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What's in a Name?

U.S. Supreme Court Defines 'Supervisor'

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Legal remedies are essentially useless unless there is a solvent or deep-pocketed wrongdoer. In personal injury cases, that solvent wrongdoer is usually someone with a generous insurance policy. In employment law, the deep pocket is invariably the employer, rather than the harassing co-employee.

In employment harassment actions, the status of the wrongdoer is vital to the scope of a plaintiff's recovery. The United States Supreme Court has narrowed the definition of "supervisor" under Title VII of the Civil Rights Act of 1964, while providing much-needed clarity to the definition of the term for purposes of employer harassment suits under the act.[1]

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[2] Of course, the New Jersey Law Against Discrimination (NJLAD) prohibits the same conduct by employers.[3] Federal precedent under Title VII is particularly relevant to the NJLAD, as the New Jersey Supreme Court frequently looks to federal precedent to interpret its parameters.[4]

In *Vance*, the U.S. Supreme Court addressed an issue it had left open in two landmark decisions, namely who qualifies as a supervisor (a term undefined in the statute, in a case in which an employee asserts a Title VII claim for workplace harassment). In *Faragher* and *Burlington*, the U.S. Supreme Court held that under Title VII an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. However, if the harasser was merely the victim's co-employee, the employer was not liable absent proof of negligence.[5]

In the wake of *Faragher* and *Burlington*, there was a split in the federal circuits. The Second, Fourth and Ninth circuits had held that the *Faragher* and *Burlington* supervisor liability rule applies to harassment by those the employer vests with authority to direct and oversee their victim's daily work. However, the First, Seventh and Eight circuits had held that the rule was limited to those harassers who have the power to "hire, fire, demote, promote, transfer or discipline" their victims.[6]

The Supreme Court resolved the split in *Vance*. The Court held that an employee is a supervisor if he or she can take tangible employment action against the victim, such as hiring, firing or action causing a significant change in benefits. Crucially, a supervisor need not be empowered to take such tangible employment actions directly, and a manager who works closely with his or her subordinates and can indirectly effectuate tangible employment actions also qualifies under the Court's new definition.

In *Vance*, plaintiff Maetta Vance was employed by Ball State University (BSU). She alleged that a fellow BSU employee, Saundra Davis, created a racially hostile work environment. On cross-motions for summary judgment, both the trial court and the Seventh Circuit held that BSU could not be vicariously liable for the alleged racial harassment because Davis could not hire, fire, demote, promote, transfer or discipline Vance. Both courts concluded that Davis was not Vance's supervisor, and thus Vance could not recover from BSU unless she could prove negligence. Finding that BSU was not negligent with respect to Davis's conduct, the trial court dismissed the plaintiff's case. The Seventh Circuit affirmed.

The United States Supreme Court affirmed the Seventh Circuit and upheld the dismissal of the plaintiff's case. In doing so, the Court narrowed the definition of supervisor for the purposes of Title VII harassment claims, and for the purposes of New Jersey practitioners, implicitly under the NJLAD as well. However, the scope of recovery is slightly different under

each of the acts.

As a threshold matter, there are two types of claims in employment harassment jurisprudence: *quid pro quo* harassment and hostile work environment harassment. *Quid pro quo* harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of employment. It involves a threat that if the employee does not accede to the sexual demands, he or she will be terminated, receive unfavorable reviews or suffer other adverse action. A hostile work environment claim arises when an employer or fellow employees harass an employee because of his or her sex or race, to the point where the working environment becomes hostile. Both Title VII and the NJLAD require the plaintiff to establish that the harassing conduct was objectively severe or pervasive in order to establish a hostile work environment claim, as a *quid pro quo* claim speaks for itself.

