

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 688

(Senator Raskin, *et al.*)

Judicial Proceedings

Health and Government Operations

Fair Employment Preservation Act of 2014

This bill establishes that in an action concerning an unlawful employment practice based on the creation or continuation of a hostile work environment, an employer is liable for the acts or omissions of an individual who (1) undertakes or recommends tangible employment actions affecting the employee or applicant for employment, including hiring, firing, promoting, demoting, and reassigning the employee or applicant or (2) directs, supervises, or evaluates the work activities of the employee. An employer is also liable if the employer's negligence led to the creation or continuation of the hostile work environment.

The bill applies prospectively only.

Fiscal Summary

State Effect: None. The bill codifies existing interpretations of State law, as discussed below.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law/Background: Discrimination in employment based on an individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, or disability is prohibited. This includes discrimination by employers with 15 or more employees, employment agencies, labor organizations, and training programs. Discrimination is also prohibited against individuals who have opposed any

discriminatory practice or made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing relating to an alleged discriminatory act. The creation of a hostile work environment through harassment on the basis of a protected class is a form of discrimination.

The Supreme Court has held that an employer can be vicariously liable under Title VII of the Civil Rights Act of 1964 for harassment by an employee given supervisory authority over subordinates (see, *Faragher v. Boca Raton*, 524 U.S.775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S.742 (1998)). The U.S. Equal Employment Opportunity Commission's guidance on vicarious employer responsibility for unlawful harassment, issued in 1999, states that an individual qualifies as a "supervisor" if the individual has authority to undertake or recommend tangible employment decisions affecting the employee or the individual has authority to direct the employee's daily work activities. Tangible employment decisions specified in the guidance include hiring, firing, promoting, demoting, and reassigning the employee.

In *Vance v. Ball State University*, 133 S. Ct.243 (2013), the Supreme Court ruled that an employer is liable for the discriminatory actions of a supervisor only if the supervisor has the power to hire, fire, transfer, or affect the status of another employee. In *Vance*, an African American woman sued her employer, alleging that a fellow employee created a racially hostile work environment in violation of federal law. The Supreme Court upheld the decisions of the lower courts, stating that an employee is a "supervisor" for purposes of vicarious liability only if the employee is empowered by the employer to take tangible actions against the alleged victim.

State Effect: The Maryland Commission on Civil Rights advises that the bill's provisions codify the existing interpretations of law within the State prior to the issuance of the *Vance* decision. Furthermore, the *Vance* decision was an interpretation of federal law and not of Maryland's prohibitions against employment discrimination. Accordingly, the *Vance* decision does not limit the authority of state courts with regard to vicarious liability. Because the bill does not expand or change an employer's liability relating to an unlawful employment practice based on a hostile work environment, there is no fiscal or operational impact.

Additional Information

Prior Introductions: None.

Cross File: HB 1350 (Delegate Rosenberg, *et al.*) - Health and Government Operations.

Information Source(s): Department of Budget and Management, Maryland Commission on Civil Rights, Judiciary (Administrative Office of the Courts), Maryland Association of Counties, Maryland Department of Transportation, University System of Maryland, Equal Employment Opportunity Commission, Department of Legislative Services

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