reviewing an employer's negligence for direct liability). *See* Cortina et al., *supra* note 3, at 1601.

B. UNDER *VANCE*, EMPLOYERS WILL NOT PREVENT RACIAL INCIVILITY.

Incivility[133] is not a static occurrence: it is a dynamic issue affecting the workplace that has been on the rise for some time.[134] For example, research on the trend of incivility, but not necessarily racial incivility, in the United States found that seventy-three percent of Americans used to treat each other better, and that seventy-nine percent of Americans believe that respect and courtesy is a serious problem in society.[135] In fact, the writers of one study stated that they were "amazed by how many managers and employees [state] that they don't understand what it means to be civil"—one quarter of surveyed culprits of incivility conceded that they did not even realize that they were being uncivil.[136]

Employers' Motivations to Promote Diversity

There are three primary motivations for employers to promote diversity[137] in the workplace: (1) fulfilling compliance requirements, such as an employer complying with the affirmative requirement to prevent harassment in the workplace; (2) maximizing competitive advantage and consequently productivity in the workplace; and (3) meeting "ethical, moral, and social objectives."[138]

For the compliance objective, employers are chiefly interested in preventing negative publicity about their organization, and will generally only do the bare minimum to meet compliance standards.[139] Thus, instead of doing what is right and good for the company, which would likely minimize incivility, companies are engaging in reactionary or response-based attitudes toward instances of racism or incivility, because that is all that is necessary.[140] In order to achieve a true betterment for diversity, and consequently eradication of incivility, companies would instead need to adopt a preventative approach where they act for the betterment of the company and what is good for their employees.[141]

133. This relates to general incivility, but not necessarily racial incivility.

134. *See* Trudel & Reio, *supra* note 130, at 397.

135. *Id.*

136. Christine Porath & Christine Pearson, *The Price of Incivility: Lack of Respect Hurts Morale-and the Bottom Line*, 91 HARV. BUS. REV. 114, 115, 120 (2013).

137. Promoting diversity would ideally minimize or eradicate incivility in the workplace.

138. Rod P. Githens, *Diversity and Incivility: Toward an Action-Oriented Approach*, 13 ADVANCES IN DEV. HUM. RESOURCES 40, 43 (2011).

139. *Id.*

140. *See id.*

141. *See id.*

Additionally, because the compliance objective cannot effect long term positive change on incivility by itself, employers need to act on the other two objectives, maximizing competitive advantage and meeting moral/ethical obligations, in order to effect appropriate change to remove incivility.[142] Because the three objectives "work in concert," they can complement each other to help an organization improve its diversity.[143] Currently, employers are generally meeting only the compliance requirement because incivility, like sexual harassment, has not been a large concern of employers, despite arduous research efforts to recognize workplace incivility as something that can cause a host of organizational problems.[144] Thus, employers are unlikely to, and will not, implement sufficiently strong anti-harassment policies to prevent racial incivility.

Before Vance, Employers Generally Would Not Prevent Racial Incivility

Even before *Vance*, employers were unlikely to prevent racial incivility because they lacked incentive to do so. Although most employers are not interested in perpetuating racism in the workplace,[145] the fact that racial incivility exists suggests that current anti-discrimination policies implemented by employers are not strong enough. In addition, not only does racial incivility exist, but it is also on the rise—especially since the turn of the millennium—and, despite identifying incivility as an issue, rates of incivility have risen at least partly as a result of a change in business structures.[146] For example, because of factors such as loss of stability, increased workloads, and a general "overload," traditional "niceties" of the workplace have been replaced with forms of hostility, including incivility.[147] Thus, even before the *Vance* decision, employers were not actively endeavoring to prevent incivility, let alone racial incivility, with enough determination. This is particularly unfortunate as organizational changes have led to an increase in incivility.

142. *See id*. at 44.

143. *See id*.

144. *See* Trudel & Reio, *supra* note 130, at 396–98.

145. See Cortina et al., *supra* note 3, at 1581 (stating that blatant discrimination has undergone strong decline in the last century).

146. Trudel & Reio, *supra* note 130, at 396, 402.

147. Incivility is not necessarily motived by racial prejudice and can stem from other reasons, such as an employee wanting to be superior to or dominate other employees in an attempt to gain security or establish his or her position in an organization. *See id*. at 402, 416.

