

# Employment Law Briefing



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# Recent decision shows narrowed scope of “tangible actions”

**T**he doctrine of vicarious liability assigns legal responsibility for an injury to a person who didn’t cause the harm in question, but who has a particular relationship to the individual who acted negligently. One such relationship is that of an employer to an employee.

Vicarious liability has long been of great concern to employers, who might find themselves at legal risk for interactions between employees that occur out of their control. As the case of *McCafferty v. Preiss Enterprises* demonstrates, however, the scope of “tangible employment actions” that could trigger vicarious liability recently was narrowed.

## **Background**

The plaintiff, a McDonald’s restaurant employee, sued the franchisee for sexual harassment under Title VII. She alleged that her manager had offered to pick her up from school so that she could cover another employee’s shift. Instead of reporting to work, however, the two went to the home of the manager’s friend, where the plaintiff alleged she was drugged and raped by the manager over the course of two days.

*Importantly, the shift manager was not authorized to hire, fire, promote, demote or transfer employees.*

After the event, the plaintiff received psychiatric treatment but never informed her employer of what had happened. When she didn’t contact the restaurant, her employer treated her as having voluntarily resigned.

## **Decision**

About six months later, the plaintiff filed a charge of discrimination against the franchisee with the Equal



Employment Opportunity Commission. She received a right-to-sue letter. The district court granted summary judgment to her employer, and she appealed to the U.S. Court of Appeals for the Tenth Circuit.

The case turned on whether the accused was the plaintiff’s supervisor, thereby making the franchisee vicariously liable for his actions. At the district court level, the court noted that the circuit courts were divided as to what was the proper test to determine whether an individual qualifies as a specific employee’s supervisor.

But, since that decision, the U.S. Supreme Court’s decision in *Vance v. Ball State University* has resolved the split. Using the *Vance* standard, the Tenth Circuit affirmed the district court’s decision.

## **Analysis**

As the appellate court noted, employers aren’t automatically liable for harassment perpetrated by their employees. If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling work conditions.

Because, in this instance, the incident took place off the employer's premises, that argument wasn't viable. But if the plaintiff could demonstrate that the accused was her supervisor, who took tangible employment actions against her, the employer might have been liable for his actions.

The accused was a leader / shift manager participating in a Manager-in-Training program. As such, he oversaw the work of employees. Specifically, his responsibilities included:

- Directing the day-to-day activities of employees by assigning them specific duties,
- Scheduling shift breaks with the authority to request that an employee cover another's shift when necessary,
- Authorizing workers to stay on the clock past their scheduled shifts,
- Sending employees home before the end of a shift if the restaurant was overstaffed, and
- Disciplining staff by writing up workers for infractions or ordering an employee to clock out early for misconduct.

Importantly, however, he was *not* authorized to hire, fire, promote, demote or transfer employees. This was critical

because, in *Vance*, the Supreme Court identified three tangible employment actions pertinent to defining a supervisor:

1. A significant change in employment status such as hiring, firing or failing to promote,
2. Reassignment with significantly different responsibilities, or
3. A decision causing a significant change in benefits.

The Tenth Circuit found that, even though the accused performed certain personnel management responsibilities for the restaurant, none of them constituted any of these three tangible employment actions. And because the accused lacked the authority to take these actions, he wasn't the plaintiff's supervisor for the purposes of Title VII. Thus, the franchisee wasn't vicariously liable for his actions.

### Lesson

*McCafferty* demonstrates what courts will look to in attaching vicarious liability to employers for their employees' actions. The *Vance* standard narrowed the scope of what actions the court considers tangible employment actions, so employers should be particularly careful when authorizing employees to carry out such actions. As this case suggests, it may be prudent for employers to limit the authority of managers as a safeguard against being held legally liable for their actions. ♦

## Taking a closer look at *Vance*

In *McCafferty v. Preiss Enterprises* (see main article), the U.S. Court of Appeals for the Tenth Circuit relied heavily on *Vance v. Ball State University*. This decision, handed down by the U.S. Supreme Court in June 2013, warrants a closer look.



