



WORKPLACE JUSTICE

THE FAIR EMPLOYMENT PROTECTION ACT: WHY WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT

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 has had a 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, 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 are left without a remedy as a result of *Vance*.²

Employers now have a perverse incentive 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.³

Whether an employee is a supervisor is a critical issue 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 1964.⁴ The standard that applies to employer liability for hostile work environment harassment by supervisors is called vicarious liability.⁵ 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.⁶ 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.⁷

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.⁸ 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, 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 could move forward with her case and no longer had to prove her employer’s negligence to win.⁹

- 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: specifically, 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.¹⁰ 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. 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.

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

- Catherine Granofsky-Fletcher, Antoinette Baldwin, Maybi Fernandes-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, directed by Lead Drivers, before CRST certifies them and gives them full pay as CRST drivers. 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. 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. Fernandes-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, an appeals court upheld a lower court’s decision to throw 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 claims¹¹

Courts have denied justice to workers as a result of Vance

Lower-level supervisors can use the authority delegated to them by their employers to harass their victims, imposing or threatening worse schedules, undesirable work assignments, and poorer working conditions. As a result of Vance, many more victims of this sort of harassment have had their cases thrown out by the courts for failing to meet the tougher negligence standard that applies in cases of coworker harassment.¹²

- Fifteen-year-old Megan McCafferty worked at McDonald's, where her shift supervisor was 21-year-old Jacob Wayne Peterson, often the most senior person on duty when McCafferty worked. Peterson participated in McDonald's manager-intraining 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, Peterson signed her out of school early, ostensibly to give her a ride to work as he had promised the day before. Instead, Peterson allegedly 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. McCafferty alleged that Peterson later took her to his own home, and over the course of two days repeatedly sexually assaulted her.

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.¹³

- Cassandra Morrow and Savannah Barrow, two clerks at a Kroger's grocery store, sued the company alleging ongoing harassment by their meat market supervisor, Mickey Mancini. Morrow and Barrow both alleged that Mancini made inappropriate comments, called and texted them after working hours, and touched them inappropriately over the course of about a year.¹⁴

The court found that Mancini did not qualify as their supervisor under the Vance framework, despite acknowledging that Mancini was Morrow and Barrow's immediate supervisor and that he oversaw the day-to-day operations in their department. Morrow and Barrow further alleged that Mancini had the power to write them

up and had input into hiring, and they presented evidence that he had bragged about hiring them because they were pretty. Nevertheless, the court held that regardless of Mancini's day-to-day supervisory power over Morrow and Barrow, because he did not have the power to hire, fire, promote, demote, or transfer employees, he was not their supervisor within the definition established by Vance. As a result, the court held that the employer was not vicariously liable for Mancini's conduct, and because Morrow and Barrow could not meet the much tougher negligence standard, their sexual harassment claims were thrown out.¹⁵

- David Hylko worked at a US Steel plant in Michigan with his alleged harasser, John Hemphill. Hemphill trained Hylko, assigned him daily duties and could recommend disciplinary action against Hylko. Hylko alleged that almost as soon as they started working together, Hemphill began to harass him by grabbing his buttocks and penis on multiple occasions, and telling Hylko that he had a "nice firm ass." In subsequent meetings with plant Human Resources, Hemphill even admitted to his behavior. Nevertheless, when Hylko sued under Title VII alleging sexual harassment, both the lower court and the appeals court found that the employer was not vicariously liable for Hemphill's behavior under the Vance standard. Even though both the employer and Hemphill himself referred to Hemphill as Hylko's supervisor, the courts found that Hemphill did not qualify as Hylko's supervisor for purposes of proving vicarious liability.¹⁶

The Fair Employment Protection Act S. 2019, H.R. 4152 restores strong protections from harassment.¹⁷

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 strong protections from harassment.

The Act:

