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## Supervisors in a World of Flat Hierarchies

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## Articles

### Special Issue on Circuit Splits

# Supervisors in a World of Flat Hierarchies

CATHERINE L. FISK\*

*Under the National Labor Relations Act (“NLRA”), employees who are supervisors do not have the rights to join or assist labor unions or engage in other concerted activities for mutual aid and protection. The federal courts and the National Labor Relations Board (“NLRB”) have longstanding disagreements between and among them over how much authority over what types of working conditions is necessary to render one a supervisor. Recent cases reach conflicting results over issues such as whether nurses who can report co-workers for disciplinary infractions or can direct other employees to perform certain tasks are statutory supervisors who exercise independent judgment. The Supreme Court has twice rejected the NLRB’s efforts to clarify the law by narrowing the breadth of vague statutory terms defining supervisors. Because the statutory language invites the meaning of supervisor to be fact dependent and tethered closely to the policy bases for protecting employees’ rights to unionize and for excluding supervisors from the protection of those rights, deference to the Board’s judgment in line drawing is important. As the Supreme Court prepares to resolve a circuit split over the definition of supervisor under Title VII, it is particularly important to remember that, although the NLRB and the Equal Employment Opportunity Commission (“EEOC”) have adopted similar tests under the two different statutes, the policies underlying the legal definition of supervisor are dramatically different and call for a broad definition of supervisor for Title VII and a narrow definition of supervisor under the NLRA.*

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## INTRODUCTION

In the contemporary workplace, the definition of which employees should be deemed supervisors under law is both important and uncertain. It is important because many employment and labor laws treat supervisors differently than other employees. Under some statutes, such as the National Labor Relations Act (“NLRA” or the “Act”), supervisors are not protected.<sup>1</sup> Under other statutes, such as Title VII of the Civil Rights Act of 1964, the actions of a supervisor can create vicarious liability for the employer more readily than the actions of a nonsupervisory employee.<sup>2</sup> The uncertainty surrounding who meets the legal test for a supervisor stems both from law and from an evolution in personnel practice. The law will be explained below. The personnel practices that make the law interesting and difficult may be familiar to anyone who looks carefully at the service economy workplace. If you visit a nursing home or many of the food or retail stores in a huge shopping mall, you’ll find hundreds of employees but few real managers. A nursing home may have a staff of 100 working in three shifts around the clock. Of those, there will be perhaps five or ten clear supervisors (the director of nursing, the assistant director of nursing, and some others). Then there may be forty licensed practical nurses (“LPNs”), forty nursing assistants, or others who clearly are not supervisors. Because the clearly supervisory employees are not on the premises at all times, it is quite possible that at some times there will be no one around who is clearly a supervisor. When the Director of Nursing is not on the premises, are all the LPNs and nursing assistants working without a supervisor? Or are the LPNs all supervisors?

As a legal issue, the question of who is a supervisor is interesting in a number of circumstances. Under the NLRA, a worker who meets the statutory definition of “supervisor” does not enjoy the rights to form, join, or assist labor unions, to bargain collectively over terms of employment, or to engage in other concerted activities for mutual aid and protection.<sup>3</sup> She

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1. 29 U.S.C. § 152(11) (2012).

2. 42 U.S.C. § 2000e (2012). *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1997).

3. *See* 29 U.S.C. § 152(3) (defining employee with rights under the NLRA); *id.* § 157 (defining rights of employees under the NLRA).

can be fired for engaging in the kind of activity that the statute protects. Moreover, if a worker is deemed to be a supervisor, she is not entitled to vote on whether a workplace should be unionized and, indeed, her involvement in efforts to form a union may be itself an unfair labor practice or grounds for setting aside an election.<sup>4</sup> Supervisors can join unions, of course: The powerful Directors Guild of America, which represents directors, first and second directors, and some other production supervisors in film and television, is a union—but they must rely only on market power, and not law, to protect their rights to unionize and bargain.<sup>5</sup>

In a union-organizing campaign, both the employer and the union have incentives to be strategic about whether to deem particular workers to be supervisors. For example, if a worker encourages coworkers to support the union, the employer could later argue that the worker was a supervisor and that her encouragement constituted unlawful coercion that should invalidate the union's election win.<sup>6</sup> If a particular employee's vote on a union election is crucial to the margin of victory, whoever lost the election has an incentive to argue that the tie-breaking voter was a supervisor in order to change the outcome.<sup>7</sup> Yet as a general matter, employers tend to prefer that employees who are arguably supervisors be declared as such under the NLRA because that way they have fewer rights against wrongful discharge. And, as a general matter, the National Labor Relations Board ("NLRB" or the "Board") tends to find fewer employees to be supervisors than employers would prefer—perhaps because of the Board's perceived pro-labor orientation.

As interpreted by the courts and the NLRB, an employee is a supervisor under section 2(11) of the NLRA if she exercises authority (1) to engage in one or more of twelve enumerated supervisory job functions (including, obviously, the power to hire, fire, discipline, promote and demote and, less obviously, the power to "assign," "responsibly to direct," or "effectively to recommend" any of the twelve actions); (2) "in the interest of the employer"; and (3) in a manner that is "not merely . . .

