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By: Todd P. Photopulos

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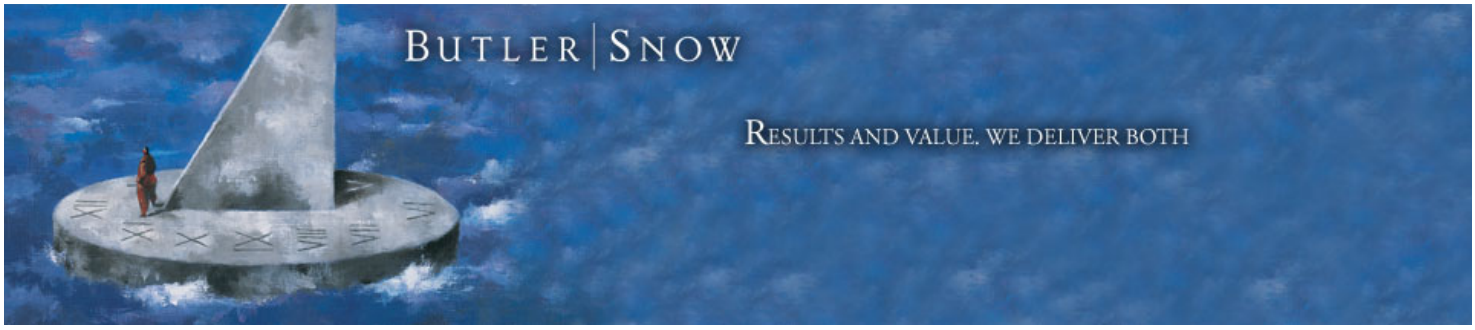

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The Facts in *Vance*

Plaintiff Maetta Vance worked for Ball State University's Banquet and Catering Department for over 15 years. General Manager Bill Kimes was Vance's direct supervisor. Vance complained in 2005 that she had been threatened by catering specialist Saundra Davis, and that another employee, Connie McVicker, had called her racial slurs. Ball State investigated and gave McVicker a written warning, but because Ball State received conflicting accounts of the incident with Davis, it decided to counsel both employees regarding their behavior.

Over the next two years, Vance continued to complain about her treatment by McVicker and Davis, ultimately leading to her law suit. The trial court dismissed all of Vance's claims including her hostile work environment claim, which involved the actions taken by Davis. The court found that Davis was only a co-worker – not a supervisor, because Davis could give Vance basic orders or directions on how to do her job not *discipline* or *fire* her. Vance appealed to the Seventh Circuit Court of Appeals, which affirmed the decision, holding that Davis was not a supervisor since she did not have the power to "hire, fire, demote, promote, transfer or discipline" Vance.

Why *Vance* Matters

The importance of *Vance* dates back to 1998 when the Supreme Court published two decisions – *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth* – *that* set the legal standard for how courts analyze Title VII harassment claims. That approach essentially split harassment claims into two categories – those committed by co-workers, and those committed by supervisors.

Under the *Faragher* and *Ellerth* standard, an employer will only be liable for harassment by a co-worker if it unreasonably failed to prevent or stop the harassment. In other words, did the employee prove that the employer knew or should have reasonably known about the harassment, and did it fail to stop it?

Harassment by supervisors, however, creates a much bigger problem for employers. For supervisor harassment cases, the first question asked by the court is whether the employee suffered a "tangible adverse employment action" – i.e., was the employee fired or denied a promotion? If so, then the employer is strictly liable.

But in supervisor harassment cases where there was no tangible adverse employment action, the employer is not automatically liable. To avoid liability, however, the employer bears the burden of proving that it took reasonable steps to prevent and correct the harassing behavior, and that the employee unreasonably failed to take advantage of the opportunities the employer offered to reduce the harm. For instance, did the employer have an anti-harassment policy with a reporting mechanism to bypass the harassing supervisor, and did the employee fail to report the harassment?

Employers obviously fare far better in harassment cases where the court determines that the alleged perpetrator was a co-worker, not a supervisor. The problem with the *Faragher* and *Ellerth* standard is that the Supreme Court never defined the term "supervisor." In the 15 years since *Faragher* and *Ellerth*, different jurisdictions have developed different opinions about the fundamental question of exactly who is a supervisor.

The *Vance v. Ball State* opinion answered that question in favor of employers by narrowing the list of potential supervisors down to only those whom the employer has given the power to take "tangible employment actions" against the plaintiff employee, such as the ability to hire, fire, promote, reassign to a position with significantly different responsibilities, or cause significant change in benefits. Thus, the employer may not be held strictly liable for the actions of lower-level lead persons or supervisors who lack the authority to take such actions. The majority noted that its decision was meant to provide a bright line test in harassment cases so disputes can be more quickly analyzed and resolved.

