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Supreme Court Issues Decision Favorable To Employers In Harassment Cases

By Thomas L. Skalmoski

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex or national origin. The statute prohibits discrimination that has direct economic consequences to an employee, like termination, demotion and pay cuts, and it also prohibits an employer from creating a hostile work environment. Although employees are expected to endure "the ordinary tribulations of the workplace" such as the sporadic use of abusive language, offhand comments and occasional teasing, the statute protects employees from a hostile work environment "permeated with discriminatory intimidation, ridicule and insult" based on any of the protected categories of race, color, religion, sex or national origin. In the recently decided case of Vance v. Ball State University, the Supreme Court of the United States clarified the standard for an employer's liability for harassment by a co-worker in Title VII cases and made it more difficult for employees to prove hostile work environment claims by adopting a narrow definition of a "supervisor."

The Vance case involved a typical hostile work environment scenario. Vance, an African-American woman, worked for Ball State University. She complained that she had been subjected to a racially hostile work environment because of a co-worker's offensive conduct that included the use of racial epithets, racial taunts and veiled threats of physical harm. Although the co-worker had the authority to direct some of Vance's daily work assignments, the co-worker did not have the power to hire, fire, demote, transfer or discipline Vance, and Vance was not subject to any such action.

> *"An employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists"*

The question before the Supreme Court was whether Ball State was liable for the co-worker's racial harassment. Although Vance did not incur any direct economic loss as a result of the harassment, under Title VII she had the right to seek damages for the mental anguish resulting from the harassment and punitive damages. The standard for determining an employer's liability for a co-worker's harassment depends on the, status of the co-worker and specifically, whether the co-worker is a supervisor. Harassment by co-workers differs from harassment by supervisors.

It is easier for an employee to prove that the employer is liable for a for a co-worker's harassment if the harassing co-worker is a supervisor. In such a case, the employer is automatically liable for the supervisor's harassment if the harassing supervisor has taken tangible employment action against the employee such as hiring, firing, failing to promote or changing compensation or benefits. Even if the supervisor did not take any tangible employment action, the employer is still liable for the supervisor's harassing conduct unless the employer can prove that it exercised reasonable care to prevent and correct the harassing behavior and that the employee failed to take advantage of preventive or corrective opportunities provided by the employer.

An employee has a greater burden of proof when the harassing employee is merely a co-worker. The employee has the burden of proving that the employer was at fault, i.e. that the employer was negligent in permitting the harassment to occur either by not monitoring the workplace, by not having a system for registering complaints, by failing to respond to complaints or by discouraging complaints. In cases of harassment by a co-worker who is not a supervisor, proof that the employer knew of the harassing conduct is often required. As one court has stated, "an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer

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that a problem exists" because "it would be unrealistic to expect management to be aware of every impropriety committed by every low-level employee." But, when the harasser is a supervisor, the employer is presumed to have knowledge of the harassment and that makes the employee's case easier.

Because an employer's liability depends ultimately on whether the harasser is a supervisor or a mere co-worker, the Supreme Court in Vance had to decide what it means to be a supervisor and, specifically, what degree of authority an employee must have to be classified as a supervisor. Ball State argued that the term "supervisor" should be narrowly defined and limited to those employees who have the power to hire, fire, demote, transfer or discipline an employee. On the other hand, Vance argued that there should be a broader, more flexible standard so that a "supervisor" would be any co-worker who has the ability to exercise significant discretion over another employee's daily work.

The Supreme Court adopted the pro-employer, more restrictive test. The Court concluded that an employee can only be a "supervisor" for purposes of a hostile work environment claim when the employee is "empowered by the employer to take tangible employment actions against the victim" including the power to hire, fire, demote, promote, transfer or discipline the employee. The Court rejected a broad standard based on a co-worker's ability to exercise discretion over another employee's daily work as "nebulous," "ill-defined" and "simply not sufficient." The Court emphasized that its restrictive standard provided a "clear distinction" that was "easily workable" and could "be applied without undue difficulty." Because Vance's harassing co-worker did not have the power to take tangible employment action against Vance, the co-worker was not Vance's supervisor and Ball State was not liable for that co-worker's harassment.

The Supreme Court's decision benefits employers in two ways. First, by confining the class of supervisors to a well-defined group of employees who have the power to make the tangible employment decisions, the Court has protected employers from being liable for the harassing conduct of a relatively low-level employee unless the employee can prove that the employer has been negligent in permitting the harassment to occur. Second, by having a straightforward standard that is easy to apply, employers will better be able to assess their liability risk when presented with a claim of co-worker harassment.

> *The Court concluded: an employee can only be a "supervisor" for purposes of a hostile work environment claim when the employee is "empowered by the employer to take tangible employment actions against the victim"*

However, the Vance decision should not be read as changing an employer's fundamental obligation to monitor the workplace for harassment and have a system for registering complaints and responding to complaints. Taking those steps will minimize an employer's risk of liability for hostile work environment claims under Title VII regardless of whether the harasser is a supervisor or a co-worker. And, it's important to remember that the Vance decision involves claims under the federal discrimination law. The Wisconsin Fair Employment Act ("WFEA") also prohibits an employer from permitting a hostile work environment (although the employee's potential damages are much more limited than under federal law and that makes a Wisconsin state law claim generally less attractive to employees). The Wisconsin state courts recognize the distinction between harassment by a supervisor and harassment by a co-worker and have held that the WFEA, like Title VII, "contemplates liability for supervisory employees only." However, the current Wisconsin test for determining whether a co-worker is a "supervisor" involves multiple factors including, among other things, whether the co-worker has the power to hire, fire, demote, promote, transfer or discipline. It remains to be seen whether the Wisconsin state courts will adopt the simpler, more straightforward Vance standard. WBB

Expert? Maybe. Expert Witness? Maybe Not.

