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Employment Law Outlook

Winter 2014

SUPREME COURT LIMITS TITLE VII DEFINITION OF SUPERVISOR – MAYBE?

Samuel J. Webster

In June, 2013, the Supreme Court issued a decision that many commentators hail as a victory for employers in avoiding liability for workplace harassment and hostile work environment. In *Vance v. Ball State University* (June 24, 2013), a 5-4 majority held, for purposes of employer vicarious liability for a supervisor's actions, that a supervisor could only be someone who could take "tangible employment actions" affecting the alleged victim, not merely a daily supervisor. The Court further explained that "tangible employment action" involved a significant change in employment status – hiring, firing, failure to promote, reassignment with significantly different responsibilities, or decisions involving significant change in benefits – some economic effect on the victim. Notably, the Supreme Court rejected the EEOC's broader "supervisor" definition – employees having daily supervisory/job assignment authority.

The Supreme Court earlier set forth its vicarious liability jurisprudence in two 1998 cases, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. First, employers may be liable for co-worker harassment under a negligence theory – if the employer knew or reasonably should have known of the co-worker's harassing behavior. Second, employers will be vicariously liable for supervisor behavior if the supervisor could affect the tangible employment conditions of the employee. The employer could avoid this latter vicarious liability only if it had in place an effective anti-harassment policy and procedures, and it could show that the harassment victim did not avail himself/herself of those procedures. Both cases left open the question of what constitutes a

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NEW YEAR'S RESOLUTION: START YOUR H-1B VISAS EARLY

Susan R. Blackman

The new season for filing H-1B visa petitions will open on April 1, 2014. Last year, H-1B visas ran out at the opening of the season, which had not happened in the four previous years. For this reason, immigration practitioners are preparing for what may be another short H-1B season this upcoming April.

In years past, when the economy was very strong, the H-1B visa cap would routinely be exhausted at the opening of the filing season. This would require a lottery to determine who would get the available 65,000 H-1B visas (plus 20,000 for applicants with U.S. graduate degrees). Because the federal government starts its fiscal year on October 1 and H-1B visa petitions can be filed up to six months prior to the start date, the earliest you can file a petition for a new non-exempt H-1B employee is April 1. Last year, U.S. Citizenship and Immigration Services (CIS) received 124,000 H-1B petitions during the first five business days after April 1, requiring a lottery. We did not have a lottery in the previous year, because the H-1B cap did not run out until June 11, 2012. In the three years before that, H-1B visas had remained available until late Fall or Winter.

While no one can predict exactly when the H-1B cap will run out for the upcoming fiscal year, we recommend that our clients start the process now (or as soon as possible) for any candidates they think they will want to employ in H-1B status for fiscal year 2015, which runs from October 1, 2014 through September 30, 2015. Certain preliminary steps must be completed before an H-1B petition can be filed, including posting and filing a Labor Condition Application (LCA) with the U.S. Department of Labor.

For these and other reasons, we suggest you contact our firm promptly if you have identified professional candidates who may be eligible for H-1B employment in the next fiscal year. Persons who already hold H-1B status and wish to change employers may do so at any time through H-1B portability procedures. Similarly, those cases that qualify as cap exempt do not have to wait until April 1 to file.■

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EMPLOYER'S HIPAA OBLIGATIONS AS A SPONSOR OF A GROUP HEALTH PLAN

Cher E. Wynkoop and Corina V. San-Marina

With the passage last year of new guidance promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and substantially increased HIPAA enforcement actions and audits, employers that are not directly subject to HIPAA but are sponsors of group health plans should immediately review and assess their obligations under HIPAA to ensure full compliance. Regardless of the type of group health plan sponsored, self-insured or fully insured, employers as plan sponsors are responsible for ensuring that their group health plans are meeting their HIPAA obligations to protect the employees' protected health information (PHI). However, many employers are unaware of their HIPAA obligations with respect to their group health plans. This is particularly true for employers sponsoring fully insured group health plans, who often erroneously believe they have no HIPAA responsibility because their plans are primarily administered by health insurance companies.

