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EMPLOYMENT

FACT SHEET

The Fair Employment Protection Act: Why Workers Need Strong Protections from Supervisor Harassment

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Harassment in the workplace on the basis of sex, race, national origin, religion, disability, age, and genetic information is prohibited under federal employment nondiscrimination law. This is true regardless of whether the harassment is perpetrated by a supervisor or coworker. Employers have a heightened legal obligation to guard against supervisor harassment because of the potential for supervisors to exploit their authority over their subordinates by harassing them. As a result of this heightened obligation, employees have had strong protections from supervisor harassment and employers have had strong incentives to prevent and remedy supervisor harassment when it occurs.

In *Vance v. Ball State University*, decided in June of 2013, a bare majority of the Supreme Court weakened those protections by holding that the heightened legal obligations on employers to prevent and remedy supervisor harassment only apply when the supervisor has the power to hire and fire and take other tangible employment actions against the victim.[1] By essentially reclassifying as coworkers those lower-level supervisors who direct daily work activities but do not have the power to hire and fire, the decision watered down protections from harassment by these supervisors.

The *Vance* decision is likely to have a significant detrimental impact on victims' ability to seek a remedy for supervisor harassment, because victims of harassment by lower-level supervisors who have the authority to direct daily work activities, but not the authority to take tangible employment actions, will now have to meet the tougher negligence standard that applies to claims of coworker harassment. Particularly because some courts have applied an overly narrow definition of negligence—refusing to find employers negligent even when their efforts to prevent and remedy harassment were weak to nonexistent—many employees who are harassed by a lower-level supervisor could be left without a remedy as a result of *Vance*.[2]

The importance of the definition of supervisor in hostile work environment claims

Sexual harassment that is sufficiently severe or pervasive that it creates an intimidating, hostile, or offensive work environment violates Title VII of the Civil Rights Act of 1964.[3] The standard that applies to employer liability for hostile work environment harassment by supervisors is called vicarious liability.[4] Under the vicarious liability standard, employers are legally responsible for such harassment unless they are able to prove: (1) they exercised reasonable care to prevent and correct promptly any harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[5] In contrast, in cases of coworker harassment, the burden is on the employee to show that the employer was negligent in not preventing and remedying harassment.[6]

Prior to the Supreme Court's decision in Vance*, some federal courts treated both individuals with the power to take tangible employment actions and individuals who direct daily work activities as supervisors.*[7] *This was often crucial to employees' ability to survive employers' efforts to have their hostile work environment claims for harassment by lower-level supervisors dismissed by the courts.*

For example:

- Clara Whitten filed a lawsuit alleging that she was subject to the following acts of egregious harassment by Matt Green, the store manager who directed her daily activities and controlled her schedule: Green told Whitten she needed to "be good to him and give him what he wanted" if she wanted long weekends off from work; Green told her that he would make her life a "living hell" if she ever took work matters "over [his] head"; Green pressed his genitals against Whitten's back, and called her dumb and stupid repeatedly; Green demanded that Whitten meet him in the storeroom in the back of the store, and when she refused because she was afraid of what would happen there, he ordered her to stay late to clean and told her that the store should be spotless and that he did not care if it took her all night.

  The employer did not even contend that Green did not commit unlawful harassment. Instead, it tried to escape liability by arguing that Green was not Whitten's supervisor. The lower court agreed, and held that because Green did not have the power to "hire, fire, demote" or take other actions that would have an economic impact on Whitten, he was not her supervisor. At the employer's request, the lower court threw out Whitten's harassment claim on the grounds that Whitten presented insufficient evidence for a jury to find that her employer was negligent—the tougher standard for employer liability that applies in cases of coworker harassment. Fortunately, however, the appellate court reversed, and held that Green was Whitten's supervisor because he exercised "significant" authority over Whitten, including the ability to change her schedule and impose unpleasant duties. Because the appellate court held that Green was Whitten's supervisor, Whitten no longer had to prove her employer's negligence to win her case and was able to get a trial on her sexual harassment claim.[8]

- Yasharay Mack, a mechanic's helper, brought suit alleging the following harassment by James Connolly, the mechanic-in-charge and most senior employee at her worksite: Connolly frequently stripped down to his underwear in front of Mack, and adjusted himself while changing his clothes; Connolly grabbed Mack by the waist, pulled her into his lap, tried to kiss her, and touched her buttocks; Connolly frequently questioned, why, as an African-American woman, Mack had her job and boasted to her about his sexual exploits; Connolly told Mack that she had a "fantastic ass," "luscious lips," and "beautiful eyes"; when Connolly became angry with Mack, he denied her overtime hours; in response to Mack's requests that he stop harassing her Connolly replied, "I get away with everything."

