No. 23-7628

IN THE SUPREME COURT OF THE UNITED STATES

ELLEN XIA,
Petitioner,

v.

LINA T.RAMEY, AND ASSOCIATES,
WILLIAM MARTINEZ
Respondents.

On Petition for Writ of Certiorari to theUnited States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ELLEN XIA
11816 Inwood Rd Apt 77921
Dallas, Texas 75244
ellenx2019@gmail.com
Telephone: (361) 200-0832
Pro se Petitioner

QUESTIONS 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 coemployee, however, under the prevailing rule, the employer is not liable absent proof of negligence.

In the decision herein, the Fifth Circuit entirely discounted the Petitioners Claim failing to address it comprehensively and proceeded to address itself to the other claims which it dismissed. 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.

The following questions are presented.

1. Did the Fifth Circuit err in its affirmation of the Districts Court reading of Rule 12(b)(6) given that five other Circuits read the rule liberally to allow for pro se litigants in similar proceedings, similar to the one alleged by Petitioner here?

2. Did the Fifth Circuit Court err in its interpretation of Sanchez v. Chevron N. Am. Expl. & Prod. Co., No. 20-30783, 2021 WL 5513509, at *5 (5th Cir. 2021) whereafter it found that the Petitioners claim for discrimination was deficient due to the alleged failure to establish causation by protected characteristics such as race, national origin, or sex?

3. Was the Fifth Circuits Court dismissal of the Petitioner's promissory estoppel claim on the basis of alleged evidential inadequancies because her attached exhibit refutes the existence of any such promise and consequently was their interpretation and application of Esty v. Beal Bank S.S.B., 298 S.W.3d 280, 305 (Tex. App. - Dallas 2009, no pet) proper?

4. Did the Fifth Circuit Courts decision take into account the applicability of the principles enunciated in Maetta Vance v Ball State University 570 US.421 (more) 133 S.Ct.2434;186 L.Ed.2d 565;2013 U.S LEXIS 4703; 81US that were entirely relevant and

applicable to the Petitioners Claim against her supervisor but left entirely unaddressed and as such does their failure to do so constitute an error that prejudices the Petitioners right to be heard?

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I. PETITION FOR WRIT OF CERTIORARI

Ellen Xia petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

II. JURISDICTION

The Fifth Circuit entered judgment on February 21, 2024. See Appendix 1. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED.

The Federal Rule of Civil Procedure Rule 12 (b) (6) authorizes the Court to dismiss a complaint for failure to state a claim upon which relief can be granted.

The District Court dismissed the petitioners complaint on this basis and this formed the crux of the petitioners appeal before the Fifth Circuit.

42 U.S. Code § 2000e-3 - Other unlawful employment practices

29 U.S. Code § 152 that the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

42 U.S. Code § 1981 - Equal rights under the law

42 U.S. Code § 1981a - Damages in cases of intentional discrimination in employment

42 U.S. Code § 2000e-2 - Unlawful employment practices.

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

It shall be an unlawful employment practice for an employer--

1. 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).

2. The Equal Employment Opportunity Commission ("EEOC") guidelines provide in pertinent part: 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. Equal Employment Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, at *3, Pet. App. 90a (EEOC Guidance).

III. STATEMENT OF THE CASE

Introduction.

Petitioner like many other individuals was an industrious lady, eager to learn and ready to contribute to the great American dream in her capacity as a design engineer, a competent one at that.

To this end the Respondent, Lina T.Ramey and Associates, with head offices in Dallas made a decision and subsequently expanded operations to San Antonio and the Petitioner was employed in this new office. Initially operations were manned/undertaken by a three people office with the Respondent, one William Martinez being the supervisor, the Petitioner as a design engineer and one Sam also working therein.

The Petitioner worked from October 2019 to February 2020 when she got laid off in March 2020. The circumstances precipitating her unceremonious termination form the crux of the preceding suits where the petitioner alleges employment discrimination and harassment, Fraud on the Respondents part, Promissory Estoppel and Violations of H-1B Visa Statute.

The United States District Court for the Norther District of Texas heard and determined the original suit which it dismissed and the Petitioner subsequently filed an appeal at the United States Court of Appeals for the Fifth Circuit. The Appeals court affirmed the District Courts decision and dismissed the claims/appeal.

The Petitioner now seeks to implore the Supreme Court to call for the proceedings, review the same and be pleased to find that the decisions rendered were not proper as the Learned Judges erred in law and in fact and arrived at a wrong conclusion.

