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*What's in a Name?*

# Supremes Define "Supervisor" Under Title VII

At the end of its last term, the U.S. Supreme Court issued several decisions of great national importance on issues ranging from voting rights to the rights of gay married couples. With all of the press attention dedicated to those decisions, practitioners and employers can easily overlook another key decision by the Court that will have a significant impact on our national jurisprudence.

In *Vance v. Ball State University*,[1] the Court settled the long-disputed question of "who is a supervisor" for employer liability for workplace harassment under Title VII of the Civil Rights Act of 1964.[2] This decision sets the baseline for when an employer will be held vicariously liable for the tortious actions of its employees. This, in turn, undoubtedly will aide in the resolution of the more than 15,000 employment civil rights cases brought in federal court alone each year.[3]

## Title VII Employer Liability Under *Faragher* and *Ellerth*

The *Vance* decision comes against the backdrop of two landmark decisions issued by the Supreme Court in the late 1990s – *Burlington Indus., Inc. v. Ellerth*[4] and *Faragher v. Boca Raton*[5] – establishing the parameters for an employer's liability under Title VII for workplace harassment committed by an employee. At their core, the rules for imputing liability to employers established by these two decisions centered on whether the employer knew or should have known of the harassing conduct and what steps the employer took to remedy such harassment.

Specifically, the Court found that if the harassing employee is the victim's co-worker, then knowledge could not be imputed to the employer. As a result, the employer could be liable only if it unreasonably failed to control the working conditions; that is, the employer either provided no reasonable avenue for complaint or knew (or should have known) of the harassment but did nothing about it.[6] Thus, the victim of a co-worker's harassment must establish that the employer knew of the unlawful conduct or turned a blind-eye to it before a court could hold the employer liable.

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The Court set a different set of rules, however, if the harasser is the victim's "supervsor." In that context, the Court found that, based on the rules of agency, *i.e.*, a principal's vicarious liability for the acts of its agents, an employer is strictly liable for a supervisor's discrimination that culminates in a tangible employment action, such as hiring, firing, failing to promote, a decrease in responsibilities, or a significant change in benefits.[7] In that context, knowledge of the harassment is automatically imputed to the employer, as the employer and the supervisor are deemed merged into one based on the tangible employment action of the company taken through its agent.[8]

If there is no tangible employment action – *e.g.*, the victim is only subject to a hostile work environment – then the Court found it unfair to hold the employer liable if the employer could establish, as an affirmative defense, (1) that it took reasonable care to prevent and correct known harassing behavior and (2) that the victim unreasonably failed to take advantage of the employer's preventative or corrective opportunities.[9] The first prong of this defense is premised on the employer's knowledge, or lack of knowledge, of the supervisor's conduct; but, unlike with co-worker liability, the burden is on the employer to establish these facts, as corporate knowledge is preliminarily assumed based on the agency relationship with the supervisor.

Given these different standards, it is extremely important whether a harasser is defined as a "supervisor" or merely the victim's co-worker, as this is the starting point for analyzing employer liability.[10] But, the federal employment discrimination statutes did not (and do not) contain, let alone define, the term "supervisor" and the *Faragher* and *Ellerth* decisions left that term undefined.

## The Two Competing Definitions of "Supervisor"

For the next 15 years, the lower federal courts disagreed on a definition of a "supervisor" in the context of employer liability under Title VII.

Some courts, including those in the First, Seventh and Eighth Circuits, held that an employee is not a supervisor unless the employer cloaked him or her, as its agent, with the specific powers to hire, fire, demote, promote, transfer, or discipline the victim.[11] These courts, drawing on distinctions made in the *Faragher* and *Ellerth* decisions, based their decisions on a narrow view that a supervisor is limited to someone with the power to "directly affect the terms and conditions of the plaintiff's employment."[12] In other words, a supervisor is someone acting on behalf of, and with the tacit approval of, the company.

Other courts, including the Second and Fourth Circuits, as well as the U.S. Equal Employment Opportunity Commission (EEOC), adopted a more open-ended approach, tying one's supervisor status to his or her mere ability to exercise significant direction over the victim's daily work.[13] These courts and

the EEOC rationalized that vicarious liability for supervisor harassment "draws on, but is not exclusively derived from, principles of agency" and that an employer's liability may therefore arise if the employee is merely "aided in accomplishing the tort [or harassment] by the existence of the agency relations."[14]

Thus, if the employer gives the harasser the authority to enable him or her to impose a hostile work environment or discriminate against the victim by being allowed to significantly direct the victim's daily work, then, the courts found, the employer may be liable for the supervisor's unlawful conduct.

## *Vance:* The Narrower Definition Prevails

In *Vance*, the plaintiff, an African-American woman employed by Ball State University (BSU), alleged that another BSU employee, Saundra Davis, a white woman, racially discriminated against her.

Vance alleged that because of her race Davis "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her" by blocking her path. Importantly, although the parties disputed the precise nature and scope of Davis's duties with BSU, they agreed that Davis did not have the authority to hire, fire, demote, promote, transfer, or discipline Vance.[15]

The District Court ultimately entered summary judgment in favor of BSU explaining that BSU could not be held liable for Davis's conduct because, following the precedent in the Seventh Circuit, Davis was not Vance's supervisor, as Davis did not have the requisite authority to hire, fire, demote, promote, transfer, or discipline Vance.