What Employers Should Do Now

While this ruling may lessen the chance that some harassment cases will result in strict liability, employers should not forget their ongoing obligation to train their management and non-management employees to prevent both supervisor and co-worker harassment. Employers still have a responsibility to create workplaces free from unlawful harassment. In addition to those normal housekeeping measures, employers should also be reviewing their job descriptions to clarify which "managers" fit the Court's definition of "supervisors." In doing so, employers must also be sure that their written job descriptions actually reflect the duties and responsibilities of their employees.

If you have any questions regarding discrimination or harassment in your workplace, please contact the author of this article or any of Butler Snow's Labor and Employment attorneys for guidance.

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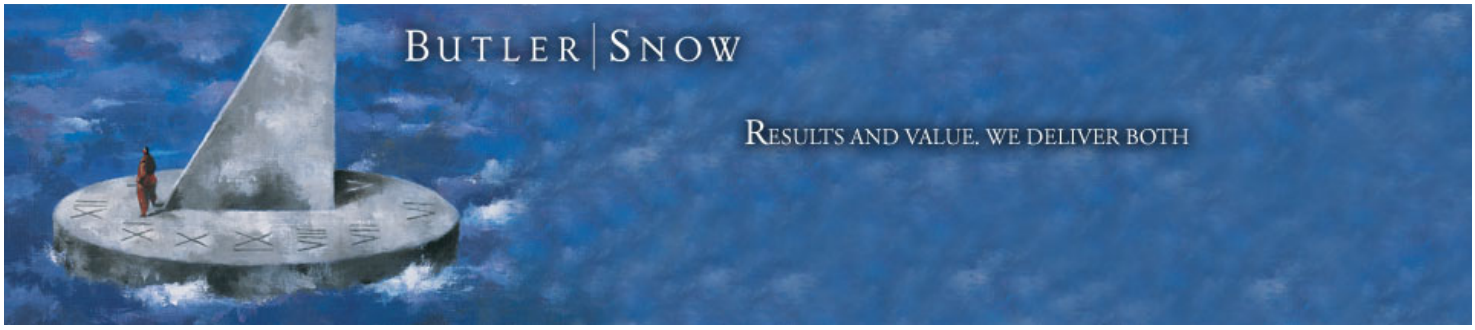

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The Statute Specifically Defines Who is a "Supervisor"

The Act provides that only "employees" have the right to bargain collectively under federal law, and broadly defines "employee" but states that the term does not include "any individual employed as a supervisor." A supervisor, in turn, is defined by the statute as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Because the listing of supervisory functions is ***not*** conjunctive ("and"), but rather disjunctive ("or"), an individual must possess authority to exercise only ***one*** of these functions in order to qualify as a supervisor.

The NLRB Misapplied the Term "Discipline"

In *GGNSC*, the Sixth Circuit found that the NLRB had misapplied the term "discipline" contained in the statute by concluding that discipline meant the employee must suffer some immediate adverse employment action, such as suspension or termination. The problem with the NLRB's view was that the term "discipline" was one of twelve supervisory functions, including suspension and termination: "any individual having authority . . . to . . . suspend, . . . discharge, . . . *or* discipline other employees . . . ."

In this particular case, the employer's written disciplinary policy did not reference verbal warnings. However, a written warning was expressly included in the policy as a step in progressive discipline. Since the RNs had the authority independently to write memoranda that automatically resulted in a written warning, it was clear to the Sixth Circuit that RNs were supervisors because they exercised authority to discipline. The court rejected the NLRB's contention that the RNs exercised only a *reporting* function, which under case precedent does not constitute the exercise of independent judgment. The record showed that although RNs sometimes consulted with their own superiors in issuing memoranda, they did not always do so because GGNSC did not require RNs to consult before issuing memoranda.

Bottom Line

The *GGNSC* decision, like most decisions involving the determination of supervisory status, is factually dependent. Labeling RNs as "charge nurses" or "supervisors" is not enough. Nor would it be sufficient to include language in a job description which appears to give certain authority, especially if the record otherwise shows that it is paper authority only and never actually exercised by RNs. The *GGNSC* disciplinary policy did not include verbal warnings as a step in the disciplinary process. As a result, the Sixth Circuit found that merely deciding whether to give a verbal warning would not constitute discipline. Presumably, if the employer's policy had included verbal warnings in the process, this might have been sufficient also.

