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TENISHA O'REGGIO *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
(AC 45011)

Prescott, Seeley and Eveleigh, Js.

Syllabus

The plaintiff employee appealed from the decision of the trial court affirming the decision of the defendant Commission on Human Rights and Opportunities, which concluded that the defendant employer was not liable to the plaintiff under the Connecticut Fair Employment Practices Act (CFEPA) ((Rev. to 2015) § 46a-51) for her claim of a hostile work environment created by one of its employees, K. The commission's presiding human rights referee determined that, although K, whom the referee referred to as the plaintiff's "supervisor," had created a hostile work environment, the employer had acted promptly and reasonably under the circumstances to remedy the situation and, accordingly, was not negligent. The trial court affirmed the decision of the commission, concluding that K was required to be a "supervisor," as that term had been defined by the United States Supreme Court in *Vance* v. *Ball State University* (570 U.S. 421) for purposes of CFEPA's federal counterpart, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), in order for liability to be imputed to the employer on the basis of a supervisor theory of liability. The trial court acknowledged that the referee's decision was ambiguous as to whether K's responsibilities satisfied such definition, but it determined that a remand was unnecessary because the plaintiff's counsel had conceded that K's responsibilities did not satisfy the definition, as she was not empowered to take tangible employment actions against the plaintiff. Accordingly, the trial court concluded that the commission had properly applied the negligence standard for harassment by a coworker to the plaintiff's claim. On the plaintiff's appeal to this court, *held* that the definition of "supervisor" set forth in *Vance* was the appropriate definition for distinguishing between the coworker and supervisor theories of liability for hostile work environment claims brought under CFEPA and that the trial court properly applied the *Vance* test to the plaintiff's CFEPA claim: this court assumed, without deciding, that the framework for determining whether an employer could be held liable for the creation of a hostile work environment by its employees for purposes of claims brought under Title VII applied to claims brought under CFEPA, and, under that framework, an employer could be held strictly liable for the actions of a supervisor but could be held directly liable for the actions of a coworker only if the plaintiff could prove that the employer was negligent; moreover, although Connecticut appellate courts had not previously decided whether to adopt or to reject the *Vance* definition of "supervisor" for purposes of CFEPA claims, federal courts had applied it to CFEPA claims, and, in interpreting antidiscrimination statutes, our state courts consistently have looked to federal precedent for guidance; furthermore, our state courts have interpreted CFEPA differently than Title VII only in circumstances in which there is clear evidence of a contrary legislative intent, the plaintiff in the present case did not present any evidence to suggest that our legislature intended for the term "supervisor" to be more broadly construed than the definition used by the courts for Title VII purposes, and the mere facts that CFEPA was remedial in nature and was required to be construed to effectuate its beneficent purpose were not sufficient for this court to reject federal guidance; additionally, the plaintiff's argument that the broader definition of "supervisor" set forth in the United States Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance was better suited for CFEPA claims than the *Vance* definition was unpersuasive, as, under either definition, employers would be prompted to focus their attention on all employees, not just on decision makers, and the plaintiff had failed to address the rationales of the United States Supreme Court for rejecting the EEOC guidance and adopting the *Vance* definition, all of which this court found

compelling; accordingly, although the commission did not make a factual finding specific to whether K fell within the *Vance* definition of supervisor, because the plaintiff had conceded that K's responsibilities did not satisfy such definition and, at oral argument before this court, that she could not prove negligence on behalf of the employer as required by the coworker theory of liability, the evidence supported only one conclusion as a matter of law and a remand for further proceedings was unnecessary.

Argued October 5, 2022—officially released April 25, 2023

Procedural History

Appeal from the decision by a human rights referee for the named defendant concluding that the defendant Department of Labor was not liable to the plaintiff for her claim of a hostile work environment, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Klau*, *J.*; judgment affirming the decision, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (named defendant).

Colleen Valentine, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Michael Skold*, deputy solicitor general, for the appellee (defendant Department of Labor).

Opinion

SEELEY, J. In this appeal, we are asked to consider whether the Superior Court erred in affirming the administrative decision of the named defendant, the Commission on Human Rights and Opportunities (commission), which concluded that the defendant employer, the Department of Labor (department), was not liable to the plaintiff, Tenisha O'Reggio,[1] for the claim of a hostile work environment created by one of its employees brought under the Connecticut Fair Employment Practices Act (CFEPA), General Statutes (Rev. to 2015) § 46a-51 et seq.

