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'Supervisor' Case To Shape Title VII Outlook For Employers

By **Abigail Rubenstein**

Law360, New York (November 20, 2012, 5:26 PM ET) -- The U.S. Supreme Court will hear a case on Monday that will resolve a circuit split over which employees qualify as supervisors whose actions can saddle an employer with Title VII liability, and regardless of which definition the court adopts, attorneys say the outcome will have a major impact on employer exposure to harassment suits.

In reviewing the Seventh Circuit's dismissal of former Ball State University dining services employee Maetta Vance's claims that she was subjected to a hostile work environment because of her race, the high court will have the opportunity either to side with the Seventh, First and Eighth circuits — which have held that supervisors must have the power to hire, fire, demote, promote, transfer or discipline — or with the Second, Fourth and Ninth circuits — which have said supervisors need only have the authority to direct and oversee an alleged victim's daily work.

Because the alleged harasser's role as either a supervisor or co-worker of the accuser affects the standard for determining employer liability in Title VII cases, attorneys say the court's decision will play a large role in how employers approach suits filed against them, attorneys say.

"It will really affect the initial assessment that an employer and the company's outside counsel undertake at the outset to determine whether or not a case has a particular settlement value or is ripe for dismissal," Donald Schroeder of Mintz Levin Cohn Ferris Glovsky & Popeo PC told Law360.

The significance of supervisory authority for Title VII cases stems from the Supreme Court's 1998 rulings in Faragher v. City of Boca Raton and Burlington Industries Inc. v. Ellerth, which established that, when a hostile work environment is created by co-workers, the employer is liable only if the plaintiff proves that the employer failed to take reasonable measures to stop them. When the alleged harasser is a supervisor, however, liability is imputed to the employer, which must then prove it had an effective anti-harassment policy that the plaintiff failed to take advantage of in order to duck the claims.

These decisions did not precisely define what makes an employee a "supervisor," as attorneys now expect the high court to do in the Ball State case.

With the circuits currently split on the question of what responsibilities make an employee a supervisor, having a uniform standard will make a difference for employers facing sexual harassment suits, attorneys say.

"Clarity would certainly be helpful, since many of these cases are analyzed at the pleading

and summary judgment phase," Dennis Duffy of BakerHostetler said. "Getting clear guidance as to whether affirmative defenses will be available or whether the plaintiff will have to prove negligence would be useful in litigating these matters."

And because the distinction between a supervisor and a co-worker can have such a significant impact on whether the employer ends up on the hook for an alleged harasser's actions, whether the court chooses to define supervisory authority narrowly or a broadly will determine the Title VII landscape employers will face moving forward, attorneys say.

A decision in favor of a broader definition is not only apt to lead to an uptick in litigation but will also make it tougher for employers to defend themselves once suits are filed, lawyers told Law360.

"There is no question that there would be more litigation as a result of the ruling if it adopted a broader definition of supervisor," Camille Olson of Seyfarth Shaw LLP said. "It would subject an employer to basically strict liability for a much larger group of individuals' actions so of course it would increase the risk of litigation and the amount of litigation."

And while the narrower definition provides a bright line rule, the broader definition will require a more fact-specific inquiry to determine whether the alleged harasser counts as a supervisor, which could make it harder for employers to get quick wins without having to go to trial, attorneys say.

"[A broader definition] will curtail the cases where an employer has been able to obtain summary judgment prior trial," Schroeder said.

Because the court's decision has the potential to have such a sweeping impact on employer exposure to harassment and bias litigation, it may also require some businesses to rethink how employers organize their workforces and implement training to ensure that they are in a strong position should litigation arise.

"No matter what the decision is, employers will need to take the step of reviewing and perhaps revising their job descriptions and job performance evaluation forms for management-level positions to ensure that whatever the descriptions and expectations are in terms of job responsibilities are consistent with the Faragher/Ellerth legal requirements as defined or redefined by the court," Olson said.

"Not all employment cases that reach the Supreme Court have a direct impact on the workplace, but this one will," she said.

The Supreme Court appeal arose out of a suit Vance filed in October 2006 alleging she was subjected to a hostile work environment because of her race.

Vance turned to the high court after the Seventh Circuit affirmed a district court's ruling that the white employee she claimed had assaulted and threatened her did not qualify as a supervisor and that Ball State was not vicariously liable for the employee's conduct.

Vance is urging the high court to reject the Seventh Circuit's narrow view of what makes an employee a supervisor.

And although Ball State insists that the employee Vance accused of harassment would not be a supervisor under any standard, the university has also told the Supreme Court that the Seventh Circuit's definition of a supervisor does not necessarily capture all the employees who may qualify. While the Seventh Circuit's test provides a reliable, bright-line rule for determining who is a supervisor, vicarious liability may also be triggered when the harassing employee has the authority to control the victim's daily work activities in a way that materially enables the harassment, the school said in a brief to the court.

However, some amici in support of Ball State have asked the court to take up the narrower definition.

The U.S. solicitor general's office, which will also be participating in Monday's oral arguments despite having initially counseled the justices against taking the case, has also said that while the definitions of supervisor may need to be expanded, the employee whose actions are at the heart of the case would not be considered a supervisor even under a broader standard.

Attorneys for both Vance and Ball State expressed confidence in their positions advance of Monday's oral arguments.

"It presents a great opportunity for the court to, at long last, settle this uncertain area of law," Vance's attorney Daniel Ortiz of the University of Virginia School of Law Supreme Court Litigation Clinic told Law360. "And it looks like it will settle the rule of law quite favorably, since the respondent basically agrees with us."

Gregory Garre of Latham & Watkins LLP, an attorney for Ball State, said his client is looking forward to presenting its arguments to the high court.

Vance is represented before the Supreme Court by Daniel Ortiz of the University of Virginia School of Law Supreme Court Litigation Clinic and David Goldberg of Donahue & Goldberg LLP.

Ball State is represented by Gregory Garre, Jessica E. Phillips and Roman Martinez of Latham & Watkins LLP and Scott Shockley, Lester H. Cohen and Shawn A. Neal of DeFur Voran LLP.

The case is Maetta Vance v. Ball State University et al., case number 11-556, in the U.S. Supreme Court.

--Editing by John Quinn and Katherine Rautenberg.