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4. See, e.g., *NLRB v. J.S. Carambola, LLP*, 457 F. App'x 145 (3d Cir. 2012). In *J.S. Carambola*, the employer urged that the union election victory should be set aside because an alleged supervisor urged coworkers to vote for the union. *Id.* at 147. The NLRB then argued that the employee was not a supervisor within the meaning of the statute. *Id.*

5. *Directors Guild of Am.*, 198 N.L.R.B. 707, 725 (1972) (finding the Directors Guild of America to be a labor organization within the meaning of the NLRA notwithstanding that its members were supervisors).

6. See, e.g., *J.S. Carambola*, 457 F. App'x at 147–48. But see *NLRB v. Special Touch Home Care Servs., Inc.*, 566 F.3d 292, 301–02 (2d Cir. 2009) (finding that interrogators of union supporters were agents of the employer and that the coercive nature of the interrogations made it immaterial whether they were technically supervisors).

7. See, e.g., *Alois Box Co. v. NLRB*, 216 F.3d 69, 71–73 (D.C. Cir. 2000) (finding that the union won a majority of ballots cast by eligible voters in a close union representation election during which the union and the company were arguing that different employees were supervisors ineligible to vote).

routine or clerical” but that “requires the use of independent judgment.”<sup>8</sup> The controversy in the law is not whether this is the test for a supervisor; the controversy is over the meaning of these three elements. Within and among the federal courts—and between the courts and the NLRB—there has been an intensely fact-specific debate over what sorts of circumstances establish that a particular employee is a statutory supervisor, and particularly over when an employee exercises enough authority with enough discretion to be a supervisor. This is a fight over how law should be applied to facts; it is not really a circuit split in the conventional sense.

Whether an employee is a supervisor also matters under Title VII of the Civil Rights Act of 1964. When a supervisor engages in harassing or other discriminatory conduct prohibited by Title VII, the employer will be liable unless it can establish as an affirmative defense that it had a reasonable and effective antidiscrimination policy which the victim unreasonably failed to use.<sup>9</sup> But if a nonsupervisory employee engages in the same behavior, the employer will be liable only if the victim can prove that the employer was negligent in failing to prevent or stop it; that is, the employer knew or should have known about the conduct and failed to address it.<sup>10</sup>

The circuits have clearly split on who constitutes a supervisor under Title VII, with the Seventh and Eighth Circuits having taken a relatively extreme position that only those who have the actual power to hire, fire, demote, transfer, and discipline workers are supervisors,<sup>11</sup> and other circuits having accepted the Equal Employment Opportunity Commission’s (“EEOC”) position that a Title VII supervisor includes one who has the authority to direct another employee’s daily activities, workload, or tasks.<sup>12</sup> The EEOC has issued guidance (it does not have rulemaking authority under Title VII) providing that an individual is a

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8. The statute defines a supervisor as an 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.

29 U.S.C. § 152(11).

9. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1997).

10. See *Ellerth*, 524 U.S. at 759, 765.

11. See *Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011), *cert. granted*, 133 S. Ct. 23 (2012). In *Vance*, the panel, while noting that the law of its circuit is more restrictive than in other circuits, stated that a supervisor is one “with power to *directly* affect the terms and conditions of the plaintiff’s employment,” including “the power to hire, fire, demote, promote, transfer, or discipline an employee,” but not the power “to direct an employee’s daily activities.” *Id.* at 470. See generally *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 684 (8th Cir. 2012); *Rhodes v. Ill. Dep’t of Transp.*, 359 F.3d 498 (7th Cir. 2004).

12. See, e.g., *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122–28 (2d Cir. 2003).

supervisor if she “has authority to undertake or recommend tangible employment decisions affecting the employee” or “authority to direct the employee’s daily work activities.”<sup>13</sup> The Supreme Court has taken a case to resolve this circuit split, but the oral argument revealed the difficulty of developing a rule that avoids the kind of factual line-drawing problems that have persisted in the NLRA context.<sup>14</sup> The experience of the federal courts with the frequently litigated issue of supervisory status under Title VII offers some lessons for courts considering the supervisor issue under the NLRA.

This Essay was written in response to an invitation from the *Hastings Law Journal* to write on the NLRA supervisor question for its special issue dedicated to circuit splits. Part I addresses the question whether there is a circuit split on this issue. Part II briefly examines the evolution of the definition of supervisor under the NLRA and under Title VII of the Civil Rights Act of 1964. Although, for reasons given below, I conclude that there is not really a circuit split on the definition of supervisor under the NLRA and, to the extent there is, the Supreme Court is unlikely to resolve it, the question nevertheless merits discussion in this circuit split symposium. The interesting question for Supreme Court watchers, it seems to me, is a comparison between the test for supervisor under the NLRA and the test for supervisor under Title VII. It is that comparison that I will address in Parts III and IV below. In Part III, I argue that the designation of supervisor has different legal significance under Title VII and the NLRA and the policies advanced by treating supervisors differently than employees are also different. In Part IV, I argue that if the Court adopts a narrow definition of supervisor under Title VII in *Vance v. Ball State*, its decision will likely have little bearing on the definition of supervisor under the NLRA. The narrow definition of supervisory status urged by the employer—Ball State—and its business group amici in the Supreme Court is inconsistent with the language and purpose of Title VII, just as the broad definition urged by employers and adopted by the Board is inconsistent with the language and purpose of the NLRA. In other words, several federal courts have it exactly backwards. In order to protect employees from workplace discrimination, a broad range of employees should be supervisors within the meaning of Title VII. But in order to protect the rights of employees to bargain collectively, a narrow range of employees should be supervisors.