After Vance, Employers Are Even More Unlikely to Prevent Racial Incivility

The definition of "supervisor" created by *Vance* will provide even less incentive for employers to implement sufficiently strong anti-discrimination policies because they are now less likely to be vicariously liable or bear the burden of an affirmative defense. For example, multiple studies show that in the absence of a substantive legal change applicable to a business, barriers such as career advancement for minorities stay in place and rarely change.[148] Thus, as long as racial incivility is not considered a tangible employment action under federal law, employers are unlikely to implement sufficiently strong discrimination policies to eradicate racial incivility simply because they are not required to do so.[149]

In addition, not only will *Vance* lessen employers' incentives to prevent racial incivility, but the Supreme Court's decision can now be a factor in perpetuating cyclical occurrences of racial incivility. Racial incivility can be the status quo because not only will employers not care about it, but their attention will not properly be brought to it. For example, because employers generally do not recognize or act on incivility[150] that causes an employee to quit (an apparently frequent and prevalent occurence considering racial incivility's relation to high job turnover rates),[151] an employer will probably not learn the real reason the employee is leaving, even if it conducts an exit interview. Although employers may be interested in determining why an employee is leaving the organization, an employer will usually only get "vague" answers from an exit interview, which will sadly help in perpetuating an employer's misrecognition and misconception of why an employee really left the organization.[152]

In contrast, if "supervisor" were defined to include the ability of the harasser to direct the victim's daily tasks, employers would have a greater incentive to implement more stringent anti-harassment policies barring racial incivility; in other words, a legal change that more broadly defines "supervisor" would be a powerful force in motivating employers to change the status quo of their discrimination policies.[153] Even if an employer were to meet the bare minimum to comply with the law, the heightened policies

148. William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 124 (2000).

149. *See id.* at 125.

150. *See* Trudel & Reio, *supra* note 130, at 397.

151. Cortina et al., *supra* note 3, at 1583.

152. Porath & Pearson, *supra* note 142, at 121.

153. Brief of National Partnership for Women & Families, *supra* note 115, at 2.

and attention to racial incivility that would naturally accompany a higher susceptibility to vicarious liabilty, would allow racial incivility to be fought and eradicated proportionally to its increasing prevalence in the workplace.[154]

C. EMPLOYERS CAN MINIMIZE RACIAL INCIVILITY IN THE WORKPLACE.

In General

Incivility is generally strongest in workplaces with weak discrimination policies or leadership that turns a blind eye.[155] Similarly, the impact of racial bias is inversely proportional to the extent that decisionmakers are accountable for the processes they use in making their judgments.[156] In addition, racial incivility is likely directly related to job turnover—the more frequently racial minorities experience incivility in the work place, the greater their intention to leave their job.[157] Unsurprisingly, turnover intention is a clear predictor of job turnover, and racial minorities have more job turnover than non-racial minorities.[158] The high rates of racial minorities' intentions to leave organizations, as well as their following through on those intentions, are very likely attributable to the victim's inability to remove the harassment.[159] For example, even the Supreme Court has recognized that an employer is better able to prevent harassment by employees with authority over victims, who are common workers, specifically because such authority exists.[160] A victim is more likely to develop an intent to leave the organization, rather than prevent the discrimination, precisely because his or her perception of being under the harasser's authority reduces his or her confidence in the ability to prevent the discrimination.

The three instances in which racial incivility manifests itself would be either minimized or eradicated by implementing stronger discrimination policies that include transparent mechanisms to (1) provide victims with the unfettered ability to report unwanted workplace conduct, including

154. *See* Githens, *supra* note 144, at 43.
155. Cortina, *supra* note 1, at 65.
156. Bielby, *supra* note 154, at 124.
157. Cortina et al., *supra* note 3, at 1583.
158. *Id.* at 1583.
159. Brief of National Partnership for Women & Families, *supra* note 115, at 26–27 (citing multiple studies and articles that propose when a harasser has authority over a victim, the victim is not able to prevent the harassment).
160. *Faragher*, 524 U.S. at 803.

racial incivility, and (2) have appropriate repercussions for the individuals or harassers that commit the unwanted conduct.

