

Attys Weigh In On Justices' Ruling In Harassment Suit

Law360, New York (June 24, 2013, 10:35 PM ET) -- The U.S. Supreme Court ruled Monday that only employees with the authority to hire, fire or promote others should count as supervisors in Title VII harassment suits. Here, attorneys tell Law360 why the 5-4 ruling is significant.

Chris Bacon, Vinson & Elkins LLP

"The biggest loser in *Vance* [v. Ball State University] is the [U.S. Equal Employment Opportunity Commission], which had long been a proponent of a broad and vague definition of supervisor, including anyone who exercised direction over another's daily work — even those without real power on major employment decisions. While employees can still assert claims of harassment based on the behavior of team leaders, such action will no longer subject the employer to vicarious liability. The clear winner in *Vance* is juries in harassment cases. Courts should now be able to determine whether or not a harasser is a supervisor, sparing juries overly confusing (flowchartlike) jury charges."

Natasha J. Baker, Hirschfeld Kraemer LLP

"The U.S. Supreme Court decision, *Vance* v. Ball State, provides clarity on employer liability for supervisory harassment under Title VII. Under *Vance*, supervisors have the authority to take tangible employment actions, which include 'a significant change in employment status.' This distinction is critical — employers are strictly liable for harassment by supervisors. Conversely, employers may avoid liability for actions of nonsupervisors by the exercise of 'reasonable care to prevent and correct any harassing behavior.' The decision underscores the necessity of clearly drafted job descriptions that delegate authority to take tangible employment actions and anti-harassment policies that are clearly communicated and enforced."

Amy Beckstead, DLA Piper

"The Supreme Court's *Vance* v. Ball State University decision provides employers needed clarity on when an employee is considered a supervisor for purposes of Title VII harassment laws. The Supreme Court, rejecting EEOC guidance on the issue, created a clear rule: supervisors are limited to those individuals who have the power to take tangible employment actions (hiring, firing, demoting, promoting, etc.) against the alleged harassment victim."

Bernard Bobber, Foley & Lardner LLP

"The Supreme Court's business-friendly decision in Vance helps employers to better manage liability for illegal harassment in the workplace. The court adopted the narrower view of who is a 'supervisor' than that espoused by the EEOC and some appellate courts. Employers now will face fewer instances of automatic liability for workplace harassment perpetrated by one deemed to be a supervisor, and more often will be permitted to defend harassment cases on the grounds that they were not negligent in preventing or remediating illegal harassment. Plus, the decision reminds employers and litigants that the EEOC's guidance is just that: guidance, not law."

Paulette Brown, Edwards Wildman Palmer LLP

"This is obviously the correct decision. There will, however, still be increased attention given to what constitutes a co-worker and what constitutes a supervisor. In both instances, employers will likely need to enhance the training provided and develop internal monitoring mechanisms to ensure that the employer will not unnecessarily be deemed vicariously liable for acts of its employees who truly have no authority to tangibly impact the employment of another. Are we now going to be faced with every case being examined on an individual basis, ... making it more difficult to obtain summary judgment even in cases where employers have proper procedures in place to handle discrimination complaints?"

J. Randall Coffey, Fisher & Phillips LLP

"The Supreme Court's holding in Ball State results in a workable approach that is far more simple to apply than other proposed alternatives. The definition of 'supervisor' being tied only to those employees who have been empowered to make 'tangible employment actions' means that it will be the rare case when there is a fact issue about whether someone is a supervisor or not. The result is that the lower courts and the parties will have much greater ease in determining whether a hostile work environment case will proceed under the [Burlington Industries v. Ellerth/Faragher v. City of Boca Raton] affirmative defense or under a negligence standard."

Mary Elizabeth Davis, Spotts Fain

"The purpose of Title VII is not 'to provide redress but to avoid harm.' Today's [U.S.] Supreme Court decision ... holding that a 'supervisor' is an employee empowered by the employer to take tangible employment action against the plaintiff fits the purposes of the statute. This definition of supervisor can be consistently and readily applied by employers and will result in employer-created, narrow, yet effective, preventative measures. This definition of supervisor does not leave employee co-workers unprotected from harassment. Instead, it encourages employees to report improper conduct so that their employers are on notice and can take appropriate action."

