

## Who is a Supervisor?

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### PRACTICE AREAS

Employment and Labor

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC 2000e-2(a). Also prohibited by Title VII is harassment based on any of these protected classes.

Under Title VII, an employer's liability for harassment depends, in part, on the identity of the harasser. If the employee is being harassed by a non-supervisory person (*i.e.*, co-worker, customer, etc.), the employer's liability is based on whether or not the employer is negligent in controlling the work environment. In other words, did the employer know about the harassment, and if so, did the employer do anything to prevent or correct the situation. If the employee is being harassed by a "supervisor," the employer is strictly liable in the event the harassment culminates in a tangible employment action (*i.e.*, demotion, loss of pay, loss of job, etc.). If the employee is harassed by a "supervisor" and no tangible employment action occurs, the employer may still be liable, but the employer could effectively avoid such liability if it could establish that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. As one might guess, a question regularly raised in these cases is – who is a "supervisor"?

## Who is a Supervisor?

In *Vance v. Ball State University*, the U.S. Supreme Court adopted a narrow definition of the term "supervisor" under Title VII. The Supreme Court rejected the United States Equal Employment Opportunity Commission's broader definition which included any employee who supervised and directed day-to-day activities, but did not have authority to make tangible employment decisions. According to the Supreme Court, an employer can now only be held strictly liable under Title VII for a supervisor's actions if the supervisor has the authority to hire, fire, promote, demote, or cause other tangible changes in the terms and conditions of employment.

Overall, this decision by the U.S. Supreme Court may make it easier to defend against allegations of harassment by leads and other employees that facilitate the work but who have no real supervisory authority. We note, however, that this decision does not affect an employer's liability under similar state or local anti-discrimination laws. We also note that this decision does not alter our recommendation that employers have policies in place prohibiting and requiring reporting of discrimination and harassment, and procedures to ensure that all employees, including management, receive periodic training on the policies and procedures adopted by the employer.