Employers who wish to delegate supervisory authority to RNs or other employees should make sure that their policies and job descriptions reflect this intention. Further, employees should be trained concerning their responsibility for discipline, and the accomplishment of this training should be documented. Finally, authority that is granted but then routinely disallowed is not real authority, but this does not mean that disciplinary actions initiated by RNs or other employees should never be overruled or reversed. All discipline should be subject to review to ensure fairness, which is why most healthcare employers have a formal disciplinary review process.

If you have any questions regarding labor laws administered by the NLRB or other questions regarding suspension, discipline or termination, please contact the author of this article or any member of the Butler Snow Labor and Employment group.

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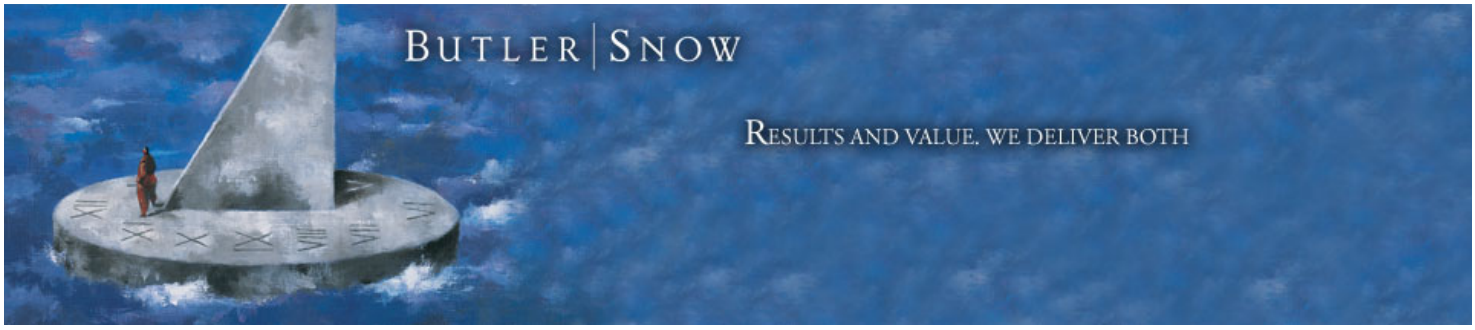

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Facts and Findings

In the opinion delivered by Justice Kennedy, the Court in *University of Texas Southwestern Medical Center v. Nassar* held that although Title VII *discrimination* cases require only that the plaintiff prove that the discriminatory motive was a motivating factor in an employment decision, Title VII *retaliation* claims require that the plaintiff prove "but for" causation. In other words, prove that the employment action would not have occurred in the absence of the employer's retaliatory motivation.

The Court had previously addressed the question of which causation standard to use in *discrimination* cases in *Price Waterhouse v. Hopkins*, finding in favor of the motivating factor standard. This standard was codified only two years later when the legislature amended the discrimination statute to explicitly require the motivating factor standard. The Supreme Court had not yet, however, looked at the causation standard for Title VII *retaliation* claims.

First, the Court found that the plain language of the retaliation statute pointed to the "default" "but for" standard in the absence of a specific legislative indication otherwise. Moreover, the Court found it persuasive that Congress amended the language regarding *discrimination*, but it did not amend the language of the *retaliation* provisions. The Court interpreted this as an intentional differentiation of the discrimination and retaliation standards, since it could have chosen to amend the retaliation language as well.

The Court also relied on the previous decision in *Gross v. FBL Financial Services, Inc.*, interpreting the similar language of the Age Discrimination in Employment Act for guidance. In that case, the Court held that the prohibition against taking employment actions "because of" age meant that age must be *the* reason – meaning the "but for" cause – of the adverse employment action for an employer to have violated the statute. For the same reason, the Court here found that the Title VII retaliation provision, which also prohibits employment actions "because of" an employee's protected activity, also requires the "but for" standard.

Finally, the Court noted that, as a practical matter, a lessened causation standard would lead to frivolous claims. This, along with the statutory language, led the Court to hold that plaintiffs must prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer," or "but for" causation.

Bottom Line

This decision overturned the previous use of the lesser motivating factor standard in some jurisdictions, like the Fifth Circuit (covering Mississippi, Texas and Louisiana), while clarifying the standard in other jurisdictions where it was previously unclear, like the Sixth Circuit (covering Tennessee, Kentucky, Ohio and Michigan). But across the board, the opinion displays the Court's understanding of Title VII's intent to protect the legitimate business decisions of the employer while protecting employees against illegal actions.

Yet, even in light of the more employer-friendly standard, the decision highlights the importance of documenting the reasons for all employment decisions. Proper training to identify protected activity under Title VII and potential situations that can lead to allegations of retaliation, and proper investigation and documentation procedures can make all the difference in defending and, hopefully, avoiding retaliation claims.

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