In *Vance*, the Supreme Court resolved the question of who qualifies as a supervisor for purposes of assessing vicarious liability in a Title VII harassment claim. Before this decision, some courts followed the Equal Employment Opportunity Commission (EEOC) guidance to make this determination. The EEOC defines a supervisor as someone who exercises significant direction over another's daily work. Courts interpreted that directive in different ways, leading to different outcomes depending on which circuit a case was tried in.

Noting that Congress didn't use the term "supervisor" in the text of Title VII, the Supreme Court settled the issue. It criticized the EEOC's "open-ended" approach and limited scope of the definition of "supervisor" by looking at the specific actions taken by an employee that would make that person a supervisor. By way of a solution, the Court provided a list of discrete tangible employment actions that, if taken by an employee, would lead him or her to have supervisory status.

# Age-related remarks lead employer to court

Quips, wisecracks and verbal repartee can all play a role in a productive workplace. But when remarks turn inappropriate, even stray ones can have legal repercussions. A telling example of this can be found in *Johnson v. Securitas Security Services*.

## Termination in dispute

The plaintiff was terminated from his position as a security guard at age 76. In response, he alleged age discrimination under the Age Discrimination in Employment Act (ADEA). As evidence, the plaintiff pointed to comments from a supervisor that he needed to “hang up his Superman cape” and retire because he was “too old to be working.” The plaintiff testified that he had told other supervisors about these comments.

Securitas, his employer, claimed that he was terminated because he was involved in an automobile accident while on duty and allegedly left his post early. The company also maintained that his age played no role in the decision.

Yet one of the plaintiff’s supervisors testified before the district court that he’d never disciplined the plaintiff for performance issues, nor had he ever received any performance complaints regarding the employee in question before the accident. The supervisor did testify that, on one occasion, he verbally warned the plaintiff for sleeping on the job. In addition, Securitas provided information that at least two employees weren’t terminated following automobile accidents.

## Remote in time

The district court granted summary judgment to the employer, finding that the plaintiff had failed to establish a genuine issue of fact creating a reasonable inference that he was the victim of employment discrimination. The court analyzed his claims under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, which says that:

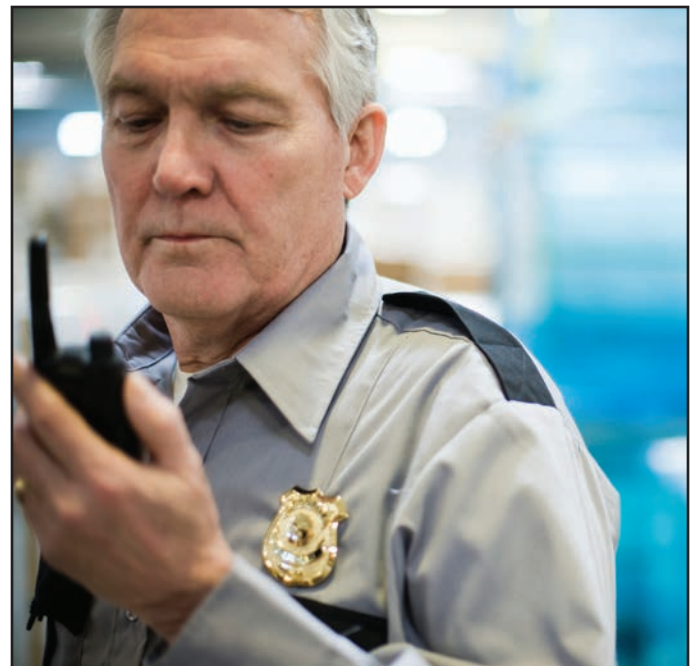
[A]n age discrimination plaintiff may survive the defendant’s motion for summary judgment either by setting out direct evidence of discrimination or by creating an inference of discrimination.

