



## Labor & Employment ADVISORY ■

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### Supreme Court Endorses Narrow View of “Supervisor” Under Title VII and Clarifies Plaintiff’s Burden of Proof for Retaliation Claims

On June 24, 2013, the United States Supreme Court issued two opinions that will have a significant impact on employer liability in cases involving certain types of discrimination and retaliation claims. In the first case, *Vance v. Ball State University*,<sup>1</sup> the Court held that an employee is a “supervisor” for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim (i.e., to “hire, fire, demote, promote, transfer, or discipline” the employee). In the second case, *University of Texas Southwestern Medical Center v. Nassar*,<sup>2</sup> the Court concluded that plaintiffs claiming that their employer unlawfully retaliated against them for complaining about discrimination or harassment, or otherwise engaging in statutorily protected activity, must prove that their protected activity was the “but-for” cause of the employer’s adverse action, not simply one motivating factor among others. These two opinions and their potential significance for employers are discussed in more detail below.

#### ***Vance v. Ball State University***

Under long-standing precedent established by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*<sup>3</sup> and *Faragher v. Boca Raton*,<sup>4</sup> an employer’s liability for workplace harassment under Title VII and other federal employment statutes depends on the employment status of the alleged harasser. If the harassing employee is a co-worker of the victim, the employer is only vicariously liable if it was negligent in preventing such employee-on-employee harassment. If the alleged harasser is a “supervisor,” however, the employer will be strictly liable where the harassment involves a tangible employment action such as hiring, firing or failing to promote the victim. Where the alleged harasser is a “supervisor” but there is no tangible employment action involved, the employer may escape liability under the so-called *Faragher/ Ellerth* defense by establishing that it exercised reasonable care in taking measures to prevent and/or correct any harassing behavior, and that the plaintiff unreasonably failed to take advantage of these measures.

<sup>1</sup> [http://www.supremecourt.gov/opinions/12pdf/11-556\\_11o2.pdf](http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf)

<sup>2</sup> [http://www.supremecourt.gov/opinions/12pdf/12-484\\_o759.pdf](http://www.supremecourt.gov/opinions/12pdf/12-484_o759.pdf)

<sup>3</sup> 524 U.S. 742 (1998).

<sup>4</sup> 524 U.S. 775 (1998).

This framework for employer vicarious liability for harassment applies not only to claims of sexual harassment, but also to claims of harassment based on race and other protected characteristics.

Although the general framework for analyzing employers' harassment liability has been well-established under *Faragher* and *Ellerth*, those and subsequent cases left open the issue of how the term "supervisor" should actually be defined. Not surprisingly, then, different courts have taken different approaches to the issue, leading to a significant split among the federal appellate courts that the Supreme Court has now stepped in to resolve. In brief, some courts (as well as the Equal Employment Opportunity Commission (EEOC)) adopted a broad view of supervisor status that included individuals with the authority to direct and oversee the alleged victim's daily work activities (e.g., scheduling and assigning tasks), or the power to recommend—rather than personally execute—tangible employment decisions. By contrast, the Seventh Circuit in *Vance* joined several of its sister circuits in taking a narrower view, limiting supervisory status to only those individuals with the power to hire, fire, demote, promote, transfer or discipline an employee. The Supreme Court granted *certiorari* in *Vance* to resolve this circuit split.

In *Vance*, the plaintiff was an African-American woman who worked in the university's kitchen and catering department, where she was allegedly a victim of racial harassment by a fellow employee she claimed was her supervisor. The U.S. District Court for the Southern District of Indiana found, however, that the alleged harasser was not Vance's supervisor because she did not have the authority to fire Vance or take any other tangible employment action against her. Because the alleged harasser was therefore only Vance's co-worker, and because the court found that the university also exercised reasonable care in taking corrective action after Vance complained, the university was held not to be liable and the case was dismissed. On appeal, the Seventh Circuit affirmed the district court's decision.

The Supreme Court affirmed the Seventh Circuit's holding and held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" In so deciding, the majority of the Court expressed a preference for a narrow, bright-line rule that it found to be "clear," "readily applied" and "easily workable" over the "vagueness" of a broad interpretation like that endorsed by the EEOC.