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13. See EEOC, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

14. See *Vance*, 646 F.3d at 470.

### I. IS THERE A CIRCUIT SPLIT?

In 2006, the Board decided a trio of cases articulating a new approach to defining supervisors.<sup>15</sup> Since then, while some panels of some courts of appeals have rejected NLRB determinations about supervisory status on particular facts, the law on the formulation of the three-part test for a supervisor under the NLRA has appeared to have settled. Only two of the three parts of the NLRA test for supervisor are seriously contested in any case—whether the employee possesses supervisory authority and whether she uses independent judgment in exercising that authority. The third element—that the employee exercise supervisory authority in the “interest of the employer”—is generally met in every case because it is rare that a putative supervisory employee’s activities are not undertaken in the interest of the employer, at least as the Supreme Court has defined the terms since 1994.<sup>16</sup>

For the first prong—whether the employee possesses one of the twelve enumerated types of authority—the major points of controversy have been over (a) whether an employee has the power to “assign” another to do tasks; (b) whether an employee has the power “responsibly to direct” others; and (c) what to do with employees who sometimes have the power to assign and direct and sometimes do not.<sup>17</sup> To assign means to designate an employee to a place or time (such as a shift assignment) or to give significant overall duties.<sup>18</sup> A supervisor “responsibly directs” another if the supervisor will be held accountable for the other’s performance.<sup>19</sup> “An individual who is ‘engaged part of the time as a supervisor and the rest of the time as a unit employee’ will be considered a supervisor if she spends ‘a regular and substantial portion’ of her work time performing supervisor functions.”<sup>20</sup> A “regular” part of time means “according to a pattern or schedule, as opposed to sporadic substitution.”<sup>21</sup>

For the second prong—whether the authority involves the kind of discretion that requires “independent judgment” or whether it is “merely

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15. See *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006).

16. In the 1980s, as professionals in the healthcare fields began joining unions, the Board began to emphasize the significance of the “interest of the employer” prong in order to distinguish between employees who exercised authority to direct others because of professional norms or licensing requirements and those who exercised such authority because their employer had delegated personnel powers to them. See Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?*, in *LABOR LAW STORIES* 353, 366–68 (Laura Cooper & Catherine Fisk eds., 2005). The Supreme Court rejected the Board’s interpretation of the “in the interest of the employer” prong in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

17. KENNETH DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 180–81 (2009).

18. *Golden Crest Healthcare*, 348 N.L.R.B. 727; *Croft Metals*, 348 N.L.R.B. 717; *Oakwood Healthcare*, 348 N.L.R.B. 686.

19. DAU-SCHMIDT ET AL., *supra* note 17, at 180–81.

20. *Id.*

21. *Id.*

routine or clerical” (such as the power one employee has to ask another to do something and to report her for discipline if her request is ignored or refused)—the controversy has primarily involved the degree of power, discretion, and judgment an employee is permitted to exercise when asking a coworker to do something. Under the Board’s 2006 rule, independent judgment is determined by the *degree* of discretion, not the kind of discretion.<sup>22</sup>

The question whether there is a split among the circuits on the NLRA supervisor is complicated by the fact that the circuits are supposed to grant deference to the decisions of the NLRB. The NLRA vests responsibility in the NLRB to interpret and enforce the statute both through rulemaking and through adjudication.<sup>23</sup> Like many other federal agencies created during the New Deal and since, NLRB adjudication decisions are subject to judicial review by either a party filing a petition for review in a federal court of appeal or by the agency seeking enforcement of its order (NLRB orders are not self-enforcing).<sup>24</sup> The courts of appeals review NLRB decisions under the well-established substantial evidence standard applicable to most administrative agency adjudications. The court is to uphold the agency’s interpretation of the statute if it is reasonable and the agency’s findings of fact and its decision based on those findings are supported by “substantial evidence on the record considered as a whole.”<sup>25</sup> The Supreme Court often says that courts should grant deference to the Board and to give the Board “a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act’s application.”<sup>26</sup> On the other hand, the Supreme Court at times ignores the Board’s interpretation of the very same sections of the Act, even where it might seem that the Board’s expertise in labor relations might be implicated.<sup>27</sup>

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22. See *Oakwood*, 348 N.L.R.B. at 692–93.

23. 29 U.S.C. § 154 (2012). Unlike many other administrative agencies, the NLRB rarely exercises its rulemaking power; it has chosen to exercise its quasi-legislative power to interpret the statute mainly by deciding particular cases.

24. *Id.* § 160(e).

25. *Id.*; see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (describing the substantial evidence standard).

26. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 89–90, 95–98 (1995) (upholding the Board’s interpretation of the definition of employee covered by the Act in a case involving the question of whether union organizers are employees); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (upholding the Board’s interpretation of the definition of employee covered by the Act in deciding whether undocumented workers are employees).

27. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721–22 (2001) (rejecting the Board’s interpretation of the scope of the supervisor exception); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539–41 (1992) (rejecting the Board’s decision that union organizers have rights to communicate with employees on company premises because, in the majority’s view, the statute unambiguously does not provide such rights).