In ruling in favor of the employer, the court noted that the plaintiff was 70 years old at the time of hire and, thus, already a member of the protected class. It also noted that Securitas didn’t hire anyone to replace him, and that the plaintiff had failed to present specific evidence showing that he had been treated differently from similarly situated younger workers. The district court concluded that the age-related comments were “stray remarks, remote in time and unrelated to the decision to terminate [the plaintiff].”

## Prima facie case

The plaintiff appealed to the U.S. Court of Appeals for the Eighth Circuit. The court first established whether he presented a prima facie case. To make a prima facie case of age discrimination under the ADEA, plaintiffs must show that they were:

1. A member of a protected age group,
2. Performing at a level commensurate with their employer’s legitimate expectations,
3. Discharged, and



4. Replaced by a younger worker or, if there was no replacement, that age was a factor in the employer's decision to terminate.

Under the *McDonnell Douglas* framework, once a plaintiff makes a prima facie case, the burden then shifts to the employer to provide a legitimate, nondiscriminatory reason for the adverse employment action. If the employer provides such reason, the burden shifts back to the plaintiff to show that the proffered reason was pretext for age discrimination.

The Eighth Circuit noted that the plaintiff had satisfied element Nos. 1 and 3 of the prima facie case requirement. The court also noted that the record contained evidence that he had been meeting Securitas' job expectations (element No. 2) before the on-site accident — to wit, the plaintiff's supervisor had recorded no complaints regarding his job performance.

As for the fourth element (that age was a factor in the decision to terminate), the Eighth Circuit pointed to the various comments made by a supervisor relating to the

plaintiff's age. Therefore, the court determined, the plaintiff had indeed presented a prima facie case.

### No summary judgment

So, as mentioned, the burden then shifted back to the employer. Securitas contended that it had terminated the plaintiff because of the accident and early leave. The Sixth Circuit, however, found there were factual issues surrounding this contention best left for a trial.

Because the plaintiff denied leaving his post early, the court further found that Securitas' proffered reason for terminating him might be pretextual and ruled that summary judgment was inappropriate in light of the disputed facts. As a result, the plaintiff was able to move forward with his age discrimination claim.

### Severe and negative impact

Employers need to train — and remind — supervisors about the dangers of inappropriate stray remarks. Even seemingly innocuous comments can later have a severe and negative impact on an employer's defense should a litigant pursue discrimination claims. ♦

# Upping the ante

## *USERRA case clarifies the “escalator principle”*

**T**he Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) prohibits employers from engaging in discrimination based on military service or obligation. One facet of the law, the “escalator principle,” was clarified in the recent case *Rivera-Meléndez v. Pfizer Pharmaceuticals*.

### Leadership shuffle

The plaintiff was a member of the U.S. Naval Reserve. When he wasn't serving in that capacity, he was employed by Pfizer at the company's manufacturing facility in Barceloneta, Puerto Rico. The plaintiff was one of several Active Pharmaceutical Ingredient (API) Group Leaders at that location.

In February 2009, while the plaintiff was away on active duty, Pfizer eliminated the Group Leader position and created two separate positions: API Team Leader and API

Service Coordinator. The API Team Leader position had greater responsibilities, and each former Group Leader had to reapply for the position. If the former Group Leader wasn't selected for the Team Leader position, the alternatives were to:

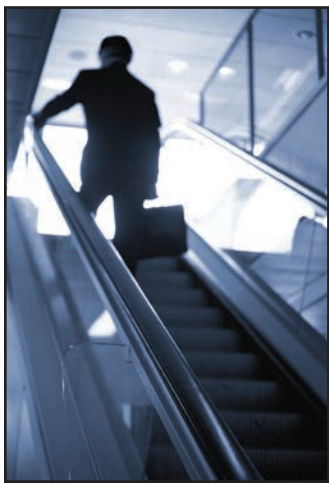
- Apply for the new Service Coordinator position,
- Accept demotion to the Senior API Operator position, or
- Participate in a voluntary separation.

