

Supervisors on the line: The case of *Vance v. Ball State*

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On Nov. 26, the U.S. Supreme Court heard oral argument in the case of *Vance v. Ball State University*,¹ which addressed a long-standing split among the federal circuit courts of appeal over how much authority an employee must have over a co-worker to be deemed a “supervisor” in Title VII² harassment cases to render the employer vicariously liable for that employee’s conduct. The *Vance* case is being watched closely by employers and employees alike, as the Supreme Court’s decision may have broad implications.

responsible for the harassing behavior of its employees. The court issued two decisions⁶ on the same day — creating what came to be known as the *Faragher-Ellerth* affirmative defense — in which it laid out three basic rules:

- In cases where the hostile environment was created by a co-worker, the employer can be held liable only if it knew or reasonably should have known about the harassment and failed to stop it.⁷
- In those cases where a “supervisor” engaged in harassing behavior, and



The plaintiff sued Ball State University, shown here, accusing staff there of harassment, among other things. The case turns on the definition of “supervisor” in terms of employer liability for workers’ actions.

The federal courts of appeal have developed different standards on how much authority an employee must exercise to qualify as a “supervisor” and thus render the employer vicariously liable.

LEGAL BACKDROP

Title VII protects employees against workplace discrimination based on race, color, religion, sex and/or national origin.³ In 1986, the Supreme Court first recognized that a hostile work environment created by harassing behavior was a form of unlawful discrimination under Title VII.⁴ As the court noted, Title VII gives employees “the right to work in an environment free from discriminatory intimidation, ridicule and insult.”⁵

Nearly 12 years later, in 1998, the court assessed for the first time under what circumstances an employer could be held

the employer took a tangible adverse employment action against the victim, the employer may be held strictly liable.⁸

- In those cases where the employer did not take a tangible adverse employment action, the employer may be vicariously liable for “an actionable hostile environment created by a supervisor with ... authority over the employee.”⁹

Under this third scenario, liability is not automatic; rather, the employer may avoid liability for the supervisor’s harassment *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.¹⁰

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, what the Supreme Court did not do is define who qualifies as a “supervisor” for purposes of imposing vicarious liability on the employer. As a result, the federal courts of appeal have developed in the ensuing 14 years different standards on how much authority an employee must exercise over another to qualify as a “supervisor” and thus render the employer vicariously liable.

On the one hand, the 1st, 7th and 8th U.S. circuit courts of appeal have 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.¹¹ 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 is not imputed to the employer absent a finding that the employer knew or reasonably should have known about the harassment and failed to stop it.¹²



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Accordingly, in the 1st, 7th and 8th circuits, “low-level supervisors” and those individuals with only limited supervisory roles generally lack the power needed to alter the employment environment and thereby render the employer vicariously liable for their actions.¹³

On the other hand, the 2nd, 4th and 9th circuits have rejected the foregoing differentiation between “low-level supervisors” and others.¹⁴ Instead, these circuits 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, these appellate courts faulted the other circuits — including most notably the 7th Circuit — for defining too narrowly who was a “supervisor” for purposes of Title VII.¹⁵

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

BACKGROUND OF THE VANCE CASE

Maetta Vance is a black employee who worked for Ball State University’s catering department in Muncie, Ind., which is within the jurisdiction of the 7th Circuit. Vance began working for Ball State in 1989 as a substitute server for the catering department. In 1991 the school promoted Vance to a part-time catering assistant position and, in 2007, it promoted her again to a full-time catering assistant position. At all times, Bill Kimes served as general manager of the catering department and was Vance’s direct supervisor.

In 2005 Vance complained of threats by Sandra Davis (an employee whom she later claimed in her lawsuit was her supervisor). She also complained that another employee, Connie McVicker, directed racial epithets toward her. Ball State investigated and gave McVicker a written warning. With regard to Davis, however, the school 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 sued Ball State, Davis, McVicker and Kimes.¹⁶

Vance has claimed, among other things, that the university should be held vicariously liable for the hostile work environment allegedly created by Davis, whom she contends was a “supervisor” under Title VII.

