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WHO IS A SUPERVISOR? THE SUPREME COURT HAS THE ANSWER

Today, June 24, 2013, the U. S. Supreme Court cleared the air on the question of who is a supervisor for purposes of discrimination cases arising under Title VII of the Civil Rights Act. In this case that has been pending since 2006, the Court, in a 5 to 4 **decision**, ruled that the broad definition of supervisor used by the EEOC in its enforcement guidance is wrong. The EEOC has taken the position since at least 1999 that a supervisor is any employee that has the *ability to exercise significant direction over another's daily work*. Justice Alito, writing for the majority, said that the EEOC's definition of supervisor is "nebulous" and "wrong." Rather, according to the Court, a supervisor for purposes of discrimination claims is an employee who is *empowered by the employer to take tangible employment actions* against the victim of discrimination. Tangible employment action means that the supervisor has the power to effect a *"significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."* In other words, an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer or discipline.

WHY IS SUPERVISORY STATUS IMPORTANT?

Supervisory status is important because if discrimination or harassment is committed by a supervisor, then the employer is *strictly liable* and there is very little to argue about. The importance of supervisory status in discrimination cases arose out of two 1998 Supreme Court cases (commonly referred to as the *Faragher* and *Ellerth* cases) that involved sexual harassment by supervisors. In those cases, the Court set down the standard that made employers strictly liable for the sexual harassment of their supervisors. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But, the Court said, if no tangible employment action is taken, the employer may escape liability by establishing that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

THE COURTS AND THE EEOC HAVE APPLIED DIFFERENT DEFINITIONS OF SUPERVISOR

In the case that was decided today, the definition of supervisor was the central question. The case involved alleged racial discrimination and harassment at the Ball State University food services department. The plaintiff complained that a co-worker was creating a racially hostile work environment by "making faces" at her, "blocking her way" and "smiling." The University addressed the issues, but the plaintiff filed a charge with the EEOC anyway and then went to court. The plaintiff argued that the co-worker was her "supervisor" and, because she was a supervisor, the University should be strictly liable for the supervisor's actions. In other words, if the discrimination did occur, the University had no defense and would lose the case. The trial court granted summary judgment for the University because the co-worker was not a "supervisor" for purposes of discrimination law and there was no evidence that the University was negligent in not addressing the alleged harassment. The plaintiff then appealed to the Seventh Circuit and lost. The appeals court affirmed the summary judgment holding that the co-worker did not have the power to take tangible employment action against the plaintiff and therefore was not a supervisor. The case then went up to the Supreme Court because some federal appeals courts had followed the EEOC's broad definition while other appeals courts, including the Seventh Circuit, used the narrower definition of supervisor. The legal conflict needed to be resolved so the Supreme Court agreed to take the case. And now the definition is clear.

THE EEOC'S DEFINITION IS "NEBULOUS" AND "WRONG"

The Supreme Court rejected the EEOC's definition of supervisor as being "nebulous" and "wrong." The Court, in essence, said that virtually any employee could be argued to exercise some direction over another employee's work and so neither party would ever know what standard or burden of proof to apply in any case that goes to court. The supervisory status should hinge on a bright line test so that the parties, as in this case that has been in litigation for seven years, can go to the heart of the facts of discrimination rather than arguing about job duties of the alleged harasser. The clarity of the definition will spare juries the ordeal of trying to understand the nuances of conflicting burdens of proof depending on the status of the alleged wrongdoer. But, some might wonder, what about other common definitions of supervisor that are in frequent use in other laws? Not a problem, the Court said. Other laws have other purposes. For instance, under the National Labor Relations Act, Congress balanced the rights of management and the rights of employees in defining supervisor. According to the Court, the statutory definition found in the NLRA was evidence of that balance. Statutory supervisors are not protected under the NLRA.

because they are considered to be management. If the definition of supervisor was too broad, then those employees on the margin, like lead men and "straw bosses," would not have the protections of the law. The absence of any statutory definition of "supervisor" in Title VII allows the Court to apply the standards it developed back in 1998 in *Faragher* and *Ellerth* cases that were specifically tailored for use in discrimination cases arising under Title VII.

LESSONS FOR EMPLOYERS

The Court's decision to clear up the conflicting definitions of supervisor can only help to make the litigation process less burdensome for employers. Instead of facing uncertainty under the EEOC's definition, where virtually any employee could be argued to be a supervisor, employers now can better prepare a defense and avoid the risk of strict liability for the acts of a low level employee. With this decision, the standards and burdens of proof can - and likely will - be resolved at early stages of litigation so that the parties can better evaluate the relative strengths of their respective cases involving allegations of discrimination and harassment. However, employers should be mindful that there are multiple definitions of supervisor depending on the particular statute and the factual context. At least now there is some clarity in discrimination cases.

Reference: [Vance v. Ball State University](#), (U.S. S Ct. No 11-556, June 24, 2013)

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