



WORKPLACE JUSTICE

THE FAIR EMPLOYMENT PROTECTION ACT: RESTORING PROTECTIONS FROM WORKPLACE HARASSMENT

The Supreme Court's decision in *Vance v. Ball State University* in June of 2013 significantly undercut protections for employees facing harassment in the workplace.¹ Workplace harassment on the basis of sex, race, national origin, religion, disability, age, and genetic information is prohibited under federal employment nondiscrimination law.² 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, however, because supervisors have the added power of the authority delegated to them by their employers. As a result of employers' heightened legal obligation, employees have had strong protections from supervisor harassment and employers have had strong incentives to prevent that harassment and remedy it when it occurs.

Vance v. Ball State University watered down protections for victims of supervisor harassment by essentially reclassifying as coworkers those lower-level supervisors who direct daily work activities, but do not have the power to take concrete employment actions like hiring and firing employees. Harassment remains a persistent problem in the workplace, and victims of harassment suffer profound economic and emotional harm as a result of harassment. The Fair Employment Protection Act would restore important protections for employees facing harassment by lower-level supervisors.

Legal Background

Harassment that creates a hostile work environment for the victim was recognized as a violation of Title VII of the Civil Rights Act of 1964 by the Supreme Court in 1986 in *Meritor Savings Bank v. Vinson*.³

The Supreme Court articulated the standards for an employer's liability for hostile work environment harassment that does not result in an economic injury in 1998 in *Burlington Industries, Inc. v. Ellerth*⁴ and *Faragher v. City of Boca Raton*.⁵ The Supreme Court reasoned that because a supervisor's ability to harass his or her victim is a direct result of the authority conferred on the supervisor by the employer, the employer should have a heightened legal responsibility for harassment perpetrated by supervisors and should therefore be vicariously liable for supervisor harassment.⁶ However, this vicarious liability is not automatic—the Court created an affirmative defense, allowing employers to avoid liability if they could 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.⁷

These decisions put incentives in place for employers to have appropriate policies and practices to prevent harassment and take corrective action when harassment occurs. It also gave employees strong tools to use when seeking a remedy for supervisor harassment. In cases of supervisor harassment not resulting in a tangible employment action, once an employee has proven that harassment occurred, the burden is on the employer to prove the affirmative defense. In cases of coworker harassment, the Supreme Court articulated a tougher standard—in addition to proving that harassment occurred, the employee bears the burden of proving that the employer was negligent in failing to prevent the harassment.⁸

Following the Supreme Court's decisions in *Ellerth* and *Faragher*, the Equal Employment Opportunity Commission (EEOC) established guidance on employer vicarious liability.⁹ The guidance explained that the vicarious liability standard applied to harassment by those supervisors who direct employees' daily work activities, as well as supervisors with the power to undertake or recommend tangible employment actions such as hiring, firing, setting pay, or making promotion decisions.¹⁰



As a result of *Ellerth, Faragher*, and the EEOC guidance, employers were incentivized to train supervisors at all levels on anti-discrimination policies, to monitor their behavior, and to take corrective actions when supervisor harassment occurred.

The Supreme Court's Decision in *Vance v. Ball State University* Weakened Worker Protections from Harassment

In *Vance v. Ball State University*, Maetta Vance, an African-American employee who worked in the catering department, filed a lawsuit against her employer for racial harassment alleging that Sandra Davis, whom Vance argued was her supervisor, subjected Vance to racial slurs, threats, and intimidation.¹¹ Because Davis did not have the power to take tangible employment actions against Vance, the Court held that Davis did not qualify as Vance's supervisor, and that Ball State could not be held vicariously liable for Davis's actions.¹²

The Supreme Court's decision in *Vance v. Ball State University* weakened workplace protections for supervisor harassment by narrowing the definition of supervisor to those with the power to hire and fire or take other tangible employment actions against the victim.¹³ This means that when employees with the authority to direct daily work activities—but not the authority to hire, fire, and take other tangible employment actions—harass their subordinates, their employers are no longer vicariously liable for that harassment.

Lower-level supervisors without the power to take tangible employment actions will now be treated as coworkers to whom the tougher negligence standard applies.

This decision is grossly out of touch with the realities of the workplace. As Justice Ginsburg explained in her dissent in *Vance*, the narrow definition of supervisor adopted by the majority “ignores the conditions under which members of the workforce labor, and disserves the objectives of Title VII to prevent discrimination from infecting the Nation's workplaces.”¹⁴

Supervisors with the authority to direct daily work activities wield a significant amount of power over their subordinates. For example, these lower-level supervisors can “saddle an employee with an excessive workload or with placement on a shift spanning hours disruptive of her family life.”¹⁵ Strong protections are necessary to prevent lower-level supervisors from exploiting their

power by harassing their subordinates.

The *Vance* decision undermines Title VII's core objectives of preventing discrimination and providing a remedy when discrimination occurs.¹⁶ Before *Vance*, some courts' refusals to limit vicarious liability to supervisors with the power to hire and fire was pivotal to employees' ability to survive their employers' efforts to have their hostile work environment claims thrown out by the courts.¹⁷ *Vance* has had a negative impact on victims' ability to have their day in court¹⁸, and unless Congress takes action, it will continue to do so.

The Fair Employment Protection Act (S. 2019, H.R. 4152) Restores Strong Protections from Harassment

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 the affirmative defense to vicarious liability for hostile work environment harassment.

If the Supreme Court's decision in *Vance* is not reversed by Congress, workers who have suffered harassment at the hands of a lower-level supervisor run the risk of having their cases thrown out by the courts and employers will have insufficient incentives to prevent and remedy this harassment. Congress must step in to prevent this injustice.

1. *Vance v. Ball State Univ.* 133 S.Ct. 2434 (2013).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623; Americans with Disabilities Act, 42 U.S.C. § 12112; Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-1.

3. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

4. 524 U.S. 742, 754 (1998).

5. 524 U.S. 775, 807 (1998).

6. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

7. *Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 807.

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



9. Equal Employment Opportunity Commission, Notice 915.002, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>. As of December 2017, the EEOC was awaiting approval of an updated proposed guidance on harassment that will supersede this guidance. See EEOC, PROPOSED ENFORCEMENT GUIDANCE ON UNLAWFUL HARASSMENT (Jan. 2017), <https://www.regulations.gov/docket?D=EEOC-2016-0009>.
10. *Id.*
11. *Vance v. Ball State Univ.*, No. 1:06-CV-1452-SEB-JMS, 2008 WL 4247836 (S.D. Ind. Sept. 10, 2008), *aff'd*, 646 F.3d 461 (7th Cir. 2011), *aff'd*, 133 S.Ct. 2434, (2013)
12. 133 S.Ct. 2434 (2013).
13. The Court held that to qualify as a supervisor an employee must have the power “to take tangible employment actions against the victim . . . such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Id.* at 2455.
14. 133 S.Ct. at 2455 (Ginsburg, J. dissenting).
15. *Id.* at 2456.
16. See 42 U.S.C. § 2000e-2.
17. 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); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F.Supp.2d 1254, 1266 (M.D. Ala 2001).
18. Nat'l Women's Law Ctr., The Fair Employment Protection Act: Why Workers Need Strong Protections from Harassment (February 2018) <https://nwlc.org/resources/fair-employment-protection-act-why-workers-need-strong-protections-harassment/>

