

EMPLOYMENT LAW

JULY 2013

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Georgia A. Staton and Elizabeth Gilbert analyze the Supreme Court's bright line test, announced in Vance v. Ball State University, 570 U.S. ___, (2013), for defining who qualifies as a supervisor for purposes of vicarious liability under Title VII and how that line may not be as bright as the Court believes, especially when it comes to governmental employers.

Who's The Boss: Employer Liability After *Vance v. Ball State* Is the Line Really as Bright as the Court Intended?

ABOUT THE AUTHORS



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The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis.

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Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an employee, with respect to compensation, terms, conditions, or privileges of employment, because of the employee's race, color, religion, sex, or national origin.¹ Additionally, employers can be held liable, under Title VII, when employees are subjected to a discriminatorily-based hostile work environment.²

The extent of the employer's liability depends on the status of the harasser; co-worker or supervisor. If the harasser is a co-worker, the employer is only liable if it was negligent in managing the working conditions to which the employee was subjected. If the harasser is a supervisor, however, the employer can be held strictly liable if the supervisor's harassment culminates in a "tangible employment action", e.g. demotion, discipline, discharge.³

Prior to *Vance*, there was a split among the Circuit Courts of Appeals regarding how to define a "supervisor" for purposes of vicarious liability under Title VII. Both the Fourth and the Ninth Circuit Courts of Appeals utilized the broad definition of supervisor, as recommended by the Equal Employment Opportunity Commission guidelines, defining a supervisor as an individual who has the authority to demand obedience from an employee⁴, while the First, Seventh and Eight Circuit Courts of Appeals used the narrower definition of supervisor

adopted by the Court in *Vance*.⁵

The Court, in *Vance*, adopted the Seventh Circuit's definition of supervisor, setting forth what purports to be a bright line test for determining who will be deemed a supervisor for purposes of vicarious liability under Title VII. The Court held that an employee is a "supervisor" if the employee has the authority to take tangible employment actions against the alleged victim, *i.e.* the power to effect a significant change in employment status, such as hiring, firing, demotion, failing to promote, significantly changing the employee's responsibilities or making significant changes to the employee's benefits.⁶ The Court believed that this would create a bright line test and streamline Title VII litigation, giving litigants clear guidance on the determination of whether the employer can be held vicariously liable for the discriminatory conduct of its employees. However, this line may not be as bright as intended.

ABC Construction Company

In the majority of employment situations, it may be very easy to draw that bright line between supervisor and co-worker, based on job descriptions and clearly defined roles, making clear the employer's liability in a Title VII lawsuit. For example, Dave, Tom and Susan are all employed by ABC Construction Company. Dave is the Construction Manager, Susan is a Foreman and Tom is Master Carpenter. As the Foreman, Susan makes the schedules for all carpenters, assigning them to specific projects and setting their work hours. Dave, as the Construction

¹ 42 U.S.C. §2000e-2.

² *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986).

³ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 807 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 765 (1998).

⁴ *Whitten v. Fred's Inc.*, 601 F.3d 231 (4th Cir. 2010); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1119 (9th Cir. 2002)

⁵ *Noviello v. Boston*, 398 F.3d 76 (1st Cir. 2005); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004); *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998).

⁶ *Vance v. Ball State University*, 570 U.S. ___, p. 9, (2013).

Manager, is responsible for making the decisions regarding hiring, firing, promotion, and pay increases. Dave relies on input from Susan with regard to the evaluation of all of the construction employees, including the carpenters.

Over a period of months, Susan has made sexual advances toward Tom, which Tom has repeatedly rebuffed. The company recently began a large construction project which will require a great deal of intricate carpentry work which is usually reserved for Master carpenters. Tom has made it known that he would very much like to work on the project. The company also has many smaller projects, which entails menial carpentry work which is typically performed by entry-level carpenters.

Susan approaches Tom and tells him that if he does not have sex with her she will make sure that he does not get assigned to the large project and instead will only be assigned to the low-level, menial jobs which require working late into the evenings. This would significantly impact Tom's ability to spend time with his children. Tom succumbs to Susan's advances and engages in sexual contact with her and Susan assigns him to the large project. After a few weeks, Tom ends the sexual contact and Susan immediately reassigns him to the low-level project, requiring him to work late into the evening. Tom reports to Dave that he feels that he has been subjected to sexual harassment by Susan. Dave immediately begins an investigation in accordance with company policy.

Tom files a lawsuit against ABC Construction Company, in federal court, alleging a sexually hostile work environment in violation of Title VII. Will ABC Construction Company be held vicariously liable for the actions of Susan? Using the *Vance* standard, the answer

is "no". Susan is not a "supervisor" as defined in *Vance* because, although she had the authority to direct Tom's daily work, she did not have the authority to hire, fire, discipline, demote or take other tangible employment action against Tom. ABC Construction Company could only be held liable if Tom proved that it was negligent in managing the working conditions to which Tom was subjected.

