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U.S. SUPREME COURT SETS NEW LIMITATION ON EMPLOYER LIABILITY FOR WORKPLACE HARASSMENT UNDER TITLE VII

June 24, 2013

On June 24, 2013, the United States Supreme Court issued a split opinion setting a new categorical standard by which litigants must now measure an employer's liability for Title VII discrimination.

In *Vance v. Ball State Univ.*, the Court reviewed a Title VII case brought by an employee against her employer for workplace harassment and retaliation. Vance, an African-American woman, sued her employer, Ball State University (BSU) alleging that a fellow employee, Sandra Davis, created a racially hostile work environment in violation of Title VII. Vance's complaint alleged that Davis gave Vance a "hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." [Vance] alleged that she was "left alone in the kitchen with Davis, who smiled at her"; that Davis "blocked" her on an elevator and "stood there with her cart smiling"; and that Davis often gave her "weird" looks." *Vance v. Ball State Univ.*, No. 11-556, slip op. at 3 (U.S. June 24, 2013).

The District Court granted summary judgment to BSU, holding that BSU was not vicariously liable for Davis' alleged actions because Davis, who could not take tangible employment actions against Vance, was not a supervisor. The Seventh Circuit affirmed.

Under Title VII, an employer's liability for workplace harassment may depend 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," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action (i.e., "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 employer is strictly liable. But if no tangible employment action is taken, the employer may escape 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.

The previous standard, set in light of the Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), and *Faragher v. Boca Raton*, 524 U. S. 775 (1998), and informed by the EEOC's official guidance, was that an employee, in order to be classified as a supervisor, must wield authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." *Id.*, slip op. at 21. According to the Court, that standard was so ill-defined and murky that it was susceptible to thousands of interpretations on a case-by-case basis.

Seeking to set a preliminary categorical standard that may be dealt with

as a matter of law by a trial court, the Court held that an employee is a “supervisor” for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. For this definition, the Court restricts Title VII claims to 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.” *Id.*, slip op. at 9.

In dissent, Justice Ginsburg argued that the categorical standard adopted by the Court may allow employers to escape Title VII’s arm by creatively limiting supervisory authority by title, contending that individuals with the power to assign daily tasks are often regarded by other employees as supervisors. The majority dispensed with that concern stating that, particularly in modern organizations that have abandoned a highly hierarchical management structure, it is common for employees to have overlapping authority with respect to the assignment of work tasks, so that members of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus may have the responsibility to direct each other in that area of responsibility.

The Court’s opinion should cleave a line for preliminary case evaluation on employer liability by expressly eliminating from Title VII consideration claims based on legitimate peer-to-peer harassment. The wise practitioner will use this to tee up early summary judgment at the trial level. (“Under the definition of ‘supervisor’ that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial.” *Id.*, slip op. at 22.)

The case is *Vance v. Ball State Univ.*, United States Supreme Court Case No. 11–556, Opinion and Order dated June 24, 2013. A full copy of the opinion [can be found here](#).

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