The District Court further held that BSU could not be liable because it responded reasonably to the incidents of which it was aware. The Seventh Circuit expectedly affirmed the District Court's decision, paving the way for the Supreme Court to finally define the term "supervisor" for employer liability under Title VII.

The Supreme Court affirmed the Seventh Circuit's decision, and adopted the narrower, more precise, definition of a "supervisor," holding that:

> an employer may be vicariously liable for an employee's unlawful harassment 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.[16]

The Court, in adopting a workable standard that could be applied evenly by the District Courts, rejected the EEOC's and Vance's "nebulous definition" of a "supervisor." The Court found that the framework set out in *Faragher* and *Ellerth* "presupposes a clear distinction between supervisors and co-workers" and that Vance's reliance on the general usage and understanding of the term "supervisor" was misplaced, as a review of colloquial authorities and legal contexts cited by Vance showed the term has wide-ranging and often opposite definitions.

The Court also rejected the argument that a narrower definition ignored the "all-too-plain reality" that employees with authority from their employer to control their subordinates' daily work are aided by that authority in perpetuating a discriminatory work environment.[17] The Court found that the mere ability to direct another employee's tasks is insufficient to impose strict vicarious liability upon an employer, as it would be unfair to hold the employer liable for conduct that it likely does not know about. The Court found that a more precise definition of a "supervisor" would give greater clarity to judges, who can now resolve this issue as a matter of law, and to juries, who will be presented with a clearer set of instructions when faced with resolving claims of workplace harassment.

The Court also found that the narrower definition of a "supervisor" did not leave employees unprotected against harassment by co-workers who can inflict psychological injury by assigning unpleasant or demeaning tasks. Those victims, the Court stated, can seek remediation from employers through their internal complaint procedures (*i.e.*, attempt to mitigate their damages) and, absent a resolution there, they could prevail on their claims in court by showing the employer, once it knew or should have known about the unlawful conduct, failed to take reasonable steps to prevent it from occurring or continuing.

The Court then reaffirmed its findings in *Faragher* and *Ellerth* that "evidence that an employer did not monitor the workplace, failed to respond to complaints, or effectively discourage complaints from being filed would be relevant" in determining an employer's liability for co-worker harassment.[18]

## The Practical Effect of *Vance*

The *Vance* decision provides a precise, workable definition of a "supervisor" that takes into consideration the fairness of holding employers liable (strictly or otherwise) only for conduct to which they are reasonably deemed to know about based on the rules of agency.

But, the *Vance* decision also yields an important warning to employers. In both co-worker harassment and supervisor harassment where there is no tangible employment action, employers must take steps to adequately prevent and address claims of workplace harassment in the first instance, lest they be subject to liability for conduct they are deemed to know or should have known about.

In short, while the *Vance* decision does not change the rules of employer liability under Title VII, it sets the proper stage for when and how to apply them.

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1. 570 U.S. ___, 133 S. Ct. 2434 (2013).
2. Title VII makes it "an un unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e(2)(a)(1).
3. *See* Judicial Business of the United States Courts, 2012 Annual Report of the Director, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2008 Through 2012, Table C-2A.
4. 524 U.S. 742 (1998).
5. 524 U.S. 775 (1998).
6. *See, e.g., Petrosino v. Bell Atl.*, 385 F.3d 210, 225 (2d Cir. 2004).
7. *See Mack v. Otis Elevator Co.*, 326 F.3d 116, 124-25 (2d Cir. 2003) (noting that "it seems unlikely that an employment action with economic dimensions taken by one employee with respect to another would entirely escape the knowledge of the employer's managers"), citing *Burlington Indus., Inc.*, 524 U.S. at 761-62.
8. *See Faragher*, 524 U.S. at 761-62 (explaining that "when a supervisor makes a tangible employment decision, the is assurance the injury could not have been inflicted absent the agency relation ... [a] tangible employment decision requires an official act of the enterprise, a company act").
9. *Id.; see also Burlington Indus., Inc.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
10. *Mack*, 326 F.3d at 123.
11. *See, e.g., Vance v. Ball State University*, 646 F.3d 461, 470 (7th Cir. 2011); *Noviello v. Boston*, 398 F.3d 76, 96 (1st Cir. 2005); *Weyers v. Lear Operations Corp.* 359 F.3d 1049, 1057 (8th Cir. 2004).
12. *See Rhodes v. Ill. Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004).
13. *See, e.g., Mack*, 326 F.3d at 126-27; *Whitten v. Fred's Inc.*, 601 F.3d 231, 245-47 (4th Cir. 2010); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), available at http://www.eeoc.gov/policy/docs/harassment.html.
14. *Mack*, 326 F.3d at 123.
15. 570 U.S., at p. 2.
16. *Id.* at p. 9.
17. *Id.* at p. 17.
18. *Id.* at p. 28.