Peter Farley, Sutherland Asbill & Brennan LLP

"This decision brings much needed clarity regarding who qualifies as a supervisor for Title VII harassment cases. Notably, the court distinguished the definition of a supervisor under the National Labor Relations Act, explaining that the NLRA has a different purpose than Title VII with different goals of 'balance[ing] ... power between labor and management' This distinction, versus Title VII's goal of 'eradicating discrimination,' and in the context of a harassment case—imposing vicarious liability on the employer for the discriminatory and harassing acts of a true supervisor—is a welcomed point from the Court."

Spencer Hamer, Michelman & Robinson LLP

“Under Title VII, the primary federal anti-discrimination employment law, employers can be strictly liable for supervisor workplace harassment in certain circumstances. Today, in *Vance v. Ball State University*, the U.S. Supreme Court held that only employees with the power to affect significant changes in employment status — e.g., hiring, firing, failing to promote, reassignment or benefits changes — can be deemed supervisors. Because the court has now simplified this issue, employees and employers will be better able to evaluate potential liability, and litigation of employment cases can proceed under a clear definition of the term ‘supervisor.’”

Michael Glassman, Dinsmore & Shohl LLP

“Since an employer’s liability for harassment claims often depends on whether the alleged harasser is a supervisor or a co-worker, *Vance* is a significant decision because it eliminates prior ambiguity as to exactly who qualifies as a supervisor. The decision should streamline litigation involving harassment claims, because there no longer should be any legitimate controversy over who qualifies as a supervisor. In addition, since a supervisor can create automatic liability under Title VII, *Vance* also is significant, because employers can use it as a tool to analyze and structure their workforces with respect to who will be considered a supervisor.”

Allyson Ho, Morgan Lewis & Bockius LLP

“Notably, the key term at issue in *Vance* — ‘supervisor’ — isn’t defined in Title VII. Instead, the court focused on the framework it established in *Faragher* and *Ellerth*, and expressed particular concern about the workability of the government’s proposed definition as a practical matter.”

Beth Jones, Womble Carlyle Sandridge & Rice LLP

“After recent Supreme Court decisions made employment retaliation cases easier for employees to bring, the *Vance* decision scores one for employers. The question of just who’s the boss is an important one under Title VII, especially under the *Ellerth/Faragher* framework that provides for vicarious employer liability for actions of its supervisors. In this interpretation of the important term ‘supervisor,’ the court states that its description is clear and ‘readily applied.’ Some grey may remain, but this opinion clearly dispenses with the current EEOC guidance on ‘supervisor’ as not persuasive.”

Brian Kaplan, Kasowitz Benson Torres & Friedman LLP

“The takeaway from today’s ruling is that employers should carefully review employee job descriptions, duties and responsibilities to determine who has authority to take ‘tangible employment actions,’ such as hiring, firing, promoting, reassigning, and causing significant changes to benefits (or compensation). Employees vested with such power should receive anti-harassment training and clearly understand the employer’s anti-harassment policies and procedures.”

Nathan Kipp and Camille Olson, Seyfarth Shaw LLP

“*Vance* is a watershed decision on two levels. On its surface, the Supreme Court created much-needed certainty as to who qualifies as a ‘supervisor’ for the purposes of the affirmative defense announced in *Faragher* and *Ellerth*. But on a deeper level, the court has signaled that its clarification of ‘supervisor’ was needed, in part, to simplify complicated Title VII lawsuits, if not resolve them altogether before any litigation begins. *Vance*, accordingly, will benefit litigants, courts and jurors alike by streamlining — and, perhaps, truncating — harassment and discrimination cases that have grown more complicated since the court decided *Faragher* and *Ellerth*.”

