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THE IMPORTANCE OF DETERMINING SUPERVISOR STATUS IN TITLE VII HARASSMENT CLAIMS

In 1998, the United States Supreme Court decided two cases on the same day—*Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth*—which have become foundational in Title VII harassment cases.¹

Ms. Faragher was a part-time ocean lifeguard for the City of Boca Raton. Her immediate supervisors were Bill Terry, David Silverman, and Robert Gordon. Faragher brought a Title VII claim against Terry and Silverman for creating a sexually hostile atmosphere. Specifically, she accused the two supervisors of offensively touching her and other female lifeguards, making lewd remarks, and speaking to her and the female employees in offensive terms. Faragher alleged Terry once said he would never promote a woman, and also that Silverman once said, “Date me or clean the toilets for a year.”

Faragher argued that under agency principles, Terry and Silverman were able to carry out their harassment because they could misuse their supervisory powers to deter resistance and complaint while keeping subordinates in their presence. The Court agreed with Faragher’s argument and stated,

in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.²

Thus, the Court ultimately made the following crucial holdings, which most employment law practitioners are well-versed in today:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the

¹ *Faragher v. City of Boca Raton*, 524 U.S. 775 (June 26, 1998); *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (June 26, 1998).

² *Faragher*, 524 U.S. at 802.

corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.³

In *Faragher*, the City failed to disseminate its antiharassment policy and failed to keep track of the conduct of its supervisors. Moreover, the City's policy did not have a reporting mechanism that would allow victims to bypass the alleged harassers when lodging a complaint. Therefore, the Court held "as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct."⁴ Nevertheless, the Court reversed and remanded for additional fact finding.

In *Ellerth*, the Court faced a parallel sexual harassment case. The *Ellerth* decision involved the same analysis and holdings as *Faragher*, and further defined a tangible employment action 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."⁵ Notably, the Court reasoned, "only a supervisor, or other person acting with the authority of the company, can cause [a tangible employment action]," which typically results in direct economic harm.⁶ Indeed, "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."⁷

Thus, just as in *Faragher*, *Ellerth* held that when a tangible employment action is taken by a supervisor, it becomes the act of the employer for Title VII purposes. The Court adopted the same holdings of *Faragher*: (1) when a supervisor takes a tangible employment action against a victimized employee, the employer is vicariously liable; and (2) when the supervisor does not take a tangible employment action, the employer will still be held vicariously liable unless it is successful in proving the two-prong affirmative defense described above (which has come to be known as the *Faragher-Ellerth* affirmative defense).

Faragher and *Ellerth* left unanswered the question—who qualifies as a "supervisor"?—and circuit splits developed in the wake of these twin decisions in an attempt to provide a workable definition of a "supervisor". The Supreme Court's recent holding in *Vance v. Ball State University* definitively answered this question.⁸ *Vance* makes clear that the status of the harassing employee is pertinent to a Title VII analysis. If the alleged harasser is "the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions."⁹ If the harasser is a "supervisor," the rules of *Faragher* and *Ellerth* apply. The Court defined the test for who qualifies as a supervisor by holding,

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 a "significant change in employment status, such as hiring, firing, failing to

³ *Id.* at 807-08. The employer bears the burden of proving the affirmative defense.

⁴ *Id.* at 808.

⁵ *Ellerth*, 524 U.S. at 761.

⁶ *Id.* at 762.

⁷ *Id.*

⁸ *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (June 24, 2013).

⁹ *Id.* at 2439. The plaintiff bears the burden of proving employer negligence.

promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹⁰

Since *Vance*, the Tenth Circuit has applied the “supervisor” standard in a couple of notable cases. In *Kramer v. Wasatch County Sheriff’s Office*, the Tenth Circuit emphasized an alternative holding of *Vance*—“that an employee need not be empowered to take . . . tangible employment actions *directly* to qualify as a supervisor.”¹¹ Indeed, a “manager who works closely with his or her subordinates and who has the power to *recommend* or otherwise substantially influence tangible employment actions, and who can thus indirectly effectuate them, also qualifies as a ‘supervisor’ under Title VII.”¹² In this situation, for the employer to be held liable, the decisionmaker must rely on the biased recommendation of the quasi-supervisor *uncritically*, without any independent investigation or consideration. In *Kramer*, the Tenth Circuit concluded there were fact questions regarding whether the alleged harasser had the power to recommend and substantially influence tangible employment actions against Ms. Kramer.

To contrast, in *McCafferty v. Preiss Enterprises, Inc.*, the Tenth Circuit applied the *Vance* rule to the undisputed facts and found the alleged harasser was not a supervisor for purposes of Title VII.¹³ The alleged harasser, as a manager-in-training, had the ability to “direct the day-to-day assignments of crew members,” “could ask an employee to cover an extra shift, stay beyond a scheduled shift, or send an employee home early,” but he did not have the authority to hire, fire, promote, demote, or transfer employees.¹⁴ *McCafferty* was also unable to show that the harasser had substantial influence over the Preiss managers. Indeed, the court recognized Preiss’s management was actively involved with employment operations and did not effectively delegate its power to the harasser.

Conclusion

The lineage of *Faragher-Ellerth* to *Vance* demonstrates the Supreme Court’s focus on an employer’s managerial hierarchy in the context of Title VII harassment cases—those with the ability to take tangible employment action against other employees expose the employer to the most liability. Thus, it is important to note the effect the *Vance* decision may have on your employment setting:

(1) Working leads, team leads, or management trainees who have the capacity to oversee other employees, but who are not authorized to take tangible employment actions, are not considered supervisors, and any harassing conduct will be analyzed under a negligence standard.

(2) Remember the alternative holding of *Vance*—that the vicarious liability standard may still apply to individuals who lack the ability to take tangible employment action, but who have been effectively delegated that power because they have substantial influence over the employer’s decisions. To avoid vicarious liability in this situation, employers should independently investigate employment decisions, *i.e.*, avoid rubber stamping management’s recommendations.

(3) To avoid liability under the negligence standard, it is important to have a harassment reporting policy that allows the victimized employee to complain to multiple levels of management about harassment. Do not allow the reporting procedure to stop at the level of the alleged harasser.

¹⁰ *Id.* at 2443 (citation omitted). The Court rejected the EEOC’s definition of a supervisor as nebulous and murky. The EEOC Enforcement Guidance classified a supervisor as one wielding authority “of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.” *Id.* at 2449 (citation omitted).

¹¹ *Kramer v. Wasatch Cnty. Sheriff’s Office*, 743 F.3d 726, 738 (10th Cir. 2014) (emphasis added).

¹² *Id.* (citation omitted).

¹³ *McCafferty v. Preiss Enters.*, 534 Fed. Appx. 726, 731 (10th Cir. 2013).

¹⁴ *Id.*

(4) As the *Vance* decision noted, the bright-line supervisor test allows the parties to know before litigation is commenced, or at least after discovery, whether an alleged harasser was a supervisor. This permits each side to assess the strength of its case early on, which may lead to swift dispute resolution.