Responding to the Justices’ hypos in Vance
LL&V §K-O // Prof. Garet // Fall, 2016

Left circle: Plaintiff Maetta Vance proposes that the Court adopt a standard: someone counts as a supervisor for Title VII purposes when he or she has the power to hire or fire the plaintiff, etc., OR if his or her power over plaintiff’s working conditions or work assignments materially assists or augments his or her harassment of the plaintiff.

Right circle: Plaintiff Maetta Vance proposes that the purpose of Title VII is to prevent the coercive economic power of the employment relationship from reinforcing or perpetuating racial and gender hierarchy and subordination.

At oral argument, Roberts and Alito pose a series of hypos. When does someone’s power to choose the music, control the thermostat, assign plaintiff to an office that has no air conditioning, make the plaintiff chop onions all day, make the plaintiff clean the toilets, etc., suffice to qualify him or her as plaintiff’s supervisor? These Justices are concerned that plaintiff’s proposed standard resists consistent, predictable application, and is expensive to administer because it requires case-specific fact-intensive application.

Plaintiff’s best response to these hypos and to the concern that motivates the hypos may be along the following lines: In light of the purposes behind Title VII and behind the doctrinal (judge-made) distinction between supervisors and mere co-workers, the advantages of the proposed standard outweigh its disadvantages.

1. In the music hypo, the senior employee picks the music that plays all day long in the workroom where five people work. So the threat’s coercive pressure is more self-limiting than in Faragher, the toilet-cleaning case. It is less likely to materially assist harassment.

2. In the hypo about assigning the target of harassment to the office that has no heating or air conditioning: whether the power to make this threat is sufficiently coercive to materially assist the harassment depends in part on climate. Is the workplace in LA? DC in the summer? Twin Cities in the winter? This kind of fact-specific inquiry is doable and is an appropriate way to get at what Title VII cares about: the abuse of workplace power to subordinate people on the basis of race or sex.

3. Even if the Seventh Circuit’s rule is less expensive to administer, it doesn’t eliminate the fact-intensiveness of adjudication (due to the negligence standard), and it is underinclusive in relation to the purpose of Title VII and of the supervisor/co-worker doctrine.