In every circuit but the Fourth, at least one decision has upheld the Board's determination of supervisory status as supported by substantial evidence since 1997, and most circuit courts of appeals have affirmed the Board on this issue since 2005.<sup>28</sup> While there is no obvious circuit split, there remains inconsistency within circuits about when panels will find Board determinations of nonsupervisory status to be supported by substantial evidence.<sup>29</sup> If one digs deeply into the facts of particular cases, one can find inconsistencies, both within and among circuits and between the Board and some circuits about when an employee's authority to ask another to do something makes her a supervisor. For example, one D.C. Circuit decision upheld the Board's determination that registered nurses in a nursing home were not supervisors, notwithstanding that they could "write up" coworkers and provide "performance evaluations" of them, because they "had no negative effects on the reviewed employees' job status or pay."<sup>30</sup> In contrast, the Eleventh Circuit rejected the Board's determination that LPNs in a nursing home were not supervisors, finding that the authority of the LPNs to fill out "coaching forms" was not "merely reportorial," and therefore the LPNs were supervisors.<sup>31</sup>

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28. See *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 316 (6th Cir. 2012) (upholding the Board's determination that charge nurses were not supervisors); *Rochelle Waste Disposal, L.L.C. v. NLRB*, 673 F.3d 587, 589 (7th Cir. 2012) (upholding the Board's determination that a "landfill supervisor" was not a supervisor); *735 Putnam Pike Operations, L.L.C. v. NLRB*, 474 F. App'x 782, 782-83 (D.C. Cir. 2012) (upholding the Board's determination that RNs and charge nurses were not supervisors); *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853-54 (3d Cir. 2011) (upholding the Board's determination that resident assistants were not supervisors); *NLRB v. Saint Mary Home*, 358 F. App'x 255, 257-58 (2d Cir. 2009) (upholding the Board's determination that charge nurses were not supervisors); *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257-58 (5th Cir. 2007) (upholding the Board's determination that a maintenance employee was not supervisor); *NLRB v. St. Clair Die Casting*, 423 F.3d 843, 845 (8th Cir. 2005) (upholding the Board's determination that set-up specialists were not supervisors); *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1073 (10th Cir. 2005) (upholding the Board's determination that public utility revenue protection workers were not supervisors); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1260 (11th Cir. 1999) (upholding the Board's determination that docking pilots were not supervisors); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 147-48 (1st Cir. 1999) (upholding the Board's determination that district and charge nurses were not supervisors); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 550 (9th Cir. 1997) (upholding the Board's determination that RNs employed as charge nurses were not supervisors).

29. In contrast to the cases cited *supra* in note 28, several cases have rejected Board determinations of supervisory status. See *Lakeland Health Care Assocs., L.L.C. v. NLRB*, 696 F.3d 1332, 1334 (11th Cir. 2012) (rejecting the Board's determination that LPNs were not supervisors); *Jochims v. NLRB*, 480 F.3d 1161, 1163-64 (D.C. Cir. 2007) (rejecting the Board's determination that an RN was a supervisor); *Extendicare Health Servs., Inc. v. NLRB*, 182 F. App'x 412, 413 (6th Cir. 2006) (rejecting the Board's determination that floor nurses were not supervisors); *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333, 334-35 (4th Cir. 1998) (rejecting the Board's determination that RNs and LPNs were not supervisors); *Schnuck Mkts. v. NLRB*, 961 F.2d 700, 703-07 (8th Cir. 1992) (rejecting the Board's determination that an employee was a supervisor). Typically, these cases and those upholding Board determinations of supervisory status either do not cite cases from the same circuit reaching the opposite conclusion about whether to uphold the Board or simply distinguish the other case on the facts.

30. *735 Putnam Pike Operations*, 474 F. App'x at 783.

31. *Lakeland Health Care Assocs.*, 696 F.3d at 1340.

If the crucial element of being a supervisor is the power to choose whether to report misconduct that may lead to discipline against another worker, in many bureaucratic workplaces, a large number of employees are possibly supervisors. A Sixth Circuit opinion rejecting the Board's determination that nurses were not supervisors illustrates the possibilities. The issue was whether the nurses were supervisors because they could initiate a disciplinary process by "writing up" coworkers.<sup>32</sup> The court of appeals explained:

The nurses decide independently whether a nursing assistant's misconduct is severe enough to warrant disciplinary proceedings. . . .

. . . [A] floor nurse's completion of a disciplinary action report initiates formal disciplinary proceedings against a nursing assistant. By making such a report, therefore, a nurse plays an effective part in the disciplinary process.<sup>33</sup>

Many employees work in environments in which they are encouraged or allowed to report misconduct by coworkers. Employees always have a choice about whether to make a report, and most are probably encouraged to exercise judgment in deciding whether the misconduct is sufficiently serious or occurs often enough to be worth reporting. In most workplaces with such a process, the making of such a report is the first step in a process that can result in discipline, at least if the person who reviews the report decides to do something about it. This gives the Board and reviewing courts latitude to emphasize some facts over others in deeming a worker a supervisor. When a court disagrees with the Board's decision, it is often "difficult to discern whether the circuit court has applied a different standard for § 2(11) status, or merely decided that the Board's factfinding was unsupported by substantial evidence, the standard for appellate review."<sup>34</sup>

The challenge is discerning when an employee who has the power to ask another to perform a task has the power to "assign" or "responsibly to direct" and therefore is a supervisor. The Board explained the problem this way:

[I]f a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to "assign" for purposes of Section 2(11) refers to the charge nurse's designation of significant overall duties to an employee, not to the charge nurse's ad hoc instruction that the employee perform a discrete task.<sup>35</sup>

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32. See *Extencicare Health Servs.*, 182 F. App'x at 416–17.

