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WHO IS A "SUPERVISOR" UNDER TITLE VII AND WHY YOU SHOULD CARE

By Scott J. Wenner

Oral Argument in *Vance v. Ball State University* Takes an Unexpected Turn

Late last month the U.S. Supreme Court heard oral argument in *Vance v. Ball State University*, No. 11-556. The issue that *Vance* is expected to decide is how much authority over other workers an employee must be given to be considered a "supervisor" under Title VII. While the question may appear to be of academic interest, how it is answered actually will have great practical importance for employers given the lack of a consistent answer from the courts.

Some Background

The question of who is considered a supervisor arises consistently under Title VII and other employment laws in deciding whether an employer should be held responsible for the unlawful act by one employee against another. In other words, whether the employer is liable for an employee's harassment of or other discrimination against another employee can depend on whether the alleged wrongdoer should be considered a supervisor. The concept of employer responsibility for the wrongdoing of an employee is referred to by lawyers and the courts as "vicarious liability." Not surprisingly, it often is a key issue in harassment cases. Indeed, whether and in what circumstances to hold an employer liable for sexual harassment was central to the Supreme Court's trail blazing decisions in the sexual harassment area. First, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), where the Court held that both *quid pro quo* and hostile working environment sexual harassment claims can be brought under Title VII, it directed that traditional "agency" principles, which are used in most other contexts to determine employer liability for the acts of employees, also be used to determine employer liability in Title VII harassment cases.

Then, a dozen years later in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court built on its embrace of agency principles in *Vinson* and held that employer liability for unlawful harassment of an employee by a supervisor is automatic, but where the wrongdoer is a non-supervisory co-worker instead, the employer's responsibility depends on whether it can establish affirmative defenses that the Court spelled out. However, it was easier for the Supreme Court to articulate the *Faragher/Ellerth* rule than it has been for the lower courts to apply it. As it has turned out, the question the Supreme Court identified as determining whether an employer was strictly liable for harassment of one employee by another — whether the harasser is a supervisor — has been answered inconsistently in the courts of appeals.

Conflict Among the Circuits

Vance v. Ball State University arose in the Court of Appeals for the Seventh Circuit. That court, along with the Courts of Appeals for the First and Eighth Circuits (and the Third and Sixth in unpublished opinions, as well), has defined "supervisor" as one having "the power to directly affect the terms and conditions of the plaintiff's employment." According to this view, the supervisory employee's authority must include the power "to hire, fire, demote, promote, transfer, or discipline an employee."

The narrow standard employed in the line of cases represented by *Vance* adheres faithfully to the Supreme Court's command in *Meritor, Ellerth* and *Faragher*: that whether an employer is liable for unlawful harassment by its employee is to be decided in accordance with principles of agency law. Under those agency principles, "because liability is predicated on misuse of supervisory authority, the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor." *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998) This agency test thus focuses the inquiry on whether the kind of authority over other workers the employer has delegated to the employee accused of the unlawful harassment or discrimination consist of "actual

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supervisory powers"; "authority … of a substantial magnitude" over the terms and conditions of other workers that is the hallmark of a true agent of the employer. *Id.*, at 1033-34 (citations omitted). Other circuit courts of appeals, including the Courts of Appeals for the Second, Fourth and Ninth Circuits, have adopted a more expansive standard for conferring supervisory status on an employee that will make the employer strictly liable for that employee's wrongdoing. This competing test is largely the result of the endorsement of a broad definition developed and used by the EEOC. In these appellate circuits, anyone having the authority to direct the employee's work activities is deemed a supervisor. Under this view, an employer is strictly liable for the acts of purported harassment by any employee who can direct the daily activities of the employee who was allegedly harassed, whether or not the accused harasser has authority to take any form of adverse action against that employee, and whether or not the employee has the opportunity to report the alleged harassment to a real supervisor or other person having authority to address and remedy the wrongful conduct.

Oral Argument Before the Supreme Court Takes a Strange Turn

At oral argument the defendant, Ball State — which is part of the university community — did not argue that the Court should adopt the stricter Seventh Circuit standard at issue. Rather than defending the more conservative test that had allowed it to prevail on a motion for summary judgment, the university joined with the plaintiff to instead advocate adopting the Second Circuit/EEOC standard. Its lone argument for affirming the trial court's judgment entered in its favor was that even under the broader standard it advocated, the alleged harasser was not a supervisor.

Ball State's posture at argument in failing to defend the standard applied by the Seventh Circuit caused several expressions of consternation among more conservative Justices. Both Justice Alito and Justice Scalia commented explicitly that the reason the Court agreed to hear the case was to resolve the conflict among the circuits, and not the factual question that seemed to be the only remaining dispute between the parties — *i.e.*, whether the alleged harasser directed the plaintiff's activities sufficiently to qualify as a supervisor under the broader EEOC/Second Circuit test. Those two Justices openly suggested that rather than resolve the issue for which it had accepted review, it might be more appropriate to send the case back to the Seventh Circuit, or perhaps to the trial court to further develop the record and resolve the factual questions. (http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-556.pdf)

Points to Take Away

In view of the comments of several justices about the absence of a true controversy over the question originally before it, it is not clear that the Court will resolve it.

If the Court were to decide the question by agreeing with the parties before it and adopting the EEOC's broad definition of supervisor, it would enlarge the pool of employees whose acts of harassment of co-workers would make their employers automatically liable. Employer liability for unlawful harassment and discrimination by members of this supervisor group enlarged to include lead persons and others not typically viewed as agents would ensue regardless of training or other measures implemented to deter and punish unlawful harassment.

In addition to keeping informed of developments at the Supreme Court, it would be prudent for employers to include a broader group in any upcoming mandatory harassment and discrimination training and to review their policies for any updating that may become necessary or advisable once the outcome of *Vance* is known. ◆

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