  The lower court decided that Connolly was not Mack's supervisor, and then dismissed Mack's claim on the grounds that Mack would not be able to prove employer negligence—as required in a case of coworker harassment. However, the appellate court reversed, holding that Connolly was Mack's supervisor because he had the authority to assign and schedule work, direct the workforce, ensure the quality and efficiency of assignments, and enforce safety practices and procedures. Because the appellate court determined that Connolly was indeed a supervisor, Mack's opportunity to get her day in court on her hostile work environment claim was restored.[9] But if this case had been decided after *Vance*, the court may have felt bound to conclude that Connolly did not meet the definition of "supervisor" necessary to establish the employer's vicarious liability for harassment.

- Six women workers in a chicken processing plant alleged egregious harassment by their lower-level supervisors. For example, according to Jennelle Beasley, a plaintiff in the case, one of these lower-level supervisors, Jerry Marsh, told her that "every time he looked into her eyes" it made his "dick trickle," and that he had some lotion in his van he wanted to rub on her; Marsh repeatedly stood behind Beasley, simulating masturbation and anal intercourse while she worked; and Marsh grabbed Beasley between the legs, touched her breasts, followed her into the restroom, and touched her inappropriately.

  When Beasley and other women workers brought

harassment claims against the chicken processing plant, the employer tried to have their case thrown out on the grounds that Marsh and other lower-level supervisors did not qualify as supervisors, and that the women did not have grounds for holding the employer liable for the harassment. The court disagreed. The court noted that the harassers' titles included line chief and line leader, and that the harassers trained employees, told them when they could take breaks, and monitored employees' progress. For all of these reasons, the court held that the harassers were indeed supervisors. As a result of the court's determination that the harassers met the definition of a supervisor, the plaintiffs' hostile work environment claims survived the employer's motion to have their claims dismissed, and were allowed to proceed to a jury.[10]

Unfortunately, when other courts applied overly narrow definitions of supervisor, employees' hostile work environment claims were often dismissed.

- Donna Rhodes, a seasonal highway maintainer for the Illinois Department of Transportation, brought a hostile work environment claim alleging egregious harassment by her lower-level supervisor. Rhodes was responsible for plowing snow during the winter months. Michael Poladian, the alleged harasser, was "Lead Lead Worker." Poladian was in charge of assembling crews and assigning tasks to employees. Rhodes was the only woman out of thirty-two workers at her work site. Rhodes' allegations of harassment included the following: when Rhodes objected to Poladian's decision to shorten her plow route he threatened to "strangle her"; when Rhodes complained to a higher-level supervisor about the threat, the harassment increased—Poladian responded by calling her "bitch," "cunt," and forcing her to wash a truck in subzero temperatures; Poladian gave Rhodes less work, placed restrictions on her activities that did not apply to any other employees, and told a mechanic not to fix the heat in her truck; and Rhodes found a picture of a nude woman on her locker, cartoons of a sexual nature on the bulletin board, and pornographic movies playing on the workplace TV.

  The lower court threw out Rhodes' lawsuit, and this decision was affirmed on appeal on the grounds that Poladian and another alleged harasser were not supervisors because they did not have the ability to hire, fire, promote, demote, discipline or transfer Rhodes. The court reached this conclusion despite its acknowledgment that Poladian managed Rhodes' work assignments, investigated complaints and disputes, and made recommendations concerning sanctions for rule violations. And despite Rhodes' complaints about the harassment and her employer's tepid efforts to address it, the court held that Rhodes could not meet the tougher employer negligence standard required for a coworker harassment claim to proceed to trial.[11]