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 Title VII imposes vicarious liability (subject to an affirmative defense) on employers for sex- (and race-)based workplace harassment of a subordinate employee by his or her supervisor. Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765. In the decision below, the Seventh Circuit, following circuit precedent, held that rule inapplicable to actionable harassment by personnel who direct, oversee, evaluate—and "supervise"—their victims, but do not have power to take formal tangible employment action against them. Pet. App. 12a-13a.

A. Legal Background

Title VII prohibits workplace discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

The holding in NATIONAL LABOR RELATIONS BOARD v. HEALTH CARE & RETIREMENT CORPORATION OF AMERICA that employees are considered "supervisors," and thus are not covered under the National Labor Relations Act, 29 U. S. C. § 152(3), if they have authority, requiring the use of independent judgment, to engage in one of 12 listed activities and they hold the authority "in the interest of the employer," § 152(11) is relied upon in the brief herein.

The primary holding in Robinson v. Shell Oil Co., 519 U.S. 337 (1997) is relied upon on the submission that federal law prohibits employers nationwide from taking adverse action in retaliation against former employees who filed job discrimination complaints.

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 66. The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Id. at 65. In Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the Court laid out the basic elements of a hostile work environment claim: that

(1) the race- or gender-based harassment be "severe or pervasive"; (2) a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) the plaintiff perceived it as such. Harris, 510 U.S. at 21-22.

In Faragher and Ellerth, this Court indicated that three different standards govern employer liability in such cases. When the harasser is a co-worker, not a supervisor, of the victim, employer liability turns on the employer's negligence – its "combined knowledge [of the behavior] and inaction" in response. Faragher, 524 U.S. at 789; see also Ellerth, 524 U.S. at 760. When a "supervisor with immediate (or successively higher) authority over the [victim]" creates an "actionable hostile environment," on the other hand, vicarious liability applies to the employer. Faragher, 524 U.S. at 807 (emphasis added); Ellerth, 524 U.S. at 765 (emphasis added). When the supervisor took no tangible employment actions against the victim, however, the employer can raise 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." Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

In Sanchez v. Chevron N. Am. Expl. & Prod. Co., No. 20-30783, 2021 WL 5513509, at *5 (5th Cir. 2021, the appellant brought claims under Title VII and 42 U.S.C. § 1981 for "unlawful employment practices on the basis of national origin, a hostile work environment, retaliation, a retaliatory hostile work environment, and to provide appropriate relief."1 Sanchez claimed that the discrimination and harassment he experienced were due to his Puerto Rican heritage and the court agreed with his averments which we wish to align ourselves with entirely.

In **Parkins v. Civil Constructors of Illinois, Inc.**, 163 F.3d 1027 (7th Cir. 1998), the Seventh Circuit took a narrow view of who counts as a "supervisor." It held that vicarious liability applies only when the supervisor has the power to alter the victim's formal employment status, i.e., to hire, fire, promote, or discipline her. Id. at 1034 ("[A]bsent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer."). "[F]or purposes of Title VII," an individual who has the title of manager, functions as the

victim's boss, oversees her work, and assigns her daily tasks is a mere "co-worker." Id. at 1033. As the Seventh Circuit later explained, "'[s]upervisor' is a legal term of art for Title VII purposes," Rhodes v. Illinois Dept. of Transp., 359 F.3d 498, 506 (7th Cir. 2004), and, in particular, "a 'supervisor' for purposes of Title VII is not simply a person who possesses authority to oversee the plaintiff's job performance," Andonissamy v. Hewlett- Packard Co., 547 F.3d 841, 848 (7th Cir. 2008).

A few months later, the EEOC issued an Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, available at 1999 WL 33305874 (reproduced at Pet. App. 81a-93a) (EEOC Guidance), which rejected the Seventh Circuit's interpretation. Under the EEOC Guidance, an employee who has "authority to direct the [victim's] daily work activities" or the power "to recommend," though not personally effect, "tangible employment decisions" against the victim counts as the victim's "supervisor," Pet. App. 90a, because the employee's ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks," Pet. App. 91a.

That interpretation, which has been advanced by the EEOC as enforcer and as amicus curiae, has persuaded the Second and Fourth Circuits. Whitten v. Fred's, Inc., 601 F.3d 231, 245 (4th Cir. 2010) (rejecting, in state law claim decided under federal Title VII principles, rule that absence of "authority to take tangible employment actions" forecloses vicarious liability); Mack v. Otis Elevator Corp., 326 F.3d 116, 125 (2d. Cir. 2003); see also McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1119 n.13 (9th Cir. 2004) (holding that application of vicarious liability depends "upon whether a supervisor has the authority to demand [his target's] obedience"), cert. denied, 552 U.S. 1180 (2008).