The implementation of such policies will resolve problems of non-racist employees who are still either unknowingly racially uncivil due to an unconscious desire for social dominance or knowingly racially uncivil to fit in with their peers, because that manifestation of racial incivility is only likely to manifest when lax discrimination policies are in place.[161] Thus, encouraging racial minorities to report conduct to employers should prevent the unconscious racist from continually engaging in unwanted conduct towards the victim because the unconscious racist will see his or her actions as unacceptable and the employer will ideally prohibit the continuance of those actions.[162] Second, conscious racists will also be prevented from hiding racist actions behind racial incivility, because their repeated pattern of uncivil conduct will not be tolerated. Although consciously uncivil racists would most pervasively manifest racial incivility in organizations with strong anti-discrimination policies,[163] the repercussions for their actions should render them less able to perpetuate a racially uncivil environment.[164]

Most importantly, victims of racial incivility are provided a mechanism and motivator to report unwanted conduct directed towards them. Thus, victims cannot become hopeless or fear other employees' perceived authority because racial incivility can otherwise go unchecked.[165] Consequently, employees must also be informed about racial incivility in order to perceive other means of preventing it besides leaving their organization.[166]

Changing to a Preventative Method

Employers should place incivility on a "high-priority" list, especially because it can be targeted and removed by changing current incivility

161. Cortina, *supra* note 1, at 64.

162. *See id*. at 71. A problem, however, exists that because the unconscious racist does not know she is being racist, stronger anti-discrimination policies will not remove the harasser's unconscious bias completely, but maybe only prevent it in the workplace.

163. *Id*. at 64–65.

164. *See id*. at 65.

165. *See, e.g.*, Brief of National Partnership for Women & Families, *supra* note 115, at 26–27 (arguing that victims of workplace discrimination can lack the ability to prevent being discriminated against by those who have authoritative power).

166. *See, e.g.*, Cortina et al., *supra* note 3, at 1596.

practices from a reactionary to a preventative approach.[167] For example, some methods to prevent racial incivility are for employers, employees, and human resource departments, to

> (a) establish a zero tolerance of incivility, (b) tak[e] an honest look in the mirror, (c) weed out trouble before it enters the organization, (d) teach civility, (e) put one's ear to the ground and listening, (f) hammer incivility when it occurs, (g) heed warning signals, (h) stop making excuses for powerful instigators, and (i) invest in postdeparture interviews.[168]

Although the forgoing are broad objectives, it is a starting place—one that *Vance* likely precludes or deters.[169]

An Example of Implementing a Preventative Method: The CREW Program

Incivility is not so discrete and intangible that it is not preventable, and there are resources available for organizations to prevent incivility in the workplace. For example, the Quality Worklife-Quality Healthcare Collaborative ("QWQHC") is a coalition of healthcare providers that aims to "create healthier workplaces and to ultimately improve patient/client and system outcomes."[170] Since September 2008, QWQHC has recognized incivility[171] in the workplace as an issue that creates negative work environments for employees.[172] QWQHC provides a service, the CREW program, in which work groups meet regularly over a six-month period, to discuss issues such as teamwork, civility, and engagement, amongst colleagues.[173] A trained facilitator from QWQHC leads those work groups.[174]

The CREW program has already seen significant success in mitigating workplace incivility. Compiling results from pre-program and post-program surveys with other information, QWQHC has reported the following:

167. Brad Estes & Jia Wang, *Integrative Literature Review: Workplace Incivility: Impacts on Individual and Organizational Performance*, 7 HUM. RESOURCE DEV. REV. 218, 233–34 (2008).

168. *Id*. at 235.

169. *See supra* text accompanying notes 145–63.

170. *About QWQHC*, QUALITY WORKLIFE - QUALITY HEALTHCARE COLLABORATIVE, http://www.qwqhc.ca/about-us.aspx (last visited Feb. 27, 2014).

171. QWQHC implements programs to prevent incivility, but not necessarily racial incivility. *CREW – Civility, Respect, and Engagement at Work*, QUALITY WORKLIFE - QUALITY HEALTHCARE COLLABORATIVE, http://www.qwqhc.ca/knowledge-exchange-practices-details.aspx?id=75 (last visited Feb. 27, 2014).

172. *Id*.

173. *Id*.

174. *Id*.

> Units who participated in the CREW program reported less absenteeism (missed less days of work), less intention to quit, experienced less co-worker and supervisor incivility, and reported more positive mental health outcomes overall. In addition, the feedback from the units that participated in CREW has been very positive and encouraging, indicating that individuals are taking full advantage of the program and its benefits in order to improve their own workplaces.[175]

However, certain issues with the CREW program remain, including (1) the cost of implementing the program, and (2) the fact that the CREW program addresses incivility, but not necessarily racial incivility.