Ball State sought summary judgment on all of Vance’s claims. With regard to her hostile-environment claim based on Davis’ behavior, the school argued it could not be held liable under Title VII because Davis was not Vance’s supervisor.

The standard articulated by the 1st, 7th and 8th circuits limits the imposition of liability on employers to only those individuals with express authority to make consequential decisions about an employee.

After considering Ball State’s arguments and the evidence submitted by both parties, U.S. District Judge Sarah Evans Barker of the Southern District of Indiana concluded the university was correct: It could not be liable for Vance’s hostile-environment claims because, under *Faragher* and existing 7th Circuit precedent, Davis was not Vance’s supervisor. Specifically, the District Court in *Vance* found that, because Davis did not have the power to “hire, fire, demote, promote, transfer or discipline” Vance, Davis’ alleged acts could not be imputed to Ball State under Title VII. In so finding, the judge relied, in part, on Vance’s own testimony that she did not actually know whether Davis was her manager.

Vance appealed to the 7th Circuit, which affirmed the decision.¹⁷ According to the appeals court, whether or not there was a basis to impose liability on Ball State, and whose burden such liability was to prove, depended on whether Davis was a supervisor or co-worker.¹⁸

The 7th Circuit agreed with Judge Barker that, because Davis did not have the power to “hire, fire, demote, promote, transfer or discipline” Vance, Davis did not have sufficient authority to be her supervisor and thereby impute liability to Ball State as a result of her conduct.¹⁹

In so finding, the 7th Circuit explicitly rejected the opinions of other courts of appeal — including the 2nd, 4th and 9th circuits — that “the authority to direct an employee’s daily activities established supervisory status under Title VII.”²⁰

Vance subsequently appealed the 7th Circuit’s ruling to the U.S. Supreme Court, which agreed to review it by order dated June 25.

AT ISSUE BEFORE THE HIGH COURT

The standard articulated by the 1st, 7th and 8th circuits represents a bright-line rule that allows not only the courts, but also employers and employees, to know who qualifies as a “supervisor” for purposes of Title VII.

This bright-line rule is a clear, somewhat immutable rule that typically can be determined early on in Title VII litigation as a matter of law — whether someone is a supervisor for purposes of Title VII depends solely on whether they were granted the power to “hire, fire, demote, promote, transfer or discipline” by their employer. However, such a rule limits the imposition of liability on employers to only those individuals with express authority to hire, fire or make other consequential decisions about an employee. For many employers, this is limited to only a few individuals within the organization.

The standard articulated by the 2nd, 4th and 9th circuits, by the Equal Employment Opportunity Commission, and currently by Vance is significantly broader and would encompass far more people. To the extent this standard is adopted by the Supreme Court, it could trigger liability not only for acts by individuals with actual authority to take tangible job actions against subordinate employees, but also for acts by individuals who have little or no such authority or oversight responsibilities.

RECAP OF THE ARGUMENT BEFORE THE COURT

At oral argument, Vance, Ball State and the government (through the solicitor general) made appearances. Not surprisingly, Vance advocated for the broader standard used by the 2nd Circuit, and the solicitor general defended the test articulated by the EEOC, both of which contemplate a definition of

supervisor broader than that articulated by the 7th Circuit.

Ball State, on the other hand, focused on the fact that, regardless of which test for supervisor the Supreme Court used, the employee at issue — Davis — did not meet it, requiring that the high court affirm the 7th Circuit's decision.

None argued the bright-line rule articulated by the 7th Circuit was the complete answer, as even Ball State suggested to the Supreme Court that guidance on the appropriate legal standard would benefit all parties.

The high court appeared split on the issue.

Chief Justice John Roberts and Justice Samuel Alito, in particular, asked questions suggesting they favored a bright-line definition of supervisor that would avoid courts having to delve into the details of each case and determine, on a case-by-case basis, who is a supervisor for purposes of triggering liability.