Daily Elementary School

However, there are some employers, such as some governmental employers, where the bright line test for who qualifies as a supervisor is not as sharply defined. For example, public school districts operate under the direction of an elected Governing Board. Day to day administration of the District and the schools are managed by Superintendents, Principals, and other administrators. The Superintendents and Principals are responsible for interviewing and selecting candidates to serve as administrators and teachers, but the ultimate decision to hire any school district employee rests solely with the Governing Board. Likewise, Superintendents and Principals are responsible for directly supervising the day to day performance of employees and performing yearly performance evaluations on those employees who are under their direct supervision, however the decision to retain or release any employee does not rest with the Superintendent or Principal, it rests solely with the Governing Board; the Superintendent and Principals can only make recommendations with regard to the employee's position.

Jack is the Principal at Daily Elementary School in the Brown Elementary School District. Stacy is a 5th grade teacher at Daily, teaching students in the gifted program, a

position that she had held for four years. Since the beginning of the school year, Jack has, on repeated occasions, visited Stacy's 5th grade class, frequently making physical contact with Stacy and asking her out on dates. Stacy has declined Jack's invitations and tried to distance herself from Jack when he would come into her class and at staff meetings and professional development classes. Jack tells Stacy that he does not like the fact that she avoids him and that he is hurt that she refused his invitations for dates. He continues to visit her class and make suggestive comments.

Later in the school year, the parents of one of Stacy's students contacts Jack complaining about the grade that Stacy gave their child on an English paper. Jack meets with Stacy before the meeting with the parents and tells Stacy that he will support her with the parents if she agrees to go on one date with him; Stacy declined. The parents attend a meeting with Jack and Stacy and Jack tells Stacy to change the grade to appease the parents; she refuses. Jack reports Stacy to Dr. Brown, the District Superintendent, stating that she was insubordinate in refusing to follow his directive. Dr. Brown agrees that Stacy's conduct was insubordinate. Stacy receives a non-disciplinary letter of direction from Dr. Brown to maintain professional and courteous interactions with her Principal and to adhere to his directives.

Stacy is offered and accepts a teacher's contract for the following school year. After signing her contract, Jack, with Dr. Brown's approval, tells Stacy that he is transferring her to a 2nd grade teaching position at Daily Elementary for the following school year. Stacy had previously told Jack that she did not feel comfortable teaching 1st or 2nd grade classes and preferred the upper level classes.

Stacy files a lawsuit against Jack, Dr. Brown and the School District, alleging that Jack created a hostile work environment, in violation of Title VII, and that she suffered a tangible employment action in retaliation for her refusal to accede to Jack's sexual advances. Will the School District be held strictly liable for the actions of Jack? Using the strict definition of *Vance*, the answer should be "no", since the Governing Board holds the sole power to hire, fire, retain or release employees from the District and transferring a teacher from one grade to another in the same school probably would not constitute a tangible employment action.

What if Stacy's position as the 5th grade gifted teacher entitled her to an additional \$2,000/year stipend which she would not receive as the 2nd grade teacher? What if Dr. Brown involuntarily transferred Stacy to a school that required her to drive an additional 30 miles from her home? What if Stacy wanted to apply for a position as an Assistant Principal and one of the requirements for applying for that position was teaching an upper level gifted class for 5 years?

The rationale behind the Court's ruling was that the definition of supervisor could be easily applied and easily determined early in litigation allowing the matter to be resolved as a matter of law. The majority stated that this would not, as the dissent feared, leave employees unprotected against harassment by co-workers who possess some authority to assign daily tasks. In those situations where the offending employee is not a supervisor the victim could still prevail by showing that the employer was negligent in permitting the harassment to occur or continue, and that the jury should be given instructions that the nature and degree of the authority actually wielded by the harassing employee is an important factor to be considered in

determining whether the employer was negligent.⁷

These scenarios demonstrate how the Supreme Court's definition of a supervisor may not be such a bright line test, and may not lead to the streamlined litigation and early resolution envisioned by the Court, especially in government sector employment situations. This will require attorneys who are representing these employers to engage in a multi-tiered evaluation of the facts of each case. The attorney will need to determine the exact nature of the role of each of the relevant actors in the case to determine the likely extent of the employer's liability, prepare dispositive motions and defend against a claim of negligence.

Practice Pointers

1. You should not make any snap judgments on liability. In assessing the claim, you must look at the job description of the harasser to determine whether that person has the authority to take tangible employment action. This can include the authority to hire, fire, promote, demote, discipline. It can also include the authority to reassign the employee to a position with significantly different responsibilities or make a decision that causes a significant change in benefits.

2. In addition to reviewing job descriptions, you should interview all of the relevant employees, especially those who regularly interact with the alleged harasser, to find out, as a practical matter, what authority they actually wield, on a day-to-day basis, over other employees. This will assist in determining whether the alleged harasser will be considered a supervisor, subjecting the employer to strict liability or a simply a co-

worker.

3. In the event that the harassing employee does not have the authority to take tangible employment action, you should file a motion for summary judgment on any claims for vicarious liability. This does not, however, end the inquiry.

4. Once you have determined that the harassing employee is not a supervisor, then you should then analyze the nature and degree of authority the harassing employee wields over the victim's day-to-day work activities, as this information can be used by the victim to allege negligence on the part of the employer. This will allow you to determine whether the employer was negligent in managing the work environment, *i.e.* allowed the harasser to either create a hostile work environment or allowed the continuation of a known hostile work environment.

⁷ Vance at p. 24.

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