Sidney F. Lewis V, Jones Walker LLP

"Today, the court settled some confusion for Title VII litigants by adopting a clear, workable standard for when an employee is a 'supervisor.' In Faragher and Ellerth, the court held that a 'supervisor's' harassment can saddle an employer with vicarious liability under Title VII, but did not define 'supervisor.' Looking at the Faragher/ Ellerth framework, the court concluded that it draws a stark distinction between 'co-worker' and 'supervisor,' and that the latter's defining characteristic is the authority to make 'tangible employment decisions.' Thus, the court adopted the narrow standard. And for good reason: An employee's status as a 'supervisor' can now be decided as a matter of law, prior to trial."

Joan C. McKenna, LeClairRyan

"The Supreme Court's Vance v. Ball State University decision will protect an employer from the unjust result of being bound by actions of individuals it never selected to exercise its authority. The Faragher and Ellerth decisions hang a sword of Damocles over the heads of employers: Demonstrate the affirmative defense or face strict liability. In light of the harshness of that approach, it seems only fair that only the actions of an employee whom the employer has selected to act in its stead and to exercise its legal authority should bind the employer so completely."

Bryan P. Neal, Thompson & Knight LLP

"The main takeaway from the decision is without question that it favors employers by reducing the number of employees who fall within the supervisor category, a category that triggers in harassment cases either automatic liability or the requirement that the employer prove an affirmative defense to avoid liability. The Supreme Court also rejected what it called the EEOC's proposed 'nebulous' and 'murky' standard. That the court refused to defer to the EEOC sends an important message to the EEOC that the agency cannot depend on courts to accept without question the positions it takes in its enforcement guidance documents."

Craig Oliver, Bradley Arant Boult Cummings LLP

"Vance is clearly a win for employers. However, language near the end of the majority opinion likely foreshadows future disputes. Responding to the possibility of employers concentrating decision-making authority in a few individuals, to attempt to limit who qualifies as a 'supervisor' under Vance, the court stated that an employer may 'effectively delegate the power to take tangible employment actions to the employees on whose recommendation it relies.' This leaves an opening for plaintiffs, and I anticipate them rushing through this opening in an attempt to create a genuine issue of material fact and survive summary judgment."

Katharine Parker, Proskauer Rose LLP

"The case is a victory for employers but also a win for employees. The court's decision announces a bright-line practical standard easily applied by employers and employees, as well as courts. Indeed, the decision predicts that the issue of supervisory status is one that will likely be resolved as a matter of law before trial. The standard will avoid juror confusion and allow for clear jury instructions in trials of harassment claims without the need to instruct on alternative theories of liability."

Mark Phillis and Denise Visconti, Littler Mendelson PC

"This ruling is welcome news for employers in litigation, since this standard usually will provide the clarity necessary to decide whether someone is a supervisor at the summary judgment stage. As the court made clear, however, employers may still be liable for unlawful harassment under the negligence standard of Faragher and Ellerth. Since the vast majority of harassment cases turn on whether the conduct rises to the level of unlawful harassment and the steps an employer took to prevent or address such conduct, employers should not expect to see much of a decline in harassment claims."

Stephen Richey, Thompson Hine LLP

“The Vance decision will give employers and their counsel a sigh of relief. The standard for liability in workplace harassment claims under Title VII is vastly different depending upon whether the harasser is a supervisor or co-worker. In today’s decision, the court drew a bright-line distinction between supervisors and co-workers, adopting the Seventh Circuit’s holding that a supervisor is distinguished by the authority to take ‘tangible employment actions.’ As defined by the court in Faragher and Ellerth and subsequent decisions, tangible employment actions require ‘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.’ Nothing is more welcome to employment defense counsel and their clients than a bright-line distinction.”

Barbara Roth, Hogan Lovells

“The Vance decision is fair to both employers and employees, as it precludes an employee from holding his or her employer liable for discrimination by a lower-level supervisor unless the employee has previously placed the employer on notice of the allegedly discriminatory conduct, while at the same time not requiring employees to make formal complaints about managers who could negatively affect their terms and conditions of employment.”