Under Title VII, an employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior.[7] Different rules apply where the harassing employee is the plaintiff's supervisor. In those instances, an employer may be vicariously liable for the creation of a hostile work environment. Two circumstances expose an employer to supervisor liability under Title VII. First, an employer is strictly liable when a supervisor takes a tangible employment action, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits.[8] Second, when a supervisor's harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense that: 1) it exercised reasonable care to prevent and promptly correct any harassing behavior; and 2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided.[9] The Court rejected the significance of labeling the harassment *quid pro quo* or hostile work environment with regard to the employer's ultimate liability.

In the earlier case of *Lehmann*, the New Jersey Supreme Court set out the parameters of supervisor liability under the NJLAD.[10] In *Lehmann*, the New Jersey Supreme Court held that employer liability for compensatory and punitive damages for hostile work environment claims is governed by agency principles. The Court stressed that in cases of supervisory harassment of either kind, the employer is strictly liable for all equitable damages and relief, but rejected strict liability for compensatory and punitive damage claims. The *Lehmann* Court held that an employer whose supervisor is acting within the scope of his or her employment will be liable for the supervisor's conduct in creating a hostile work environment. Where the supervisor is acting outside the scope of his or her employment, the employer will be liable for the supervisor's behavior under four specific exceptions: 1) the employer intended the conduct or the consequences; or 2) the employer was negligent or reckless; or 3) the conduct violated a non-delegable duty of the employer; or 4) the supervisor purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he or she was aided in accomplishing the tort by the existence of the agency relation.

Thus, whether a co-employee is a supervisor or merely a peer dictates the scope of a plaintiff's potential recovery. Recognizing this reality, the *Vance* Court favored a narrow, concrete definition of supervisor, which would allow the parties to, more often than not, resolve the issue as a matter of law before trial. The Court 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 (*i.e.,* to affect 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). The Court rejected the nebulous definition of a supervisor advocated by the Equal Employment Opportunity Commission (EEOC), which tied a supervisor's status to the ability to exercise significant discretion over another's daily work.

Turning to the specific facts of the plaintiff's and Davis's working relationship, the Court held that there was simply no evidence Davis directed the petitioner's day-to-day activities. The record indicated that the general manager of the catering division where the plaintiff worked and the chefs assigned the plaintiff's daily tasks, which were given to her on specific "prep lists." The fact that Davis may have sometimes handed prep lists to the plaintiff was insufficient to confer supervisor status under the Court's test.

The *Vance* Court's holding has obviously received limited treatment in the various federal circuits in the time that has elapsed since its publication. However, a couple of recent circuit court opinions demonstrate some of the clarity the *Vance* Court's holding has offered to the definition of supervisor, and the limits of that clarity.

In *Velazquez-Perez v. Developers Diversified Realty Corp., et al.*, the plaintiff sued his former employer, DDR Corp., for sexual discrimination and retaliation under Title VII.[11] He alleged he worked as an operations manager for DDR, and that a woman named Rosa Martinez, the representative of DDR's human resources department for Puerto Rico, made sexual advances. The plaintiff rebuffed the advances and was ultimately terminated,

following Martinez's recommendation.

The plaintiff's claim was dismissed by the district court. The First Circuit reversed in part, but upheld the dismissal of the plaintiff's case based upon supervisory sexual harassment.

The First Circuit noted that as a human resources manager, Martinez provided advice to management on human resource issues, including employee discipline. In performing her accounting duties, she also gave direction to company managers, including the plaintiff, on their compliance with company budget and accounting practices. However, the court held there was no evidence DDR delegated to Martinez any relevant authority over any tangible employment actions affecting the plaintiff.

The court noted that while Martinez may have been a formidable adversary as a coworker, it did not make her the plaintiff's supervisor as defined by the *Vance* Court. Finally, the First Circuit underscored the insignificance of categorizing claims as hostile work environment or *quid pro quo* harassment with regard to an employer's potential liability under Title VII.