First, though there is a cost to implementing civility programs like the CREW program, that cost can be likened to an investment because of the positive benefits of lessening incivility in the workplace.[176] However, the monetary and hourly costs of the CREW program, which requires about ten hours a month for groups of an organization,[177] could be an issue for small businesses, which lack the resources and flexibility that large organizations have to implement civility training. In fact, the effect of creating a broad definition of "supervisor" was of special concern for briefs submitted for consideration in *Vance*, which argued that the definition of "supervisor" should be narrow because (1) small businesses lack resources that large businesses have and (2) small businesses lack a clear hierarchical structure in which every employee could plausibly be seen as a "supervisor."[178] However, because small business lack the resources of large organizations, they could implement civility training in other ways, such as looking at tips online[179] or buying a book.[180] Additionally, even if every employee could plausibly be seen as a "supervisor" in a small business due to blending, changing, and alternating duties between employees,[181] which under a

175. *Id.*

176. For example, lessening job turnover rate and increasing retention in organizations. Cortina et al., *supra* note 3, at 1599.

177. *CREW – Civility, Respect, and Engagement at Work*, *supra* note 177.

178. Brief of the National Federation of Independent Small Business Legal Center and the Retail Litigation Center as Amici Curiae Supporting Respondent at 7–11, Vance v. Ball State University, 133 S. Ct. 2434 (2013) (No. 11-556).

179. *E.g.*, Barbara Richman, *Ten Tips for Creating Respect and Civility in Your Workplace*, LORMAN, http://www.lorman.com/newsletters/article.php?article_id=694&newsletter_id=150 (last visited February 27, 2014) (stating tips to prevent incivility in the workplace).

180. *E.g.*, JAMIE R. HARDEN FRITZ, PROFESSIONAL CIVILITY: COMMUNICATIVE VIRTUE AT WORK (2013) (educating individuals on an approach to civility that restores respect and integrity to communications).

181. Brief of the National Federation of Independent Business Small Business Legal Center, *supra* note 185, at 10.

broad definition of "supervisor" would create greater vicarious liability for employers in hostile work environment claims,[182] as incivility is facilitated by being in a position of power,[183] then civility should not be as large of an issue in small businesses because of the fluidity of power that flows between the employees in a small business. Thus, although training programs such as the CREW program can be costly for a small business to implement, there are other methods of teaching and implementing civility. Moreover, civility is likely not as large of an issue in small businesses because they are less affected by delegations of power.[184]

Second, although the CREW program does not necessarily address racial incivility, civility training can be applicable to racial incivility, especially for those individuals that are unconsciously racially uncivil.[185] At least for the individual that is being unconsciously racially uncivil, general civility training should be applicable because the individual would consequently become conscious of his or her racism.[186] Granted, there is considerably less information avaiolable on racial incivility than on general incivility, but "more research on the nature, causes, and consequences of [racial incivility] will" aid in combating it more effectively.[187]

Thus, the CREW program is one example of how organizations can minimizing or even eradicate racial incivility, or at least general incivility, in the work place.

D. FURTHER EXAMPLES OF IMPLEMENTING PREVENTATIVE METHODS FOR INCIVILITY

Another method of implementing a program to prevent incivility is to teach incivility by filming employees.[188] For example, an experiment evidenced that filming employees engaging in various interactions, and thus allowing employees to view their own "facial expressions, posture, words, and tone of voice," can aid in preventing incivility.[189] A CEO of a medical firm that participated in the experiment stated that he did not

182. *See Vance*, 133 S. Ct. at 2449.
183. Githens, *supra* note 144, at 50.
184. *Id.*
185. Cortina, *supra* note 1, at 64–65.
186. *See id.*
187. *Id.*
188. Porath & Pearson, *supra* note 142, at 120.
189. *Id.*

"realize what a jerk [he] sounded like," and as a result, tried to improve his communication.[190]

Other examples to pragmatically prevent incivility include (1) penalizing bad behavior, (2) conducting post departure interviews (not just exit interviews), (3) rewarding good behavior, (4) creating group norms by discussing expectations of behavior in the workplace, and (5) avoiding bringing uncivil individuals into the workplace altogether by considering it in hiring decisions.[191] Although in one study, only eleven percent of organizations reported considering civility during the hiring process, at least one company, for example, stated that it conducts group interviews so that interviewers can gauge applicants' incivility and teamwork abilities.[192]

