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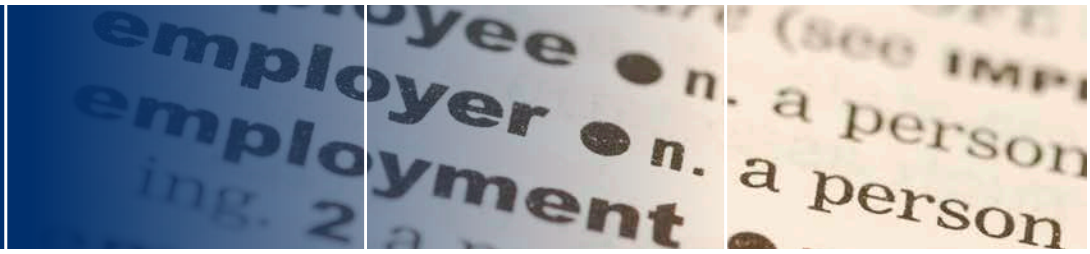

NEWSLETTER
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U.S. Supreme Court Limits Who Qualifies as a "Supervisor" under Title VII

On June 24, 2013, the United States Supreme Court in *Vance v. Ball State University*, 133 S.Ct. 2434 (2013), issued one of the most important decisions on workplace harassment under Title VII of the Civil Rights Act since it decided *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton* in 1998.

THE ISSUE OF WHO IS A "SUPERVISOR" AND WHY IT MATTERS IN HARASSMENT CASES

In *Faragher* and *Ellerth*, the Court held that different rules apply in evaluating harassment cases in which the accused harassers are supervisors and not merely co-workers. For co-workers, an employer can only be held liable for unlawful harassment under Title VII if the employer is negligent with respect to the offensive behavior. If the accused harasser is a supervisor, however, an employer can be strictly liable for the supervisor's acts in two circumstances:

- First, an employer is liable for the acts of a supervisor engaged in unlawful harassment if the supervisor takes action that results in "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." *Continued*

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- Second, an employer is liable if it fails to establish a two-step affirmative defense: (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 the employer offered.

In *Vance*, the Supreme Court decided the question left open in *Faragher* and *Ellerth*: "namely, who qualifies as a 'supervisor' in a case in which an employee asserts a Title VII claim for workplace harassment?" The Court took up the question to resolve a split among the federal circuit courts of appeal. In the First, Seventh and Eighth Circuits, the courts adopted a narrower approach 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 circuits, including the Second and Fourth, adopted the EEOC's much more sweeping approach, in which supervisor status was determined by whether the person exercised significant discretion over an employee's daily work. Resolution of the question of which definition of supervisor applies often determines whether the employer is liable.

FACTS

Maetta Vance was an African-American employee in the banquet and catering department of Ball State University. Vance complained about alleged racial discrimination and harassment by Saundra Davis, a white department employee. According to Vance, Davis glared at her, slammed pots and pans around her, intimidated her, blocked her path and gave her inappropriate looks. The parties disagreed about how much authority Davis had over Vance. There was evidence that Davis's job description gave her leadership responsibilities and "that Davis at times led or directed Vance and other employees in the kitchen." The parties agreed that "Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance." Nevertheless, Vance alleged that Davis was her supervisor and that Ball State therefore was liable for Davis's actions in creating a racially hostile work environment.

The District Court granted Ball State's motion for summary judgment, finding as a matter of law that Davis was not Vance's supervisor and that Ball State was not negligent in preventing the alleged racial harassment. The Seventh Circuit affirmed, applying its narrower definition requiring that a supervisor possess authority over ultimate employment actions that the undisputed facts showed Davis lacked.

RULING AND CRITICISM OF EEOC'S TEST FOR "SUPERVISOR"

On appeal, the Supreme Court adopted the Seventh Circuit's test. The Court held that a worker will only qualify as a supervisor under Title VII "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.'"

The Court found that the Seventh Circuit's test for who qualifies as a supervisor is "easily workable" and can "be applied without undue difficulty at both the summary judgment stage and at trial." As the Court explained, in "a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute." That will allow the question of supervisor status to "very often be resolved as a matter of law before trial."

Because Saundra Davis did not possess the authority to take tangible employment actions against Maetta Vance, the Court held in a 5–4 decision that Davis was not Vance's supervisor and that summary judgment was properly entered in favor of Ball State, the employer.

In reaching its conclusion, the Court criticized the EEOC's contrary definition of supervisor in its Enforcement Guidance manual as "a study in ambiguity." That definition would have allowed anyone with sufficient authority to assist the harasser in carrying out the harassment to qualify as a supervisor under Title VII. It would depend "on a highly case-specific evaluation of numerous factors,"
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which would be used to determine whether there was direction for a sufficient amount of time and for a sufficient number of activities.