B. Facts and Proceedings Below

This case arises from a decision of the Fifth Circuit holding that the District Courts determination was proper and sound when it dismissed the Petitioners Complaint. The Fifth Circuit Court affirmed and dismissed the appeal.

The Fifth Circuit was presided by Circuit Judges Jolly, Higginson, and Duncan.

The Petitioner acted pro se and sued her employer for employment discrimination and harassment, fraud, promissory estoppel, and violations of the H-1B visa statute. The district court had earlier on dismissed Xia's lawsuit under 12(b)(6) for failing to state a claim. This prompted the Petitioner to file the appeal against the dismissal and further requested for the Court to be pleased to appoint her counsel.

The Contextual background was that on September 16, 2019, Linda T. Ramey, and Associates ("LTRA") offered the Petitioner, a Chinese national working in America on an H-1B visa, a job as a design engineer. After several months on the job, however, LTRA terminated her employment. In response, the Petitioner sued LTRA. She later amended her initial complaint and added William Martinez, an LTRA employee and her supervisor, as a codefendant.

The Petitioner alleged employment discrimination based on sex, race, and national origin. She further alleges a hostile working environment claim and claims related to her H-1B visa. The Petitioner further alleges that: (1) her supervisor told an inappropriate joke around her, glanced at her inappropriately, invited her to lunch, and followed her to her car, as well as other grievances; (2) her male coworkers invited her to drink alcohol with them during working hours; and (3) her coworkers gossiped about her and made comments about and asked her insensitive questions relating to her Chinese heritage. Regarding her visa claim, the Petitioner further alleges that LTRA defrauded her when it promised to help her earn her green card, fraudulently induced her to accept the employment offer based on that promise, and fired her in violation of the H-1B statute.

The district court granted the Respondents motion for dismissal basing the same on Rule 12(6)(b). Pertinent to note is the fact that the trial court entirely neglected to gauge the veracity of the Petitioners complaints as against her supervisor, entirely misdirecting itself and lumping the two as one entity.

It was not tested under the rules developed under Faragher and Ellerth which rules include : "the power to hire, fire, demote, promote, transfer, or discipline an employee,". The court, in failing to assess the complaint through this lens ultimately dismissed the complaint prematurely. The Fifth Circuit affirmed the district court. The court assumed the same assessment of the initial complaint and failed to engage in a thorough comprehensive evaluation of the petitioners complaint. A holistic evaluation would have revealed that the complaint was very much merited and the Petitioners grievances were legitimate.

From the evidence and pleadings on record, it is evident that: "(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.". Based on the aforegoing, it was incumbent upon the fifth circuit to interrogate thoroughly the Petitioners complaint.

The Fifth Circuit concluded that, Xia cannot show that the district court erred by: (1) dismissing her claims, (2) not relying on the allegations found in both of her amended complaints, or (3) refusing to permit her to further amend her claims. Nor can Xia show that she is entitled to appointed counsel, and her motion is DENIED.

Summary of Argument

The Fifth Circuit decision affirming the District Judges findings and subsequent dismissal rests on among other issues to be detailed herein, that court's neglect and failure to assess the complaint from the view of the Title VII on employer liability rules established by Faragher and Ellerth.

That further, the court upheld the district courts interpretation and restrictive view on the applicability of rule 12 (b)(6) and this the Petitioner avers is unjust.

Beginning with **Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027 (7th Cir. 1998)**, that court's first post-Faragher/Ellerth decision, the Seventh Circuit (since joined by the Eighth Circuit and others) has developed a rule rooted in the claimed need to distinguish between a "supervisor" in the ordinary sense of the word and "a true supervisor," id. at 1033.

Holding that "'[s]upervisor' is a legal term of art for Title VII purposes," Rhodes, 359 F.3d at 506, the Seventh Circuit has enumerated a narrow set of personnel powers necessary "to make someone a supervisor under Title VII," Andonissamy v. Hewlett-Packard Co., 547 F.3d 841, 848 (7th Cir. 2008). Specifically, a Title VII plaintiff seeking redress for actionable workplace harassment by a person her employer holds out as her "supervisor" and vests with authority to direct and oversee her daily work activities, to evaluate her performance, or to recommend adverse personnel actions against her is relegated to "co- employee" status unless the harasser "could hire, fire, promote, demote, discipline or transfer" her.