- Catherine Granofsky-Fletcher, Antoinette Baldwin, Maybi Fernandez–Fabre, and Jennifer Susson were all newly hired truck drivers for CRST Van Expedited, Inc., one of the country's largest interstate trucking companies, operating a fleet of team-driven tractor trailers. New drivers must successfully complete CRST's Training Program before CRST certifies them and gives them full pay as CRST drivers. Lead Drivers direct the training program. The Lead Drivers traveled with the women on the 28-day over-the-road training trip, trained them, gave them a "pass/fail" evaluation that superiors considered when determining whether to certify them as drivers, and directed their daily work, down to scheduling rest stops. The women alleged sexual harassment at the hands of their Lead Drivers: Granofsky-Fletcher alleged that her Lead Driver told her to "scoot over" so he could join her in her bunk. When she refused, he threw things around the truck angrily. The next day, he removed his shirt and said she "was going to do it or [she] wasn't going to pass." Baldwin alleged that her Lead Driver made repeated sexual advances, and though she wanted to report his conduct, he refused to let her use the phone in the truck. He told her "[it's] his truck and he can do what he wants to do in his truck." She hoped saying "no" repeatedly would put a stop to his behavior, but instead he ordered Baldwin off the truck mid-trip and left her at a truck stop in Illinois. Fernandez-Fabre alleged that her Lead Driver exposed himself, urinated in her presence, and required her to urinate in a cup. Susson alleged that her Lead Driver repeatedly made sexually suggestive comments and touched her inappropriately, and that he raised his hand as if he was going to hit her and then spit in her face instead.

However, when the federal Equal Employment Opportunity Commission brought a lawsuit on behalf of these women and dozens of others who alleged harassment by their Lead Drivers, the lower court threw out many of their claims. Even though the Lead Drivers had significant authority to direct and control the women's daily work, the appellate court affirmed the dismissal of their hostile work environment claims because the harassers did not have the authority to take tangible employment actions and therefore did not meet the court's definition of supervisor. The court found that the Lead Drivers were the women's coworkers, and that CRST was not legally responsible for much of the harassment, applying an overly burdensome negligence standard to their claims.[12]

Courts have already begun denying justice to workers as a result of Vance.

- Fifteen-year-old Megan McCafferty began working at McDonald's after its recruiters came to her alternative high school for at-risk youth seeking job applicants. Jacob Wayne Peterson was McCafferty's 21-year-old shift supervisor, and often the most senior person on duty when McCafferty worked. Peterson participated in McDonald's manager-in-training program, assigned job duties, scheduled break time, had authority to authorize overtime, and had authority to send employees home when work was slow or when an employee had engaged in misconduct. On a day when McCafferty agreed to report to work to cover a shift for a coworker and packed her McDonald's uniform in her school backpack, Peterson picked her up from school, ostensibly to give her a ride to work as he had promised the day before. Instead, Peterson told her that she did not have to report to work that day and drove her to his friend's home where he plied her with drugs and alcohol. He later took her to his own home, and over the course of two days Peterson repeatedly sexually assaulted McCafferty.

  The lower court dismissed McCafferty's case on the grounds that the employer could not be held liable for Peterson's actions, since he was not a supervisor as defined in *Vance* because he did not have the power to hire, fire, or promote employees. The appellate court affirmed the lower court's dismissal on these grounds. Because McCafferty believed Peterson was her supervisor when she brought her case, she did not allege negligence. On appeal, the Court held that any negligence claim was therefore waived.[13]

The need to restore protections from supervisor harassment

In many instances lower-level supervisors have used the authority delegated to them by their employers to harass their victims. Worse schedules, undesirable work assignments, and poorer working conditions are imposed or threatened to perpetuate harassment. Before *Vance*, some courts held employers accountable for this blatant abuse of power while others adopted an overly narrow definition of supervisor that allowed many employers to escape liability, even in the face of egregious abuses by lower-level supervisors.

Courts have already begun interpreting *Vance* in ways that make it more difficult for workers to hold their employers accountable for harassment by lower-level supervisors.[14] As a result of *Vance*, many more victims of harassment by lower-level supervisors are likely to have their cases thrown out by the courts for failing to meet the tougher negligence standard that applies in cases of coworker harassment. *Vance* also creates the perverse incentive for employers to concentrate hire and fire power in the hands of a few, while still delegating significant day-to-day authority to lower-level supervisors, in an effort to avoid vicarious liability for supervisor harassment.[15]

The Fair Employment Protection Act would amend Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act and other federal nondiscrimination laws to restore protections from supervisor harassment.

