



# UTAH

## EMPLOYMENT LAW LETTER

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### SEXUAL HARASSMENT

## Supersize victory: Shift leader isn't supervisor under Title VII

by Ryan B. Frazier

*Harassment is a word employers never want to hear. A long-standing question for many employers has been the extent of their potential liability for workplace harassment. An employer's liability for harassment under Title VII of the Civil Rights Act of 1964 may depend on whether the alleged harasser is a supervisor or just another coworker.*

*Liability for harassment by a coworker is typically limited to situations in which the employer fails to control working conditions. By contrast, an employer may be strictly liable if a supervisor's harassment involves what courts refer to as a "tangible employment action" against the harassed employee. Tangible employment actions occur when a supervisor uses the official power of the employer against the harassed employee. Such actions would include hiring, firing, demoting, failing to promote, or reassigning the employee.*

*The definition of "supervisor" for Title VII purposes has been in flux for some time. In June 2013, the U.S. Supreme Court resolved the issue in the landmark case of *Vance v. Ball State University*. That case makes it more difficult for a harassed employee to win a lawsuit against an employer when the harasser isn't a supervisor. For purposes of vicarious employer liability under Title VII, the Supreme Court defined "supervisor" as an employee empowered to take tangible employment actions against the victim of harassment.*

*Recently, the 10th U.S. Circuit Court of Appeals (whose decisions are applicable to Utah employers) had the opportunity to determine whether a fast-food restaurant's shift leader was a supervisor for Title VII purposes in light of the *Vance* decision.*

### **That's not in my job description**

In February 2007, Preiss Enterprises, Inc., which operates a McDonald's restaurant in Cheyenne, Wyoming,

hired Megan McCafferty as a crew member. She was 15 years old when she was hired, but she had indicated on her job application that she was 16.

Jacob Peterson, who was 21 years old at the time, worked for Preiss as a "shift leader." In that position, he directly oversaw the work of crew members and directed their day-to-day activities. He assigned them specific duties, such as operating the cash register or the deep fryer. He determined how long crew members worked during shifts when he was in charge, including controlling when they took their breaks, left work for the day, and worked past the end of their shifts. He could even request that one crew member cover a shift for another.

Preiss also authorized Peterson to impose some discipline on crew members, such as writing up employees for infractions. The company did not give him any authority to hire, fire, promote, demote, or transfer employees, but he did have some influence on such decisions. During his time with the company, he also participated in McDonald's "manager-in-training" program.

On March 26, 2007, McCafferty worked a shift with Peterson, who was the employee with the most authority during the shift. Although it is unclear who made the request, McCafferty was asked to cover a shift the next day. She was willing to work the shift, but she needed a ride from school to work. Although he was not scheduled to work on March 27, Peterson agreed to pick her up and drive her to work.

The next day, Peterson showed up at McCafferty's school and arranged to have her checked out. Instead of driving to work, Peterson and McCafferty smoked marijuana and went to get something to eat. McCafferty then reminded Peterson that she needed to go to work. He told her that she had been excused from her shift and asked if she wanted to hang out. After she



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agreed, Peterson provided her with alcohol, methamphetamines, and other drugs. At some point, they went to his home and engaged in sexual relations.

For the next two days, McCafferty remained with Peterson. He continued to provide her with drugs and alcohol, and they continued to engage in sexual activities. She was scheduled to work on March 28, 30, and 31. However, she did not report to work for any of her shifts on those days.

On March 29, McCafferty's sister saw her in Peterson's car and pulled her out. The sister reported Peterson to the police, and the state filed various drug charges against him. After the incident, McCafferty was treated for depressive disorder, post-traumatic stress disorder, and drug dependence. She did not contact anyone at Preiss about the events involving Peterson. The company considered her to have voluntarily quit her job.

In September 2007, McCafferty filed a charge of discrimination against Preiss with the Equal Employment Opportunity Commission (EEOC). After receiving a right-to-sue letter, she sued Preiss in federal court, alleging claims under Title VII and state law against both Preiss and Peterson. The trial court ruled in favor of Preiss before the case went to trial. McCafferty appealed the ruling to the 10th Circuit.

### ***Employer's vicarious liability***

Title VII prohibits employers from requiring employees to work in a discriminatorily hostile or abusive environment. However, an employer is not automatically liable for harassment perpetrated by its employees. Employer liability for harassment by a victim's coworker is limited to situations in which the employer failed to control working conditions.