Following his military discharge, the plaintiff requested reinstatement at Pfizer. He returned to work on Oct. 22, 2009, and was told that he was being assigned to “special tasks” under the API manager's supervision. Although his salary and benefits weren't altered, his job responsibilities had been reduced. On May 17, 2010, the plaintiff was appointed to the API Service Coordinator position along with three other former API Group Leaders.

## Not automatic

The plaintiff sued Pfizer, arguing that he was entitled to the Team Leader position upon his return from active duty. Pfizer moved for summary judgment and the district court granted the motion, holding that the Team Leader position wasn't the plaintiff's "escalator position."

Under USERRA, the escalator position is the "position of employment in which [the plaintiff] would have been employed if [his] continuous employment ... with the employer had not been interrupted by [his] service." The district court held that, because the Team Leader position wasn't an "automatic promotion," there wasn't necessarily a *reasonable certainty* that he would have been promoted. The plaintiff appealed.



## Two-pronged appeal

On appeal, the U.S. Court of Appeals for the First Circuit heard a two-pronged argument from the plaintiff:

1. The district court had erred in holding that USERRA's escalator principle and its associated reasonable certainty test apply only to automatic promotions, and
2. There were genuine issues of material fact regarding whether it was reasonably certain that, if not for the period of service, the plaintiff would have attained the Team Leader position.

The court noted that USERRA's provisions should be broadly construed, given its purpose to encourage military service, provide prompt reemployment to returning service members and prohibit discrimination.

The First Circuit also considered the Department of Labor's (DOL's) comments on the escalator principle following the passage of USERRA. The DOL suggested that cases involving promotion based on employer discretion would require employers "to speculate whether a returning employee would have (1) sought the promotion in the first instance and (2) have been chosen over the successful candidate."

In addition, the court interpreted the escalator principle in light of the broad remedies afforded to returning service members entitled to reemployment. For example, an employer may not refuse to reemploy a service member on the basis that another employee was hired to fill in during the service member's absence.

Ultimately, the First Circuit ruled against the district court, holding that the proper standard is whether the promotion was reasonably certain to have been given — not whether it was automatic. The court then remanded the case to the district court for reconsideration of the motion of summary judgment in light of the correct legal standard.

## Greater than statutes

Whenever reinstating an employee under USERRA, employers need to mind the details. The law provides extensive coverage to service members, and its protections go far beyond those set forth in other antidiscrimination statutes. ♦

# Were assessed attorneys' fees an abuse of discretion?

**Y**ou'd be hard pressed to find a court case that doesn't involve attorneys' fees. But did a district court go too far when it assessed the plaintiff in a recent case more than \$750,000 in such expenditures? That was the question at the heart of *EEOC v. Peplemark*.

## Applicant denied

The Equal Employment Opportunity Commission (EEOC) brought a Title VII discrimination suit against Peplemark after an African-American woman with a felony conviction submitted an application to the staffing agency and wasn't referred for employment. The EEOC

alleged that Peplemark violated Title VII by having a policy of denying employment opportunities to persons with felony records. This policy, said the EEOC, disparately impacted African-American applicants. The EEOC based its allegations on representations made in 2007 by Peplemark's Vice President and Associate General Counsel, who claimed that Peplemark had a company-wide policy of rejecting felon applicants.

In April 2009, Peplemark changed its position, informing the EEOC that no such company policy existed. The EEOC asked for two extensions to the deadline to file expert reports so that it could further investigate its claims. In July, Peplemark provided the Commission with a copy of its e-database. This electronic information also indicated that the company had no companywide policy of rejecting felon applicants. Then, in September, the EEOC again asked for an extension on the expert reports.

