

Department of Legislative Services  
Maryland General Assembly  
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 527

(Senator Raskin)

Judicial Proceedings

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Fair Employment Preservation Act of 2015

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This bill establishes that in an action concerning an unlawful employment practice based on quid pro quo harassment or the creation or continuation of harassment in 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 an employee or applicant for employment, including hiring, firing, promoting, demoting, and reassigning an employee or applicant or (2) directs, supervises, or evaluates the work activities of an employee. An employer is also liable if the employer's negligence led to the creation or continuation of quid pro quo harassment or harassment in a hostile work environment.

The bill applies prospectively only.

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Fiscal Summary

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

**Local Effect:** None.

**Small Business Effect:** None.

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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. Quid pro quo harassment (*i.e.*, when an employer either implies or overtly offers favored treatment to an employee in exchange for sexual favors) and the creation of a hostile work environment through harassment on the basis of a protected class are forms 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 or quid pro quo harassment, there is no fiscal or operational impact.

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### **Additional Information**

**Prior Introductions:** SB 688 of 2014, a substantially similar bill as amended by the Senate Judicial Proceedings Committee, passed the Senate and received a hearing in the House Health and Government Operations Committee, but no further action was taken. Its

cross file, HB 1350, received a hearing in the House Health and Government Operations Committee, but no further action was taken.

**Cross File:** HB 42 (Delegate Rosenberg, *et al.*) - Health and Government Operations.

**Information Source(s):** Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Office of Administrative Hearings; Maryland Department of Transportation; University System of Maryland; Equal Employment Opportunity Commission; Department of Legislative Services

**Fiscal Note History:** First Reader - February 26, 2015  
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