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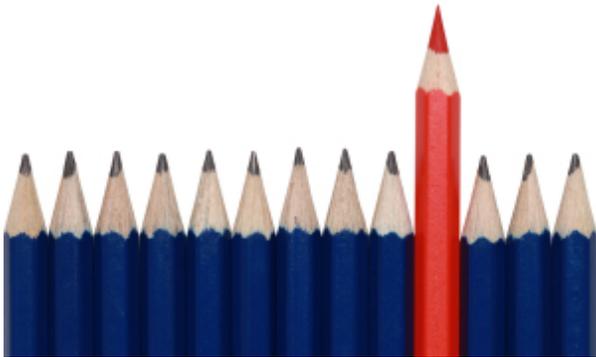
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Verdict

November 27, 2012

[Joanna L. Grossman](#)

Who's the Boss? The Supreme Court Hears Argument on the Meaning of the Term "Supervisor" in Workplace Harassment Law



What makes someone a supervisor? Employees have practical reasons for knowing the answer to this question, but courts must also know the answer, because it dictates the standard for employer liability for workplace harassment. Yesterday, November 26, 2012, the Supreme Court heard oral argument in *Vance v. Ball State University*, a case raising the question how much power or control an employee must have over other employees before he or she is deemed a “supervisor” in the harassment context. While the issue might seem technical, it takes on substantive importance too, as it implicates the scope and strength of harassment law and the ability, or lack thereof, of victims to enforce their anti-discrimination rights in court.

Workplace Harassment Law: The Basics

In the landmark case of *Meritor Savings Bank v. Vinson* (<http://supreme.justia.com/cases/federal/us/477/57/case.html>), the Supreme Court held that sexual harassment in the workplace is a form of sex discrimination under Title VII of the Civil Rights Act of 1964. It held that both “quid pro quo” and hostile- environment forms of harassment were actionable. This holding has, since then, been applied universally to other forms of harassment that are perpetrated on the basis of characteristics protected by Title VII, such as race, ethnicity, national origin and religion.

The Court in *Meritor* left open, however, the question of employer liability, stating only that a rule of automatic liability was too harsh for employers, while a rule preconditioning liability on actual notice to the employer was too harsh for victims. (The ability to sue one’s employer—such as the corporation for which one works—is central to the enforcement of Title VII, because individuals cannot be held liable under the statute.) The Court directed lower courts to apply “agency principles”—that is, the law of a principal, and the person or entity that acts on behalf of that principal—when determining whether employers should be held liable for any particular type or incidence of harassment. Lower courts took wildly divergent views in the cases that followed, disagreeing about (1) whether and how to differentiate between harassment by co-workers and harassment by supervisors, (2) how much weight to give an employer’s policies against harassment, and (3) whether and how to penalize victims who have failed to make use of available grievance procedures.

In 1998, the Supreme Court agreed to hear two cases, *Faragher v. City of Boca Raton* (<http://supreme.justia.com/cases/federal/us/524/775/case.html>) and *Burlington Industries v. Ellerth* (<http://supreme.justia.com/cases/federal/us/524/742/case.html>), which each raised questions about the scope of employer liability for harassment committed by supervisors. In a joint holding, the Court ruled that for supervisory harassment culminating in a tangible employment action, such as a demotion or firing, employers are automatically liable.

For supervisory harassment that does not result in a tangible employment action, the Court also imposed automatic liability, but it created a two-prong affirmative defense that a defending employer may raise. As the Court explained, the “defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

This defense was a compromise between the two extremes in lower court opinions. It derives from the Court’s interpretation of applicable agency principles, and its determination as to when supervisors are “aided by the existence of the agency relation” in committing harassment, and when they are not.

Although *Faragher* and *Ellerth* both involved harassment by supervisors, the Court also approved the lower-court consensus that claims of harassment by co-workers or third parties should be governed by a negligence standard, holding employers liable only when they knew or should have known of the harassment, but failed to take prompt and effective remedial action.

The Scope of the Affirmative Defense for Supervisory Harassment: A Constant Battle

In the almost fifteen years since *Faragher* and *Ellerth* were decided, the meaning and scope of the affirmative defense to liability has become the centerpiece of harassment litigation, as well as the driving force behind the widespread adoption of anti-harassment policies, grievance procedures, and workplace training.

By and large, courts have interpreted the affirmative defense in a way that benefits employers by minimizing their liability exposure. Courts, for example, have ruled that the adoption of an anti-harassment policy alone is enough to show reasonable effort to prevent harassment. They have also found that employers had exerted reasonable effort to correct harassment even when the underlying harassment still continued unabated. And, in a remarkable series of cases, some have held that employers who satisfy the first prong of the affirmative defense get a free pass on the second, even though the Court clearly stated the test in the conjunctive, so that both must be satisfied.

More troublingly still, courts have held victims to impossibly high standards under the second prong of the affirmative defense. There is widespread evidence that harassment victims suffer extremely high rates of retaliation for complaining and—for that and other reasons—they are very reluctant to file formal complaints. Nevertheless, courts have rejected most explanations for a harassed employee’s failure to complain, and have held that delays in filing a complaint that are as short as a week are unreasonable.

The question presented in *Vance v. Ball State University*—the case that, as I noted in the beginning of this column, is before the Supreme Court—is thus important because it represents one more opportunity for the Court to protect—or not protect, as the case may be—employee rights against harassment. A broad definition of “supervisor” would bring more cases under the stricter standard of liability; a narrow definition would do just the opposite.