The Act:

- Restores employee protections from harassment by lower-level supervisors by making clear that employers can be vicariously liable for harassment by individuals with the authority to undertake or recommend tangible employment actions or with the authority to direct an employee's daily work activities;
- Leaves undisturbed the negligence standard that applies to coworker harassment;
- Leaves undisturbed the strict liability standard that applies to supervisor harassment that results in a tangible employment action; and
- Makes clear that employers are still able to avoid liability by proving an affirmative defense to vicarious liability for hostile work environment harassment.

1 133 S.Ct. 2434, 2439 (2013).

2 The Supreme Court explained in *Vance*, and the Equal Employment Opportunity Commission reiterated in guidance, that the degree of authority delegated to the harasser by the employer should be considered in evaluating employer liability under the negligence standard. *Vance*, 133 S.Ct. at 2451; Equal Employment Opportunity Commission, *Enforcement Guidance on Employer Vicarious Liability for Unlawful Harassment by Supervisors*, *available at* http://www.eeoc.gov/policy/docs/harassment.html. But all too often courts have applied an overly narrow interpretation of the negligence standard that has allowed employers to escape liability, even when employers clearly failed to prevent or respond to harassment.

3 *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that Title VII prohibits "severe or pervasive" sexual harassment in the workplace); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (developing the standard for an actionable sexually hostile work environment).

4 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

5 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

6 *See Ellerth*, 524 U.S. at 759.

7 *See, e.g, Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003); *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010); *Kent v. Henderson*, 77 F.Supp.2d 628 (E.D. Pa 1999); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F.Supp.2d 1254, 1266 (M.D. Ala 2001).

8 *See Whitten v. Fred's, Inc.*, No. 8:08-0218-HMH-BHH, 2009 WL 364077 (D.S.C. Feb. 11, 2009); *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010). While Whitten asserted only state law sexual harassment claims under South Carolina's law prohibiting employment discrimination, the appellate court explained that it was applying the principles of federal employment nondiscrimination law from Title VII of the Civil Rights Act of 1964 in interpreting the state law. 601 F.3d at 242.

9 *See Mack v. Otis Elevator Co.*, No. 00 DIV 7778 LAP, 2001 WL 1635885 (S.D.N.Y. Dec. 18, 2001); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003).

10 *See Dinkins v. Charoen Pokphand USA, Inc.*, 133 F.Supp.2d 1254 (M.D. Ala. 2001).

11 *See Rhodes v. Illinois Department of Transportation*, 359 F.3d 498 (7th Cir. 2004).

12 *See E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); Corrected Opening Brief of the Equal Employment Opportunity Commission as Appellant, E.E.O.C. v. CRST Van Expedited, Inc., Nos. 09-3764, 09-3765, 10-1682 (8th Cir. May 28, 2010), *available at* http://www.eeoc.gov/eeoc/litigation/briefs/crst.txt.

13 *See McCafferty v. Preiss Enterprises, Inc.*, 524 F. App'x 726, 729-32 (10th Cir. 2013).

14 *See, e.g., Morehouse v. Idaho State Department of Corrections*, No. 12-8039, 2013 WL 5798701 (D. Id. Oct. 28, 2013); *McCafferty v. Preiss Enterprises, Inc.*, 524 F. App'x 726 (10th Cir. 2013); *Marugame v. Napolitano*, 2013 WL 4608079 (D. Hawaii 2013).

15 Employment lawyers have already begun counseling their clients to restructure job descriptions to limit the potential for vicarious liability post-*Vance*. One management lawyers' newsletter for employers recently advised, "consider strategic opportunities to capitalize on the *Vance* and *McCafferty* decisions by limiting the scope of authority that certain leaders possess in order to narrow the scope of your risk for vicarious supervisory liability. And be sure to note the limitations in the updated job descriptions, which you will use as Exhibit "A" in establishing the leader is not a "supervisor" for Title VII purposes. For those leaders that already lack authority to hire, fire, promote, demote, or transfer, but who have power to direct others to some extent, make sure the job descriptions for those positions clearly reflects the lack of such authority." Christopher S. Thrutchley, *The Employers' Resource: 10th Circuit Ruling Good for Employers But . . .*, (Sep. 9, 2013), *available at* www.dsda.com/News-Publications/Newsletters?...=../&find....