

June 28, 2013

HARASSMENT UPDATE

U.S. SUPREME COURT NARROWLY, BUT PRECISELY, DEFINES “SUPERVISOR” AND “TANGIBLE EMPLOYMENT ACTION” FOR PURPOSES OF TITLE VII WORKPLACE HARASSMENT CLAIMS

On June 24, 2013 a divided United States Supreme Court answered two questions left lingering over the past 15 years: for purposes of workplace harassment claims based on Title VII, who is a “supervisor” and what is a “tangible employment action”? The Supreme Court’s answers, delivered in *Vance v Ball State University*, are clear and concise. First, the Court held that a supervisor for purposes of Title VII is an employee “empowered by the employer to take tangible employment actions against the victim.” Second, the Court clarified that “tangible employment actions” include “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

This Alert will briefly summarize the standard for employer liability for workplace harassment under Title VII; this will illustrate why the definitions for “supervisor” and “tangible employment action” are so important. Following this summary, the Alert will outline the facts of the *Vance* case and analyze the Court’s opinion.

Framework for Workplace Harassment Claims

The Supreme Court acknowledged that Title VII workplace harassment claims are complex. For one thing, the Court observed that “an employer’s liability for such harassment may depend on the status of the harasser” as either a co-worker or a supervisor. The Court then describes three scenarios in which an employer may be liable.

1. If “the harasser is a ‘supervisor’” and the “harassment culminates in a tangible employment action, the employer is strictly liable” (strictly liable means that there is no defense available once the elements are proven).
2. If the harasser is a supervisor, but there is no tangible employment action, then the employer will be liable unless it proves, “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.”
3. “If the harassing employee is the victim’s co-worker” rather than a supervisor, then “the employer is liable only if it was negligent in controlling working conditions.”

The terms “supervisor” and “tangible employment action” have been bolded to illustrate that the definitions of those terms are of central importance to claims for workplace harassment.

The Underlying Facts

Maetta Vance is an African-American woman. In 1989 Ball State University hired her as a substitute server in its Dining Services division. In 1991, Ball State promoted Ms. Vance to a part-time catering assistant position. Further, in 2007 Ms. Vance successfully applied for a full-time catering assistant position.

During her employment Ms. Vance lodged numerous complaints with Ball State and the EEOC regarding alleged race discrimination and harassment. The present case relates to her 2005 complaints of alleged race harassment and discrimination. Ms. Vance identified a catering specialist, Saundra Davis, as her harasser. Ms. Davis a white woman. Although she “did not have the power to hire, fire, demote, promote, transfer, or discipline,” Ms. Vance described Ms. Davis as a supervisor and attributed the following behavior to her:

- Ms. Davis “gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her;”
- Ms. Davis “smiled at her” when she was “left alone in the kitchen with Davis;”
- Ms. Davis “‘blocked’ her on an elevator and ‘stood there with her cart smiling;” and
- Ms. Davis “often gave her ‘weird’ looks.”

Lower Court Decisions

Ball State attempted to address Ms. Vance’s complaints, but its efforts did not resolve the situation to Ms. Vance’s satisfaction. In 2006 Ms. Vance filed a federal lawsuit “claiming, among other things, that she had been subjected to a racially hostile work environment in violation of Title VII.” She alleged that Ms. Davis “was her supervisor and that BSU was liable for Davis’ creation of a racially hostile work environment.”

The district court granted summary judgment for Ball State, finding that Ms. Davis was not a supervisor because she “could not ‘hire, fire, demote, promote, transfer, or discipline’” Ms. Vance (eliminating potential liability under scenarios 1 and 2, as outlined above). The district court also said that the evidence would not support a negligence finding because Ball State “responded reasonably to the incidents of which it was aware” (scenario 3). After the Seventh Circuit affirmed summary judgment, Ms. Vance sought Supreme Court review.

The Supreme Court’s Decision

The Supreme Court agreed to review the following question: “who qualifies as a ‘supervisor’ in a case in which an employee asserts a Title VII claim for workplace harassment?” After retracing the 42-year history behind the framework for workplace harassment claims (summarized briefly, above, in this Alert), the Court answered the question it posed by stating that a supervisor is an employee who:

the employer has empowered ... 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.”

The Supreme Court essentially adopted the Seventh Circuit’s definitions for these terms. The Court observed that its carefully crafted framework for workplace harassment claims “presupposes a clear distinction between supervisors and co-workers” and predicted that its “interpretation of the concept of a supervisor” would lead to clarity in litigation.

In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser’s status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment. By contrast, under the approach advocated by [Ms. Vance] and the EEOC, supervisor status would very often be murky—as this case well illustrates.

The Court rejected a number of less precise definitions as unworkable.

First, the Court rejected Ms. Vance’s argument that it should adopt the “general usage” definition for the term supervisor. The Court demonstrated that general usage “lacks a sufficiently specific meaning to be helpful for present purposes.” It cited the inconsistencies in the definitions found in various dictionaries, two “colloquial business authorities” and several laws and regulations. The Court said that these “varying meanings” demonstrate that there is not a general usage definition that it could adopt.

Second, the Court rejected the view of the dissenting Justices that the precise definition adopted “ignor[ed] the ‘all-too plain reality’ that employees with authority to control their subordinates’ daily work are aided by that authority in perpetuating a discriminatory work environment.” The majority recognized that an employee with some level of responsibility for directing others is “certainly capable of creating intolerable work environments.” However, the majority simply found that “[n]egligence provides the better framework for evaluating an employer’s liability when a harassing employee lacks the power to take tangible employment actions.”

Third, the Court rejected the EEOC’s definition of supervisor as “a study in ambiguity.” Specifically, the Court found “no clear meaning” in the EEOC’s 1999 Enforcement Guidance titled Vicarious Employer Liability for Unlawful Harassment by Supervisors, which described a supervisor as an employee who wields authority “of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.” The Court observed that the EEOC’s definition “would present daunting problems for the lower federal courts and for juries.”

Practical Considerations

The *Vance* decision does not change the law. Rather, it clarifies the law and should make the litigation of Title VII harassment claims less confusing for parties and juries.

In their efforts to prevent sex, race and other harassment in the workplace, and to protect themselves in the event of claims, employers are well advised to continue to have strong policies and consistent practices. The appropriate steps continue to include:

- Having a clearly written policy prohibiting harassment (zero tolerance);
- Making certain that the policy is distributed to new employees and redistributed to existing employees whenever it changes (document this);
- Providing periodic training regarding the policy (document this);
- Implementing a simple-to-use internal complaint procedure that makes sense, is well known, and allows employees at least two avenues for reporting;
- Promptly and thoroughly investigating all complaints (document the investigation);
- Where a complaint is found to have merit, immediately taking appropriate corrective action that is designed to end the harassment, make the victim whole, and appropriately discipline the harasser; and
- Communicating appropriately with the complaining employee regarding the outcome of the investigation and, where the complaint had merit, communicate the fact that corrective action has been taken.

Bullard Law will continue to monitor developments in the law regarding harassment, discrimination and retaliation. Please also feel free to contact us anytime with any questions about the *Vance* decision or any other labor, employment, or benefits issues.

~MICHAEL G. MCCLORY

[Back to Bullard Alerts](#)