The Facts in *Vance v. Ball State University*

The case that the High Court heard revolves around allegations by Maetta Vance, an African-American woman who worked in Ball State University’s kitchen and catering department, that she was racially harassed. Many of her allegations involve co-workers, but at least two involve individuals who she alleges held supervisory positions. Vance began working at Ball State in 2001, and she was, for many of the years she worked there, the

only African-American employee.

With respect to one harassment claim, which Vance said was perpetrated by William Kimes, the court below found that Kimes was Vance's supervisor, but that the alleged harassment was neither sufficiently severe nor sufficiently pervasive to be actionable, nor was it racial in character. Kimes, in the court's view, was an "equal opportunity harasser" whose "difficult demeanor" was imposed on all subordinate employees, regardless of race.

With respect to the other person whom Vance named, Saundra Davis, Vance alleged that Davis slapped her on one occasion and used racial epithets toward her. For example, Vance alleges that Davis cornered her on an elevator in a threatening manner, and told her "I'll do it again." She also allegedly used the racial slurs "Buckwheat" and "Sambo" to refer to Vance, both in Vance's presence and outside it.

The court ruled that Davis, too, was not Vance's supervisor and applied the standard for co-worker harassment. Under that standard, the employer prevailed because Vance did not notify the employer about some of the incidents of which she complained, and with respect to other incidents, the employer took steps to remediate the problem.

The Disagreement Among the Federal Circuits on the Answer to the Question of Who Qualifies as a "Supervisor"

In granting summary judgment to Ball State, the U.S. Court of Appeals for the Seventh Circuit ruled that Davis was not Vance's supervisor. To reach that conclusion, the court applied a definition of supervisor that encompasses only "someone with the power to directly affect the terms and conditions of the plaintiff's employment," with authority that "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." Applying that standard, the Seventh Circuit held that Davis was not a supervisor, even if (here, the facts were in dispute) she "periodically had authority to direct the work of other employees." That power, the court reasoned, "would still not be sufficient to establish a supervisory relationship for purposes of Title VII."

Two other federal circuit courts—the First and the Eighth Circuits—have used the "power to hire and fire" definition of "supervisor. Three others, however, have adopted a broader definition that also includes individuals with the authority to direct and oversee the victim's daily work. It is this circuit split that prompted the Supreme Court to review this case.

The circuit split turns on agency principles: Is an individual without the power to make tangible employment actions, but with the power to direct or control day-to-day activities, acting as an agent of the employer? The EEOC, which issued an enforcement guidance in 1999 in the wake of *Faragher* and *Ellerth*, takes the broader view of supervisory status. Under that guidance, an employee who has the "authority to direct [the victim's] daily work activities" or the power "to recommend," though not personally affect, "tangible employment decisions" qualifies as a supervisor because his ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks."

Why the EEOC's Broader Definition of "Supervisor" in This Context Is Clearly the Correct One

Without a doubt, the broader definition of "supervisor" that is endorsed by the EEOC is the appropriate one. Even the defendant-employer does not fully defend the Seventh Circuit's narrow definition of "supervisor" in its briefs. (Justice Scalia expressed frustration during oral argument at the fact that "there's no one here defending the Seventh Circuit.") Instead, Ball State argues, primarily, that Davis couldn't be considered a supervisor under any of the competing definitions. (That is a plausible interpretation of the facts, since Vance herself is quite vague about the power Davis might have had over her.) The Solicitor General takes a similar point of view.

During the argument, Justice Kagan seemed supportive of a broader definition of supervisor than the one adopted by the Seventh Circuit, worrying, for example, that a narrower definition would mean that a professor who harassed a secretary would be considered merely a co-worker just because he didn't have the power to fire the secretary. Yet, she implied, their relationship was clearly one of a supervisor and a subordinate, whose life he

could make a "living hell."

Justice Roberts was attracted to a bright-line rule that would be easy to apply and worried out loud about a soft rule that would treat someone as a supervisor just because he had the power to pick the music to play in the office. Is the music picker exercising supervisory authority if he threatens a more junior employee by saying that "if you don't date me, it's going to be country music all day long?"

Whether the definition of "supervisor" will determine the outcome of this case is unclear (which suggests that perhaps the Court should not have taken this case in the first place). But a ruling on the definition of "supervisor" will have an impact upon many other cases to come. When employees are harassed by someone with power to control their status or workload, they are more likely to submit to demands; more likely to feel threatened and harmed; and less likely to file formal complaints. No one wants to upset the boss, and employees will put up with more from a person with supervisory authority to avoid consequences of complaining, than they would from one who lacked that key authority.

A formal definition of supervisory power that focuses exclusively on the ability to create or terminate employment relationships is naïve. If an employer delegates authority to some employees to dictate the daily activities of others, then it must be held responsible for their potential misuse of authority. Too narrow a definition will give employers the incentive to manipulate job titles and responsibilities to minimize the number of people who qualify as supervisors, while still giving many of them the opportunity to affect the working lives of their subordinates. The affirmative defense already gives rise to many form-over-function problems that allow employers to minimize liability without making a dent in the problem of harassment.

Moreover, a broad definition will not necessarily translate into greater liability for employers. With the affirmative defense, the employer still has a significant opportunity to avoid liability or damages if it takes reasonable efforts to prevent and correct harassment. (Notably, plaintiffs win as few as five percent of employment-discrimination cases, so any prediction of a flood of litigation from a Court ruling is unlikely to be borne out in the real world.)

Workplace harassment still, sadly, persists, even despite clear prohibitions in federal and state law and decades of litigation seeking to enforce and clarify those rules. The Supreme Court should now take this opportunity to reinforce the importance of abolishing such harassment, and to strengthen the scheme it established in *Faragher/Ellerth*.



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