The framework for determining when an employer can be held liable for a claim of the creation of a hostile work environment by its employees brought under CFEPA's federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2018) (Title VII),[2] was set out in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher* v. *Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). As summarized by the United States Supreme Court in *Vance* v. *Ball State University*, 570 U.S. 421, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013), the federal framework provides that if the employee who created the hostile work environment is the plaintiff's " 'supervisor,' " then the employer will be vicariously liable, regardless of whether the harassment resulted in a "tangible employment action," unless the employer satisfies an affirmative defense; id., 429; namely, the *Ellerth/Faragher* defense, which requires showing "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided." Id., 430. If the employee is the plaintiff's coworker, then the framework provides that the employer will be liable only if the plaintiff establishes that the employer was negligent in controlling the working conditions. Id., 424.

In the present case, the Superior Court concluded that the department was not liable because the employee who created the hostile work environment, Diane Krevolin, was not the plaintiff's "supervisor" pursuant to the definition adopted by the United States Supreme Court for Title VII purposes in *Vance* v. *Ball State University*, supra, 570 U.S. 424; that is, someone "empowered by the employer to take tangible employment actions against the [plaintiff] . . . ." Id. The court determined that because Krevolin was not a supervisor, there was consequently "no merit to the plaintiff's argument that [the commission] should have imputed liability to [the department] on the basis of a supervisor theory of liability," and because the plaintiff did not challenge the decision on any other ground, it affirmed the decision of the commission in favor of the depart-

ment.

On appeal to this court, the plaintiff asks us to conclude, contrary to the determination of the Superior Court, that the *Vance* definition of a "supervisor" for Title VII purposes does not apply to hostile work environment claims that are brought under CFEPA. She asks us, instead, to adopt a broader definition of the term for CFEPA purposes that would include employees like Krevolin who cannot "take tangible employment actions" but nonetheless control the day-to-day conditions of their subordinate's work. We conclude that the Superior Court properly determined that the *Vance* definition applies to claims brought under CFEPA, and, accordingly, we affirm the judgment of the court.

The following facts, as found by the commission's presiding human rights referee (referee), and procedural history are relevant to our resolution of this appeal. The plaintiff began working for the department in 2009. In early 2012, she was promoted to the position of an adjudicator[3] in the unemployment unit of the Bridgeport office, where she reported to Krevolin, the program services coordinator. The plaintiff is Black, and Krevolin is white. On October 21, 2016, the plaintiff filed an internal complaint with the department's human resources (HR) team alleging that, over the years, Krevolin had made several upsetting and racially biased statements to her or in her presence.[4] On October 27, 2016, the plaintiff met with HR personnel and, the following day, the department placed Krevolin on paid administrative leave so it could conduct its internal investigations. The department conducted two investigations: one by HR and one by its equal employment opportunity manager. Following the completion of the investigations and a subsequent *Loudermill* hearing,[5] the department's commissioner, weighing Krevolin's nearly forty year long career at the department with an unblemished record, issued a one day suspension to Krevolin and required her to attend diversity training.

On November 22, 2016, while the department's investigations were ongoing, the plaintiff filed a complaint with the commission against the department alleging, inter alia,[6] that the department subjected her to a hostile work environment based on her race and color in violation of General Statutes (Rev. to 2015) § 46a-60 (a) (1)[7] and General Statutes §§ 46a-58 (a)[8] and 46a-70.[9] On January 31, 2018, following an initial investigation, the commission issued a finding indicating that there was reasonable cause for believing that a discriminatory practice had been or was being committed as alleged in the complaint, after which the parties unsuccessfully attempted to conciliate the matter. The case was then certified to a public hearing before the referee, which took place over three days.[10] At the close of the hearing, the plaintiff, the department, and the commission sub-

mitted posthearing briefs. Notably, the commission urged the referee to conclude that the plaintiff had been subjected to a hostile work environment for which the department was liable. On July 10, 2020, the referee issued her final decision in which she ruled in favor of the department. The referee concluded that, although Krevolin, whom the referee referred to as the plaintiff's "supervisor," had in fact created a hostile work environment, the department acted promptly and reasonably under the circumstances to remedy the situation and, therefore, was not negligent. As a result, the referee held that the department was not liable. Thereafter, the plaintiff timely appealed the commission's decision to the Superior Court pursuant to General Statutes § 4-183.[11]

On appeal to the court, the plaintiff argued in her brief that the referee failed to apply the applicable law. She specifically argued that, because the referee concluded that the plaintiff was subjected to a hostile work environment created by her supervisor, Krevolin, the referee *was required to* impute liability to the department as a matter of law unless it proved the *Ellerth/Faragher* defense. She further argued that, because the department did not prove that defense, the referee erred in declining to find it liable.