Group Health Plans as Covered Entities under HIPAA

A group health plan is considered a "covered entity" and is subject to HIPAA. An employer that is the sponsor of a group health plan is not a covered entity in its own right, and is, therefore, not directly subject to the HIPAA Regulations. However, the regulations place obligations on the group health plan and restrict the flow of information from the plan to the employer as the plan sponsor. This ultimately places compliance burdens on the employer, which will vary depending on (i) whether the plan is self-funded or provides fully insured health benefits through a health insurance issuer; and (ii) the extent of PHI the employer receives from the plan or the insurer.

An exemption from HIPAA compliance is available to self-administered, self-insured group health plans with fewer than 50 employees eligible to participate in the plan. This exclusion will not apply to a self-insured group health plan that uses a third-party administrator, such as a health flexible spending account that is administered by an outside vendor.

Restrictions on Exchange of PHI between the Group Health Plan and Employer

Employers are prohibited from freely exchanging PHI with their sponsored group health plans. In general, in order for a group health plan to disclose PHI to the employer (or to provide for or permit the disclosure of PHI to the employer by an insurer), the plan documents must be amended to provide for certain restrictions regarding the flow of information to the employer sponsoring the plan. Essentially, these amendments require employers to

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EMPLOYER'S FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS DOES NOT LEAD TO ADA CLAIM

Monica A. Stahly

In a recent decision, *Wilson v. Dollar General Corporation*, the Fourth Circuit held that an employer's failure to engage in the interactive process did not entitle a former employee to a judgment under the Americans with Disabilities Act (ADA) because no reasonable accommodation was available for the plaintiff's disability.

Within five months of starting with Dollar General, Lamont Wilson developed a debilitating condition in his left eye. Although Wilson took eight weeks of leave from his position, he continued to have significant vision problems that prevented him from returning to work on the date specified by his physician. The company provided an additional day of leave, and Wilson sought treatment, but his condition did not improve. Wilson's physician cleared Wilson to return in another two days' time, but Dollar General discharged Wilson when he did not return to work after the additional day of leave.

Wilson filed a claim against Dollar General, alleging that the company unlawfully discriminated against him by failing to provide him a reasonable accommodation. During the course of litigation, Wilson revealed that his vision problems persisted well beyond his termination from Dollar General, and he provided no evidence that had he been accommodated with his two-day leave request, he would have been able to perform the essential functions of his position at the conclusion of that leave period.

Wilson also claimed that Dollar General violated the ADA by failing to engage in the interactive process. In response, the Fourth Circuit determined that the interactive process is not an end in itself, but it is a means for determining what reasonable accommodations may be available. The Court concluded that even when an employee triggers an employer's duty to engage in the interactive process, the employer's liability for failing to engage in the process may collapse for a number of reasons (including the employee's failure to identify a reasonable accommodation that would have been feasible or would have enabled him to perform his essential job functions).

While Dollar General ultimately prevailed in this case, the result is an exception, and rarely will a court find that *no* reasonable accommodation would have been possible. Despite this ruling, employers should engage in the interactive process with its disabled employees to identify and discuss possible accommodations. Stay tuned to the Spring 2014 edition of *Employment Law Outlook* for a comprehensive discussion on how to navigate the interactive process. ■

SUPREME COURT LIMITS TITLE VII DEFINITION OF SUPERVISOR – MAYBE?

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supervisor. The *Vance* Court purported to address that issue.

The Supreme Court in *Vance* wanted to adopt a bright-line test, a laudable goal. The majority wanted to provide a "workable" definition to reduce the number of times the "supervisor" question actually gets submitted to a jury. The 5-4 majority held that for purposes of Title VII vicarious liability, a "supervisor" must be someone who could take "tangible employment actions" against the alleged victim – hiring, firing, demoting, or having significant economic effect (benefits or pay reduction). While the majority may have succeeded in creating a "bright-line" test, some murkiness remains.

