

# EMPLOYMENT LAW NEWSLETTER

Volume 5, Issue 1

January 2013

## In This Issue

The Definition of  
 “Supervisor” Under Title VII  
 of the Civil Rights Act of  
 1964.....Page 1

Who Owns Your Twitter  
 Account?.....Page 2

## THE DEFINITION OF “SUPERVISOR” UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

BY ANTHONY E. COOCH, ESQUIRE



Title VII of the Civil Rights Act of 1964 was designed to protect employees from “severe or pervasive” workplace harassment. The potential for employer liability differs depending on whether the “bad acting” employee is a supervisor or co-worker of the complaining party.

If the “bad acting” employee is a co-worker of the complaining employee, the employer will face liability only if it was negligent in discovering or remedying the harassment. If the “bad acting” employee is a supervisor, liability is more easily found. For wrongs by supervisors, the employer can be held “vicariously liable,” meaning the employer can be held

responsible for the supervisor’s actions regardless of knowledge or corrective action.

Because of the potential for vicarious liability, it is in an employer’s best interests to minimize the employees who are classified as supervisors or at least be sure that supervisors are adequately trained. But what about the employee who may occasionally perform some tasks that could be considered supervisory? Could this person be classified as a supervisor under Title VII? This question is currently being considered by the U.S. Supreme Court in *Vance v. Ball State University*, which was argued in late last year.

In *Vance*, the Plaintiff, Meeta Vance filed suit claiming that, among others, Saundra Davis created a hostile work environment through severe and pervasive harassment. Vance worked for Ball State University as a substitute server and catering assistant. Davis worked as a catering specialist. The catering specialist job description identified “kitchen assistants and substitutes” as positions supervised by the catering specialist.

In her suit, Vance alleged that Davis was her supervisor. The Seventh Circuit Court of Appeals disagreed, finding that to be classified as a supervisor, Davis’ primary authority should include the ability to hire, fire, demote, promote, transfer, or discipline an employee. Davis did not have these powers; therefore, she was not Vance’s supervisor. Vance subsequently appealed to the U.S. Supreme Court.

Currently, courts take one of two positions regarding the definition of a supervisor under Title VII. Several courts interpret supervisor like the Seventh Circuit in *Vance*. Other courts, including Virginia, follow the rule that supervisor includes anyone whom the employer vests with authority to direct or oversee the complaining employee’s daily work.

The two positions taken by the courts vary widely in who could be considered a “supervisor” for purposes of Title VII. Employers should take note that some courts, particularly the federal courts in Virginia and Maryland, view the definition of “supervisor” under Title VII as including persons who have occasional authority. It is not the title or stated duties, but the actual power and authority the employee possesses. The power and authority does not have to be utilized every day, as intermittent or occasional authority may be sufficient. This broader view of “supervisor” for employers in Virginia and Maryland means that employers should evaluate current policies and procedures for dealing with workplace

(Continued to next page)



2300 Wilson Blvd., 7th Floor  
 Arlington, VA 22201  
 703.525.4000  
 www.beankinney.com

## Business & Corporate Services

- Appellate Practice
- Business Services
- Construction Law
- Copyright/Trademark
- Creditors’ Rights
- Criminal Defense
- e-Commerce
- Employment Law
- Government Contracts
- Land Use, Zoning & Local Government
- Landlord/Tenant
- Lending Services
- Litigation
- Mergers & Acquisitions
- Nonprofit Organizations
- Real Estate Services
- Title Insurance
- Tax Services

## Individual Services

- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

## Contact Us

2300 Wilson Boulevard, 7<sup>th</sup> Floor  
Arlington, Virginia 22201  
703-525-4000 fax 703-525-2207  
www.beankinney.com

harassment. Employers should ensure, at the very least, that all potential supervisors are adequately trained and that current policies take into account the possibility that some employees could be classified as “supervisors” based on the duties they perform.

In addition to the above, employers can also protect themselves from unexpected classification of employees by:

- Comparing written job descriptions with actual tasks performed by employees.
- Determining whether some employees are regarded as “senior” and provide direction to other employees, even though they may have the same job title.
- Developing a workplace harassment training program that is completed by each employee annually.
- Ensuring harassment policies are up to date and all employees are aware of their rights and responsibilities under the policies.

An employer can never completely insulate against any type of lawsuit being filed, but it can ensure that policies, procedures and training are in place to reduce the risk. Taking steps now can go a long way to prevent or minimize future turmoil.

*Anthony E. Cooch is a shareholder with Bean, Kinney & Korman, P.C. in Arlington, Virginia, practicing in the areas of business law, employment law, government contracts, bankruptcy and creditors' rights and civil litigation. He can be reached at [acooch@beankinney.com](mailto:acooch@beankinney.com) or 703.525.4000.*

## WHO OWNS YOUR TWITTER ACCOUNT?

BY ARIANNA S. GLECKEL, ESQUIRE

Do you have a Twitter account for your business that your employees access? Do any of your employees' tweet using a Twitter handle that includes your company's name? If so, you need to update your social media policy in order to protect your company.

PhoneDog Media (“PhoneDog”), a South Carolina based company, had an employee, Noah Kravitz, who left the company in 2010 but continued to use his Twitter name “Phonedog\_Noah.” The Twitter account was linked to Kravitz's personal email account and had 17,000 followers.

PhoneDog sued Kravitz for the loss of Twitter followers. PhoneDog told the *New York Times* that “The costs and resources invested by PhoneDog Media into growing its followers, fans and general brand awareness through social media are substantial and are considered property of PhoneDog Media L.L.C.” The company also stated that PhoneDog plans to fight to protect their customer lists, confidential information and brand.

The company is seeking \$340,000 in damages, which it calculated by valuing each Twitter follower as being worth \$2.50 per month for each month Kravitz used the Twitter name (which he has since changed). It alleges that the Twitter list is a customer list, which is the property of the company. Kravitz claims that PhoneDog asked him to continue to tweet for the company from time to time since he left PhoneDog amicably.

The lawsuit is currently pending before the United States District Court in the Northern District of California. Regardless of the outcome of this case, employers should clearly define in their employment policies what property belongs to the company so that there is no confusion about ownership when an employee's employment is terminated.

If you are considering hiring a third party to tweet on behalf of your company, have your attorney review the terms of the contract before signing to ensure that the agreement clearly defines who owns the Twitter followers and the Twitter name.

*Arianna S. Gleckel is an associate at Bean, Kinney & Korman, P.C., practicing in the areas of commercial litigation and employment law. She can be reached at [agleckel@beankinney.com](mailto:agleckel@beankinney.com) or 703.525.4000.*

*This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. It is not intended as a source of specific legal advice. This newsletter may be considered attorney advertising under the rules of some states. Prior results described in this newsletter cannot and do not guarantee or predict a similar outcome with respect to any future matter that we or any lawyer may be retained to handle. Case results depend on a variety of factors unique to each case. © Bean, Kinney & Korman, P.C. 2013.*