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Who Really Is the "Supervisor" in Your Office When It Comes to Your Liability for a Hostile Work Environment?

By Susan Olson

On June 24, 2013, the U.S. Supreme Court answered that question when it announced its decision in *Vance v. Ball State University*, 570 U.S. ____ (2013), an employment discrimination lawsuit claiming violations of Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination based on race, color, religion, sex, and national origin. One factor in determining liability is: Who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?

The Supreme Court answered this question when it held that under Title VII, an employer's liability for workplace harassment may depend upon the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling the complaining employee's working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable.

The Court defined tangible employment action to include the hiring, firing, demoting, promoting, transferring or disciplining of another employee. But if no tangible employment action is taken, the employer may escape liability by establishing, an affirmative defense. The elements the employer must demonstrate to establish an affirmative defense are that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the complaining employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

The facts on which the decision was based are pretty straight forward. Ms. Vance, an African-American, was hired in 1989 as a substitute server in the University's Banquet and Catering Division. In 1991, Ms. Vance was promoted to a part-time catering assistant position and in 2007 she was promoted to a full-time catering assistant position. During the period of time in question, Ms. Davis, a white employee, was hired by the University as a catering specialist in the same Division. In late 2005 and early 2006, Ms. Vance filed a number of complaints with the University as well as charges with EEOC alleging racial harassment and discrimination, of which most of the complaints and charges pertained to Ms. Davis. Although the University attempted to resolve Ms. Vance's issues, the University was unsuccessful and Ms. Vance filed suit in 2006. Ms. Vance's primary complaint was that she was subjected to a racially hostile work environment in violation of Title VII. Ms. Vance alleged that Ms. Davis was her "supervisor," thus the University was liable for Ms. Davis' creation of a racially hostile work environment.

Both the District Court for the Southern District of Indiana and the Seventh Circuit Court of Appeals, held that the University could not be held vicariously liable for Ms. Davis' alleged racial harassment because Ms. Davis could not "hire, fire, demote, promote, transfer or discipline" Ms. Vance. Since Ms. Davis could take no tangible employment action, Ms. Davis was not Ms. Vance's supervisor. Additionally, the lower courts concluded the University could not be held liable in negligence because the University had taken reasonable steps once it became aware of the Ms. Vance's complaints. On appeal to the US Supreme Court, both of the lower courts' decisions were affirmed.

The principal take away from the Vance case is that an employer must clearly identify who are the designated "supervisors" within the organization and then ensure that those supervisors are trained in handling situations like that of Ms. Vance. In addition to identifying supervisors,



employers should have in place a clearly defined system for handling complaints, communicate that system to employees, and more importantly follow the system that has been established when the employer becomes aware of actions that may violate Title VII.