In response, the department argued in its brief that the referee's decision should be affirmed because the *Ellerth/Faragher* defense is applicable only to instances in which the employee who created the hostile work environment was a "supervisor" as defined by *Vance*, and, although the referee in her decision referred to Krevolin as the plaintiff's supervisor, she did not make a specific finding of supervisor liability, nor could she have, because the record was clear that Krevolin could not have taken " 'tangible employment actions' " against the plaintiff. The plaintiff's attorney addressed the department's contention at oral argument before the trial court. Although he conceded that Krevolin would not meet the definition of a "supervisor" under *Vance*, he argued that *Vance* is not controlling because no Connecticut case has applied it to a CFEPA claim and because CFEPA must be liberally construed in order to promote its underlying remedial purpose. He further argued that the court need not decide what the appropriate definition of a "supervisor" is for CFEPA purposes because the fact that the department itself had referred to Krevolin as the plaintiff's supervisor was dispositive of the issue.

The commission, despite having argued to the referee that the department should be liable to the plaintiff, changed its position on appeal and argued that the court should affirm the referee's decision. Like the department, it argued in its brief that the *Ellerth/Faragher* defense was inapplicable, but for different reasons. The commission contended that the defense was waived

because the department failed to plead it. The commission also argued that the court should affirm the referee's decision because the plaintiff's claim was inadequately briefed. At oral argument, the commission declined to take a position on whether the *Vance* definition was applicable to the matter and, instead, argued that the court need not decide the question to resolve the appeal.

The court, *Klau*, *J.*, agreed with the department. It specifically determined that, for liability to be imputed to the department based on a supervisor theory of liability, Krevolin must have been a supervisor as defined by the United States Supreme Court in *Vance*. Although the court acknowledged that the referee's decision was ambiguous as to Krevolin's status as a supervisor under *Vance*, it reasoned that a remand was unnecessary because the plaintiff's counsel had conceded that Krevolin's responsibilities did not satisfy that definition. Thus, the court concluded that the referee had properly applied the negligence standard for harassment by a coworker to the plaintiff's claim. Because the plaintiff did not challenge the referee's decision on any other ground, the court affirmed it. This appeal followed.

The plaintiff's sole claim on appeal is that the Superior Court erred in applying the *Vance* definition of a supervisor to her CFEPA claim. The plaintiff argues that the Title VII definition as set forth in *Vance* is inconsistent with the remedial nature of CFEPA, and, therefore, this court should reverse the judgment of the Superior Court. The plaintiff further asserts that, for hostile work environment claims brought under CFEPA, we should adopt a definition of supervisor that includes employees like Krevolin who have the power to control the day-to-day conditions of their subordinates' work rather than limit the definition only to those who have authority to take tangible employment actions. The department argues that this court should affirm the court's decision because it properly applied the *Vance* definition of a supervisor to the plaintiff's CFEPA claim, as "Connecticut state courts have consistently looked to federal law and Title VII when interpreting CFEPA claims, and thus the *Vance* definition of supervisor should apply."[12] We agree with the department.

We begin by setting forth the standard of review and legal principles relevant to the plaintiff's claim. Our review of a Superior Court's decision to affirm an administrative appeal is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Cases that pres-

ent pure questions of law, however, invoke a broader standard of review . . . .'' (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 156 Conn. App. 239, 245, 113 A.3d 463 (2015), aff'd, 322 Conn. 154, 140 A.3d 190 (2016). For pure questions of law, ''plenary review should be applied . . . [if] the issue of law ha[s] not been time-tested by the [agency] or previously considered by the courts.'' (Internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 166, 931 A.2d 890 (2007). Because the present case presents a pure question of law that never has been considered by the commission or by our appellate courts, our review is plenary.