Because these examples of methods to prevent incivility in the workplace likely do not cost as much as implementing civility training such as the CREW program, they are more fit for small businesses that do not have the resources to implement such a program.[193] In addition, similar to the CREW program, these examples have been shown to effectively attack general incivility, but not necessarily racial incivility.[194] Thus, although they would likely be effective to prevent those individuals that are unconsciously racially uncivil, more research would be needed to completely affirm whether such methods can also prevent those individuals that are consciously racially uncivil in the work place.[195]

V. OTHER METHODS TO PREVENT RACIAL INCIVILITY

A broader definition of "supervisor" for purposes of hostile work environment claims is not the only method to eradicate racial incivility,[196] but it may be a very efficient method because it will mandatorily heighten

190. *Id*.
191. *Id*. at 119–21.
192. *Id*. at 119.
193. *See supra* notes 184–92 and accompanying text.
194. *See supra* notes 195–99 and accompanying text.
195. *See* Cortina, *supra* note 1, at 64–65.
196. For example, for a discussion of courts taking an alternative approach to adjudicating hostile work environment claims that try to take into account subtle forms of racism, see, e.g., Pat K. Chew, *Seeing Subtle Racism*, 6 Stan. J. C.R. & C.L. 183 (2010) (reviewing the emergence of some cases where judges are recognizing racial harassment as more complicated and varied than traditional blatant racial harassment). In addition, the following examples of state law rights and retaliation claims are not an exhaustive delineation of other methods to prevent racial incivility.

the status quo responsibility of employers to prevent discrimination in the work place.[197]

A. STATE LAW RIGHTS

While Title VII is one federal statute that makes discrimination unlawful, applicable to both private and public employers,[198] states also have laws that make discrimination on the basis of race unlawful.[199] For example, California's Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice for an employer, unless certain exceptions apply, to discriminate on the basis of race.[200]

Nonetheless, the problem with the state laws that prohibit discrimination on the basis of race is that because they are fairly analogous to Title VII, state courts treat federal court decisions interpreting Title VII as applicable to the analogous state law statutes.[201] Consequently, four state court decisions in Colorado,[202] Hawaii,[203] New York,[204] and South Carolina[205] have already affirmed the rule announced in *Vance* that a "supervisor" is only an employee that has been given the ability to take tangible employment actions against subordinates.

Thus, the Supreme Court's decision in *Vance* will not only pervade state courts applying a Title VII framework to their analogous state discrimination laws, but could also potentially facilitate employers' comfort in not having to prevent racial incivility. For example, while Title VII only reaches employers that have fifteen or more employees,[206]

197. *Faragher*, 524 U.S. at 806 (reviewing regulations that the EEOC has adopted); Githens, *supra* note 144, at 46-47; Brief of National Employment Lawyers Association and AARP at 5, Vance v. Ball State University, 133 S. Ct. 2434 (2013) (No. 11-556). (stating that "Congress intended Title VII to encourage employers to develop policies to prevent and address workplace harassment, and to promote employee use of these policies to address discrimination, rather than resorting to the federal courts.").

198. 42 U.S.C. § 2000e(b) (2006).

199. *E.g.*, Cal. Gov. Code § 12940(a) (West 2014).

200. An employer also cannot discriminate on the basis of "religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." Cal. Gov. Code § 12940(a) (West 2014).

201. *E.g.*, Metoyer v. Chassman, 504 F.3d 919 (9th Cir. 2007), *cert. denied*, 553 U.S. 1049 (stating that Calfornia courts apply Title VII's framework to claims brought under FEHA).

202. Yotes, Inc. v. Indust. Claim Appeals Office, 310 P.3d 288, 291 (Colo. App. 2013).

203. Lales v. Wholesale Motors Co., 133 Haw. 332 (2014).

204. Cajamarca v. Regal Entm't Group, No. 103027/12, 2013 WL 5717119 at *1 (N.Y. Sup. Ct. 2013).

205. State v. Scott, 749 S.E.2d 160, 164 n.4 (S.C. Ct. App. 2013).

206. 42 U.S.C. § 2000e(b) (2006).

California's FEHA reaches employers with five or more employees.[207] Although states such as California generally protect more employees because FEHA reaches more organizations, more organizations can take comfort in knowing that, because of *Vance*, racially uncivil individuals are less likely to cause an employer to be vicariously liable and consequently bear the burden of an affirmative defense.