Fourth Circuit cases since the *Vance* decision indicate continued struggles over whether a front-line supervisor fits the *Vance* definition. Rather than leading to summary judgment on the issue, courts in the Fourth Circuit are finding the existence of factual questions regarding whether the alleged harasser fits the *Vance* definition; that is, whether alleged harassment could take a "tangible employment action" against the victim. Other factual questions involve whether the lower level supervisor possessed sufficient authority to be viewed as the one principally responsible for the "tangible employment action." This continued murkiness after the supposed establishment of a "bright-line" test shows why employers must maintain continued vigilance for harassment to avoid hostile work environment claims.

While the definition of "supervisor" has now probably been limited to persons having tangible economic power over the employee, it does not reduce employers' Title VII vicarious liability exposure. If anything, the Court's *Vance* decision requires employers to devote even more attention to training. This training has two focuses.

First, employers must provide training to **all** of their employees reiterating that discrimination, including, especially harassment and hostile work environment, will not be tolerated. They must also provide both an effective complaint procedure and training on the use of that complaint procedure. Employers should review their anti-harassment policies for their commitment to creating, maintaining and protecting a harassment-free work environment. The harassment complaint procedure should be available, workable, and used. Finally, employers must follow up on harassment complaints.

Second, employers must take steps to assure that their supervisors – the ones with the power to make tangible employment decisions affecting an employee's economic status – are especially sensitive to anti-harassment policies and procedures and adhere to them. They must also train the supervisors to be vigilant in recognizing other employees' harassing and hostile work environment behavior. Those supervisors must be especially attentive to their subordinate supervisors.

Finally, employers should review their job descriptions for accuracy and clarity in reflecting the employees' responsibilities. The *Vance* Court admonished employers by stating that they could not avoid Title VII liability just by focusing decision-making authority in a few employees. Job descriptions for employees with authority to take tangible employment actions should clearly reflect such authority. Conversely, lower level position descriptions should accurately reflect their more limited authority.

While the Supreme Court's *Vance* decision helps employers by limiting who is a "supervisor" for vicarious strict liability, it by no means reduces employers' Title VII exposure. Employers need to take the following steps:

- Revise performance expectations for management to enforce supervisory responsibilities, especially for supervisors who may take "tangible employment actions" against employees;
- Provide an effective discrimination/harassment/hostile work environment complaint procedure and regularly provide training on it;
- Promptly investigate any and all harassment and discrimination complaints to show "reasonable care" in handling improper conduct;
- Provide thorough EEO training to all employees, especially those in management, to disseminate the company's updated EEO policies.

Now, the "merely daily supervisor" becomes a harassment and hostile work environment target under the negligence standard. The more narrowly defined "supervisors" must be vigilant for harassment and hostile work environment behavior.■

Welcome Jimmy Wood

Jimmy recently joined the firm as an associate in the Business Immigration practice team.

Jimmy is a 2013 graduate of the University of Richmond School of Law. He received his B.A. from Hampden-Sydney College.

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EMPLOYER'S HIPAA OBLIGATIONS AS A SPONSOR OF A GROUP HEALTH PLAN

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create a "firewall" between themselves (as plan sponsors) and their group health plan with regard to employee's PHI and to implement policies and procedures with respect to handling of such information. Even after the group health plan documents are amended, the plan (or an insurer on its behalf) may disclose PHI to the employer sponsoring the plan only for certain plan administrative functions.

An exception to the requirement to amend the plan documents is available for employers who sponsor insured group health plans and only exchange summary health information with their plans for limited purposes and enrollment and disenrollment information.

Different Obligations for Fully Insured and Self-Insured Plans

The extent of HIPAA compliance obligations depends on whether the employer sponsors either an insured or a self-insured group health plan. For example, in order for a self-insured group health plan to disclose to the employer sponsoring the plan the PHI that the sponsor needs to operate and administer the plan, the plan must obtain a certificate from the employer indicating that the plan documents have been amended and the firewall put in place. An employer who sponsors an insured group health plan will be subject to different HIPAA obligations depending on whether it has adopted a "hands-on" or "hands-off" approach. Under a "hands-off" approach, most of HIPAA's obligations are imposed upon the insurer.

In conclusion, employers should review and assess their obligations under HIPAA for all of their group health plans, paying special attention if they sponsor both a self-insured group health plan, such as a health flexible spending account, and a fully insured health plan.■

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