*Once it became clear through discovery that the company representative's statements were inaccurate, the EEOC should have reassessed its claims.*

In February 2010, the parties agreed to voluntarily dismiss the case with prejudice, meaning that Peplemark was the prevailing party for purposes of requesting fees. By that point, the company had amassed expenses of \$751,942.48 in attorneys' fees, expert witness fees and other expenses in defending against the EEOC's charges.

### **District court's ruling**

The district court, adopting the recommendations of the magistrate judge, ruled that the EEOC had to bear the costs of Peplemark's fees because it found that the EEOC's claims were "frivolous, unreasonable, or groundless, or ... the plaintiff continued to litigate after it clearly became so."

The court ruled that the EEOC should have known the case was groundless as of Oct. 1, 2009. That date represented the point at which the EEOC had the opportunity to review the vast majority of Peplemark's documents, which demonstrated that the company had no policy of rejecting applicants who were felons.



### **Sixth Circuit's stance**

The U.S. Court of Appeals for the Sixth Circuit reviewed the district court's decision under the "abuse of discretion" standard. The court noted that the district court is entitled to substantial deference — especially when the rationale for the award is predominantly fact driven.

In determining whether a district court abused its discretion when it granted an attorney's fees to a defendant, the Sixth Circuit noted that it had previously considered whether the:

- Plaintiff had presented sufficient evidence to establish a prima facie case,
- Defendant had offered to settle the case, and
- Trial court had dismissed the case prior to trial.

The court found that the EEOC's case wasn't groundless when filed because of the statements of the Vice President and Associate General Counsel. But the EEOC could rely on these statements only up to a point. Once it became clear through discovery that the company representative's statements were inaccurate, the EEOC should have reassessed its claims. Thus, the Sixth Circuit upheld the district court's award of fees.

### **Costs due**

It's well known that, in Title VII discrimination suits, the defendant may be forced to pay the prevailing plaintiff's attorneys' fees. Many employers may not realize, however, that the opposite is also true. The EEOC, as well as private litigants, can be forced to pay a defendant's costs in defending itself against what's later deemed a frivolous lawsuit. ♦

# A message to our clients and friends ...

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

*“Above all, we are at your service ...”*



## Employment and Labor Attorneys



Steve Lyman  
(317) 977-1422  
slyman@HallRender.com



Sam DeShazer  
(502) 568-9361  
sdshazer@HallRender.com



Bruce Bagdady  
(248) 457-7839  
bbagdady@HallRender.com



John Ryan  
(317) 977-1423  
jryan@HallRender.com



Michael Kim  
(317) 977-1418  
mkim@HallRender.com



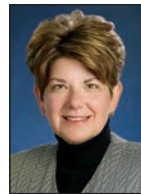
Jon Bumgarner  
(317) 977-1474  
jbumgarner@HallRender.com



Kevin Stella  
(317) 977-1426  
kastella@HallRender.com



Jon Rabin  
(248) 457-7835  
jrabin@HallRender.com



Robin Sheridan  
(414) 721-0469  
rsheridan@HallRender.com



Dana Stutzman  
(317) 977-1425  
dstutzma@HallRender.com



Craig Williams  
(317) 977-1457  
cwilliams@HallRender.com



Larry Jensen  
(248) 457-7850  
ljensen@HallRender.com



Carrie Turner  
(414) 721-0458  
cturner@HallRender.com



Jarrod Malone  
(317) 977-1494  
jmalone@HallRender.com



Jennifer Gonzalez  
(248) 457-7840  
jgonzalez@HallRender.com



Natalie Dressel  
(317) 977-1481  
ndressel@HallRender.com



Mary Kate Liffrig  
(317) 977-1455  
mliffrig@HallRender.com



Bradley Taormina  
(248) 457-7895  
braormina@HallRender.com

## Employee Benefits Attorneys



Fred Bachmann  
(317) 977-1408  
bachmann@HallRender.com



Bill Roberts  
(502) 568-9364  
ebplans@HallRender.com



Calvin Chambers  
(317) 977-1459  
cchambers@HallRender.com

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