Equally troubling, the Court found that the EEOC Guidance could result in two tiers of supervisors: those with the authority to take tangible employment actions and those without such authority who "have the ability to direct a co-worker's labor to some ill-defined degree." Resolution of whether the alleged harasser was a supervisor often would not be possible before trial, necessitating two sets of jury instructions: one describing the negligence standard for coworkers and another describing the strict liability standard and affirmative defense for supervisors, which would create a strong "danger of juror confusion." The *Vance* majority found that application of the standards under the EEOC's "nebulous definition of supervisor" would "present daunting problems for the lower federal courts and for juries."

In contrast, under *Vance*'s test for supervisor status, the Court adopted "a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions," that presents "a clear distinction between supervisors and co-workers." The issue of supervisor status "can usually be readily determined, generally by written documentation." By making it more likely that the issue of supervisor status is resolved before trial, the "plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the *Ellerth/ Faragher* affirmative defense."

The *Vance* majority explained that "this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or by altering the work environment in objectionable ways." Rather, a plaintiff could still establish his or her claim by showing that the employer was "negligent in permitting this harassment to occur." Relevant factors in determining negligence include "the nature and degree of authority wielded by the harasser" even if the alleged harasser is not a supervisor under the Court's test. In addition, evidence "that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant."

WHAT DOES THIS MEAN FOR YOUR BUSINESS?

By using a narrower definition of "supervisor" for Title VII cases, the Supreme Court has made it more difficult for employees to establish workplace harassment claims in many cases. Now, an employee alleging a harassment claim must show that the accused harasser has the authority to take an ultimate employment action against them to take advantage of the strict liability standards under *Faragher* and *Ellerth*. Simply being responsible for the day-to-day direction of the employee's work assignments is not enough. If the alleged harasser is not a supervisor, then the employer gets the benefit of defending under a simple negligence standard. Typically, that makes it more likely an employer will successfully defend itself from a harassment claim.

In response to *Vance*, employers should consider reassessing which workers should qualify as supervisors under Title VII. Limiting which employees have the authority to take ultimate employment actions is one possible way of doing that. Employers should consider which managers need to have the authority to hire, fire, promote, demote or reassign employees who report to them as part of the manager's job functions. Because written documentation of that authority will be a key piece of evidence in responding to any Title VII claim, employers should review – and if necessary revise – applicable job descriptions and policies. Any such changes should be provided to all of the affected personnel, and acknowledged in writing. Making those changes in writing will not be effective unless they are actually implemented consistently.

Vance also offers a cautionary note for employers. Simply limiting the number of workers who qualify as supervisors is insufficient by itself to insulate employers from liability. Employers need to make sure that all workers providing direction to other employees are monitored to confirm that they are exercising their authority appropriately. Active supervision of all employees, including managers, is needed, which may include unannounced visits, walking the floor and regular attendance at department meetings. A good open-door policy likewise can be helpful. An employer should make it clear that the lines of communication are always open and workers are strongly encouraged to raise any workplace issues or concerns.

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Employers should discourage long-distance management, which is more likely to result in problems not being identified and corrected early. Empty suits lead to liability.

In addition, employers should ensure that they have an updated employee handbook and workplace policies that clearly:

- Describe their equal employment opportunity and anti-harassment standards
- Identify multiple channels for reporting suspected violations
- Explain that suspected violations will be immediately investigated
- Inform employees that those reporting violations or participating in investigations will not be subjected to unlawful retaliation.

All employees, managers included, should be required to sign and date an acknowledgment that they have received a copy of the company handbook, have read it, understand it and agree to comply with the policies in it. Initial training on those policies should be provided to all new employees and refresher training should be provided at least annually, with written documentation for each employee.

Managers should be provided with separate training about their additional responsibilities in identifying, reporting and assisting in the investigation of suspected violations of workplace policies. Employers should make sure that they have posted all recommended equal employment opportunity signs in areas frequented by employees (typically an employee break room or where employees clock in and out), including instructions on where and how to report suspected harassment. Documentation of all of these measures is critical. Finally, all reports of suspected workplace harassment should be promptly investigated and addressed appropriately.

The narrower definition of supervisor under the *Vance* test places employers in a better posture to successfully defend a harassment claim. Clearly limiting which managers qualify as supervisors, when combined with the other measures described above, goes a long way toward reducing exposure. Proactive, vigilant employers with strong anti-harassment practices are more likely to avoid liability following *Vance*.

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