**Supreme Court Narrows the Meaning of "Supervisor" and Clarifies Retaliation Standard**

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Both public and private employers can rest *a little* easier this week knowing that the U.S. Supreme Court handed down two decisions limiting the ability of the EEOC to pin liability upon employers for unlawful harassment and retaliation. The cases were *Vance v. Ball State University, No. 11-556 (June 24, 2013)* and *University of Texas Southwestern Medical Center v Nassar (No. 12-484 (June 24, 2013).*

*Who is a Supervisor for Purposes of Finding an Employer Strictly Liable?*

In *Vance* the the Supreme Court decided (by a 5-4 margin) what the definition of a "supervisor" is for purposes of assessing liability for unlawful harassment under Title VII. The majority ruled that an employer will be vicariously liable for the actions of a supervisor only "when the employer has empowered that employee 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, a decision causing a significant change in benefits.'" The majority found that this "workable" definition of supervisor will provide much needed guidance to employers and employees even before litigation begins.

A Brief History of the Law of Hostile Environment Harassment

Title VII protects employees against workplace discrimination based on a number of protected grounds, including race, color, religion, sex, or national origin.[1] The Supreme Court first recognized in 1986 that a hostile work environment created by harassing behavior was a form of unlawful discrimination under Title VII in the *Vinson v Meritor Savings Bank*[2] case (my students in the Law Enforcement Command College and New Chiefs' Schools may remember this as the "safe sex" case). However not until 1998 did the Court pronounce standards for determining the circumstances under which an employer could be held responsible for the harassing behavior of its employees.

The Court issued two decisions on the same day -- *Burlington Industries, Inc. v. Ellerth*[3] and *Faragher v. City of Boca Raton*[4] – in which it set a framework for assigning, and for employers avoiding liability for sexual harassment claims. The Court in these two cases laid out three basic rules for determining whether an employer should be held liable for the un lawful harassment: (i) in cases where the hostile environment was created by a co-worker, the employer can be liable only if it knew or reasonably should have known about the harassment and failed to stop

it;[5] (ii) in those cases where a supervisor engaged in the harassing behavior, and where the employee suffered a tangible adverse employment action, an employer will be held strictly liable;[6] and, finally, (iii) in those cases where it was the supervisor who was the harasser but there was no tangible adverse employment action, the employer can be subject to vicarious liability for "an actionable hostile environment created by a supervisor with ... authority over the employee."[7]

Under this third scenario, however, liability would not be strict or automatic; rather, an employer may establish a defense to liability *if* it can prove it exercised reasonable care to prevent and correct harassing behavior, and the employee claiming harm unreasonably failed to take advantage of any preventive or corrective opportunities that could have avoided or reduced the harm.[8]

While the Supreme Court largely addressed both the type of liability and when each kind liability might be imposed on employers in a harassment case under Title VII, it did not define which persons will qualify as a "supervisor " for purposes of imposing vicarious liability on an employer. Thus after the *Ellerth* and *Faragher* decisions, different federal appellate courts developed different standards on how much authority an employee must exercise over another employee to be a supervisor.

The First, Seventh, and Eighth Circuits ruled to prove an employee is a supervisor for purposes of imposing vicarious liability under Title VII, the plaintiff has to show an employee had the power to "hire, fire, demote, promote, transfer or discipline" another employee.[9] Consequently, in these circuits, individuals who lack such actual authority to make consequential economic decisions about another's employment are merely considered to be co-workers rather than superviosrs. Unless the p[laintiff could show that the employer was negligent in failing to prevent or cure such unlawfylly harassing behavior the employer could not be found liable for the harassment. Thus, where low level supervisors or work leaders who directed the daily work or oversaw aspects of employees work were the individuals who actually engaged in the bad behavior, the courts would not impute responsibility or liability to an employer unless there also was presented evidence sufficient for a finding that the employer knew or reasonably should have known about the harassment but failed to stop it.[10]

In contrast to this standard, the Second, Fourth, and Ninth Circuits rejected any distinction between "low-level supervisors" and other superviosrs for whose actions the employer might be strictly liable.[11] Instead, they held that *any* individual who had authority to direct and oversee another employee's daily work would be considered a supervisor for purposes of assigning Title VII liability. Thus, to the extent such an individual was the harasser, the court would hold the employer may vicariously liable for their harassing behavior. The Second, Fourth, and Ninth Circuits faulted the decisions by the other circuits – including most notably that of the Seventh Circuit – as being too narrow in defining who was a supervisor for purposes of Title VII.[12]

Against the backdrop of this split in federal circuit appellate court authority arose the June 24, 2013 Supreme Court decision in *Vance v. Ball State University*.

