

One Minute Memo[®]



The U.S. Supreme Court To Revisit The Scope Of The *Faragher/Ellerth* Supervisor Liability Rule

On November 26, 2012, the U.S. Supreme Court will hold oral argument in a case that may reshape the scope of supervisor liability under the Court's opinions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). In *Faragher* and *Ellerth*, the Court held that, under Title VII of the Civil Rights Act of 1964, an employer is vicariously, and strictly, liable for its supervisors' workplace harassment of, and discriminatory conduct directed toward, employees. However, an employer is vicariously liable for harassment or discrimination inflicted by employees' co-workers only if the employer was negligent in either discovering or remedying the offending conduct.

In *Vance v. Ball State University*, the Court will examine the scope of the *Faragher/Ellerth* definition of "supervisor" by deciding whether (i) it encompasses all individuals who have the authority to direct and oversee a Title VII complainant's daily work, or (ii) is limited only to those individuals who have the power to "hire, fire, demote, promote, transfer, or discipline" the complainant. Depending on how narrowly or broadly the Court defines "supervisor," the volume of Title VII claims brought against employers involving employees in management-level positions will increase or decrease. Regardless of how the Court rules in *Vance*, the case will require employers to ensure that company-wide policies, training, job descriptions, and performance expectations are all consistent with current Title VII law so as to avoid and, if need be, to defend against any Title VII claim.

Facts

Plaintiff Maetta Vance was the only African American who worked in defendant Ball State University's Banquet and Catering Department. In 2006, she filed a complaint against Ball State, alleging, among other things, that the University violated Title VII through the actions of Sandra Davis, who also worked in the Banquet and Catering Department. Specifically, Ms. Vance claimed that Ms. Davis created and fostered a hostile work environment by making discriminatory remarks about Ms. Vance's race and ethnicity. Ms. Vance reported Ms. Davis' actions to Banquet and Catering Department supervisors, who investigated the claims. Because both women provided conflicting accounts concerning who harassed whom, the supervisors declined to formally discipline either woman and instead required both to undergo counseling concerning proper work-place behavior.

Based on these facts, Ball State filed a motion for summary judgment on the ground that it was shielded from Ms. Vance's suit under *Faragher* and *Ellerth*. In granting the motion, the U.S. District Court for the Southern District of Indiana concluded that Ms. Vance failed to establish that Ms. Davis was her supervisor; as the court noted, Ms. Vance's only evidence on the point showed that Ms. Davis had the authority to direct Ms. Vance's day-to-day activities, and was not required to record her time like other hourly employees in the Banquet and Catering Department. Thus, because Ms. Davis was merely Ms. Vance's co-worker, and because Ball State took corrective action in addressing Ms. Vance's claims by requiring both women to undergo work-place counseling, Ball State was immune under *Faragher* and *Ellerth*. The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision, reasoning that Ms. Vance failed to establish that Ms. Davis had the

authority to hire, fire, demote, promote, transfer, or discipline employees, and therefore failed to establish that she was a supervisor.

The Supreme Court granted Ms. Vance's writ of *certiorari*, placing front and center the question of what is the correct definition of "supervisor" under *Faragher* and *Ellerth*. For their part, the Circuit Courts of Appeals have formed two camps of thought when addressing the issue. In some circuits, a supervisor is one with whom an employer vests authority to direct and to oversee employees' daily work activities. Other circuits had adopted the narrower definition that the Seventh Circuit applied in its opinion: that supervisors are limited to individuals who have the power to "hire, fire, demote, promote, transfer, or discipline" employees. By hearing Ms. Vance's appeal, the Supreme Court will act as the final arbiter in defining "supervisor" under *Faragher* and *Ellerth*.

The Impact Of Vance

The Supreme Court's decision in *Vance* not only will impact employment discrimination and harassment litigation, it also will require employers to proactively re-examine policies, training, and job descriptions to ensure that the *Faragher/Ellerth* defense is available if litigation arises. The Court's conclusion as to the proper definition of "supervisor" will lead either to increased or decreased litigation against employers. On one hand, if the Court adopts the broader definition of supervisor — that is, an individual who has the authority to direct and oversee employees' daily work activities — employers will face increased exposure to Title VII claims. On the other hand, if the Court affirms the Seventh Circuit's narrower definition — that is, supervisors are individuals who have the power to "hire, fire, demote, promote, transfer, or discipline" employees — employers' exposure to Title VII litigation will decrease.

Vance underlines the importance of employers continuously taking steps to ensure that they can assert *Faragher/Ellerth* immunity if faced with a Title VII claim. As always, the optimal scenario is one where an employer avoids any such litigation altogether because it instituted the proper prophylactic measures. However, as recommended action items, employers should take the following steps:

- Review and, if need be, revise job descriptions and performance expectations of those employees in management-level positions to ensure that the descriptions and expectations do not undermine any opportunity to assert the *Faragher/Ellerth* defense. Employers should also continue to thoroughly and promptly investigate any harassment, discrimination, or retaliation claims to avoid any allegations of failing to take appropriate action to address offending conduct.
- Ensure that their anti-harassment, anti-discrimination, and anti-retaliation policies are up-to-date and comport with the latest developments of the law.
- Take appropriate steps to provide information to all employees — and, in particular, those in management-level positions — explaining those updated policies in practical, user-friendly terms.
- Deploy effective and practical Equal Employment Opportunity training programs (to ensure that supervisors, front-line managers, and others of authority are acutely aware of their broad Title VII obligations, and of how all non-discrimination laws can be implicated when dealing with employees or applicants).

Regardless of how the Court holds in *Vance*, such measures will help employers to reduce their exposure, if not altogether eliminate such exposure, to any costly and prolonged Title VII litigation.

Seyfarth Shaw's Future Coverage of Vance and Related Client Services

On Wednesday, November 28, Seyfarth Shaw will host a webinar that will further discuss the legal implications of *Vance*, any issues of interest that arose during oral argument, and the steps that employers can take to limit their exposure to discrimination and harassment claims. Please [click here](#) to register.

In addition, clients of Seyfarth Shaw should note that interactive live courses offered by Seyfarth's training subsidiary, Seyfarth Shaw at Work ("SSAW"), have all been updated to comprehensively address and illustrate managers' Title VII and policy obligations. In fact, all of SSAW's key compliance courses have been reviewed and praised by the U.S. Equal Employment Opportunity Commission's designated monitors and/or the U.S. Department of Justice in the context of specific consent decrees, and several have been identified by name in court decrees due to their impact. SSAW can also collaborate with clients to design user-friendly policies.

For information regarding a Seyfarth Shaw at Work training demonstration or course deployment options and pricing, please contact Melissa Walsh at (312) 460-6258 or mwalsh@seyfarth.com.

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