

Vance v. Ball State University: Supreme Court Adopts Narrow Definition of "Supervisor" for Title VII Harassment Liability

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The U.S. Supreme Court adopted a narrow definition for the term "supervisor" for purposes of an employer's vicarious liability for harassment under Title VII. In *Vance v. Ball State University*, the Court held that only an employee who "is empowered by the employer to take tangible employment actions against the victim" is a supervisor. The Court predicts that this will expedite resolution of many harassment cases at the summary judgment stage.

Vicarious Liability for Supervisor Harassment

In its 1998 decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, the Court determined that employers are vicariously liable for harassment by a supervisor. Liability for coworker harassment depends upon proof of employer negligence. The Court did not define "supervisor," however. Lower courts thereafter have disagreed over the proper definition. Most adopted a definition of supervisor that includes only employees who can make decisions regarding tangible employment actions affecting others, such as hiring, promoting, and firing employees. Other courts imposed vicarious liability even when the harasser merely directed the performance of the victim's day-to-day work.

The plaintiff in *Vance* was an African-American woman who worked at Ball State University as a catering assistant. She sued the university alleging that a fellow employee harassed her by creating a racially hostile work environment in violation of Title VII. Among other things, the plaintiff alleged that the other employee had "glar[ed] at her, slamm[ed] pots and pans around her, and intimidate[ed] her." Although the parties disputed the exact nature of the relationship between the plaintiff and the other employee, they agreed that the other employee did not have the power to hire, fire, demote, promote, transfer, or discipline the plaintiff. Relying on the framework set forth in *Ellerth* and *Faragher*, the plaintiff argued that the other employee's ability to make work assignments and give direction were sufficient to make her the plaintiff's supervisor even without the power to fire or discipline, thereby creating vicarious liability for the employer. The district court granted summary judgment to the employer, and the Seventh Circuit affirmed.

Supreme Court Defines "Supervisor" Narrowly

Affirming the Seventh Circuit, the Supreme Court narrowly defined the term "supervisor." The definition hinges on whether the harasser is authorized "to take tangible employment actions against

the victim.” The framework of *Ellerth* and *Faragher* is grounded in principles of agency law, the Court observed. In *Ellerth*, the Court described supervisors as having been “empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” “The strong implication of this passage,” Justice Alito observed for the Court, “is that the authority to take tangible employment actions is the defining characteristic of a supervisor.”

The Court explicitly rejected the position taken by the Equal Employment Opportunity Commission. Since 2003, when it issued its *Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, the EEOC has maintained that an employee qualifies as a supervisor if: (a) he is authorized “to undertake or recommend tangible employment decisions affecting the employee”; or (b) he is authorized “to direct the employee’s daily work activities.” That latter prong required a fact-intensive analysis of the frequency with which he or she controlled the activities of the other employee and the nature of tasks he or she could dictate. Several lower courts adopted the EEOC’s definition, which helped plaintiffs resist summary judgment and proceed to trial in harassment cases.

The Supreme Court found the EEOC’s guidance to be unpersuasive, explaining that it was too broad, vague, and unworkable, especially for this threshold issue that determines whether an employer will be vicariously liable for the harasser’s behavior. The Court described the challenges district courts faced with this threshold supervisory status question, including juror confusion over “alternative theories of liability under which different parties bear the burden of proof.” “Negligence,” the Court explained, “provides the better framework for evaluating an employer’s liability when a harassing employee lacks the power to take tangible employment actions.” *Ellerth* and *Faragher* “contemplate a unitary category of supervisors, *i.e.*, those employees with the authority to make tangible employment decisions,” and that framework is one in which this threshold issue can be readily determined, in many cases, on summary judgment.

Implications

Vance represents an important victory for employers seeking to avoid vicarious liability for the actions of employees who have not been empowered to take tangible employment actions. Indeed, the decision seems to foreclose an argument that an employer can be held vicariously liable for the actions of supervisors in other parts of the company, so long as they do not have authority to take tangible employment actions against the victim.

Vance’s most immediate impact will be on cases pending in jurisdictions such as the Second and Fourth Circuits, which had previously adopted the EEOC’s definition of supervisor. Employers actively litigating harassment cases in those jurisdictions should reevaluate their strategy as a result.

- First, even if the alleged harasser no longer qualifies as a supervisor, his or her authority over the victim remains relevant. According to the Court, “the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent.”
- Second, an employer cannot avoid vicarious liability for an employee’s harassment simply because his or her decisions regarding tangible employment actions require higher level approval. “[W]e have assumed that tangible employment actions can be subject to such approval,” the Court observed.

- Third, the Court notes that where an employee has the ability to assign a victim different job responsibilities and where that reassignment has economic consequences, “such as foreclosing [the victim’s] eligibility for promotion,” he or she might well still qualify as a “supervisor” on that basis.

From a compliance perspective, employers should evaluate whether policies and handbooks accurately describe who is empowered to make tangible employment actions. The opportunities for summary judgment in subsequent litigation will be greater following *Vance*, and documentary evidence will be critical to success. Employers who seek to insulate themselves from liability by concentrating decision-making authority in just a few individuals should be cautious. Those individuals may be effectively forced to delegate those decisions to other employees for lack of personal interaction with the affected employees, which may qualify those lower-level employees as supervisors nonetheless. Finally, this provides a good occasion for all employers to revisit the adequacy of their harassment-prevention programs, including, specifically, supervisor training on those policies and internal complaint procedures that can be critical to establishing the affirmative defense to supervisor harassment.



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