I. This strange restriction that a person whom the employer, victim, and others in the workplace recognize as the victim's "supervisor" and whose job duties include directing, overseeing, and "supervising" his victim's daily work is not her "supervisor" for purposes of Title VII is nonsensical, arbitrary, and contrary to controlling precedent. Cf. United States v. Bajakajian, 524 U.S. 321, 346 (1998) (Kennedy, J., dissenting) (highlighting the "doctrinal difficulty" of "speak[ing] of nonpunitive penalties").

A. This Court's decisions conclusivelycompel the Fifth Circuit to liberally assess the complaint in view of Title VII rule and the premises on which it rests. The particular "supervisory relationship" Faragher itself held triggered vicarious employer liability as a matter of law lacked the personnel powers the Seventh Circuit holds necessary. A long line of prior and subsequent Supreme Court precedent refutes the notions (1) that for "purposes of Title VII" "supervisor" is a narrow "term of art," (2) that the most common supervisory powers—to direct a subordinate's daily work, to "demand obedience," McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1119 n.13 (9th Cir. 2004), and to evaluate her performance—are peripheral and insufficient to establish a supervisory relationship, and (3) that only high-level personnel count as "supervisors."

B. Nor do the reasons this Court has given for Title VII's employer liability regime permit the Seventh Circuit's restriction. The primary concerns that led to vicarious employer liability for harassment by supervisors—that such workplace misconduct is

aided by the agency relation, which affords supervisors contact with their victims and makes it more difficult for targets to "walk away" from or "blow the whistle" on those who harass them—apply with at least equal force to harassment by an employee's immediate supervisor.

II. Because the Fifth Circuit failed to apply the rules abovementioned, its judgment against Xia must be reversed. Xia introduced ample evidence that William was in fact her supervisor. Further, the evidence was not controverted. The district court granted the motion to dismiss , and the Fifth Circuit affirmed on that basis. LTRA did not argue in either court below that William, the Co-defendant could not be a supervisor under the correct legal standard. As this Court has repeatedly held, once it has determined that a lower court decision is based upon an improper legal rule, it should remand to the lower courts for them to reconsider the case under the correct standard.

Although the Court can resolve the question presented by simply holding that the Fifth erred in excluding from the Ellerth/Faragher rule supervisors who direct and oversee the work of their victims, the Court should provide more precise guidance to lower courts by embracing the Second Circuit's standard. That test, which inquires whether authority granted the harasser "enabled or materially augmented" the harasser's ability to create a hostile work environment for his subordinates, closely resembles the standard crafted by this Court in a similar context in Burlington Northern and would provide similar benefits of objectivity, administrability, and tight fit with the core purposes of Title VII. The Second Circuit's standard properly focuses the inquiry on those practical realities of the workplace that can, as highlighted in Faragher, enable harassment, and that standard has proven workable and nondisruptive over many years of application.

ARGUMENT

How the Questions Presented were Raised and Decided Below

Did the Fifth Circuit err in its affirmation of the Districts Court reading of Rule 12(b)(6) given that five other Circuits read the rule liberally to allow for pro se litigants in similar proceedings, similar to the one alleged by Petitioner here?

It is old hat that a district court's grant of a Rule 12(b)(6) motion to dismiss is reviewed de novo. **Vizaline, L.L.C. v. Tracy, 949 F.3d 927, 931 (5th Cir. 2020).**

It was and still is incumbent upon the court to accept all well-pled facts as true, construing all reasonable inferences in the complaint in the light most favorable to the plaintiff. Heinze v. Tesco Corp., 971 F.3d 475, 479 (5th Cir. 2020). However it is well to note that the court ought not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.

To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must [establish] the plaintiff's grounds for entitlement to relief—including factual allegations in a complaint that when assumed to be true 'raise a right to relief above speculative level.'" Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The Two courts found that the Petitioner's pleadings failed to satisfy the standard for survival and thus found that the dismissal was thus proper.

To this end, we dispute the above finding upholding the dismissal. This is bečause the Petitioner worked in an office where evry one else was given preferential treatment whereas she was actively and deliberately sabotaged and ostracized in the workplace. She submitted her evidence which include numerous correspondences in addition to her depositions under oath which we humbly submit are more than enough to demonstrate her claim for discrimination.