33. *Id.* at 417.

34. Weiss, *supra* note 16, at 365.

35. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (2006).

A similar problem exists in deciding when an employee's authority "responsibly to direct" makes her a supervisor. In its 2006 *Oakwood Healthcare* decision, the Board held that "responsible" direction exists only when the putative supervisor will herself face discipline or other adverse consequences if the employee refuses to perform the directed task or performs it poorly.<sup>36</sup>

Finally, on the "independent judgment" prong, the Board had to revise the approach it had taken that the Supreme Court rejected in *Kentucky River*. In that case, the Board had held that a staff nurse's authority to direct less-skilled coworkers such as LPNs, technicians, and nursing assistants to perform tasks did not make her a supervisor if the only judgment she exercised in exerting her authority was dictating by professional training (what any responsible nurse would do) rather than from power delegated by her employer.<sup>37</sup> In *Kentucky River*, the Supreme Court rejected this approach as lacking any statutory basis.<sup>38</sup> So the Board in *Oakwood* revised its approach, concluding that "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."<sup>39</sup> In applying this standard to the health setting, the Board offered the example that "a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio."<sup>40</sup>

In the late 1990s, some perceived a circuit split to exist on the degree of deference that courts of appeals should afford NLRB determinations of supervisory status. All agree on the test, that the standard of review is substantial evidence, and that the Supreme Court settled in 2001 that the burden is on the party asserting an employee is a supervisor to prove it.<sup>41</sup> The Eighth Circuit in 1992 said that careful scrutiny of the Board's determination of supervisory status was appropriate,<sup>42</sup> and the Fourth Circuit has similarly insisted that "courts must carefully scrutinize the Board's finding and the record on supervisory status" because "manifest" inconsistency in how the Board applies the test has displayed

an institutional or policy bias on the part of the Board's employees as illustrated by a practice of adopting that definition of supervisor that most widens the coverage of the Act, the definition that maximizes

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36. *Id.* at 695.

37. *See generally* NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001).

38. *See id.* at 714.

39. 348 N.L.R.B. at 693.

40. *Id.*

41. *See Ky. River*, 532 U.S. at 711.

42. *Schnuck Mkts. v. NLRB*, 961 F.2d 700, 703-07 (8th Cir. 1992) (overturning the Board's finding that an employee was a supervisor).

both the number of unfair labor practice findings it makes and the number of unions it certifies.<sup>43</sup>

In contrast, the Ninth, Eleventh, and D.C. Circuits have insisted on the importance of deference to the Board's expertise in weighing relevant facts and making determinations of supervisory status.<sup>44</sup> Yet the Eighth Circuit has upheld the Board's determination of supervisory status, stating that whether "a particular employee is a supervisor is a factual question within the Board's special expertise, and its findings regarding supervisory status will be upheld as long as they are supported by substantial evidence on the record as a whole."<sup>45</sup>

## II. HISTORICAL OVERVIEW

As originally enacted, the NLRA did not exempt supervisors. The statute covered all employees and defined employee broadly and circularly, in § 2(3), as "any employee."<sup>46</sup> In 1947, the Supreme Court held that supervisors were included in the definition of "employee" as used in section 2(3) of the NLRA.<sup>47</sup> Congress amended the NLRA that same year, adding § 2(11) to specifically exclude supervisors from the Act's definition of "employee."<sup>48</sup> According to the Board's recent account of the history and evolution of the supervisor exclusion, the drafters of the supervisor exclusion

agreed that the definition sought to distinguish two classes of workers: true supervisors vested with "genuine management prerogatives," and employees such as "straw bosses, lead men, and set-up men" who are protected by the Act even though they perform "minor supervisory duties." Thus, the dividing line between these two classes of workers, for purposes of Section 2(11), is whether the putative supervisor exercises "genuine management prerogatives."<sup>49</sup>

The evolution of the Board's interpretation of the § 2(11) exclusion and its reception in the federal courts of appeals and the Supreme Court has been traced quite ably by others, so I do not repeat it here.<sup>50</sup> The

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43. *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333, 338 (4th Cir. 1998) (internal quotation marks omitted) (quoting *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982)).

44. *See Alois Box Co. v. NLRB*, 216 F.3d 69, 71–73 (D.C. Cir. 2000) (upholding the Board's determination that a maintenance man was a supervisor); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1260, 1262 n.3 (11th Cir. 1999) (noting the circuit split and upholding the Board's determination that docking pilots were not supervisors); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 550 (9th Cir. 1997) (upholding the Board's determination that RNs employed as charge nurses were not supervisors).

45. *NLRB v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843, 848–49 (8th Cir. 2005).

46. *See* 29 U.S.C. § 152(3) (1935).

47. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488–92 (1947).

48. 29 U.S.C. § 152(11) (2012).

49. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 687–88 (2006) (footnote omitted) (citation omitted) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–81 (1974)).

50. *See, e.g., Weiss, supra* note 16, at 353.

significant point, for present purposes is this: The distinction has mattered a great deal in the healthcare context, and particularly in long-term care facilities where union-organizing activities have been vigorous, employer opposition has been equally vigorous, and the Board has taken various approaches to crafting a rule that allows a significant number of staff nurses to retain the right to unionize notwithstanding the fact that the job of a nurse does involve some authority to direct less-skilled workers to perform particular tasks.