As discussed earlier in this opinion, in *Burlington Industries, Inc.* v. *Ellerth*, supra, 524 U.S. 742, and *Faragher* v. *Boca Raton*, supra, 524 U.S. 775, the United States Supreme Court established a framework rooted in agency principles for determining when an employer can be held liable for the creation of a hostile work environment by its employees for purposes of claims brought under Title VII of federal law. This framework provides that if the employee was the plaintiff's coworker, then the employer can be held directly liable only if the plaintiff can show that the employer was negligent. *Vance* v. *Ball State University*, supra, 570 U.S. 427. If, however, the employee was the plaintiff's ''supervisor,'' then the employer's liability will depend on the circumstances. Id., 428. If the supervisor engaged in harassment that resulted in a ''tangible employment action,'' then the employer will be strictly liable. (Internal quotation marks omitted.) Id., 428–29. If the supervisor did not take a tangible employment action, the employer will still be vicariously liable—even in the absence of negligence—*unless* the employer satisfies an affirmative defense, the *Ellerth/Faragher* defense. Id., 429–30. This defense provides that ''an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided.'' Id., 430.

Although, to date, our appellate courts have not been presented with a CFEPA case that has required the application of this framework, there appears to be no dispute among the parties that it applies to CFEPA claims. Moreover, this framework has been applied to CFEPA claims by the United States Court of Appeals for the Second Circuit; see *Bentley* v. *AutoZoners, LLC*, 935 F.3d 76, 90–91 (2d Cir. 2019); as well as the United States District Court for the District of Connecticut; see, e.g., *Salen* v. *Blackburn Building Services, LLC*, United States District Court, Docket No. 3:14-CV-01361 (VAB) (D. Conn. January 6, 2017); and it has been acknowledged by our Supreme Court in a CFEPA case.

See *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 166 n.30, 717 A.2d 1254 (1998). Therefore, we will assume, without deciding, that this framework is applicable.

This framework is predicated on the distinction between a coworker and a supervisor and, thus, posits the question of who constitutes a "supervisor." The term "supervisor" does not appear within the text of CFEPA, and, consequently, it is not defined therein, nor has it been defined by a Connecticut court. Likewise, the term does not appear and, therefore, is not defined within Title VII. The United States Supreme Court thus defined it in *Vance* v. *Ball State University*, supra, 570 U.S. 424, for Title VII purposes. In doing so, the court clarified that the term is not a statutory term, but a term that must be interpreted so as to best fit within the highly structured *Ellerth/Faragher* framework. Id., 436.

"In *Vance*, the Supreme Court resolved a circuit split. Some courts [had] held that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or discipline the victim; other courts had substantially followed the more open-ended approach advocated by the [Equal Employment Opportunity Commission's (EEOC)] Enforcement Guidance [EEOC Guidance],[13] which tie[d] supervisor status to the ability to exercise significant direction over another's daily work. . . . The Supreme Court rejected the latter position, holding that [t]he ability to direct another employee's tasks is simply not sufficient to make one a supervisor. . . . Rather, an employee is a supervisor only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Citations omitted; footnote added; internal quotation marks omitted.) *Bentley* v. *AutoZoners, LLC*, supra, 935 F.3d 91.

Although Connecticut appellate courts have not yet been presented with the opportunity to adopt or reject the *Vance* definition for purposes of CFEPA claims, it has been applied to CFEPA claims by the United States Court of Appeals for the Second Circuit; see id., 91–92; as well as the United States District Court for the District of Connecticut; see, e.g., *Salen* v. *Blackburn Building Services, LLC*, supra, United States District Court, Docket No. 3:14-CV-01361 (VAB); *Savage* v. *Southern Connecticut State University*, United States District Court, Docket No. 3:09-CV-00302 (JAM) (D. Conn. March 3, 2016). Moreover, "[i]n interpreting our antidiscrimination and antiretaliation statutes, we look to federal law for guidance. In drafting and modifying [CFEPA] . . . our legislature modeled that act on its federal counterpart, Title VII . . . and it has sought to keep our state law consistent with federal law in this

area. . . . Accordingly, in matters involving the interpretation of the scope of our antidiscrimination statutes, our courts consistently have looked to federal precedent for guidance. . . . Furthermore, our Supreme Court has held that in defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII . . . the federal statutory counterpart to [CFEPA]." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 156 Conn. App. 249–50.