The number of individuals who may qualify as a "supervisor" under a broader definition may increase. Employers could find those employees whom they place in charge of a project, however minor, or deputize to dole out shift assignments for the day, deemed "supervisors."

Such a broad rule could include in the definition of "supervisor" those lower-level, hourly employees who have no meaningful authority over anyone else's employment. If there were such redefinition of which, and to what extent, lower-level employees are deemed to be supervisors for purposes of Title VII, it could require employers to take a careful look at their operations, be far more cautious about hiring and promotion decisions, conduct additional training, and more closely monitor the workplace. Such changes could alter the bottom line for employers and employees alike.

Additionally, a finding that lower-level, hourly employees are supervisors could result in

As a result, the value of the Supreme Court articulating a clear, bright-line test that provides everyone with sufficient notice as to when an employee's actions would be imputed to an employer, and that accurately reflects the employee's authority, cannot be overstated.²² **WJ**

NOTES

- ¹ 646 F.3d 461 (7th Cir. 2011); *cert. granted*, 2012 WL 2368689 (U.S. June 25, 2012).
- ² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.
- ³ *Id.* at 2000e-2(a).
- ⁴ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).
- ⁵ *Id.* at 66.
- ⁶ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (June 26, 1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (June 26, 1998).
- ⁷ *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 806-07.
- ⁸ *Ellerth*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 790-91.
- ⁹ *Id.*
- ¹⁰ *Faragher*, 524 U.S. at 802.
- ¹¹ *Parkins v. Civil Constructors of Ill.*, 163 F.3d 1027, 1034-35 (7th Cir. Dec. 30, 1998); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. Jan. 8, 2002); *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. Feb. 16, 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. Jan. 14, 2004). The 3rd and 6th circuits have agreed with the reasoning in these cases, but have not issued any published opinions on the issue.
- ¹² *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 806-07.
- ¹³ *Parkins*, 163 F.3d at 1033; *Noviello*, 398 F.3d at 96; *Joens*, 354 F.3d at 940-41.
- ¹⁴ *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. Apr. 11, 2003), *cert. denied*, 540 U.S. 1016 (Nov. 17, 2003); *Whitten v. Fred's Inc.*, 601 F.3d 231 (4th Cir. Apr. 1, 2010); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. Mar. 11, 2004). In addition, the 10th Circuit reached a similar conclusion in an unpublished decision. *Smith v. City of Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir. Apr. 11, 2003).
- ¹⁵ *Mack*, 326 F.3d at 126. Under the EEOC's guidelines, a supervisor's authority "must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at www.eeoc.gov/policy/docs/harassment.html. In other words, only those individuals who have "authority to undertake or recommend tangible employment decisions

The standard articulated by the 2nd, 4th and 9th circuits is significantly broader and could trigger liability for acts by individuals who have little or no authority or oversight responsibilities.

Justices Elena Kagan and Sonya Sotomayor posed various hypotheticals to all counsel, suggesting that a bright-line definition might produce perverse results, at least in those instances where the individual who has the authority to hire and fire is not the person directing the day-to-day job activities.²¹

Justice Anthony Kennedy, who remained largely silent throughout the argument, suggested the 7th Circuit's bright-line definition might be the answer when coupled "with an increased duty of care on the part of the employer to take the necessary steps to prevent forbidden harassment."

POTENTIAL IMPLICATIONS FOR EMPLOYERS

If the Supreme Court decides to adopt the broader definition of "supervisor" used by the 2nd, 4th and 9th circuits, it may expand the scope of employer liability for harassment under Title VII. Such definition could alter workplace management in several ways.

vicarious liability for *any* actionable hostile environment created by such employee. Based on numbers alone, such findings may increase employers' exposure in lawsuits alleging harassment.

Employers could see an increase in the number of lawsuits filed, and they could face greater financial risk from those lawsuits, particularly if liability is automatically imputed simply by a finding that a particular employee is a "supervisor" as Title VII defines that term. Such a shift in the way in which harassment lawsuits are filed and litigated could affect employers' operations, as well as the strategy by which they address claims from employees, without necessarily reducing the frequency with which bad actors misbehave in the workplace.