The Supreme Court twice rejected as unreasonable the NLRB's interpretation of the § 2(11) test for supervisor, both in cases involving whether nurses working in nursing homes were supervisors. In 1994 it rejected how the Board analyzed the "in the interest of the employer" prong,<sup>51</sup> and in 2001 it rejected the Board's approach to the "independent judgment" prong.<sup>52</sup> Both were 5-4 decisions that split along the conservative-liberal line that so often divides the Court, and a conservative majority in both rejected a Board rule that would have found comparatively fewer employees to be supervisors than under the rule advocated by business groups in both cases.<sup>53</sup> The Board responded to the Court's 2001 rejection of its rule by articulating a new approach in its 2006 decision in *Oakwood Healthcare*. Since then, while there are some differences of opinion between and among circuits and Board members, the differences of opinion about labor law and policy are difficult to distinguish from fine-grained factual distinctions about whether this or that nurse or maintenance employee has the power to tell coworkers what to do or to report them make an error.

The origins and existence of the circuit split on the definition of supervisor under Title VII, however, are much clearer. Title VII prohibits discrimination by employers and their "agents."<sup>54</sup> Until the statute was read to prohibit sexual harassment in the 1980s, there was rarely the occasion to litigate who was an agent of the employer because whoever decided not to hire or promote or to fire or discipline an employee on the basis of race, religion, sex, or national origin was clearly an agent of the employer. In claims involving harassment, however, employers raised the idea that the harasser was acting on his own behalf and was not authorized by management to engage in this form of discrimination and, therefore, was not an agent of the employer. In 1998, the Supreme Court held that a

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51. See *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571 (1994).

52. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001).

53. *Health Care & Retirement* was written by Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. See 511 U.S. at 572. Justice Ginsburg dissented, joined by Justices Blackmun, Stevens, and Souter. See *id.* at 584. *Kentucky River* was written by Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. See 532 U.S. at 707-08. Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. See *id.* at 722.

54. 42 U.S.C. § 2000e(b) (2012).

harasser was an “agent” of the employer (and thus the employer was liable for the harassment) if the harasser was a supervisor such that the harassment was aided “by the existence of the agency relation.”<sup>55</sup> The Supreme Court explained, “When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor.”<sup>56</sup> In that case, the harasser held the title of “lifeguard captain” and made daily work assignments, but he did not have the authority to hire, fire, promote, or demote the plaintiff.<sup>57</sup>

Because employer liability turns on whether the harasser was a coworker or a supervisor, employers predictably argued for a rule that declares relatively fewer workers to be supervisors under Title VII and limits supervisors to those who hire and fire. In a large company, of course, that would mean that few outside the ranks of senior management or the HR office would be supervisors and, therefore, plaintiffs could only prevail in harassment cases if they could prove the company was negligent in failing to prevent or stop harassment. Employers got the rule they wanted in the Seventh and Eighth Circuits, but not from the EEOC, which issued an Enforcement Guidance in 1999 that resembles the NLRB rule, in declaring supervisors to include those who assign daily tasks and those who recommend personnel actions.<sup>58</sup>

### III. HOW THE SPLIT SHOULD BE RESOLVED

The fundamental question confronting any court or agency deciding how to define the term “supervisor” is how much authority over what types of working conditions is necessary to render one a supervisor. On the surface, the EEOC definition and the NLRB definition are somewhat similar. Both focus on the existence of actual authority to direct another employee’s daily activities, workload, or tasks. While the EEOC definition is appropriate given the policy underlying Title VII to eliminate discrimination, the test is too broad under the NLRA. In its most recent decision on the meaning of supervisor under the NLRA, the Supreme Court recognized that the Board properly relied on evidence that the 1947 amendment that exempted supervisors was intended to exempt only “true supervisors” possessing “genuine management authority” and not “minor supervisors,” and that such a labor policy was an appropriate one for the Board to pursue “without our constant second-guessing.”<sup>59</sup> The challenge, the Court pointed out, is the statutory language, which broadly includes anyone who exercises any one of the twelve enumerated supervisory powers and is not entirely clear about

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55. *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998).

56. *Id.*

57. *Id.* at 781.

58. See EEOC, *supra* note 13.

59. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 720 (2001).

when such powers involve “independent judgment” or are “merely routine or clerical.”<sup>60</sup>

If the Court were to return to the NLRA definition of supervisor a third time, it would likely address the only prong of the test that it has not yet interpreted: the meaning of the list of the twelve supervisory functions and, in particular, the meaning of the three most frequently litigated functions (that is, to “discipline,” to “assign,” and “responsibly to direct”). To the extent that some panels or some circuits have held that some employees are supervisors because they have the power to report coworkers and such reports initiate a disciplinary process if acted upon by a superior, they have interpreted the statute incorrectly. None of the enumerated supervisory tasks in § 2(11) include “report” or “evaluate.”<sup>61</sup> A putative supervisor’s power to report a coworker’s conduct is supervisory under the statute, therefore, only if it is a form of “discipline.” To read “discipline” to include “report violations that lead to discipline” would expand the already broad list of supervisory functions to include a power possessed by almost every employee who works with another. Moreover, if courts were routinely to conclude that the power to report is the power to discipline, then courts would also have to give another look to the “independent judgment” prong because the reporting in some of the cases could be characterized as “routine or clerical.” The same would be true of giving a broad interpretation to “assign” and “responsibly direct.” The more that those terms encompass, the more analytic work of distinguishing supervisors from others will be done by a single prong of the test: the independent judgment prong. Line drawing will not disappear, but it will focus on the meaning of independent judgment.