The Court further incorrectly held and dismissed her hostile workplace claim stating that the incidences were too infrequent and inconsequential. This in itself acknowledges their existence but the court watered it down to insignificance by deeming them inconsequential. This begets the question, having so found that it actually occurred, is it just for the Court to entirely dismiss the claim without even availing any remedy for the aggrieved party?

Was the Fifth Circuits Court dismissal of the Petitioner's promissory estoppel claim on the basis of alleged evidential inadequacies because her attached exhibit refutes the existence of any such promise and consequently was their interpretation and application of Esty v. Beal Bank S.S.B., 298 S.W.3d 280, 305 (Tex. App. - Dallas 2009, no pet) proper?

Among other Claims, the Petitioner argued and brought forth a claim for promissory estoppel and fraud. This was because the Respondents had promised to transfer her H-1B visa to a green card and this can be evinced by the evidence in record which include E-mail printouts.

Based on this promise/ undertaking, the Petitioner proceeded to accept the offer only for it to be reneged/ entirely refuted and even worse loose her employment. This we submit is a valid reason for the grant of some form of relief and the court was in error by dismissing this.

It is trite law that without such a promise, such a claim as the one raised herein fails, but the Petitioner duly tendered her evidence but the courts nonetheless dismissed her claim. Esty v. Beal Bank S.S.B., 298 S.W.3d 280, 305 (Tex. App. - Dallas 2009, no pet.); Elson v. Black, 56 F.4th 1002, 1008 (5th Cir. 2023).

Further, the Court erred in finding that the Petitioner had failed to exhaust administrative remedies thus lacked a private cause of action. This was a miscarriage of justice that drove the Petitioner off the seat of justice and should be reviewed.

Did the Fifth Circuit Courts decision take into account the applicability of the principles enunciated in Maetta Vance v Ball State University 570 US.421 (more) 133 S.Ct.2434;186 L.Ed.2d 565;2013 U.S LEXIS 4703; 81US that were entirely relevant and applicable to the Petitioners Claim against her supervisor but left entirely unaddressed and as such does their failure to do so constitute an error that prejudices the Petitioners right to be heard?

The Fifth Circuit's failure to address the issue on Vicarious Liability Rule Is Foreclosed By Ellerth, Faragher, And This Court's Other Decisions

Although various circuits ie: the Seventh Circuit and its followers have repeatedly emphasized that "supervisor" is a "term of art" for purposes of Title VII, they have made no effort to square their restriction of its meaning with the holdings and reasoning of this Court's Title VII decisions. Nor could they.

Further in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), the court reaffirmed that anti-retaliation provisions do not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.

This Court has, in fact, ruled out each of the stated but unexplained premises of the Seventh Circuit's rule:

(1) that there is a valid and important need to limit Title VII vicarious liability under Faragher to some subset of high-level supervisors; (2) that vicarious liability should not apply to actionable harassment by those who are "referred to colloquially," even by the employer itself, as their victim's "supervisor" and charged with overseeing and directing her daily work activities or evaluating her job performance; and (3) that vicarious liability applies only to harassment by those vested with a specific list of personnel powers.

A. "Supervisor" Is Not A Narrow "Term of Art" For Purposes of Title VII

1. While Faragher and Ellerth recognize reasons for not extending vicarious liability to the abusive workplace conduct of "co-employees," they nowhere suggest that harassment by those held out by the employer and understood to be the victim's "'supervisor' in the colloquial sense of the word," Andonissamy v. Hewlitt-Packard Co., 547 F.3d 841, 848 (7th Cir. 2008), should be exempted or that personnel powers in addition to "supervising" the subordinate employee are required to "make [the

harasser] a supervisor for purposes of Title VII," ibid.; see also EEOC v. Ceisel Masonry, Inc., 594 F. Supp. 2d 1018, 1025 (N.D. Ill. 2009) ("The bulk of [the harasser's] job duties consisted of supervising the work of [those he abused.] * * * [He] did not have the authority to hire, fire, demote, promote or transfer employees. Nor does [his] ability merely to recommend discharge transform him into a supervisor, even if his recommendations usually were followed.").

To the contrary, Faragher recognized the dangers of harassment by front-line supervisors, i.e., those with power to "control[] and supervis[e] all aspects of [their target's] day-to-day activities," Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998), and the need to hold employers responsible for it, id. at 801-808. In fact, the Seventh Circuit's restriction fails the first and most basic test: consistency with the holding of the decision it is meant to implement. One of the two "supervisors," to whom the Court in Faragher applied the vicarious liability rule, Marine Safety lieutenant (later captain) David Silverman, did not possess any of the personnel powers the Seventh Circuit rule has held indispensable. Rather, Silverman was "responsible for making [the plaintiff and other lifeguards'] daily assignments, and for supervising their work and fitness training.".

