The Supreme Court’s Vance v. Ball State University decision—Who is a supervisor for purposes of Title VII?

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On June 24, 2013, the Supreme Court issued its decision in Vance v. Ball State University. The decision authored by Justice Samuel Alito held that an employee is a “supervisor” for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.

Petitioner Maetta Vance is an African-American woman who began working for Ball State University (BSU) as a substitute server in the school’s dining services department in 1989. Ms. Vance was subsequently elevated to a full-time catering assistant in 2007. The Court’s opinion indicates that Vance had a history of racial discrimination and retaliation complaints over the course of her employment. However, relevant to Court’s decision is a series of incidents in late 2005 and 2006 that resulted in Vance filing internal complaints and EEOC charges. These incidents involved Saundra Davis, a fellow employee at BSU who is a white woman. Vance specifically complained that Davis “gave [Vance] a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her.” Vance also claimed that Davis would “smile at her, “blocked” her on an elevator and gave her “weird looks.”

The Supreme Court opinion does not offer further details, but simply relates that Vance’s creation of such an environment.

While the nature of Davis’ duties was an issue in the case, there was no dispute that Davis did not have the power to hire, fire, demote, promote, transfer or discipline Vance. Both parties moved for summary judgment and the District Court entered summary judgment in favor of BSU explaining that BSU could not be held vicariously liable for Davis’ action because Davis was not Vance’s supervisor pursuant to the Seventh Circuit’s precedent. The District Court also found that BSU had responded reasonably to Vance’s complaints. The Seventh Circuit subsequently affirmed. It relied on precedent set in Hall v. Bodine Elect. Co., where it established that absent an entrustment of at least some authority to hire, fire, demote, promote, transfer, or discipline, an employee does not qualify as a supervisor for purposes of imputing liability to the employer. In addition, the Seventh Circuit concluded that Davis was not Vance’s supervisor and that Vance would not recover because BSU was not negligent with respect to Davis’ conduct.

Justice Alito framed the issue in Vance as deciding a question left open by the Supreme Court in Burlington Industries, Inc. v. Ellerth and Faragher v. Boca Raton. Specifically, and as alluded to above, the open question was the definition of “supervisor” for purposes of a claim of workplace harassment under Title VII.

In Ellerth and Faragher, the Supreme Court held that an employer might be vicariously liable for its employee’s creation of a hostile work environment in two different types of situations. First, an employer is vicariously liable when a supervisor takes a tangible action affecting the employee’s status such as hiring, firing, failing to promote or causing a change in benefits. In this situation, the Court maintained, it is appropriate to hold the employer strictly liable. A second situation occurs when an employer can be held vicariously liable even if the supervisor’s harassment does not result in tangible employment, because: 1) the employer cannot demonstrate that it exercised reasonable care to prevent and promptly correct any harassing behavior and 2) the employee failed to take advantage of any preventive or corrective action by the employer.

In Vance, the Court noted that as a result of Ellerth and Faragher, the critical question is whether an alleged harasser is a “supervisor” or a co-worker and acknowledged the existence of a conflict between the lower courts about the meaning of supervisor. The court identified the First, Seventh and Eighth Circuits as those maintaining that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer or discipline the victim. The Second, Third and Fourth Circuits, on the other hand, have followed a more “open-ended” approach advocated by the EEOC’s Enforcement Guidance, which ties supervisor status to the ability to exercise direction over the employee’s work. To resolve this conflict the Vance court held that an employer may be vicariously liable for an employee’s harassment “only 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, or a decision causing a significant
change in benefits.” In addition, the court rejected the EEOC’s definition of supervisor as “nebulous.”

Writing for the minority view, Justice Ginsburg indicated that the EEOC’s Enforcement Guidance was formulated as a result of the Ellerth and Faragher decisions and that such guidance addressed the qualifications of a supervisor as “an individual who is authorized to undertake or recommend tangible employment decisions... or an individual who is authorized to direct the employee’s daily work activities.” Justice Ginsburg saw the majority opinion as one that diminished the force of Ellerth and Faragher, ignored the conditions under which members of the work force labor, and disdained the objective of Title VII to prevent discrimination from infecting the workplace. Accordingly, Justice Ginsburg would follow the EEOC Guidance and hold that the authority to direct an employee’s daily activities establishes supervisory status under Title VII.

Of course, the Vance decision has been the subject of many commentaries by the employment law bar. Most notably, however, is Judge Richard A. Posner’s commentary noting that Justice Alito’s majority opinion’s narrow definition of supervisor as well as Justice Ruth Bader Ginsburg’s broader definition in her dissenting opinion were both “vague” and simply not helpful. Indeed, Judge Posner commented on the dissent’s footnote reference to his opinion in Doe v. Oberweis Dairy in 2006. This reference indicated that “[e]ven the Seventh Circuit, whose definition of supervisor the [Supreme] Court adopts in large measure, has candidly acknowledged that under its definition, supervisor status is not a clear and certain thing” particularly when dealing with an individual whose duties characterize him somewhere between a supervisor and a co-worker.

In Doe, the facts involved a 16-year-old plaintiff who worked as a part-time ice cream server at the defendant’s ice cream parlor. Her claim alleged that her supervisor, Matt Nayman, had harassed her sexually, culminating in sexual intercourse, for which he was prosecuted, convicted and ultimately imprisoned. Nayman had supervisory authority to direct the work of employees and could even issue disciplinary write-ups, but could not fire the employees. Judge Posner concluded in the Doe decision that “if forced to choose between the two pigeonholes, the court would be inclined to call Nayman a supervisor because he was often the only supervisory employee present in the ice cream parlor. He was thus in charge, and had he told his boss that one of the scooper girls was not doing a good job and should be fired, the boss would probably have taken his word for it rather than conduct an investigation.” In his commentary, Judge Posner also added that in Doe, the Seventh Circuit proposed a sliding scale, no longer viable as a result of Vance, where the employer’s liability would depend on the extent of the authority the employer conferred on the employee. Judge Posner felt that a jury would be capable to make a sensible finding based on the specific facts of each case. As a final point, Judge Posner noted that Vance had a weak case, which serves as a reminder of an old law school adage that sometimes bad facts make bad law.

In any event, in Vance the majority opted for a bright line test to determine who qualifies as a supervisor for purposes of Title VII over a case-by-case factual analysis. The question now becomes whether Congress will heed Justice Ginsburg’s call to “correct this error and to restore the robust protections against workplace harassment.” Stay tuned!

3. A more detailed description of Vance’s allegations and factual background is found in the Seventh Circuit opinion. See Vance v. Ball State University, 646 F.3d 461, 466-468 (7th Cir. 2011).
4. 646 F.3d 461, 470 (7th Cir. 2011).
5. 276 F.3d 345, 355 (7th Cir. 2002).
6. 646 F.3d 473. Writing for the panel, Judge Wood acknowledged that the catering department at BSU was undoubtedly an unpleasant place for Vance between 2005 and 2007. However, he noted that the record reflected BSU promptly investigated Vance’s complaints and responded appropriately and added that Title VII does not require an employer’s response to “successfully prevent subsequent harassment.”
10. Id. at * 7 (citations omitted).
11. Id.
12. Id.
13. Id. at *17, citing the EEOC, Guidance on Vicarious Liability for Unlawful Harassment by Supervisors, 8 BNA FEP Manual 405:7651 (Feb.2003).
14. Id.
16. 456 F.3d 704 (7th Cir. 2006).
18. 456 F.3d 717.