To the extent that the circuit split is not about the meaning of the statute but is, instead, about the degree of deference courts should give the Board’s reading of the statute or its application in particular cases, there is even less to be gained from Supreme Court review. There is no basis in the statute or in the Supreme Court’s cases on judicial review of administrative agency action to support the Fourth Circuit’s view that courts should carefully scrutinize agency decisions on supervisor status because Board staff or Members have displayed ideological bias. The alleged ideological bias is simply the Board’s policy judgment that the language and purpose of the Act require the Board to interpret the vague supervisory exclusion narrowly in order that employees enjoy the rights to unionize and to be free from retaliation.<sup>62</sup> The voluminous

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60. *Id.* at 710.

61. The twelve supervisory tasks are “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.” 29 U.S.C. § 152(11) (2012).

62. *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333, 338 (4th Cir. 1998) (quoting *NLRB v. St. Mary’s*

literature on judicial review of agency action and the Supreme Court's and federal appeals courts' well-known difficulties in maintaining a consistent approach to deference when they strenuously disagree with the agency's policy judgments show that the NLRB is certainly not alone among federal agencies in finding hostility to its policy judgments to be barely hidden in reviewing courts' determinations that its decisions are unsupported by substantial evidence or inconsistent with the enabling act.<sup>63</sup>

Although I would prefer that the Board adopt a rule finding fewer workers to be supervisors than under its current rule, the decision is the Board's to make. If the Board were to revisit its definition, however, the question is whether the supervisor definition it adopts for the NLRA should be the same or different from the one that determines employer liability for harassment under Title VII. Beyond the question of whether there are advantages of having the same definition under both statutes, there is a choice between a relatively narrower definition and a relatively broader one, and under both statutes there is some choice between a rule that is more fact dependent and one that is less so, which may be easier to apply but may be either under or overbroad.

Do different policies underlie the legal distinction between employee and supervisor in the two statutes, and should those push the law in different directions? The designation of "supervisor" has quite different legal significance under the two statutes, and the policies advanced by treating supervisors differently are also different. Supervisors are exempt from the protections of the NLRA because Congress decided employers needed to count on their undivided loyalty, and allowing supervisors to join a union with their subordinates would hamper the employer's ability to implement personnel policy.<sup>64</sup> An employer is presumptively liable (subject to an affirmative defense) for harassment committed only by supervisors because the Supreme Court decided that a victim can walk away from a coworker's harassment, but the authority an employer

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Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982)). See generally Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419 (2009) (arguing for a deferential standard of judicial review of agency rulemaking on the grounds that searching review standards, such as the D.C. Circuit's "hard look" rule, encourage politicization of judicial review by enabling judges appointed by presidents of one party to invalidate agency actions taken during presidents from the other party).

63. See generally Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012) (surveying the literature on judicial review of agency action and proposing a new method that will grant appropriate deference).

64. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). The Court held that faculty are exempt from NLRA protection by a judicially created "managerial" employee exception for the same reasons that supervisors are exempt: "To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." *Id.* at 686-88.



confers on supervisors enables them to perpetrate harassment and thus aids in the commission of the wrong.<sup>65</sup>

The purpose of excluding supervisors from the right to unionize is to ensure the undivided loyalty of those who make and enforce personnel policy. That policy should inform the scope of the supervisor exception. Experience with allowing low-level, quasi-supervisory employees in unions suggests that conflicting loyalties are not a problem. Such workers are not excluded from the rights to unionize and bargain collectively under the Railway Labor Act, which governs railroads and airlines.<sup>66</sup> Nor are supervisors excluded under many state public sector labor relations acts.<sup>67</sup> And, of course, Hollywood has muddled along since the 1930s with unionized directors, even on productions where the director is also the writer and is therefore simultaneously a unionized supervisor and a unionized employee, or where the same person is a producer, showrunner, and a writer and is therefore simultaneously a supervisor not eligible to be in an NLRB-certified union and a unionized employee. This experience is some empirical evidence for the proposition that a narrower definition of “supervisor” is appropriate under the NLRA because it does not pose the conflicts of interest that the exclusion seeks to avoid.

As to whether a fact-based test that turns on the particular circumstances in each workplace (the rule articulated by the NLRB and the EEOC) is preferable to a bright-line rule that may be either under- or over-inclusive in particular circumstances, there are good arguments that clarity and ease of application are to be preferred, so long as the rule does not undermine other statutory values. A clear and predictable rule is better than a confusing and unpredictable one, at least as long as it is a good rule. At the oral argument in *Vance v. Ball State*, some of the conservative members of the Court, especially Chief Justice Roberts and Justice Alito, pressed on the advantages of a simple rule like the Seventh Circuit’s which would not require courts to sort through the facts in “countless cases.”<sup>68</sup> In considering whether one worker’s power to assign another to a particular task could be used to harass another on the basis of a protected trait, the Justices peppered the lawyers with many hypothetical questions to explore the difficulties of deciding who is a supervisor. Is a kitchen worker a supervisor, queried Justice Breyer, because she can order a subordinate to chop onions all day?<sup>69</sup> To take an example from the

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65. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998).

