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## Foreman Who Controlled Employee's Hours 'Supervisor' Under Title VII

In *Moody v. Atlantic City Board of Education*, No. 16-4373 (3d Cir. Sept. 6), the U.S. Court of Appeals for the Third Circuit reversed summary judgment for an employer based on an elastic and expansive interpretation of just who constitutes a "supervisor" in a hostile work environment case.

By Jeffrey Campolongo | October 26, 2017



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In *Moody v. Atlantic City Board of Education*, No. 16-4373 (3d Cir. Sept. 6), the U.S. Court of Appeals for the Third Circuit reversed summary judgment for an employer based on an elastic and expansive interpretation of just who constitutes a "supervisor" in a hostile work environment case. The precedential opinion, which was split 2-1, expanded on a 2013 U.S. Supreme Court opinion in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), that defined a supervisor as one "empowered by the employer to take tangible employment actions" against an

employee. This was largely interpreted to mean the harasser's authority to hire and fire employees. The supervisor in the *Moody* case, however, had no such authority. Instead, the court found, he controlled a sizable amount of the hours worked, as well as whether any work was assigned at all.

According to the facts in the majority opinion, Michelle Moody was hired by the Atlantic City Board of Education as a substitute custodian in November 2011. In an effort to obtain more steady work Moody asked a board member how to go about doing so. She was advised that she introduce herself to the custodial foremen at the schools within the district because each school had a custodial foreman who was delegated the authority to select which substitute custodians worked at the school.

In September 2012, Moody introduced herself to approximately 10 custodial foremen at different schools, including Maurice Marshall, the custodial foreman at New York Avenue School. By October 2012, Marshall was assigning Moody regular work at the New York Avenue School. Marshall's alleged harassment of Moody began almost immediately thereafter. By the end of October 2012, Marshall began making sexual comments to her and even suggested that he would assign her more hours if she performed sexual favors for him.

Marshall "would often be very touch-feely and grab [Moody's] breasts or buttocks at the work place" according to the court's opinion. Within a month of working for and with Marshall, Moody testified that the foreman called her into his office and tried to remove her shirt. In another instance, Marshall purportedly called Moody into his office where she found him sitting unclothed on his office chair. Marshall was even alleged to have sent a text message asking her if he was "getting all three holes" tonight. That same night, Marshall showed up at her house, told her that she would get an employment contract if she had sex with him and then he grabbed her and began to kiss her. Moody felt threatened and acceded to Marshall's unwelcome advances and reluctantly had sex with him. After this alleged sexual assault, Moody told Marshall that it would never happen again.

In the weeks following the alleged sexual assault, there was no immediate change in the number of Moody's work hours. However, after reporting the sexual harassment to human resources in February 2013, Moody experienced a substantial change in the number of hours of work she was assigned by Marshall at the New York Avenue School. According to payroll records, Moody's working hours declined three-fold in the months following her complaint as compared to the months preceding her complaint. As a result of her complaint to human resources, the board hired an outside firm to conduct an investigation which found that no sexual harassment or discrimination occurred.

Moody eventually filed suit in the District of New Jersey alleging sexual harassment and retaliation. The district court dismissed her claims on summary judgment on the grounds that Marshall was not her supervisor and she did not suffer any tangible adverse employment action.

In its reversal, the Third Circuit extensively examined the role that Marshall played in the employment relationship. The opinion focused on several important details to determine whether vicarious liability should apply. Under the controlling precedent in *Vance*, the authority to assign work is a "tangible employment action" because it is a decision that can inflict direct economic harm by "causing a significant change in benefits," as in *Vance*, 133 S. Ct. at 2443 (citing *Burlington Industries v. Ellerth*, 524 U.S. 742, 762 (1998)). Given that Marshall had the power as a custodial foreman to even allow Moody to work, he could affect a "tangible employment action" by setting her hours and hence her pay, per the decision.

The key piece of evidence for the majority revolved around Moody's payroll records. The records were inconclusive, the majority held, because "reasonable juror could conclude that Marshall gave Moody hours to entice her to accede to his sexual demands and then reduced her hours after she rejected him .... on the other

hand, such a juror could therefore also conclude that Marshall did not reduce Moody's hours at all following her rejection of his advances." This genuine dispute about whether Moody suffered a tangible employment action did not warrant dismissal as a matter of law.

The record on summary judgment not only supported the conclusion that Marshall was Moody's supervisor because he controlled her hours, but also because the board empowered him to select from the list of substitute custodians who could actually work at the New York Avenue School; he was her supervisor while she was on school premises; and there was no other person who served as Moody's supervisor. This was enough of a showing for respondeat superior liability in a sexual harassment setting. The court went on to find that there were disputed issues of material fact regarding whether Moody suffered a tangible employment action that could not be resolved on summary judgment.

In a very spirited dissent, Judge Marjorie Rendell disagreed with the majority's interpretation of Marshall as a supervisor. The dissent accused the majority of failing to heed the unambiguous test that *Vance* established, namely:

- Could Marshall hire or fire Moody?
- Could Marshall promote or demote Moody?
- Could Marshall reassign Moody with significantly different responsibilities or make a decision that caused a significant change in her benefits?

The dissent would answer all of the foregoing in the negative. In further support, the dissent argued that as a substitute custodian, Moody was not guaranteed any work; understood what her position entailed and that she was never entitled to a minimum number of days of work per week, fixed tenure, raise in salary or promotion to full-time custodian; and that there were no benefits to which she was entitled. If she was not entitled to any of these tangible employment "benefits" then she could not experience any significant change in them at the hands of Marshall. And so goes the balance of the dissent's rationale. The problem with this view, as articulated by the majority, is that it implies that Ms. Moody would not be protected from sexual harassment no matter who was her supervisor. While Moody was not guaranteed any work hours, and by extension had no guaranteed benefits, she, like other hourly workers covered are clearly by Title VII and the NJLAD, which means she and others are "guaranteed to be protected from sexual harassment by her supervisor."

It is hard to imagine a more clear-cut scenario of a supervisor affecting the terms and conditions of employment by withholding or denying hours altogether to a subordinate employee, especially one who was sexually harassed, assaulted and retaliated against by the same schedule-wielding supervisor. When a supervisor has the ability, the means and the authority to control a sizable amount of work, and hence the employee's compensation, he is in fact controlling the benefits of her employment.

*Jeffrey Campolongo, founder of the Law Office of Jeffrey Campolongo, has been perfecting his brand of law for almost two decades, emerging as one of the region's premier employment and entertainment lawyers. Recognized on an annual basis as one of Pennsylvania's Super Lawyers™, Campolongo was selected as one of only 35 attorneys in the entire state as a "Lawyer on the Fast Track."*