By Neal S. Krokosky

Expert witness hiring is not for the faint-hearted or the inexperienced. More often than not, expert witnesses are expensive. Therefore, you want to make an educated hiring decision. Most importantly, to the extent possible, you should try to determine whether an expert may be able to support your claim or defense at the outset. Not far behind, however, is determining how a fact-finder (judge or jury) will receive the expert. This article focuses on the second issue.

Your litmus test should be: never having met this person, would I believe him or her?

In Wisconsin state courts, the admissibility of expert testimony is governed by Wis. Stat. § 907.02. In part, that statute provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case."

Admissibility is case-specific. Generalizations are difficult to state. For the purpose of this article, assume the expert's proposed testimony is admissible.

Once you have found two or more experts whose opinions you believe to be admissible, you need to determine how to choose between them. In my opinion, having hired more than ninety experts in three years, mostly in complex cases, this process is more art than science.

Ask yourself, does the expert sound: Stiff? Monotone? Confident? Easy-going?

All else equal, selecting between two potential experts requires consideration of how they look on paper, how they look in person, and how they communicate.

Not all expert witnesses are involved in professions that require a detailed resume. In those situations, the lack of a resume may not be a problem. On the other hand, in professions where a resume is common, it is important to look at the credentials listed therein. Where was the expert educated? How many years has the expert been involved in his or her field? Has the expert written or presented on the topic that he or she is being asked to offer opinions about? If so, how frequently? Does the expert have other relevant, notable accomplishments? If so, what are they?

Once you are satisfied with how the expert looks on paper, then you need to consider how he or she looks and sounds in person. First, you should consider physical appearance. How does the expert look? Does the expert dress well? Does the expert look healthy? If you can find an online picture, that can be helpful. Second, you need to talk to the expert – at least over the phone. Does the expert have any mannerisms that a fact-finder may find off-putting? Does the expert sound: Stiff? Monotone? Confident? Easy-going?

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After gathering the data, your litmus test (hire or not) should be: never having met this person, would I believe him or her? Not all experts are created equal. You may be able to retain one of several "experts." However, as the foregoing should illustrate, expertise, alone, does not qualify one to be an "expert witness." If you have properly vetted your expert, you improve the chance that a fact-finder will look favorably on him or her and, by extension, the merits of your claim or defense. WBB

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AT THE FIRM...

Weiss Berzowski Brady was a sponsor at the July 20, 2013 Summer Evening event for the Women's Center of Waukesha. The firm also sponsored a table at the June 12 Grateful Plate Dinner (Feeding America Eastern Wisconsin). Former partner **Debra A. Slater** serves on their board.

Partner **Nancy M. Bonniwell** was recently elected to the Board of Directors of Tall Pines Conservancy.

Managing partner **David J. Roettgers** has been named to the Board of Directors for St. Joan Antida.

Steven M. Szymanski, partner in the Milwaukee office, successfully completed Racine's Ironman 70.3 Triathlon on Sunday, July 21st.

Together, partners **Philip J. Miller** and **Robert B. Teuber** sponsored a team for a recent MAAC Fund Fundraiser at the Waukesha Gun Club.

Michael M. Berzowski, past Prior for the Priory of St. John the Baptist of the Sovereign Military Order of the Temple of Jerusalem, and his wife, Jan, participated in a feeding the underprivileged program on July 23 sponsored by the above organization.

Congratulations to **Richard J. Rakita** for his appointment as co-chair for the Milwaukee Bar Association's Real Property Section.

Associate **Charles R. Stone** will be presenting to the Milwaukee Chapter of the CCRG on the topic of Doing Business with China Today. The event is scheduled for August 29th and will be held at the Oak Creek Auditorium.

Associate **Neal S. Krokosky** has had an article published in the American Journal of Trial Advocacy. The article, entitled *Putting the "Product" in "Products Liability": Pleading Product Identification in a Federal Toxic Tort Lawsuit*, identifies the four pleading standards that federal district courts have used to decide Rule 12 (b)(6) motions based on product identification. Based on his review of the federal pleading requirements, Mr. Krokosky argues the only proper approach requires a plaintiff to specifically identify the product at issue. If you would like a copy of the article, please email Mr. Krokosky at: nsk@wbb-law.com.

The WBB Reporter is a Weiss Berzowski Brady LLP publication. The newsletter is for general information purposes only and should not be construed as legal advice. Consult an attorney for interpretation and application of the law.
Comments? We'd like to hear from you. Please send an email to the editor: Megan Wiseman at reporter@wbb-law.com.

Mark your calendars for our 31st Tax & Business Seminar To be held September 18, 2013

At this annual event - our biggest of the year - you can expect to hear updates and presentations on hot topics in tax and business law: **David Roettgers** will discuss the negotiation of representations, warranties and indemnities in purchase agreements, **Randy Nelson** will comment regarding estate planning after the 2012 tax law changes, **Steven Szymanski** will explore the new 3.8% investment tax, **Nancy Bonniwell** will discuss estate tax exemption portability, **Robert Teuber** will outline recent developments in the tax controversy area and **Mark Siler** will examine the pending national internet sales tax legislation. We will also have an "out of the box" topic or two we hope you will find interesting. And, as customary, several of our attorneys will deliver "five minute" presentations on topics of immediate interest.

2013 Schedule of Events

31st ANNUAL TAX & BUSINESS SEMINAR
September 18, 2013

EMPLOYMENT LAW CONFERENCE
October 16, 2013

Please check our website (wbb-law.com) for more event Information and registration.