> In applying *Vance*...in this manner, we recognize that [this case involves a claim] of hostile environment sexual harassment, not claims of quid pro quo harassment. But we see no reason why a person might be deemed to be a supervisor in connection with one type of harassment and not the other, or why the distinction between supervisors and co-workers, underscored so strongly in *Vance*, would cease to matter in the context of quid pro quo harassment. On the contrary, the language of *Vance* suggests that its limitation on vicarious liability applies more broadly, to all forms of unlawful harassment. *Vance* includes within its conception of harassment those situations in which harassment culminates in a tangible employment action *i.e., quid pro quo* harassment.[12]

While the First Circuit resolved the issue of supervisory status as a matter of law, the 10th Circuit recently had a more difficult time of it. In *Kramer v. Wasatch County*, the 10th Circuit held that a fact issue existed regarding whether the plaintiff's immediate manager qualified as a supervisor under Title VII.[13]

In *Kramer*, plaintiff Camille Kramer worked for the Wasatch County Sheriff's Department. She was assigned to the courthouse to work as a bailiff, and was supervised by Sergeant Rick Benson.

Benson commenced a course of brutal sexual harassment, which culminated in a rape. Ultimately, the plaintiff sued the county, alleging the sexual harassment she experienced at the hands of Benson constituted sex discrimination prohibited by Title VII and the United States Constitution. Her claim was dismissed on summary judgment by the district court, which held that Sergeant Benson was not her supervisor for Title VII purposes because he did not have the actual authority to unilaterally fire her. It further held that supervisor status could not be premised on apparent authority because no reasonable jury could find Kramer reasonable in believing Sergeant Benson had the power to fire her.

The 10th Circuit recognized the *Vance* Court's definition of a supervisor under Title VII as an employee the employer has empowered to take tangible employment actions against the victim, such as hiring, firing, failing to promote and reassignment with significantly different responsibilities. The 10th Circuit also recognized that an employee who can indirectly effectuate tangible employment actions may also qualify as a supervisor under Title VII.

It was undisputed that the sheriff himself was the only person who could fire employees. However, it was also undisputed that Sergeant Benson was the plaintiff's direct manager, that he was the sole person responsible for writing her performance evaluations, and that those evaluations could cause her to be promoted, demoted or fired. Sergeant Benson could recommend to the sheriff that any of his charges be fired, and Sergeant Benson was considered a supervisor in the rank hierarchy of the department.

The 10th Circuit concluded that based upon the foregoing, the plaintiff had raised a genuine issue of fact regarding whether the sheriff's department effectively delegated to Sergeant Benson the power to cause tangible employment actions regarding the plaintiff by providing for reliance on recommendations from him when making decisions regarding firing, promotion, demotion and reassignment. Furthermore, the court held that even if Benson lacked the actual authority, he could still qualify as a supervisor under apparent authority principals, if a fact finder held the department created such an appearance of things that it caused the plaintiff to reasonably believe Benson had the power to act on behalf of the department.

The authors believe the *Kramer* court's analysis appears a bit pedantic. It found a fact question where the sheriff's office itself labeled Sergeant Benson a supervisor. Regardless, the *Velazquez-Perez* and the *Kramer* holdings give some pause to the optimism expressed by the *Vance* Court that the issue of who is a supervisor can more often than not be resolved on a motion.

The issue of who is a supervisor has only been the subject of one reported decision in New Jersey state court since the Supreme Court's holding. Recently, the Appellate Division upheld the dismissal of a NJLAD claim by a plaintiff who alleged he was harassed by his supervisor. The court briefly addressed whether the harassing co-employee could be deemed the plaintiff's supervi-

sor, and never mentioned the *Vance* analysis. Ultimately, it affirmed the trial court on the grounds that the employer adopted a formal and effective anti-harassment policy.[14]

In *Dunkley*, the plaintiff commenced his employment with the defendant as an oil delivery truck driver. During the course of a two-week training period, another driver, named Richard Harrington, was assigned as the plaintiff's on-road trainer. During the training period, Harrington made numerous race-related comments directed toward the plaintiff, an African American.

