

U.S. Supreme Court Limits Employer Liability in Title VII Supervisory Harassment Case

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In a significant decision issued on June 24, 2013, the U.S. Supreme Court held that employers are vicariously liable for unlawful harassment committed by a supervisor only if the supervisor is empowered by the employer to take tangible employment actions against the victim.

Vance v. Ball State University

In *Vance v. Ball State University*, 520 U.S. ____ (2013), the Supreme Court, in a 5-4 decision, found that to hold an employer vicariously liable for the actions of a supervisor, that supervisor must have “the power to hire, fire, demote, promote, transfer, or discipline an employee.” By limiting the meaning of “supervisor” in harassment cases, the Supreme Court has further narrowed an employer’s vicarious liability under Title VII of the Civil Rights Act of 1964.

As the Supreme Court noted, under Title VII an employer’s liability for unlawful harassment depends on the status of the harasser. If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a supervisor, different rules apply. If the supervisor’s harassment culminates in a tangible employment action, the employer is strictly liable. By contrast, if no tangible employment action is taken, the employer may avoid or mitigate liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. This is commonly called the *Faragher/Ellerth* defense, so named after the two Supreme Court decisions that originated the defense – *Faragher v. Boca Raton*, 524 U. S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998).

For purposes of Title VII, a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

In *Vance*, the plaintiff, an African-American woman, sued Ball State University alleging that a fellow employee, Sandra Davis, created a racially hostile work environment in violation of Title VII. Although Davis’ job description stated she supervised, led and directed certain employees within the plaintiff’s department, Davis had no power to hire, fire, promote, transfer or discipline the employees. The plaintiff argued that the

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university was vicariously liable because Davis had the practical authority to exercise control over plaintiff's daily work—a position that had been taken by the EEOC in determining whether an employee is a supervisor. The university argued that Davis needed to have the authority to take tangible employment action for vicarious liability to adhere, *i.e.*, hiring, firing, demoting or promoting the plaintiff.

The Supreme Court affirmed the granting of summary judgment for the university and held that a “supervisor” must be someone with actual authority to take a “tangible employment action” against a plaintiff or to “effect a ‘significant change’ in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.” In so holding, the Supreme Court ended a growing trend among some courts and the EEOC which have expanded the definition of supervisor to include employees who have some form of management role, such as employee scheduling or overseeing daily tasks, but who do not have final decision-making authority over the terms and conditions of an employee's employment.

Part of the loosening comes from changing working conditions where daily managerial tasks are increasingly delegated to coworkers who can influence the working environment of their fellow employees. But the Supreme Court found that these circumstances do not warrant an overly-expansive definition of “supervisor.” In such cases, a victim of harassment may still sue the employer under the negligence standard.

The Supreme Court rejected the EEOC's “nebulous” definition of a supervisor as ill-defined and too abstract. The Supreme Court found the EEOC relied too heavily on colloquial impressions of a supervisor, and this approach led to an unnecessarily complex factual investigation into who did or did not serve as an agent of the employer. Instead, the Court turned the analysis back to the bright line distinction it originally clarified in its prior decisions in *Ellerth/Faragher*. This distinction commands the courts to return to the more sharply defined meaning of “supervisor” as an employee vested with the power to take a tangible employment action.

Implications

The issue of supervisory versus coworker harassment occurs most frequently in cases where the plaintiff alleges hostile work environment. Here, the Supreme Court's decision tightens the reins at a time when the meaning of a supervisor is becoming increasingly blurred due to common sharing of managerial duties. By reiterating that a supervisor must have demonstrable authority to tangibly affect the terms and conditions of an employee's employment, the Supreme Court attempts to eliminate burdensome factual inquiries over whether a coworker can be legally classified as a supervisor for liability purposes.

In *Vance*, the Court found a coworker acting in a minor role, such as managing daily tasks, is not sufficient to meet that standard. The Court's decision likely will require plaintiffs to make a clear showing that a supervisor accused of harassment had not only implicit authority to take a tangible employment action against the victim-employee, but also actual authority before strict liability will attach to the employer. In other words, cases involving claims of supervisory harassment will now turn to the factual inquiry of whether the supervisor was empowered by the employer to effect a significant change in the employment status of the plaintiff. The inquiry will rest as much on documentation as witness testimony.

What Employers Should Do

The *Vance* decision limits those employees who could subject employers to strict liability for Title VII harassment claims. Employers should review the job duties and responsibilities of all employees charged with any form of managerial tasks. Employers should be certain to draft appropriate job descriptions for supervisory employees consistent with the criteria and limits of supervisory authority as set forth in *Vance*. Employers also should be clear about which employees are handling minor daily activities, such as scheduling, and enforce the distinctions between supervisory managers with hire and fire authority

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versus subordinate employees who are not empowered to affect the actual terms and conditions of an employee's employment.

In conducting a review or revising job descriptions, employers should keep in mind the possible effect on other labor and employment laws, such as the National Labor Relations Act and the Fair Labor Standards Act. Employers also should remember that state and local laws may define supervisory status more broadly or may not provide for a *Faragher/ Ellerth* affirmative defense.