The particular employer-conferred authority Silverman threatened to abuse, his power to assign the plaintiff undesirable tasks, like "clean[ing] the toilets for a year," unless she agreed to "[d]ate [him]," Faragher. 524 U.S. at 780, appears nowhere on the Seventh Circuit's enumerated list of "true supervisor" powers, Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1033 (7th Cir. 1998). Indeed, those courts adopting the Seventh Circuit's rule have held, as a matter of law, that such power over the victim's work life does not make a harasser a supervisor for purposes of the Faragher and Ellerth liability regime. See, e.g., Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 (8th Cir. 2004) (holding that the harasser was not a supervisor "[a]lthough [the harasser] had the authority * * * to assign [the plaintiff] to particular tasks"); cf. Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (professing confusion as to "how the authority to assign unpleasant work activities, as opposed to desirable ones, operates to enhance a supervisory employee's

capacity to sexually harass subordinate"). The principal power this Court cited for characterizing Bill Terry, the other harasser in Faragher, as a "supervisor" was the power "to hire new lifeguards (subject to the approval of higher management)." 524 U.S. at 781 (emphasis added). This power too falls on the wrong side of the Seventh Circuit's line. See Weyers 359 F.3d at 1057 (holding that a harasser whose evaluations led to his victim's firing was a co-worker because "[he] himself did not have the authority to take tangible employment action against [the plaintiff]"); accord Ceisel Masonry, 594 F. Supp. 2d at 1025 (holding that harassers are not supervisors when "ultimate [decisions] * * * are entrusted to a higher level manager"). This Court's careful formulation of the vicarious liability rule as applicable to "an actionable hostile environment created by a supervisor with immediate (or successivey higher) authority over the [victim]," Faragher, 524 U.S. at 807 (emphasis added); Ellerth, 524 U.S. at 765 (emphasis added), refutes the Seventh Circuit's premise that harassment by high- level management is the rule's primary or sole concern.

2. Faragher and Ellerth did identify a subset of high-ranking supervisors whose actions should be subject to a distinct Title VII liability rule. A "supervisor," the Court recognized, may "hold a sufficiently high position 'in the management hierarchy of the company'" that under ordinary agency principles "his actions [should] be imputed automatically to the employer." Faragher, 524 U.S. at 789-790 (quoting Torres v. Pisano, 116 F.3d 625, 634- 635 & n.11 (2d Cir. 1997)). In these cases, the employer is directly, not vicariously, liable on the theory that these high-level managers are the employer's "proxy," id. at 789, or "alter ego," Ellerth, 524 U.S. at 758 (citing Restatement (Second) of Agency § 219(2)(a) (1957). Tellingly, the Seventh Circuit used this entirely distinct line of authority, addressing the "class of an employer['s] * * * officials who may be treated as [its] organization's proxy," Faragher, 524 U.S. at 789, to derive the particular "essential attributes of a supervisor for purposes of a claim of hostile environment sexual harassment under Title VII," Parkins, 163 F.3d at 1033 & n.1. Thus Parkins cited Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993), which explained that an "'individual * * * [who] serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment' * * * operates as the alter ego of the employer," id. at 1125 (quoting

Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), aff'd in pertinent part, 900 F.2d 27 (1990) (en banc)), and reasoned that since, "as county attorney, [the harasser] had the ultimate authority over [plaintiff's] employment and working conditions[,] * * * plaintiff's claim of a hostile work environment caused by [his] conduct is a claim against Salt Lake County itself," ibid. (emphasis added). Parkins also cited two other cases, Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796, 803 (6th Cir. 1994), and Haynes v. Williams, 88 F.3d 898, 899 (10th Cir. 1996), that rest on the "alter ego" theory of direct employer liability.

Having extensively highlighted the legal positions and contrasted the same vide the case studies above moreso the 7th Circuit's decisions, the Petitioner implores this Court to be pleased to grant the writ sought.

V. REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve a conflict regarding the threshold and applicability of Rule 12(b)(6) and further the vicarious liability that attaches on supervisor's malfeasances on the employer.

CONCLUSION AND PRAYER FOR RELIEF

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

Ellen Xia

Pro se Petitioner