The *Vance* Case

Maetta Vance, an African-American woman who worked for Ball State University's ("BSU") Banquet and Catering Department, worked for BSU for over 15 years. At all times, Bill Kimes served as general manager of the Banquet and Catering Department and was Vance's direct supervisor.

In 2005, Vance complained she had been threatened by catering specialist Saundra Davis. She also complained another employee, Connie McVicker, directed racial epithets toward her. BSU investigated and gave McVicker a written warning. BSU hS received conflicting accounts of what had occurred between Vance and Davis. As a result, it decided to counsel both employees regarding their behavior.

Throughout 2006 and 2007, Vance continued to complain about her treatment by McVicker and Davis. Eventually she sued BSU, Davis, McVicker, and Kimes.[13] Vance claimed that BSU should be held strictly liable for the hostile working environment that Davis' harassing behavior created, because she claimed, he was a supervisor.

BSU filed a motion for summary judgment on all of Vance's claims. The district court concluded that BSU could not be liable for Vance's hostile work environment claims because Davis was not Vance's supervisor and thus BSU was not strictly liable for his behavior under *Faragher* and other eSeventh Circuit decisions. The district Court found that because Davis did not have the power to "hire, fire, demote, promote, transfer or discipline" Vance, his actions could not make BSU vicariously liable under Title VII. i

Vance appealed the district court's decision to the Seventh Circuit Court of Appeals The Circuit Court affirmed the district corut's decision[14] reasoning that the question of whether BSU should be held vicariously liable for Davis' creation of a hostile working environment depended upon whether Vance could prove that Davis was a supervisor as contrasted with a mere co-worker.[15] The Seventh Circuit agreed with the lower court by determining that because Davis did not have the power to "hire, fire, demote, promote, transfer or discipline" Vance, she did not have sufficient authority to be her supervisor or to impute liability to BSU as a result of her conduct.

Notably, while all the parties (including the U.S. Solicitor General) argued that the Seventh Circuit defined "supervisor" too narrowly and advocated for some form of the standard adopted by the Second Circuit and the EEOC, they differed on how the trial court should have applied that standard in the case.

The Supreme Court's Ruling

The U.S. Supreme Court held that there is a "bright-line" standard for defining who is a supervisor, and that the Seventh Circuit was correct in defining the standard. It stated that an employer will be held vicariously liable for the acts of a "supervisor" only "when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.,* [to cause] a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision causing a significant change in benefits.'" The majority wanted to provide clear guidance to both employers and employees about which individuals qualify as supervisor for purposes of Title VII.[16]

It held that the standard that the other circiuit courts and the EEOC's Enforcement Guidelines wanted to apply was "a study in ambiguity." The standard that it rejected and that the Guidelines applied characterizes as supervisors anyone who either has the authority to undertake or recommend tangible employment decisions affecting the employee or who has the authority to direct the employee's daily work activities.

The rule which the Supreme Court majority is clear and (at least somewhat) immutable: Whether or not someone is a supervisor for purposes of Title VII depends solely on whether or not they were granted the power to "hire, fire, demote, promote, transfer or discipline" by their employer. Fiortunately, this can usually be decided early in the litigation.

While this ruling helps employers in litigation, it does not change employers' ongoing obligation to provide a workplace that is free from discriminatory intimidation, ridicule and insult. Employers will still be held liable for unlawful harassment under the negligence standard of *Faragher* and *Ellerth*. Employers should continue to provide ongoing anti-harassment training to their workforce and additional training to their managers -- even if some of those managers may no longer be considered "supervisors" for purposes of assessing liability for harassment -- because employers will want to ensure that all managers prevent and correct any harassing behavior.

*Supreme Court Clarifies Standards for Judging Retaliation Claims*

In the second case of note, *University of Texas Southwestern Medical Center v. Nassar*, the U.S. Supreme Court (again in a 5-4 split decision) abandoned its long-standing expansive standards for deciding Title VII retaliation claims by requiring that the plaintiff prove retaliation under the far stricter "but-for" causation test.

The Supreme Court rejected the more liberal "motivating factor" test used in most other claims brought under Title VII. discrimination claims. Under that standard, if a plaintiff shows that race, national origin, disability etc. was "a motivating factor" in the decision which adversely affected him, he can win

damages. This means that if the plaintiff proved that an employer's adverse decision was in any part influenced by his employer's prejudice based on race, color, creed, religion, gender, or national origin this was enough for a prima facie showing of unlawful discrimination, which the employer would then have to disprove.