By all accounts, the Court's ruling in *Vance* is a favorable decision for employers, albeit a narrow one (5-4) that drew a lengthy dissent from Justice Ginsburg. Nonetheless, barring future congressional intervention, the bright-line rule established by the Court's majority opinion will help streamline harassment lawsuits by discouraging lengthy back-and-forth arguments and complicated jury instructions about the extent to which an alleged harasser "directed" or "oversaw" a victim's daily activities. Rather, the clear "hire or fire" line for supervisors under Title VII and other federal employment laws will help avoid murky questions of fact and enable courts often to settle the issue of employer liability as a matter of law earlier in the litigation process. This may not only help employers save on legal fees in defending against harassment claims, but could also provide additional certainty and guidance as to when it is in an employer's best interest to settle rather than engage in a protracted legal battle.

In light of the rule announced in *Vance*, employers should review employee job descriptions and duties and levels of authority to ensure that, on paper and in practice, there is both consistency and clarity about which employees have the authority take tangible employment actions against lower-level employees, such as hiring, firing, promoting, reassigning with significantly different responsibilities or causing significant changes to benefits or compensation. The issuance of *Vance* also provides a good opportunity for employers to review their anti-harassment policies and training, particularly training for employees who fall within the Court's definition of "supervisor."

## ***University of Texas Southwestern Medical Center v. Nassar***

Also on June 24, 2013, the Supreme Court issued a second decision narrowly construing Title VII in a way that will likely benefit employers. In *Nassar*, at issue was the proper standard of proof for a plaintiff to show causation in support of a Title VII retaliation claim. In another 5-4 opinion (with the same four justices dissenting as in *Vance*), the majority held that Title VII retaliation claims must be proven according to traditional principles of but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive), and not under the lesser “mixed motive” standard (i.e., that an improper motive was merely one of multiple reasons for the adverse action).

In *Nassar*, the plaintiff was a physician and professor who claimed that that a job offer he had received was rescinded in retaliation for making a complaint about discrimination by his supervisor. Upon learning of the complaint and discovering that the plaintiff had been offered a job in another part of the University of Texas Southwestern Medical Center, the supervisor allegedly called the hospital that had extended the offer in order to prevent the plaintiff from being hired. Because complaining about discrimination is protected activity under Title VII, it is unlawful for an employer to retaliate against an employee for engaging in such activity. The medical center, however, argued that it had legitimate reasons for not hiring the plaintiff, regardless of any retaliatory intent. After losing at trial, the medical center appealed, arguing that the judge improperly told the jury that it only had to find that retaliation was a *motivating factor* in the decision to rescind the plaintiff’s job offer (i.e., that the employer had so-called mixed motives, one of which was unlawful retaliation). The correct standard, the medical center asserted, was that it was not liable unless the adverse action would not have occurred “but for” the retaliatory intent.

The Supreme Court agreed, holding that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lower “motivating factor” causation test for discrimination claims under Title VII. In light of this holding and the improper jury instruction, the Court vacated the prior opinions and sent the case back to the lower courts to determine whether the plaintiff could meet this burden of proof. The Court’s holding is in line with its 2009 decision in *Gross v. FBL Financial Services, Inc.*,<sup>5</sup> where it held that a “but-for” standard of proof applies to claims under the Age Discrimination in Employment Act (ADEA). When taken together, *Gross* and *Nassar* strongly suggest that but-for causation is the required standard of proof under other federal employment discrimination laws, unless Congress has specifically used “motivating factor” language, as it has for discrimination claims under Title VII.

While the overall impact of *Nassar* is not likely to be nearly as significant as the impact of *Vance*, the Court’s clarification of the causation standard will benefit employers and may help reduce the growing number of retaliation claims. Indeed, the Court specifically explained that a stricter standard of proof for retaliation claims makes sense in light of the “ever-increasing frequency” with which such claims are being filed. Under a lesser causation standard, the Court noted, an employee who believes that she might be fired for legitimate reasons could make an unfounded claim of discrimination in order to establish grounds for a retaliation claim should she in fact be terminated later. Under the rule announced in *Nassar*, however, it will be more difficult for disgruntled employees to pursue such tactics successfully.

While the *Nassar* decision will not necessarily have an immediate impact on employers, it still provides a good reason for businesses to review their performance evaluation and recordkeeping practices to ensure that they are adequate, efficient and up-to-date. Only by maintaining proper documentation can employers ensure that they will be able to persuasively demonstrate legitimate grounds for adverse employment actions and thereby be in the best position to successfully defend against retaliation claims.

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<sup>5</sup> 557 U.S. 167 (2009).

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