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## The Supreme Court Clarifies Who Is a Supervisor Under Title VII

By Mark Phillis and Denise Visconti

In a 5-4 decision, the U.S. Supreme Court decided what the definition of a “supervisor” is for purposes of assessing liability for unlawful harassment under Title VII. The Court ruled that an employer will be vicariously liable for the actions of a supervisor “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, a decision causing a significant change in benefits.’” The majority found that this “workable” definition of supervisor will provide much needed guidance to employers and employees even before litigation begins.

### A Brief History of the Law of Hostile Environment Harassment

Title VII protects employees against workplace discrimination based on a number of protected grounds, including race, color, religion, sex, or national origin.<sup>1</sup> While the Supreme Court first recognized that a hostile work environment created by harassing behavior was a form of unlawful discrimination under Title VII in 1986,<sup>2</sup> it was not until 1998 that the Court assessed for the first time under what circumstances an employer could be held responsible for the harassing behavior of its employees.

The Court issued two decisions on the same day—*Burlington Industries, Inc. v. Ellerth*<sup>3</sup> and *Faragher v. City of Boca Raton*<sup>4</sup>—in which it laid out three basic rules: (i) in cases where the hostile environment was created by a co-worker, the employer can be liable only if it knew or reasonably should have known about the harassment and failed to stop it;<sup>5</sup> (ii) in those cases where a supervisor engaged in harassing behavior, coupled with a tangible adverse employment action, an employer can be held strictly liable;<sup>6</sup> and, finally, (iii) in those cases where a supervisor was the harasser but no tangible adverse employment action was involved, an employer can be subject to vicarious liability for “an actionable hostile environment created by a supervisor with ...

1 42 U.S.C. § 2000e-2(a).

2 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

3 524 U.S. 742, 765 (1998).

4 524 U.S. 775, 807 (1998).

5 *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 806-07.

6 *Ellerth*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 790-91.

authority over the employee.”<sup>7</sup> Under this third scenario, however, liability would not be automatic; rather, an employer may establish a defense to liability *if* it can prove it exercised reasonable care to prevent and correct harassing behavior, and the employee claiming harm unreasonably failed to take advantage of any preventive or corrective opportunities that could have avoided or reduced the harm.<sup>8</sup>

Although the Supreme Court largely addressed both the type of liability and when liability might be imposed on employers in a case of harassment under Title VII, the Supreme Court did not define who qualifies as a supervisor for purposes of imposing vicarious liability on an employer. As a result, in the years since the Supreme Court decided *Ellerth* and *Faragher*, the federal courts of appeal developed different standards on how much authority an employee must exercise over another employee to be a supervisor.

On the one hand, the First, Seventh, and Eighth Circuits ruled that to be a supervisor for purposes of vicarious liability under Title VII, an employee must have the power to “hire, fire, demote, promote, transfer or discipline” another employee.<sup>9</sup> As a result, in these circuits, employees who lack such actual authority to make consequential economic decisions about another’s employment are merely co-workers, and, absent a showing of negligence, an employer would not be liable for their harassing behavior. Thus, bad behavior perpetrated by low-level supervisors and other employees who direct the daily work of others or oversee aspects of another employee’s job does not impute to an employer absent a finding the employer knew or reasonably should have known about the harassment and failed to stop it.<sup>10</sup>

The Second, Fourth, and Ninth Circuits, on the other hand, have rejected this differentiation between “low-level supervisors” and others.<sup>11</sup> Instead, they have found that *any* individual who has authority to direct and oversee another employee’s daily work is a supervisor for purposes of Title VII liability. Thus, to the extent such an individual is the harasser, an employer may be vicariously liable for any harassing behavior. In so finding, the Second, Fourth, and Ninth Circuits faulted the decisions by the other circuits—including most notably that of the Seventh Circuit—for too narrowly defining who was a supervisor for purposes of Title VII.<sup>12</sup>

It is under this split of authority that the *Vance v. Ball State University* case arose.

## The Vance Case

Maetta Vance is an African-American woman who worked for Ball State University’s (“BSU”) Banquet and Catering Department. Vance worked for BSU for over 15 years. At all times, Bill Kimes served as general manager of the Banquet and Catering Department and was Vance’s direct supervisor.

In 2005, Vance complained she had been threatened by catering specialist Sandra Davis. She also complained another employee, Connie McVicker, directed racial epithets toward her. BSU investigated and gave McVicker a written warning. With regard to Davis, however, BSU received conflicting accounts of what had occurred between Vance and Davis and, as a result, it decided to counsel both employees regarding their behavior.