- Restores strong protections from harassment 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; EEOC, ENFORCEMENT GUIDANCE ON EMPLOYER VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (last modified Apr. 8, 2010), <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. Following *Vance*, employment lawyers began counseling their clients to restructure job descriptions to limit the potential for vicarious liability post-*Vance*. One management lawyers' newsletter for employers advised: "[C]onsider 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. Thutchley, THE EMPLOYERS' RESOURCE: 10TH CIRCUIT RULING GOOD FOR EMPLOYERS BUT . . . (Sep. 3, 2013), http://www.dsda.com/News-Publications/Search?search=Thutchley&date=%4020130903_20130903
4. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that Title VII prohibits "severe or pervasive" sexual harassment in the work place); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (developing the standard for an actionable sexually hostile work environment).
5. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
6. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
7. See *Faragher*, 524 U.S. at 799.
8. See, e.g., *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003) cert denied *Otis Elevator Co. v. Mack*, 540 U.S. 1016 (2003), abrogated by *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Whitten v. Fred's, Inc.*, 601 F.3d 231, 243-47 (4th Cir. 2010) abrogated by *Vance v. Ball State Univ.*, 133 S. Ct. 2434, (2013); *Kent v. Henderson*, 77 F. Supp. 2d 628, 633 (E.D. Pa 1999); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala 2001).
9. 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) abrogated by *Vance v. Ball State Univ.*, 133 S. Ct. 2434, (2013). 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.
10. See *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003) cert denied *Otis Elevator Co. v. Mack*, 540 U.S. 1016 (2003), abrogated by *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Mack v. Otis Elevator Co.*, No. 00 DIV 7778 LAP, 2001 WL 1636886 (S.D.N.Y. Dec. 18, 2001).
11. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); Corrected Opening Br. of EEOC as Appellant, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), <http://www.eeoc.gov/eeoc/litigation/briefs/crst.txt>.
12. See, e.g., *Hylko v. Hemphill*, 698 F. App'x 298, 299 (6th Cir. 2017) (finding employer was not vicariously liable because "process coordinator" who trained victim, could assign victim daily duties, and recommend disciplinary action was not considered to be a supervisor under *Vance*); *Davenport v. Nissan N. Am., Inc.*, No. 3:14-CV-00671-CWR, 2015 WL 6394779 (S.D. Miss. Oct. 22, 2015) (finding employer not vicariously liable for and not negligent in allowing production line leader to expose his genitals to production employee because he was not her supervisor); *Zerfas v. Burwell*, No. PWG-14-2806, 2015 WL 3949372 (D. Md. June 26, 2015) (finding employer not vicariously liable for and not negligent in allowing a pathologist's ongoing unwanted sexual contact with an assistant because he was not her supervisor); *Stanley v. Nw. Ohio Psychiatric Hosp.*, 7 F. Supp. 3d 731, 735 (N.D. Ohio 2014) (finding employer not vicariously liable for and not negligent in allowing psychiatric/nurse supervisor to sexually harass and grope hospital worker because he was not her supervisor); *Reed v. Dep't of Corr., Va.*, No. 7:13-CV-00543, 2014 WL 4656208 (W.D. Va. Sept. 16, 2014) (finding employer not vicariously liable for and not negligent in allowing supervising sergeant to sexually harass correctional officer because he was not her supervisor); *McKinnish v. Donahoe*, 40 F. Supp. 3d 689 (W.D.N.C. 2014) (finding employer not vicariously liable for and not negligent in allowing route supervisor to force sexual text messaging with mail carrier because he was not her supervisor), aff'd sub nom. *McKinnish v. Brennan*, 630 F. App'x 177 (4th Cir. 2015); *Matherne v. Ruba Mgmt.*, No. CIV.A. 12-2461, 2014 WL 2938100 (E.D. La. June 27, 2014) (finding employer not vicariously liable for and not negligent in allowing weekend manager to sexually harass restaurant server because he was not her supervisor), aff'd, 624 F. App'x 835 (5th Cir. 2015); *Rhodes v. Johnson*, No. 3:13-CV-00109-MOC, 2014 WL 2531594 (W.D.N.C. June 5, 2014) (finding employer not vicariously liable for and not negligent in allowing "manager" to harass a firefighters' seamstress because he was not her supervisor), appeal dismissed (Dec. 22, 2014); *Kim v. Coach, Inc.*, No. CIV. 13-00285 DKW, 2014 WL 2439676 (D. Haw. May 30, 2014) (finding employer not vicariously liable for and not negligent in allowing store managers to inappropriately touch sales associate because they were not her supervisors) aff'd, 692 F. App'x 478 (9th Cir. 2017).
13. See *McCafferty v. Preiss Enters., Inc.*, 534 F. App'x 726, 729-32 (10th Cir. 2013).
14. *Morrow v. Kroger Ltd. P'ship I*, No. 3:13CV276-NBB, 2015 WL 1383960, at *1 (N.D. Miss. Mar. 25, 2015) aff'd *Morrow v. Kroger Ltd. P'ship*, 681 F. App'x 377 (5th Cir. 2017), cert. denied, No. 17-93, 2017 WL 3136901 (U.S. Oct. 2, 2017).
15. *Morrow*, 2015 WL 1383960, at *3.
16. *Hylko v. Hemphill*, 698 F. App'x 298, 299 (6th Cir. 2017)
17. Nat'l Women's Law Ctr., The Fair Employment Protection Act: Section by Section (February 2018) <https://nwlc.org/resources/fair-employment-protection-act-s-2019-h-r-4152-section-section/>

