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The Supreme Court to Settle Circuit Split on Supervisor Substance

By Matthew J. Feery

You would be forgiven for missing an announcement this past Monday that the Supreme Court has taken a case to decide an issue you probably thought was already decided. Amid the high-profile decisions on immigration and campaign finance, as well as the imminent decision on a minor piece of healthcare legislation you may have heard a thing or two about, the Supreme Court accepted an appeal in the case of *Vance v. Ball State University*, which seeks to settle a dispute over something seemingly basic but with far-reaching implications: who, exactly, is a "supervisor" for purposes of Title VII?

Between a pair of 1998 cases - *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) - the Supreme Court set out the circumstances under which an employer can be vicariously liable under Title VII for the harassment of its employees. Put broadly, the two decisions provided three different standards for determining employer liability in cases such as sexual and racial harassment:

1. If the harasser is a co-worker, then an employer can be liable for the actions of the co-worker if the employer was negligent either in discovering or remedying the harassment;

2. If the harasser is a supervisor *and* that supervisor takes a tangible employment action against the alleged victim - such as terminating or demoting the alleged victim - then "strict liability" applies, and the employer is automatically liable for the actions of that supervisor; and

3. If the harasser is a supervisor but *no* tangible employment actions have been taken against the alleged victim, then an employer can avoid liability by showing that the employer took prompt action to correct and prevent any harassing behavior and that the alleged victim failed to take advantage of the "preventative and corrective opportunities provided by the employer or to avoid harm otherwise," *Ellerth*, 524 U.S. at 761. (For example, the employee failed to take advantage of a company's clear and multiple means of reporting harassment. This is one reason why employment attorneys always remind you to update your handbook with clear policies.)

As you can see, there is a marked difference in the standard of employer liability that depends on whether the alleged harasser is a co-worker or a supervisor.

Yet despite this, in neither decision did the Supreme Court expressly define "supervisor" for purposes of Title VII. Indeed, the word "supervisor" does not even appear in Title VII at all. Left without express guidance, the various United States Courts of Appeals were left to define "supervisor" on their own, and in the 14 years since the *Ellerth* and *Faragher* decisions, the Courts of Appeals have fallen into two general camps.

The first definition of "supervisor" was adopted by the Seventh Circuit shortly after the *Ellerth* and *Faragher* decisions. In *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), the Seventh Circuit held that employers could only be vicariously liable for the actions of supervisors under Title VII when those supervisors had the power to make "consequential employment decisions," such as the power to "hire, fire, demote, promote, transfer, or discipline." Whether an employee was called a "supervisor" was largely immaterial; the realities of the job duties performed governed. Since the *Parkins* decision, the First and Eighth Circuits have adopted this definition of "supervisor," and the Third and Sixth Circuits have agreed with the definition in unpublished decisions.

The competing definition of "supervisor" comes from the guidelines published by the Equal Employment Opportunity Commission (EEOC) in the wake of the *Ellerth* and *Faragher* decisions. The EEOC guidelines define a "supervisor" as an individual who "has authority to undertake or recommend tangible employment decisions affecting the employee" (such as hiring, firing, demoting, promoting, and transferring) or who "has authority to direct the employee's daily work activities," though directing only a limited number of tasks would not qualify an individual as a supervisor. This definition, besides being adopted by the EEOC, has been generally adopted by the

Second, Fourth, and Ninth Circuits, as well as the Tenth Circuit in an unpublished decision.

Thus, the Courts of Appeals have developed a rather dramatic split on a fundamental question under Title VII. Is a supervisor someone who only needs to "direct the employee's daily work activities," or someone who must have the power to "hire, fire, demote, promote, transfer, or discipline" the employee? From the perspective of an employer facing a Title VII lawsuit, the distinction is hardly academic.

Yet all this is background to the facts of the *Vanc*e case. In *Vance*, Maetta Vance, who is black, worked for Ball State University's ("BSU") catering division of dining services as a substitute server and later as a part-time catering assistant. While in those positions, she was involved in multiple, racially charged incidents, including several involving Saundra Davis, who was white. The district court granted summary judgment for BSU, holding in part that BSU was not vicariously liable for Davis' behavior because Davis was not a supervisor for purposes of Title VII because even assuming that Davis "periodically" had authority to direct the work of other employees, she did not have enough power to directly influence Vance's terms and conditions of employment as required by the Seventh Circuit law on the definition of "supervisor." Conversely, Vance argued that Davis was a supervisor, although Vance's deposition testimony was somewhat equivocal, showing that Vance was not quite sure whether or not Davis was her supervisor. The Seventh Circuit affirmed the district court's grant of summary judgment to BSU.

In her request for the Supreme Court to take her case, Vance argues that the Seventh Circuit's definition of "employer" is incorrect both under the purpose of Title VII (which is to be a remedial statute to cure harassment and discrimination in the workplace) and under the Supreme Court's decisions in *Ellerth* and *Faragher*. Moreover, Vance argues that because the Courts of Appeals are so split on the matter that the Supreme Court must now step in and settle the dispute and provide clear guidance for the lower courts. BSU, while acknowledging the split of the Courts of Appeals, argues that Vance's case is not a proper case to decide the question because, among other reasons, Davis fails to meet either definition of "supervisor." The Supreme Court asked the Department of Justice to file a brief on behalf of the United States to obtain the government's opinion. The Department of Justice, while taking the position that the Seventh Circuit's definition of "supervisor" is wrong, also agreed with BSU that the Supreme Court should not take the case because, as BSU argued, Davis does not meet either definition of "supervisor."

Nonetheless, the Supreme Court has decided to take the case for its October 2012 term, and the parties will file briefs and have oral argument in the next year. Thus, unless the Court decides to resolve the matter on some narrow grounds, employers can expect a significant Title VII decision within the next year. Depending on what the Court decides, employers in many parts of the country may find themselves facing an increased possibility of liability for the actions of employees who, until now, they may not have considered supervisors.

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