The plaintiff argues that we should decline to adopt the "narrow" *Vance* definition for CFEPA claims because doing so would undermine the remedial purpose of Connecticut's statutory scheme. The plaintiff contends that we should, instead, adopt a definition that is more in line with the EEOC guidance on vicarious employer liability for unlawful harassment by supervisors, which encompasses those who have the authority to direct an employee's daily work but cannot take tangible employment actions, such as Krevolin. In support of her argument, the plaintiff contends that our courts have declined to adopt federal interpretations of similar federal employment antidiscrimination statutes when doing so would not effectuate the remedial purpose of the state statute and that adopting the *Vance* definition would not effectuate the remedial purpose of CFEPA.

The plaintiff is correct that, at times, this court and our Supreme Court have interpreted CFEPA differently than its federal counterpart, Title VII. However, the court has done so "only in circumstances in which there is clear evidence of a contrary legislative intent." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 162, 140 A.3d 190 (2016); see also *McWeeny* v. *Hartford*, 287 Conn. 56, 69, 946 A.2d 862 (2008) ("[a]lthough it is true . . . that we generally look for guidance to case law interpreting Title VII when construing our state fair employment legislation . . . such guidance is unnecessary when the language of our statutory scheme . . . is susceptible of only one reasonable interpretation" (citation omitted)). For instance, in *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 194, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008), this court was tasked with construing CFEPA's 180 day filing period, as set forth in General Statutes (Rev. to 2007) § 46a-82 (e).[14] Although a federal interpretation of Title VII's analogous 180 day limitation period existed, we declined to adopt it and, instead, adopted a more liberal construction of the provision that would allow for more claims to survive the filing period. Id., 218–19. In doing so, we recognized that the legislative history surrounding § 46a-82 (e) provides "strong evidence"; id., 198; of our legislature's intent to "avoid the defeat of such com-

plaints for filing faults rather than on their merits"; id., 219; and, accordingly, we concluded that "[o]ur interpretation of § 46a-82 (e) must be mindful of that legislative policy." Id., 218. In the present case, the plaintiff has failed to direct us to *any* evidence to suggest that our legislature, despite not having statutorily defined the term "supervisor" for CFEPA claims, intended for the term to be more broadly construed than the definition used by courts for Title VII purposes. When asked at oral argument whether there was any such evidence within the statute that the plaintiff could point to, the plaintiff's counsel stated, "All I can point to is silence." Silence is, undoubtedly, not enough to constitute clear evidence of a contrary legislative intent.

Further, the plaintiff's argument rests entirely on the fact that CFEPA is remedial in nature, but the mere fact that a statute is remedial in nature and must be construed to effectuate its beneficent purpose is not enough for this court to reject federal guidance. "*Although CFEPA is a remedial statute*, such that ambiguities in [CFEPA] should be construed in favor of persons seeking redress thereunder . . . *our fundamental objective is to ascertain and give effect to the apparent intent of the legislature*"; (citations omitted; emphasis added; internal quotation marks omitted) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 322 Conn. 165; and "our legislature's intent, in general, was to make CFEPA complement the provisions of Title VII." Id., 160.[15]

We also are not persuaded by the plaintiff's argument that the EEOC Guidance definition of a supervisor is better suited for CFEPA claims than the definition set out in *Vance*. The plaintiff has pointed us to one jurisdiction only, New Jersey, that has elected a more expansive definition of supervisor for purposes of its state law discrimination claims, and we do not find the court's reasoning to be sufficiently persuasive. In *Aguas* v. *State*, 220 N.J. 494, 107 A.3d 1250 (2015), the Supreme Court of New Jersey reasoned that adopting the EEOC Guidance would further the paramount goal of the state's antidiscrimination statute because "[i]t prompts employers to focus attention not only on an elite group of decision-makers at the pinnacle of the organization, but on all employees granted the authority to direct the day-to-day responsibilities of subordinates, and to ensure that those employees are carefully selected and thoroughly trained." Id., 528. We disagree with this rationale because adopting the *Vance* definition does not eradicate employer liability for conduct of nonsupervisory employees; rather, it requires an additional showing of negligence. Thus, we are confident that, under either definition, employers are prompted to focus their attention on *all* employees, not just decision makers.

