Proskauer

Supreme Court Adopts an Employer-Friendly Definition of "Supervisor" for the Faragher/Ellerth Analysis

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On June 24, 2013, the United States Supreme Court issued its opinion in *Vance v. Ball State University*, No. 11-556, 570 U.S. ___ (2013), holding that an employee is a "supervisor" for purposes of vicarious employer liability under Title VII of the Civil Rights Act of 1964 ("Title VII") only if he or she is empowered by the employer to take tangible employment actions against the victim.

Background

Maetta Vance, an African-American woman employed by University Dining Services at Ball State University, alleged that she had several racially-charged encounters with Saundra Davis, a white catering specialist also employed in Dining Services. Vance reported these incidents to the University, and further filed charges with the Equal Employment Opportunity Commission ("EEOC"), but asserted that no action was taken to remedy the matter or discipline Davis.

Vance filed suit in October 2006 in the U.S. District Court for the Southern District of Indiana, claiming hostile work environment in violation of Title VII, and alleging vicarious liability on the part of Ball State based on the actions of Davis. Ball State moved for summary judgment, arguing that it could not be held vicariously liable for the actions of Davis because she was not Vance's supervisor. The district court granted the University's motion, applying Seventh Circuit precedent to conclude that "[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment," which authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Vance v. Ball State Univ*., No. 1:06-cv-1452-SEBJMS (S.D. Ind. Sept. 10, 2008). The district court went on to find that Davis did not have the power to affect directly the terms and conditions of Vance's employment, and that even if Davis "periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for purposes of Title VII."

Vance appealed to the Seventh Circuit, which affirmed the holding of the district court and adopted its reasoning as to why Davis was not a supervisor. *Vance v. Ball State Univ* ., 646 F.3d 461 (7th Cir. 2011). The Supreme Court subsequently granted Vance's petition for review to decide "[w]hether the 'supervisor' liability rule established by *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or (ii) is limited to those harassers who have the power to 'hire, fire, demote, promote, transfer, or discipline' their victim."

Supreme Court Decision and Analysis

The Supreme Court upheld the narrow definition of "supervisor" as articulated by the district court and affirmed by the Seventh Circuit. It held that a supervisor is an individual who has authority to take a tangible employment action, meaning "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilies, or a decision causing a significant change in benefits." The Court began its decision by noting that, in the landmark companion cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), a split theory of liability was established for employers in Title VII harassment cases depending on whether the alleged harasser is a "supervisor" or a "co-worker" in relation to the complainant. If the harasser is a co-worker, an employer will only be liable for the harassing behavior if the employee can prove negligence on the part of the employer — that is, that the employer failed to take reasonable measures to prevent and correct the offending behavior.

If the harasser is a supervisor, however, liability may be imputed directly to the employer for the supervisor's actions. The employer may then only avoid such vicarious liability if the harassing behavior did not result in a tangible employment action such as firing, demotion, or reduction in pay. In such cases, an employer may assert a two-pronged affirmative defense to defeat vicarious liability: (1) that the employer exercised reasonable care to prevent and promptly correct the harassing behavior; and (2) that the employee unreasonably failed to take advantage of preventive or corrective measures put in place by the employer or otherwise failed to avoid the harm.

The Court in *Vance* noted that the circuits had previously been split on the question of how to define who constitutes a "supervisor" for purposes of the *Faragher/Ellerth* framework, with the First, Seventh, and Eighth Circuits generally holding that the "supervisor" designation is limited to only those individuals with the direct power to fire, hire, promote, demote, transfer or discipline the employee claiming harassment, while the Second and Fourth Circuits generally held that a supervisor also included individuals with the ability and opportunity to direct, oversee or control the complaining employee's day-to-day work activities. This broader definition substantially followed the approach advocated by the EEOC in Enforcement Guidance on the issue, which tied supervisor status to the ability to exercise significant discretion over an employee's daily work.

The Court rejected this broader definition of supervisor advocated in the EEOC Guidance and adopted by the Second and Fourth Circuits as "nebulous," stating that "the framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers" and "contemplate[s] a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions." The Court noted that there is "no hint in either decision that the Court had in mind two categories of supervisors," but rather, "the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation."

The Court rejected Vance's contention that a more expansive definition of "supervisor" is supported by the meaning of the word in general usage or in other legal contexts, concluding that the term "lacks a sufficiently specific meaning to be helpful for present purposes." The Court also rejected Vance's argument that at least some of the alleged harassers in the *Faragher* and *Ellerth* cases themselves were not "supervisors" under the more restrictive definition, finding that, in both cases, the parties did not dispute the status of the harassers and therefore the Court was "not presented with the question of the degree of authority that an employee must have in order to be classified as a supervisor." The Court nevertheless found that the *Faragher* and *Ellerth* decisions implicitly support the conclusion that "the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors," as the Court in those cases "sought a framework that would be workable and would appropriately take into account the legitimate interests of employers and employees." Thus, the Court noted that a non-supervisor's degree of authority can be a factor in the negligence analysis.

Under the EEOC's more expansive approach, stated the Court, "supervisor status would very often be murky" and "it would often be necessary for the jury to be instructed about two very different paths of analysis, i.e., what to do if the alleged harasser was found to be a supervisor and what to do if the alleged harasser was found to be merely a co-worker." Under the narrower definition being adopted by the Court, however, "the question of supervisor status, when contested, can very often be resolved as a matter of law before trial," thus "focus[ing] the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply."

The Court further rejected Vance's argument that tying supervisory status to the authority to hire, fire, etc., will encourage employers to "insulate" themselves from liability for workplace harassment by limiting the authority to take tangible employment actions to only a handful of individuals. Noting first that "an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment," the Court further found that "[i]f an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee." Under such circumstances, concluded the Court, the employer "may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies." Notably, the Court also distinguished the standard for determining supervisor status under the National Labor Relations Act, noting that the definition for purposes of Title VII was narrower.

Implications

Adopting arguments advocated in an amicus brief Proskauer submitted on behalf of the Society for Human Resources Management, the Court found the standard in the EEOC Guidance lacks the power to persuade. Instead, the Court's decision adopted a bright-line practical standard easily applied by employers and employees, as well as courts. Indeed, the issue of supervisory status now is one that will likely be resolved *as a matter of law* before trial. The standard will avoid juror confusion and allow for clear jury instructions in trials of harassment claims without the need to instruct on alternative theories of liability.

The *Vance* decision further puts an end to any disparate application of the affirmative defense and roundly rejects the EEOC's proposed standard for determining supervisory status as unworkable and ambiguous.

Finally, though the decision clarifies the circumstances under which a negligence or a vicarious liability standard will apply, it also underscores the importance for employers to have appropriate work place policies and procedures in place that are designed to prevent workplace discrimination and harassment and address any concerns or complaints in a timely fashion. Indeed, the Court noted that employers can still be liable for harassment by co-workers if they are on notice and do nothing to stop it under the negligence standard. Employers with robust non-discrimination and non-harassment policies and effective complaint procedures can ideally prevent discrimination or at least resolve issues internally and have a defense to liability whether or not the wrongdoer is a supervisor.

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