Ultimately, the plaintiff reported the incidents with Harrington. He was immediately assigned a new trainer, and never saw Harrington again after his reassignment. The plaintiff filed suit alleging the defendant had created a hostile work environment in violation of the NJLAD. The trial court dismissed the plaintiff's complaint, and the Appellate Division affirmed.

The plaintiff argued that Harrington was a supervisor, making the defendant vicariously liable for his discriminatory conduct. The Appellate Division noted that whether Harrington could be deemed to have been the plaintiff's supervisor during the two-week training period was "debatable." Harrington had no power to fire or demote the plaintiff, and he could not alter his position or compensation. He was charged with the plaintiff's on-road training, during which he directed the plaintiff and identified the plaintiff's job responsibilities. The court pointed out there were instances when comments by Harrington to the defendant's safety coordinator, Elwood Sickler, caused Sickler to speak with the plaintiff.

The Appellate Division upheld the dismissal on the grounds that the defendant had an effective anti-harassment policy. The court noted that if the determination of Harrington's supervisory status was the only test to impose vicarious liability on the defendant, summary judgment would have been prematurely granted. It appears the Appellate Division did not adopt the *Vance* definition of supervisor, because it is clear from the opinion that Harrington did not have the power to take tangible employment action against the plaintiff. While a supervisor may be someone who can indirectly affect employment status, there was no evidence Harrington could do so, other than a reference to the fact that comments by Harrington caused the defendant's safety coordinator to speak with the plaintiff on occasion.

Certainly, *Dunkley* will not be the last opportunity for New Jersey courts to address the definition of supervisor under the LAD. However, as of this writing, *Dunkley* is the only reported decision addressing the definition of supervisor, and the *Vance* analysis was not employed or even referenced.

While some commentators have defined the *Vance* holding as 'employer friendly,' a full reading of the decision, and two of the circuit cases decided in its wake, may counsel a more moderate reaction.[15] It is important to remember that Congress did not define supervisor in Title VII. It is reasonable to assume that a straightforward and workable standard benefits all parties by providing a workable standard for potential actions. The *Vance* Court's concrete definition puts both employers and employees on notice of the strength of a potential action, and it is important to remember that even if a harasser is deemed not to be a supervisor, the employer must still answer in negligence.

Overall, the *Vance* Court's definition provides a workable definition that puts all parties on notice of the strengths and weaknesses of a potential action. Certainly, the *Kramer* analysis pours a little cold water on the Court's optimism that the issue will frequently be decided as a matter of law, and demonstrates that courts will be willing to let parties duke out the definition of supervisor before a fact finder. However, the *Vance* Court's definition provides a solid foundation to decide most of the issues concerning supervisor status as a matter of law. ⚖

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ENDNOTES

1. *Vance v. Ball State University*, 133 S. Ct. 2434 (2013).
2. 42 U.S.C. § 2000e-2(a)(1).
3. *See generally*, N.J.S.A. 10:5-12.
4. *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 N.J. 89 (1990).
5. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc . v. Ellerth*, 524 U.S. 742 (1998).
6. Jonathan Goddard and Zachary Glantz, LII Supreme Court Bulletin.
7. *Faragher, supra*, 524 U.S. at 789.
8. *Id.* at 761.
9. *Id.* at 807.
10. *Lehmann v. Toys R' Us, Inc.*, 132 N.J. 587 (1993).
11. *Velazquez-Perez v. Developers Diversified Realty Corp., et al.*, 753 F. 3d 265 (1st Cir. 2014).
12. *Id.* at 273.
13. *Kramer v. Wasatch County Sheriff's Office, et al.*, 743 F. 3d 726 (10th Cir. 2014).
14. *Dunkley v. S. Coraluzzo Petroleum*, __ N.J. Super. __ (App. Div. 2014).
15. *See generally*, Mario R. Bordogna, *Vance v. Ball State*: Supreme Court Tightens Definition of Supervisor under Title VII, *Employment Essentials* July 9, 2013.