Moreover, the plaintiff has not addressed, let alone countered, the United States Supreme Court's numer-

ous rationales for rejecting the EEOC Guidance and instead adopting the *Vance* definition, all of which we find compelling. The United States Supreme Court reasoned: "We reject the nebulous definition of a 'supervisor' advocated in the EEOC Guidance and substantially adopted by several [c]ourts of [a]ppeals. [The] [p]etitioner's reliance on colloquial uses of the term 'supervisor' is misplaced, and her contention that our cases require the EEOC's abstract definition is simply wrong. . . . [T]he framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers. Those decisions contemplate a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions. There is no hint in either decision that the [c]ourt had in mind two categories of supervisors: first, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker's labor to some ill-defined degree. On the contrary, the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation. The approach recommended by the EEOC Guidance, by contrast, would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors.

"The *Ellerth/Faragher* framework represents what the [c]ourt saw as a workable compromise between the aided-in-the-accomplishment theory of vicarious liability and the legitimate interests of employers. The Seventh Circuit's understanding of the concept of a 'supervisor,' with which we agree, is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial. The alternative, in many cases, would frustrate judges and confound jurors." (Footnote omitted.) *Vance* v. *Ball State University*, supra, 570 U.S. 431–32.

In sum, we conclude that the *Vance* definition of supervisor as used by the courts in Title VII cases is the appropriate definition for distinguishing between the coworker and supervisor theories of liability for hostile work environment claims brought under CFEPA. Accordingly, we further conclude that the Superior Court properly applied the *Vance* test to the plaintiff's CFEPA claim.

We acknowledge that the commission did not make the factual findings specific to whether Krevolin falls within that definition and that, typically, when "an administrative agency has made invalid or insufficient findings, the court must remand the case to the agency for further proceedings . . . ." (Internal quotation marks omitted.) *Slootskin* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 452, 466 n.12, 806 A.2d 87, cert. denied, 262 Conn. 910, 810 A.2d 275 (2002). That is not the case, however, if the evidence

supports "only one conclusion as a matter of law . . . ." (Internal quotation marks omitted.) Id. The plaintiff has conceded to this court that Krevolin's responsibilities do not satisfy the *Vance* definition. Thus, the plaintiff would have to prove negligence on the part of the department, as required by the coworker theory of liability. In this case, the plaintiff has further conceded that she cannot do so.[16] Accordingly, the evidence supports only one conclusion as a matter of law: the department is not liable. A remand, therefore, is unnecessary.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The plaintiff now goes by Tenisha Minfield.

[2] Title VII makes it an "unlawful employment practice for an employer—(1) to . . . discriminate against any individual . . . because of such individual's race [or] color . . . ." 42 U.S.C. § 2000e-2 (a) (2018). As discussed more fully later in this opinion, CFEPA was modeled after Title VII.

[3] Ken Petow, the overseer of the department's adjudication division, explained in his testimony that, when the department identifies an eligibility issue with an unemployment benefits application, the adjudicator is the person who "calls [the applicant] up, gets a statement from them, and then just makes a decision within our laws to determine whether or not the individual is eligible for unemployment and whether or not the employer should be charged."

[4] The plaintiff described the following incidents that took place over the years: at a one-on-one meeting with Krevolin six months after the plaintiff began her adjudicator position, Krevolin asked the plaintiff what she would do if someone called her a racial epithet; on a later date, Krevolin made a comment suggesting that the man with whom she was talking to must have been lying about looking for work because he was Black; at a meeting, Krevolin stated to the plaintiff and other adjudicators, "You know Hispanics don't have bank accounts"; Krevolin made a comment that the plaintiff believed was implying that the plaintiff had no reason to be in Sweden on vacation because she is Black; Krevolin said to the plaintiff's coworker, who had dreadlocks but then changed her hairstyle, "I'm glad you . . . took that mess out of your head, you looked like Whoopi Goldberg"; and Krevolin complimented the plaintiff's hairstyle and stated that she did not like the plaintiff's old hairstyle because it reminded her of "Aunt Jemima." (Internal quotation marks omitted.)

[5] "Pursuant to *Board of Education* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), due process entitles a tenured public employee to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. The opportunity to present one's side of the story is generally referred to as a *Loudermill* hearing." (Internal quotation marks omitted.) *Meriden* v. *American Federation of State, County & Municipal Employees, Local 1016*, 213 Conn. App. 184, 189 n.6, 277 A.3d 902 (2022).

[6] The plaintiff also alleged that she was subjected to discrimination based on her national origin and age and that she was retaliated against, but those claims were dismissed following the public hearing. The plaintiff did not challenge the dismissal of those claims on appeal to the Superior Court, and, therefore, they are not at issue in the present appeal.