Most importantly, should the Supreme Court decide to adopt a broader definition of "supervisor," employers could be placed in the untenable position of making workplace decisions that may not expose them to significant liability, depending upon how a court applies such a definition of "supervisor."

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.*

¹⁶ *Vance v. Ball State Univ.*, No. 06-1452 complaint filed (S.D. Ind. Oct. 3, 2006). 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.

¹⁷ *Vance v.*, 646 F.3d 461.

¹⁸ *Id.* at 469-70.

¹⁹ *Id.*

²⁰ *Id.* Further, because Ball State had investigated Vance's complaints and, in the eyes of the court, "calibrat[ed] its response to the results of the investigation and the severity of the alleged conduct," the court found there was no basis to impose liability against the university. *Id.* at 473.

²¹ Justice Ruth Bader Ginsburg, along with Justice Kagan, also seemed to focus on whether there was sufficient evidence in the record that someone with a supervisory relationship had harassed Vance.

²² It is possible, however, that the Supreme Court may not provide the clarity that both employers and employees desire since Ball State contends that, even under the broader definition of "supervisor" adopted by the 2nd, 4th and 9th circuits and the EEOC, Davis cannot be deemed to be a supervisor.

ASBESTOS

Pfizer asks Supreme Court to disallow bankruptcy-related asbestos suits

Drugmaker Pfizer Inc. is asking the U.S. Supreme Court to review a federal appeals court's ruling that allows certain asbestos-related lawsuits against the company, even though the subsidiary that was the main target of the suits went through bankruptcy reorganization.

Pfizer Inc. v. Law Offices of Peter G. Angelos, No. 12-300, response requested (U.S. Nov. 6, 2012).

The ruling by the 2nd U.S. Circuit Court of Appeals "frustrates the congressional purposes" of the law written to deal with asbestos-related bankruptcies, Pfizer says in its petition for a writ of *certiorari*.

The Law Offices of Peter G. Angelos has been pushing courts allow the suits.

The Supreme Court requested Nov. 6 that the Angelos firm file a response by Dec. 6.

In April the 2nd Circuit said Pfizer can face suits over asbestos-containing products made by its unit Quigley Co. The products included Insulag, an asbestos-containing insulation, which Quigley made from the 1930s until the 1970s.

Quigley, which Pfizer bought in 1968, at one time faced suits by more than 160,000 plaintiffs, and it filed for bankruptcy in 2004.

Pfizer made no asbestos-containing products of its own.

The Angelos firm argued, however, that Pfizer was liable because it put its logo on some advertisements for Quigley products,

identifying both companies as manufacturers of the asbestos-containing products.

In 2008 the U.S. Bankruptcy Court for the Southern District of New York enjoined the claims. It said Pfizer's alleged liability arose from its ownership of Quigley, and the claims must be channeled toward the trust created out of the bankruptcy.

Pfizer says the question of whether the suits should be enjoined is crucial to the resolution of asbestos-related bankruptcies.

The U.S. District Court for the Southern District of New York reversed the Bankruptcy Court, and the 2nd Circuit affirmed.

In its petition for *certiorari*, Pfizer says the question of whether the suits should be enjoined is crucial to the resolution of asbestos-related bankruptcies.

"The issues presented concern the scope of asbestos-channeling injunctions under 11 U.S.C. § 524(g), which directly impacts the funding, disposition and finality of nearly



REUTERS/Jeff Christensen

every asbestos-related Chapter 11 case nationwide," the company says.

Pfizer says that if the 2nd Circuit's ruling stands, corporate parents will be discouraged from contributing the funds needed to make Section 524(g) trusts effective for compensating asbestos victims.

The company says Congress enacted Section 524(g) to encourage companies in Pfizer's position to contribute assets to asbestos bankruptcy trusts "in exchange for a broad channeling injunction."

Pfizer says the high court should grant the petition and reverse the 2nd Circuit's judgment. [WJ](#)

Related Court Document:

Certiorari petition: 2012 WL 3947624