McCafferty did not allege that Preiss failed to control working conditions. Rather, she asserted that the company was responsible for Peterson's actions under two theories: (1) He was a supervisor under Title VII and took a tangible employment action against her, and (2) under general agency principles, he acted as an agent of Preiss and was aided by his employment relationship with the company in carrying out the harassment.

### ***'Supervisor' defined***

McCafferty argued that Peterson was a supervisor, making Preiss liable if he took a tangible employment action against her. Typically, a tangible employment action taken by a supervisor is treated as an act by the employer. A tangible employment action is something that effects a change in the employment status of the victim, such as firing, failing to promote, hiring, reassigning, or making another decision that significantly affects benefits.

Relying on the Supreme Court's decision in *Vance v. Ball State University*, the 10th Circuit concluded that

Peterson was not a supervisor for purposes of Title VII. Unlike other nonsupervisor coworkers, a supervisor has the power to take tangible employment actions against another employee. The 10th Circuit determined that Peterson did not have the authority to effectuate tangible employment actions. The court specifically found that he could not hire, fire, promote, demote, or transfer other employees. Any influence he had on such decisions was insufficient to make Preiss responsible for his actions.

Notably, the court, in further reliance on the *Vance* decision, rejected McCafferty's contention that Peterson's authority to direct the day-to-day activities of other employees made him a supervisor under Title VII. Having concluded that he was not a supervisor, the court declined to hold Preiss responsible under McCafferty's first theory.

### ***'Agency' relationship***

Alternatively, McCafferty claimed that Preiss was liable under "general agency principles." In other words, she argued that Peterson acted with what appeared to be authority from Preiss or that his conduct was facilitated and aided by his position and employment relationship with Preiss. However, the 10th Circuit rejected that argument, too.

The court explained that liability had to be based on something more than Peterson's employment relationship with Preiss. The court reasoned that anyone could have engaged in the sexual advances toward McCafferty, which occurred outside the workplace, and there wasn't any evidence that Peterson's employment relationship with Preiss made the advances any more likely.

Because McCafferty could not show anything more than the existence of an employment relationship between Preiss and Peterson, the company could not be responsible under general agency principles. Her inability to persuade the court under either theory meant that her Title VII claims against Preiss failed.

### ***Negligent hiring, supervision, retention, and ratification***

McCafferty also claimed that Preiss was negligent under Wyoming state law when it hired, supervised, and retained Peterson. To prove a negligent hiring claim in Wyoming, McCafferty had to show that Preiss was negligent or reckless when it employed Peterson. However, she did not offer any evidence that the company was negligent when it hired him.

To prove a negligent supervision claim, McCafferty had to show that Preiss did not exercise reasonable care in supervising Peterson within the scope of his employment, meaning it was negligent in supervising him in the activities he was employed to perform. A negligent supervision claim exists only when the

employee is on the employer's work premises, is at a location he is privileged to enter only as an employee, or is using company equipment or other personal property of the employer. McCafferty's negligent supervision claim failed primarily because Peterson was not acting within the scope of his employment when the sexual activity occurred.

Further, the sexual activity did not take place at Peterson's workplace or using Preiss' equipment or other property. None of the inappropriate conduct occurred at the workplace or using the employer's equipment or personal property. Consequently, Preiss did not negligently supervise Peterson's actions. In addition, McCafferty could not show that any Wyoming law supported a negligent retention claim.

Finally, McCafferty argued that Preiss was liable for Peterson's actions because it ratified them (i.e., approved and accepted them). To succeed on this claim, she had to show that Preiss had full knowledge of Peterson's actions and intended to ratify them. The court explained that the employer's failure to dismiss him did not constitute ratification. Further, McCafferty failed to offer any evidence that Preiss acted with full

knowledge of Peterson's actions when it continued to employ him and promoted him. Consequently, this claim also failed. *McCafferty v. Preiss Enterprises, Inc.*, 2013 WL 4055480 (10th Cir.).

### ***Lessons learned***

By defining the contours under which employees are considered supervisors for purposes of vicarious liability for harassment under Title VII, this case helps employers strategically craft a plan to limit their exposure. Because employers are vicariously liable for harassment by supervisors, an employer can minimize its potential risk by limiting the number of employees who are authorized to take tangible employment actions.

An employer should consider consolidating the authority to hire, fire, transfer, reassign, promote, or demote to only a few supervisory employees. Other employees can be authorized to direct the daily activities of coworkers. Those employees generally will not be deemed supervisors and therefore will not expose the employer to liability under Title VII for any harassment they commit. ♣