66. The Railway Labor Act includes “employees or subordinate officials.” 45 U.S.C. § 181 (2012). See *Dorsey v. United Parcel Serv.*, 195 F.3d 814, 817–18 (6th Cir. 1999) (finding that assistant chief pilots were “subordinate officials”); *Carnival Air Lines, Inc.*, 24 N.M.B. 256, 260–62 (1997) (finding that in-flight supervisors were subordinate officials).

67. See *DAU-SCHMIDT ET AL.*, *supra* note 17, at 183.

68. Transcript of Oral Argument at 21–23, *Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. 2011) (question of Chief Justice Roberts posed to Deputy Solicitor General Srinivasan).

69. *Id.* at 14–15 (question of Justice Alito to counsel for Petitioner Vance).

NLRA, is a nursing home LPN a supervisor because she has authority to fill out a form reporting the misconduct of coworkers?<sup>70</sup>

But a bad, clear rule is worse than a good, complex rule. Under the NLRA, because the power to “assign” makes one a supervisor, so long as the power requires “independent judgment” rather than being “merely routine or clerical,” clarity will be difficult to achieve. Moreover, because the NLRA includes in its definition those who can “effectively recommend” any of the twelve enumerated personnel actions, it necessarily invites an inquiry into the supervisory status of one who cannot herself discipline or assign others but who can “effectively recommend” it. If clarity could be achieved, it would be achieved only by making the rule grossly overbroad. The definition of supervisor would be clear if it included one with the power to “effectively recommend” any assignment. To take Justice Breyer’s example, one who can order another to chop onions, as opposed to green peppers, all day would be a supervisor, at least so long as it requires “independent judgment” to choose between chopping one vegetable or another, or between chopping and peeling. So, presumably, would be a LPN who could allow another to leave early, or—to use the Sixth Circuit’s example—a Wal-Mart cashier who could get another cashier in trouble by reporting her failure to treat a customer with respect. This would create clarity but at the expense of the rights of millions of employees to unionize.

#### IV. WHY THE SUPREME COURT SHOULD (NOT) RESOLVE IT

Given that the Supreme Court has twice rejected the Board’s previous rules defining who is a supervisor under the NLRA, there is no reason to believe that if it took another case it would achieve the clarity and consistency that have so far eluded the courts on this issue. The disagreements within and among circuit courts—about whether the nurses at this or that nursing home who can write up coworkers are supervisors who are exercising “independent judgment” or are merely reporting—are not the stuff of which Supreme Court decisions are made. While, as noted above, it would be nice if it were possible to develop a bright-line rule that would give clarity to the law and predictability to employers and unions, the Court rejected the Board’s two prior efforts to clarify the scope of the supervisory exception by narrowing the breadth of the “independent judgment” and the “interest of employer” prongs. All that is left is the prong that lists the twelve supervisory functions. The language of § 2(11)—especially the “assign,” “responsibly direct,” and “effectively recommend” provisions—does not lend itself to narrow bright-line rules. While it would conceivably be possible to adopt a

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70. *See* *Lakeland Health Care Assocs., L.L.C. v. NLRB*, 696 F.3d 1332, 1336–43 (11th Cir. 2012); *see also* *Extencare Health Servs., Inc. v. NLRB*, 182 F. App’x 412, 416–17 (6th Cir. 2006).

bright-line rule that renders *anyone* who makes *any* assignment a supervisor, such a rule would be inconsistent with the statutory purpose of excluding only true supervisors from the right to unionize. So, unfortunately, we are left with a rule that turns on the facts.

If the oral argument is any guide to the likely outcome in *Vance*, it appears that five of the Justices are troubled by the EEOC's rule which focuses on the power to assign just like the NLRB's rule does. They were troubled by the difficulty of deciding, in the many different settings in which people work and the many different types of personnel practices that exist, whether the ability of one worker to direct another and thereby to change her working conditions renders her a supervisor whose harassment creates company liability. The Court may be leaning toward adopting the Seventh Circuit's narrow definition of supervisors precisely because many of them seemed troubled by the fact-dependent nature of the EEOC rule. Justice Kennedy said little but suggested at the end that one approach might be to adopt the Seventh Circuit's rule but to add some unspecified increased employer obligation to prevent harassment.<sup>71</sup> If they want clarity and they don't mind limiting vicarious liability (subject to the *Faragher/Ellerth* affirmative defense) to a narrow category of cases in which the harassers are those who actually hire, fire, discipline, and promote, the Court can do so because the supervisor rule is the Court's own invention, and it is not hampered by statutory language that includes as supervisors those who "assign" and "direct" others.

#### CONCLUSION

Whatever the Supreme Court decides about the definition of "supervisor" under Title VII will have no immediate impact on the definition of supervisor under the NLRA. Although the definition used by the EEOC is similar to that used by the NLRB, particularly in its focus on a supervisor being one who has the power to assign or direct the daily activities of others, the Court may reject the EEOC rule in favor of a narrower rule adopted by the Seventh Circuit, which holds that only those who hire, fire, discipline, and promote are supervisors.

If the Supreme Court rejects the EEOC's definition of supervisor under Title VII in favor of a narrower bright-line rule, it will create a world in which the same employee may be a supervisor under the NLRA (and thus without rights) and not a supervisor under Title VII (and thus someone whose harassment of coworkers is not unlawful). Employee advocates will deplore that outcome as a matter of labor and employment policy, but there is no legal reason why both statutes must have the same definition of supervisor.

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71. Transcript of Oral Argument, *supra* note 68, at 53–54.