That standard will remain the same for cases alleging discrimination based on race, gender, religion, etc. However, the Supreme Court said that the standard of proof demanded by Title VII's anti-retaliation provision is significantly different. In fact it is higher..To prove that an employer retaliated against an employee for opposing unlawful discrimination, or for participating in a procedure designed to investigate and remedy such unlawful discrimination, plaintiffs now will be required to prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." While this more exacting causation standard may enable employers to defeat more retaliation claims at summary judgment, Nassar does not eliminate—nor even reduce—employers' need to guard against retaliation claims through sound policies, prompt investigations and supervisory training.

Nassar's Retaliation Claim

Naiel Nassar, M.D was a former professor at the University of Texas Southwestern Medical Center. He sued the University for Title VII national-origin discrimination and for retaliation after he was denied a position at the University's medical clinic. In his retaliation claim, Nassar claimed that the University refused to hire him because, in his prior employment with the University, he had made complaints of discrimination.

Nassar and the University squared off in the Fifth Circuit Court of Appeals on the question of what the proper causation standard should be in cases alleging the employer engaged in retaliation under Title VII. The University maintained that Nassar needed to prove he would have been hired "but-for" his prior discrimination complaints. Dr. Nassar argued that he should only be required to establish that his prior anti-discrimination complaints were a "motivating factor" in the University's decision. Once again, each party's conflicting position reflected opposing positions which the federal circuit courts of appeal have adopted in applying Title VII's retaliation causation standard. The split originated from the U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc..* 557 U.S. 167 (2009). In *Gross,* the Supreme Court had held that Age Discrimination in Employment Act retaliation cases, require a "but-for" causation standard. Under that standard, when the court is judging claims that a plaintiff was fired because of having engaged in activity protected under the ADEA *i.e.,* in retaliation for exercising the right to oppose or participate in enforcement actions to eliminate age discrimination, the plaintiff has to meet a higher standard of proof and demonstrate that but for the person's protected activity, he would not have been adversely treated by the employer. The Court's receptivity to this claim is consistent with its heightened interest in

retaliation claims; thus it granted certiorari to resolve a split in the various circuit courts opinions that the Gross decision inspired.

The Supreme Court's Analysis

Retaliation claims have skyrocketed in recent years, which may explain why the Court has taken such an interest in them. In 2012, 38% of all charges filed with the EEOC included a claim of retaliation. At oral argument in *Nassar*, Justice Kennedy acknowledged this growing trend and warned that the Court should be very careful about the causation standard, especially where a failing employee claims retaliation as a "defensive mechanism" when termination appears imminent.

With this concern as a backdrop, the Court approached the causation question by looking to the 1991 amendment to Title VII that established the "motivating factor" standard for discrimination claims. The amendment provides that Title VII is violated "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." According to the Court in Nassar, excluding "retaliation" from the 1991 amendment evinces Congress's intent to require plaintiffs to prove "but-for" causation for retaliation claims.

In adopting the "but-for" causation standard, the Court rejected arguments by Nassar and the government (which joined in the oral argument) that retaliation is synonymous with discrimination and, therefore, Congress did not need to separately mention retaliation in its 1991 amendment. The Court acknowledged it has previously applied such reasoning in the context of broadly-worded anti-discrimination statutes, but found the reasoning to be "inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII." The Court also rejected arguments that the "motivating factor" standard should be adopted because it is consistent with the EEOC's interpretation, as expressed in the agency's Compliance Manual and other published guidance. Writing for a 5-4 majority, Justice Kennedy opined that the EEOC's interpretation did not specifically address or reconcile the omission of retaliation from the 1991 amendment and relied on circular reasoning. Therefore, the EEOC's position was not sufficiently persuasive to warrant deference from the Court.

While the dissent voiced strong objection to applying two different standards to claims of discrimination and retaliation under the same act, the majority maintained the distinction is not only mandated by the text of the statute, but also critical to the "fair and responsible allocation of resources in the judicial and litigation systems." Echoing concerns raised at oral argument, the Court again noted the upsurge in retaliation claims and worried that an employee facing demotion or termination "might be tempted to make an unfounded charge of . . . discrimination" to stage a retaliation claim to prevent the "undesired change in employment circumstance." According to the Court, a lower causation standard would make it difficult for employers to combat these frivolous claims at the summary judgment

stage and, consequently, would divert judicial, administrative and employer resources from legitimate efforts to combat discrimination and harassment.

