U.S. Supreme Court Decides Who’s the Boss

On Monday June 24, 2013, the U.S. Supreme Court finally decided the definition of a “supervisor” for purposes of determining an employer’s strict liability for hostile work environment claims under Title VII of the Civil Rights Act of 1964. See Vance v. Ball State University, 646 F.3d 461 (7th Cir. 2011), cert. granted, 81 U.S.L.W. 3028 (U.S. Jun 25, 2012) (NO. 11-556, 11A192); affirmed 2013 WL 3155228. To read full version of the Court’s decision, click here.

According to two notable U.S. Supreme Court decisions, Faragher and Ellerth1, employers are strictly liable for the hostile work environments created by their supervisors when the harassment results in a tangible employment action against the employee i.e., discharge, demotion and/or undesirable reassignment.

If the harassment does not result in a tangible employment action, the employer can raise an affirmative defense to the claim by showing that: (1) they took reasonable steps to prevent and correct the behavior, and (2), the plaintiff failed to take advantage of the preventative and/or corrective measures the employer has in place. This is known as the Faragher-Ellerth defense.

With respect to harassment by co-workers, however, the employer is not liable for the hostile work environment created by a co-worker unless the plaintiff can show that the employer was negligent in discovering and/or remedying the harassment.

Hence, one of the crucial issues in a Title VII hostile work environment claim is whether the alleged harasser is a supervisor and/or a co-worker. This is because if the harassment is done by a supervisor and results in a tangible employment action, the employer can be held strictly liable for the supervisor's misconduct.

There has been a split of authority among federal circuit courts concerning the appropriate test to be used to determine whether an employee is a supervisor or a co-worker. In the 7th Circuit, “[a] supervisor is someone with power to directly affect the terms and conditions of the plaintiff’s employment.” Rhodes v. Ill. Dept of Transp., 359 F.3d 498, 506 (7th Cir.2004). That authority “primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.” Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002)

In other circuits, however, courts have held that the authority to direct an employee’s daily activities in a manner that may increase the employee’s workload or assign additional or undesirable tasks establishes supervisory status under Title VII. See Mack v. Otis Elevator Co., 326 F.3d 116, (2nd. Cir. (N.Y) 2003).
Some circuit courts also deferred to the EEOC’s Enforcement Guidelines which state that “[a]n individual qualifies as an employee’s ‘supervisor’ if: (1) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (2) [t]he individual has authority to direct the employee’s daily work activities (emphasis added)” EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999).

**Employers are no longer held strictly liable for harassment done by employees with the authority to direct the daily activities of their co-workers**

**Key Issue Before the Court?**
On June 25, 2012, the U.S. Supreme Court granted certiorari to decide “who qualifies as a supervisor in a case in which an employee asserts a Title VII claim for workplace harassment?”

**U.S. Supreme Court’s Ruling?**
The U.S. Supreme court adopted the test used by the 7th Circuit and held that:

> We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victims, and we therefore affirm the judgment of the seventh circuit . . . . We hold 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 effect 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. We reject the nebulous definition of a supervisor advocated in the EEOC Guidance and substantially adopted by several courts of appeals.

**Impact on Employers?**
This decision has narrowed the class of employees whose actions an employer can be held strictly liable for in a hostile work environment claim under Title VII, and invalidates the EEOC’s Enforcement Guidelines concerning the definition of a supervisor for purposes of the Faragher and Ellerth Supreme Court decisions.

Thus, employers are no longer held strictly liable for harassment done by employees with the authority to direct the daily activities of their co-workers, and employers may now use the Faragaher-Ellerth defense for harassment done by these employees.

**Warning to Employers**
Employers are cautioned that while this decision narrows the scope of an employer’s strict liability for workplace harassment, it does not eliminate the employer’s duty to prevent and/or remedy workplace harassment pursuant to Title VII; and employers may still be liable for their negligence in handling unlawful harassment by co-workers.
Possible Future Impact of this Decision

This decision was decided by a 5–4 vote with a strong dissenting opinion written by Justice Ginsberg, joined by Justices Breyer, Sotomayor and Kagan. In her dissenting opinion, Justice Ginberg practically begged Congress to intervene and pass legislation to usurp the Supreme Court's opinion like it did when it passed the Lilly Ledbetter Fair Pay Act of 2009: “Congress has, in the recent past, intervened to correct this Court's wayward interpretations of Title VII. The 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.”

Thus, employers should monitor Congress closely next session to see if they react and pass legislation addressing this issue.

Donyetta D. Bailey represents some of the largest employers in the country and in the Cincinnati region regarding employment law matters and litigation. She frequently advises employers on various human resource matters such as reviewing employee handbooks, terminations, employee discipline, pre-employment screening and drug testing. Donnie also represents employers in all aspects of workers’ compensation claims before the Industrial Commission, as well as in various Ohio courts.