Throughout 2006 and 2007, Vance continued to complain about McVicker’s and Davis’ treatment of her, and she eventually filed a lawsuit against BSU, Davis, McVicker, and Kimes.<sup>13</sup> Among Vance’s claims was that BSU should be held liable for the hostile environment created by Davis’ harassing behavior, who she claims was a supervisor.

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7 *Id.*

8 *Faragher*, 524 U.S. at 802.

9 *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034-35 (7th Cir. 1998); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002); *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). In addition, both the Third and Sixth Circuits have agreed with the reasoning in these cases, but they have not issued published, binding opinions on the issue.

10 *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 806-07.

11 *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003); *Whitten v. Fred’s, Inc.*, 601 F.3d 231 (4th Cir. 2010); *McGinest v. GTE Service Corp.*, 360 F.3d 1106, 1119 n.13 (9th Cir. 2004). In addition, the Tenth Circuit reached a similar conclusion in an unpublished decision. *Smith v. City of Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir. 2003).

12 *Mack*, 326 F.3d at 126. Under EEOC guidelines, a supervisor’s authority “must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.” *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, available at [www.eeoc.gov/policy/docs/harassment.html](http://www.eeoc.gov/policy/docs/harassment.html). Therefore, only those individuals who have “authority to undertake or recommend tangible employment decisions affecting the employee,” or have the “authority to direct the employee’s daily work activities,” are supervisors for purposes of imputing liability under Title VII. *Id.*

13 Vance also named Karen Adkins in her complaint, the individual to whom Bill Kimes reported, and alleged she failed to properly respond to the complaints made by Vance about the others’ behavior toward her.

BSU sought summary judgment from the district court on all of Vance's claims. The trial court concluded BSU could not be liable for Vance's hostile work environment claims because, under *Faragher* and existing Seventh Circuit precedent, Davis was not Vance's supervisor. Specifically, the district court found that because Davis did not have the power to "hire, fire, demote, promote, transfer or discipline" Vance, acts by Davis could not impute supervisor liability to BSU under Title VII.

Vance appealed the district court's decision to the Seventh Circuit Court of Appeals, which affirmed the decision of the lower court.<sup>14</sup> According to the Seventh Circuit, whether there was a basis to impose liability on BSU, and the burden of proof, depended on whether Davis was a supervisor or co-worker.<sup>15</sup> The Seventh Circuit agreed with the lower court by determining that because Davis did not have the power to "hire, fire, demote, promote, transfer or discipline" Vance, she did not have sufficient authority to be her supervisor or to impute liability to BSU as a result of her conduct.

Notably, BSU, Vance, and the U.S. Solicitor General all argued that the Seventh Circuit defined supervisor too narrowly and advocated for some form of the standard adopted by the Second Circuit and the EEOC, although they differed on how that standard should have been applied by the trial court in this case.

## The Supreme Court's Ruling

In a 5-4 ruling, the Court upheld the bright-line standard for defining who is a supervisor adopted by the Seventh Circuit. An employer will be vicariously liable "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, a decision causing a significant change in benefits.'" The majority sought to provide clear guidance to employers and employees regarding who qualifies as a supervisor for purposes of Title VII.<sup>16</sup>

The Court majority rejected as "a study in ambiguity" the position the EEOC sets forth in its Enforcement Guidance which characterizes as a supervisor someone who either has the authority to undertake or recommend tangible employment decisions affecting the employee or has the authority to direct the employee's daily work activities.

Instead, the Court adopted a bright-line, somewhat immutable rule that, as the Court noted, typically can be decided by courts early on in Title VII litigation as a matter of law—whether or not someone is a supervisor for purposes of Title VII depends solely on whether or not they were granted the power to "hire, fire, demote, promote, transfer or discipline" by their employer.

While this ruling is welcome news for employers in litigation, as the Court made clear, its ruling does not affect employers' ongoing obligation to provide a workplace that is free from discriminatory intimidation, ridicule and insult. Employers will still be liable for unlawful harassment under the negligence standard of *Faragher* and *Ellerth*. Employers should continue to provide ongoing anti-harassment training to their workforce and additional training to their managers—even if some of those managers may no longer be considered "supervisors" for purposes of assessing liability for harassment—because employers will want to ensure that all managers prevent and correct any harassing behavior.

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<sup>14</sup> *Vance v. Ball State University*, 646 F.3d. 461 (7th Cir. 2011)

<sup>15</sup> *Vance*, 646 F.3d. at 469-70.

<sup>16</sup> The Supreme Court noted that neither party raised the issue of whether *Faragher* and *Ellerth* apply to race-based hostile work environment claims, so the Court assumed that the same framework applies. *Vance*, slip. op. at 7 n.3.