Daniel L. Schwartz, Day Pitney LLP

“In light of the Vance decision, employers should examine their classifications of employees and should ensure they are providing appropriate supervisory training to those employees who fall under the Supreme Court’s definition of a supervisor.”

Todd Steenson, Holland & Knight LLP

“The Supreme Court’s decision in Vance v. Ball State University is a big win for employers. Since 1998, employers have potentially been vicariously, or automatically, liable under Title VII for sexual or other discriminatory harassment by ‘supervisors,’ even if the employer did not know about the harassment. The Vance decision means that employers may be vicariously liable for the conduct of only those employees who have the authority to ‘hire, fire, demote, promote, transfer or discipline’ their victim. The decision should allow employers to focus their sexual harassment training and limits the risk employers face from supervisory harassment claims.”

Christopher Trebilcock, Miller Canfield Paddock & Stone PLC

“Vance provides significant opportunities for employers to narrow the scope of discovery early in litigation or more readily resolve claims on summary judgment. Employers should review their job descriptions to ensure they accurately reflect the authority of each individual as such evidence will be persuasive. There will likely be an uptick in early motion practice over the issue of whether the alleged bad actor had authority to take actions that led to economic harm. The lower courts will have to define when an action is sufficiently related to economic harm to constitute supervisory authority.”

Richard Tuschman, Akerman Senterfitt LLP

“For employers, Vance’s narrow definition of supervisor is good news and makes a finding of liability for harassment less likely. But all employers should remain vigilant against harassment, as even co-worker harassment can result in liability under a negligence standard. And Vance may not be the final word. In her dissent, Justice [Ruth Bader] Ginsburg states that ‘[t]he ball is once again in Congress’ court to correct the error into which this court has fallen, and to restore the robust protections against workplace harassment the court weakens today.’ The last time Justice Ginsburg said that, the Lilly Ledbetter Fair Pay Act was born.”

Ricki Roer, Wilson Elser Moskowitz Edelman & Dicker LLP

"Today's decision reaffirms the US Supreme Court's philosophical approach to the resolution of the ever increasingly number of employment claims filed in our federal courts. Continuing the approach first addressed in Faragher and Burlington, the Court is once again steering employers and employees to address these claims, at least initially, internally--once again the Court is requiring the employee to first file an internal complaint and requiring the employer to internally address complaints received and reiterating that their failure to do so is at their peril."

Michael L. Wade Jr. and James B. Spears Jr., Ogletree Deakins Nash Smoak & Stewart PC

"Rejecting the arguments for an almost unlimited and unworkable definition of 'supervisor,' the Supreme Court emphasized the benefits of clarity for employers in deciding when vicarious liability should be applied in harassment cases. The court's standard provides an opportunity for employers to evaluate which employees have the authority to create vicarious liability, and thus should be targeted for special training regarding their responsibilities for prevention and action when harassment occurs."

Elizabeth S. Washko, Ogletree Deakins Nash Smoak & Stewart PC

"The Supreme Court's decision in Vance is important for two reasons. First, the Supreme Court provided an important clarification of the term 'supervisor' under Title VII, limiting it to those who can take tangible employment actions. Second, in providing this clarification, the court expressly rejected the EEOC's 'nebulous' definition, which, the court concluded, injected too much ambiguity into the issue. The court reinforced the importance of having a clear picture of the field on which they are playing before becoming too entrenched in litigation."

Joshua Zuckerberg, Pryor Cashman LLP

"Today's Supreme Court decision will definitely make it harder for plaintiffs to impose vicarious liability on employers, and thus makes it harder for plaintiffs to hold employers liable for the conduct of certain types of 'supervisors.' For example, under this ruling, a plaintiff won't be able to hold an employer liable for the conduct of a higher-ranking employee unless that employee has the power to 'hire, fire, demote' or affect other significant changes in the plaintiff's working conditions."

--Editing by Elizabeth Bowen.