



Last year, in *Vance v. Ball State* (June 24, 2013), the Supreme Court addressed the hotly contested issue of who is a "supervisor" for purposes of assessing liability under Title VII, and, in particular, for harassment claims. In a 5-4 decision, the Supreme Court struck a victory for employers and held that to be a "supervisor" under Title VII meant that an individual had to have the ability to hire, fire, or take other tangible employment action against a subordinate employee. This **heightened** definition of who constitutes an employer under Title VII was and is important because it affects an employer's strict liability under Title VII when it is a supervisor who is accused of harassment in the workplace. Specifically, if a supervisor is accused of harassment, an employer's defenses are considerably diminished because the supervisor's actions are imputed to the employer itself and thus strict liability becomes a real possibility. Accordingly, the more difficult it is to be defined as a "supervisor," the more defensible a claim of harassment is for an employer.

Now, through the recently introduced bill entitled, "The Fair Employment Protection Act," Congress is seeking to legislatively lower the threshold for who qualifies as a "supervisor" under Title VII and thus expand the scope of potential liability for employers. The Fair Employment Protection Act seeks to define a supervisor as not just one who can fire and hire, "but also those whom the employer has put in charge of an employee's daily work activities" and who otherwise has daily influence over an employee's duties and responsibilities. If passed, therefore, an employer's potential to be held strictly liable for a supervisor's alleged harassing behavior will vastly expand beyond those individuals with the ultimate authority to take real tangible job actions against subordinates (i.e., hire, fire, etc.), to those who, for example, serve as "working supervisors" and have no real ability to directly affect a subordinate employee's job position.

McDonald Hopkins' labor and employment practice will be monitoring this bill's status and update accordingly.



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