

U.S. SUPREME COURT REJECTS EEOC'S EXPANSIVE DEFINITION OF A SUPERVISOR IN HARASSMENT CLAIMS

Employment Litigation Alert
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The U.S. Supreme Court has rejected the expansive definition of a supervisor found in the U.S. Equal Employment Opportunity Commission's Enforcement Guidelines. As a result, employers should find it easier to defend against and obtain summary judgment dismissal of many harassment claims.

In *Vance v. Ball State Univ.*, No. 11-556, 570 U.S. ___, 2013 U.S. LEXIS 4703 (June 24, 2013), Justice Alito, writing for a five-member majority, held that "an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim," such as 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." *Id.* at *18-19. The court rejected the definition of supervisor advanced by the EEOC and already adopted by several influential federal courts, including the U.S. Court of Appeals for the Second Circuit, whose jurisdiction includes New York State. The court characterized the EEOC's definition, which tied supervisor status to the ability to exercise significant direction over another's daily work, as "a study in ambiguity." *Id.* at 37.

In this way, the *Vance* decision refines the court's holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). In these widely cited decisions, the court held that an employer is strictly liable for harassment by a supervisor if the harassing behavior culminates in a "tangible" employment action such as a termination or demotion. If no tangible action resulted, however, the employer may avoid liability for supervisor harassment by proving affirmatively 1) the employer exercised reasonable care to prevent and correct the harassment and 2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Vance* at *5-6. In contrast, if the harassment is by a non-supervisor, liability will only attach against the employer if the plaintiff carries the burden of demonstrating the employer's negligence in permitting the harassment to occur. By establishing a narrow and easily applied standard for determining who qualifies as a supervisor, *Vance* should eliminate most factual disputes about this issue, thus greatly simplifying the litigation of harassment claims. *Id.* at 40.

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The *Vance* decision undoubtedly favors employers, as plaintiffs will now generally have the burden of establishing negligence. The burden will only fall on employers to establish the *Ellerth-Faragher* defense, where the alleged harasser had the power to take tangible actions. The mere ability to control some or all of the plaintiff's daily work activities is no longer enough to prove that the alleged harasser acted as a supervisor.

Still, employers should not relax their guard against potential harassment claims. Even under the negligence standard, employers will greatly increase their odds of prevailing by showing that they took reasonable precautions to guard against harassment. In most cases, such precautions will include establishing a vigorous anti-harassment policy and well-defined and broadly circulated procedures for employees to report harassment to allow for prompt corrective action. Absent such measures, employers will remain vulnerable to claims that they turned a blind eye to harassment regardless whether the perpetrator was a supervisor or a mere co-worker.

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