The Supreme Court's Approach to Retaliation Claims

*Nassar* is not the last we will hear from the Court on retaliation. Only one month after it heard oral argument in Nassar, the Court granted certiorari in Lawson v. FMR, LLC. This was a whistleblower case, which addresses the scope of retaliation claims under the Sarbanes-Oxley Act (SOX). The Court will determine whether Section 806 of SOX, which applies to publicly-traded companies, extends to privately-held companies that contract with public companies. Lawson thus will provide the Supreme Court another opportunity to either expand or further restrict the scope of retaliation claims. Although the Nassar decision represents a narrowing of the protection from retaliation, it may not be predictive of how the Court will decide Lawson.

What Practical Steps Should Employers Take?

Although in *Nassar* the Supreme Court adopted a more exacting "but for" causation standard for Title VII retaliation claims, this standard is unlikely to lead to a noticeable decrease in such claims. When the Court imposed the more demanding "but-for" causation standard for ADEA retaliations under Gross, age cases filed with the EEOC declined by a mere 1%; at most, there may be a similar decrease following Nassar. Employers still must remain vigilant in responding to complaints of discrimination and take prophylactic measures to protect against retaliation claims.

To guard against such claims, employers should consider taking the following steps:

- Develop and implement strong anti-retaliation policies.
- Educate and train all managers and supervisors about unlawful retaliation and the company's policies against it.
- Provide multiple avenues for reporting discrimination claims, at least one of which is outside of the employee's chain of command.
- Promptly investigate all complaints of discrimination, using an outside investigator where appropriate.
- Validate the legitimate business reasons for disciplining or terminating an employee who engaged in protected activity prior to taking any adverse employment action.
- Ensure that the complaint, investigation, and conclusion(s) of an investigation are properly documented.

By following each of these steps the employer will maximize its ability to utilize the reasoning and holding in *Nassar* to beat retaliation claims at the summary judgment stage.

Two cases decided on the same day have narrowed the bases for finding employers liable for discrimination. The *Vance* decision tells employers which of their team leaders will be considered supervisors for whose actions the employer is especially liable only those whom the employer has empowered to take significant tangble employment action affecting mployees' terms and conditions of employment. The *Nassar* case has defined the plaintiff's burden in a retaliation case: The Plaintiff must prove that "but for" his protected activity, the employer would not have taken the tangible adverse employment action. A "mixed motive" case, wherein an employer has both lawful and unlawful reasons for its adverse action against the employee will no longer be sufficient to prove retaliation.

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[1] 42 U.S.C. § 2000e-2(a).

[2] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

[3] 524 U.S. 742, 765 (1998).

[4] 524 U.S. 775, 807 (1998).

[5] *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 806-07.

[6] *Ellerth*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 790-91.

[7] *Id.*

[8] *Faragher*, 524 U.S. at 802.

[9] *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034-35 (7th Cir. 1998); *Hall v. Bodine Elec. Co.,* 276 F.3d 345 (7th Cir. 2002); *Noviello v. City of Boston,* 398 F.3d 76, 96 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). In addition, both the Third and Sixth Circuits have agreed with the reasoning in these cases, but they have not issued published, binding opinions on the issue.

[10] *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 806-07.

[11] *Mack v. Otis Elevator Co.,* 326 F.3d 116 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003); *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010); *McGinest v. GTE Service Corp.,* 360 F.3d 1106, 1119 n.13 (9th Cir. 2004). In addition, the Tenth Circuit reached a similar conclusion in an unpublished decision. *Smith v. City of Oklahoma City,* 64 Fed. Appx. 122, 127 (10th Cir. 2003).

[12] *Mack,* 326 F.3d at 126. Under existing EEOC guidelines, a supervisor's authority "must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, available atwww.eeoc.gov/policy/docs/harassment.html. Therefore, only those individuals who have "authority to undertake or recommend tangible employment decisions affecting the employee," or have the "authority to direct the employee's daily work activities," are supervisors for purposes of imputing liability under Title VII. *Id.*

[13] Vance also named Karen Adkins in her complaint, the individual to whom Bill Kimes reported, and alleged she failed to properly respond to the complaints made by Vance about the others' behavior toward her.

[14] *Vance v. Ball State University*, 646 F.3d. 461 (7th Cir. 2011)

[15] *Vance*, 646 F.3d. at 469-70.

[16] The Supreme Court noted that neither party raised the issue of whether *Faragher* and *Ellerth* apply to race-based hostile work environment claims, so the Court assumed that the same framework applies. *Vance*, slip. op. at 7 n.3.