[7] General Statutes (Rev. to 2015) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individuals race [or] color . . . ."

[8] General Statutes § 46a-58 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . color [or] race . . . ."

Although § 46a-58 has been amended since the filing of the plaintiff's complaint; see Public Acts 2022, No. 22-82, § 11; Public Acts 2017, No. 17-

127, § 2; Public Acts 2017, No. 17-111, § 1; Public Acts, Spec. Sess., June, 2015, No. 15-5, § 73; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[9] General Statutes § 46a-70 (a) provides in relevant part: "State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race [or] color . . . ."

Although § 46a-70 has been amended since the filing of the plaintiff's complaint; see Public Acts 2022, No. 22-82, § 16; Public Acts 2018, No. 18-72, § 44; Public Acts 2017, No. 17-127, § 8; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[10] The hearing was held on April 30, May 1, and August 1, 2019.

[11] General Statutes § 4-183 (a) provides a right of appeal to the Superior Court to persons who have "exhausted all administrative remedies available within the agency and who [are] aggrieved by a final decision . . . ."

[12] The commission argues on appeal that the court reached "the right destination, but by the wrong road." As a result, the commission asserts two alternative arguments for affirmance. It first argues that the court should have affirmed the referee's decision, not because Krevolin was not a supervisor under *Vance*, but because the plaintiff abandoned her claim due to inadequate briefing. Secondly, the commission argues that the court should have affirmed the referee's decision because the department waived the *Ellerth/Faragher* defense, and, therefore, the court should not have considered the merits of the plaintiff's claim. Given our conclusion that the Superior Court reached the right destination by the *right* road, we need not reach these alternative grounds.

The commission further argues that, if we are not persuaded by its alternative grounds for affirmance, we should remand the case for further proceedings because the commission never determined in its final decision whether *Vance* is applicable to CFEPA claims, and, therefore, "[i]t was not the role of the Superior Court to decide that question in the first instance; [and] it is no more the role of this court to decide the question now." To the extent that this argument by the commission is an independent challenge to the Superior Court's judgment, we decline to address it because the commission did not file a cross appeal. See Practice Book § 61-8; *Campbell* v. *Porter*, 212 Conn. App. 377, 387–88 n.11, 275 A.3d 684 (2022); *William Raveis Real Estate, Inc.* v. *Newtown Group Properties Ltd. Partnership*, 95 Conn. App. 772, 773 n.3, 898 A.2d 265 (2006).

[13] U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors (last visited April 11, 2023).

[14] Hereinafter, unless otherwise indicated, all references to § 46a-82 in this opinion are to the 2007 revision of the statute.

[15] The plaintiff also argues that "[r]ejecting *Vance* finds further support in retaliation claims brought under the CFEPA," because, for claims of retaliation, plaintiffs need to prove only that there was a materially adverse employment action taken against them, not an action that affects the terms and conditions of employment. We are not persuaded by this undeveloped argument. Although hostile work environment claims and retaliation claims may both fall within the realm of CFEPA, the standards that they invoke are distinctive.

[16] At oral argument before this court, counsel for the plaintiff specifically stated: "When the harassment is committed by a nonsupervisor, a coworker, the plaintiff is then required to prove negligence on the part of the employer in order to hold the employer liable for that employee's workplace harassment. . . . In this case, [the plaintiff] cannot prove negligence."

The commission argues that it is improper for us to rely on the plaintiff's concessions because they were made on appeal and were not in the record before the commission, which courts are confined to in reviewing administrative decisions on appeal. *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 156 Conn. App. 239, is instructive. There, the referee granted the defendant's motion to strike the CFEPA complaint on the ground that the plaintiff was not an employee pursuant to the federal renumeration test. Id., 244. On appeal, the plaintiff argued that the referee erroneously applied the federal renumeration test and that, if it were the applicable test, she should have been afforded an opportunity to engage in

further discovery or an evidentiary hearing. Id., 253. During her oral arguments before us, however, the plaintiff conceded that she was unable to satisfy the renumeration test. Id. Because we concluded that the renumeration test was the applicable test, and because the plaintiff conceded to this court that she could not satisfy it, we rejected her claim. Id. Thus, we disagree with the commission that relying on the plaintiff's concessions on appeal is improper.