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The Supreme Court Ruling on Workplace Harassment That Got Buried

The media are still talking about the justices' DOMA and Prop 8 decisions. But what about *Vance v. Ball State University*, which could have a huge impact on workers?

By: Kay Steiger – July 16, 2013

Amid the sweeping, high-profile cases decided at the end of the Supreme Court's term on same sex marriage and the Voting Rights Act, one little-noticed case could dramatically change the way employers bring harassment cases against their employers.

The Supreme Court's 5-4 decision in *Vance v. Ball State University* does something subtle, but with far-reaching effects: It narrows the definition of the word "supervisor."

In this particular case, Maetta Vance was a dining hall worker at Ball State University in Indiana. Vance, an African-American, sued the university in 2006, alleging that a white supervisory colleague, Saundra Davis, launched a campaign of racial harassment and intimidation against her. Even though Davis didn't have power to fire her, Vance claimed, she did have the power to direct her activities on the job in the university's banquet and catering division.

Justice Samuel Alito wrote in the majority opinion, "We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., 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.'"

Justice Clarence Thomas, who was himself once accused of perpetrating sexual harassment, went even further in his solo concurrent opinion, saying that previous cases establishing sexual harassment standards were wrongly decided.

To the average worker today, though, the Court's restriction on defining a "supervisor" in this way doesn't make a whole lot of sense. Most supervisors have to appeal to higher-level executives or human resources departments to enact demotions or alter pay. And, worryingly, though Vance v. Ball State was about racial harassment, there's no reason it wouldn't apply to other kinds of protections provided for in Title VII of the Civil Rights Act, including sexual harassment and harassment due to religion. This is a ruling likely to disproportionately affect women, since, according to data collected by the Equal Employment Opportunity Commission, just 16.3 percent of the more than 11,000 sexual harassment charges filed in fiscal year 2011 were from men.

"It makes a lot of sense for a large company to limit the number of people who actually have authority to take actions like firing and hiring and demoting," said Fatima Goss Graves, Vice President for Education and Employment at the National Women's Law

Center. But she pointed out that many companies create a structure where supervisors have a lot of leeway over a worker's environment, even if he or she doesn't have the power to hire and fire.

A supervisor could, for example, require the worker to put in longer hours, work outside or pick up unwanted duties on the job.

As Justice Ruth Bader Ginsburg lays out in her dissent, this is the problem with narrowing the definition of "supervisor."

"Exposed to a fellow employee's harassment, one can walk away or tell the offender to 'buzz off,'" Ginsburg wrote. "A supervisor's slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life. And she may be demoted or fired. Facing such dangers, she may be reluctant to blow the whistle on her superior, whose 'power and authority invests his or her harassing conduct with a particular threatening character.'"

Goss Graves, from her position as an advocate for women in the workplace, agreed with Ginsburg's assessment. "If there's someone who is abusing that power, wielding their power to make their subordinates' lives horrible in a way to aid and assist in their harassment, the idea that the company isn't liable for that and treats that person as just an average co-worker makes no sense," she said.

Still, the new definition won't make it impossible to bring forward new employment harassment cases.Cato Institute's Overlaywered blog argued that while the definition of supervisor may have become narrowed for bringing a "vicarious harassment" case--i.e., a case claiming the company is liable for the actions of the supervisor--employees can still bring forward cases under a negligence claim for failing to stop harassment by a co-worker.

Goss Graves admitted that this is the case, but though "It is possible," the ruling still makes it "really, really tough."

The *Vance* decision is one of many ways the Court has recalibrated--often restricting--its approach to employee rights in harassment or discrimination cases in recent years. Goss Graves recalled that not so long ago the Supreme Court decided in *Ledbetter v. Goodyear* that the window during which an employee could file a suit for pay discrimination must be filed within 180 days of the pay decision. But Lilly Ledbetter, the plaintiff in that case, had been unaware that she'd been subjected to pay discrimination for years.

As a result, Congress passed the Lilly Ledbetter Fair Pay Act in 2009, a rather narrow law that said each subsequent paycheck after the pay decision counted as a new instance of pay discrimination and therefore could be subject to a lawsuit.

Congress could do the same with *Vance v. Ball State*, amending Title VII of the Civil Rights Act -- which turns 50 next year -- to say that a supervisor is defined as someone with authority over an employee's actions on the job, regardless of his or her power over the employee's pay or employment status.

Even though *Vance* hasn't gotten much attention, Goss Graves and other activists remain optimistic that Congress will take up the issue. "The Ledbetter v. Goodyear decision came down in 2007 and it wasn't until 2009 that it was signed into law. But once the

public starts to really hear about the chipping away of rights for workers in the workplace, I think that we'll see some movement on the Hill," she said.