

Supreme Court Makes it Harder to Prove Supervisory Harassment

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The U.S. Supreme Court recently held that a “supervisor” is someone with the power to take “tangible employment actions” against an employee. Such actions include the right to hire, fire, promote, demote, reassign to a position with significantly different responsibilities, discipline, or significantly change benefits. [Vance v. Ball State University](#). In doing so, it rejected the EEOC’s broader definition, which treated any person with the authority to direct another’s tasks, as a supervisor. The case is important because under the well known [Faragher/ Ellerth](#) decisions employers are vicariously liable for supervisory harassment, unless they prove they exercised reasonable care to prevent and correct the harassing behavior, and the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer. Conversely, if the harassment is conducted by a non-supervisor, including a co-worker, the plaintiff must prove the employer was negligent by failing to take appropriate corrective action when it knew or reasonably should have known the harassing conduct was taking place. The Supreme Court’s decision now firmly places the burden on the employee in harassment cases to prove employer negligence, unless she can prove the harasser meets the new definition of “supervisor.”

In this case, plaintiff Maetta Vance was an African-American woman who worked for Ball State University as a catering assistant. She filed a claim against the University that a white woman, Sandra Davis, with whom she worked continually, harassed her based on race. While

Davis provided some direction in assigning Vance various tasks, both parties agreed Davis lacked the power to hire, fire, demote, promote, transfer, or discipline Vance.

Prior to filing suit, Vance lodged several complaints regarding the harassment, and the University took steps to address her concerns. The actions taken by the University failed to satisfy Vance, and she filed her legal claim. As part of her complaint, she alleged Davis was a “supervisor,” and that she had taken reasonable steps to notify the University of her concerns regarding Davis, to no avail. Therefore, she argued the University should not be permitted to assert the affirmative defense afforded under Faragher/ Ellerth.

The University argued that Davis was not a “supervisor” and therefore Vance must prove it was negligent by not responding in a timely and appropriate manner to her concerns.

The District Court for Southern Indiana found that Davis was not a “supervisor,” and that the University had not been negligent in its response. As a result, it granted the University’s Motion for Summary Judgment. The Seventh Circuit Court of Appeals and the U. S. Supreme Court both affirmed.

The Supreme Court pointed out that its ruling does not absolve employers from harassment caused by non-supervisory staff. It merely changes the burdens of proof. Also, it cautioned employers to not get too cute by placing the authority to make tangible employment decisions in the hands of just a handful of “supervisors.” More specifically it stated that even if an employer concentrates all decision making authority in a few individuals, it likely will not isolate itself from heightened liability under Faragher and Ellerth. By confining decision making power to a small number of individuals, those individuals will have limited ability to exercise independent discretion when making decisions, and will likely rely on other workers who actually interact with the affected employee. Under those circumstances, the employer may be

held to have effectively delegated the power to take tangible employment actions to those on whose recommendations it relies.

While the case increases the burden on plaintiffs claiming harassment by those who assign work, but don't have the authority to take tangible employment actions, employers should still make sure all employees are properly trained regarding unlawful conduct and complaint procedures to take advantage of the Faragher/ Ellerth defense when it applies, and to also avoid successful negligence claims.

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