B. RETALIATION CLAIMS

Similar to how state laws on hostile work environment claims could actually make racial incivility worse,[208] another recent Supreme Court decision issued on the same day as *Vance*, shows that retaliation claims could further exacerbate the issue of racial incivility. In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that in Title VII retaliation claims, a plaintiff must prove that the unlawful retaliation "would not have occurred in the absence of the alleged wrongful action or actions of the employer."[209] Thus, by upping the burden to "but-for causation," the Supreme Court abrogated multiple lower courts that had required a plaintiff to show only that the employer's actions were at least a motivating factor in the unlawful retaliation.[210]

While *Vance* will already deter employees from reporting racial incivility because an employer will be unlikely to be found vicariously liable, *Nassar* will only make the problem worse because victims will be further deterred from seeking a remedy. The higher burden set out in *Nassar* can increase a harasser's confidence in being racially uncivil because of the likelihood that a victim would not succeed on a claim, whether it be a hostile work environment claim or retaliation claim.[211] The victim would then be thrown further into a cycle of depression, low self esteem, anxiety, shame, guilt, embarrassment, and other psychological harms.[212]

VI. CONCLUSION

The definition of "supervisor" the Supreme Court adopted in *Vance* renders racially uncivil conduct far less likely to be a tangible employment

207. Cal. Gov. Code § 12926(d) (West 2014).
208. *See supra* notes 205–14 and accompanying text.
209. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2532–33 (2013).
210. *See id.*
211. Estes & Wang, *supra* note 173, at 231–32.
212. *Id.*

action. As a result, more racial incivility will go unchecked because employers are less likely to be subject to vicarious liability. Without the threat of vicarious liability hanging over their heads, employers have little incentive to implement anti-discrimination policies that will minimize racial incivility.

A broad definition of "supervisor" would not only help achieve Title VII's purpose of removing workplace discrimination,[213] but would also benefit racial minorities and their employer organizations.[214] For example, lessening racial incivility can increase organizational efficiency.[215] While the Court purportedly justifies its narrow definition of "supervisor" because of efficiency,[216] the narrow definition of "supervisor" ironically precludes the efficiency that would result from minimizing racial incivility.[217] For example, organizations have calculated that the cost of incivility can run into the millions: Costco has estimated that incivility costs it twelve million dollars a year.[218] In addition, a reduction in racially hostile work environments can prevent potential victims from being depressed, losing self-esteem, fearing harassers, or losing morale.[219]

Unfortunately, the Court did not consider racial incivility in its decision.[220] If the purpose of Title VII is to incentivize the prevention of harm[221] and charge employers with implementing policies that prevent discrimination,[222] then the Supreme Court should have considered racial

213. *Faragher*, 524 U.S. at 806 (Citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

214. By lowering turnover rates, an organization can increase its resource allocations to sectors other than hiring. *See, e.g.* Cortina et al., *supra* note 3, at 1596 (stating that racial incivility is related to racial minority job turnover rates). In addition, preventing racial incivility can prevent victims from being distracted, and thus contributing to the organization's efficiency. *See* Cortina, *supra* note 1, at 56.

215. *Id.*

216. *See Vance*, 133 S. Ct.

217. For example, less job turnover is one way in which lessening racial incivility can increase organizational efficiency. Other positive psychological benefits that can increase organizational efficiency exist as well, such as lessening racial minority's stress or distractions. *See* Cortina et al., *supra* note 3, at 1596.

218. That cost relates to generally incivility, but not necessarily racial incivility. Porath & Pearson, *supra* note 142, at 121.

219. Sunney Shin & Brian H. Kleiner, *The Psychological Effects of Working in a Racially Hostile Environment*, 21 INT'L J. SOC. & SOC. POL'Y 59, 61, 62 (2001).

220. *Vance*, 133 S. Ct. at 2454.

221. *Faragher*, 524 U.S. at 806 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

222. *Id*. (reviewing regulations adopted by the EEOC).

incivility. Racial incivility is causing harm,[223] and employers are not implementing sufficiently strong policies to prevent racial incivility.[224] Thus, it seems the Supreme Court has taken a step backward from ending racial incivility in the workplace by largely preventing its recognition.

In conclusion, the Court missed an opportunity to encourage employers to adopt sufficiently strong anti-discrimination policies to prevent racial incivility by choosing to narrowly define "supervisor" for vicarious liability purposes in racially hostile workplace claims. Thus, racial incivility can continue in a cyclical manner that has extreme costs for both employers and the victims of subtle racism.

223. For example, racial incivility is causing psychological harm, perpetuating racism, and decreasing organizational efficiency. *See* Cortinaet al., *supra* note 3, at 1596.

224. *See supra* notes 144–51 and accompanying text.