

June 25, 2013

## Supreme Court Provides Two Decisive Victories for Employers in Title VII Cases

On June 24, 2013, a divided U.S. Supreme Court issued much-anticipated decisions in two Title VII cases in which the Court provided some needed certainty and relief to employers on the front lines of employment litigation. In one case, the Court clarified who may be considered a “supervisor” of an employee for purposes of vicarious liability, and, in another case, it raised the ante for plaintiffs’ burden of proof for retaliation claims.

### Victory No. 1: Employee must have power to hire, fire, and discipline to be a “supervisor.”

In *Vance v. Ball State University*, the Court narrowly defined “supervisor” in the context of Title VII discrimination cases to include only those employees who are empowered to take “tangible employment actions,” thereby shielding employers from liability for discriminatory behavior of mere co-workers.

Under Title VII of the Civil Rights Act of 1964, an employer is liable for the actions of a harassment victim’s co-worker only when the plaintiff can prove that the employer was negligent in responding to the victim’s complaints. Different rules apply, however, when the co-worker is the victim’s “supervisor.” When a supervisor is involved, employers can be held liable for more than the employer’s own negligence: they can be held *vicariously* liable for the supervisor’s discriminatory or harassing behavior.

The plaintiff in *Vance* was employed by Ball State University (BSU) as a catering assistant. She filed a lawsuit in 2006 alleging that a catering specialist, whom she regarded as her “supervisor,” had created a racially hostile work environment in violation of Title VII. The employee complained that the specialist glared at her, intimidated her, and gave her “weird” looks, making it difficult for her to work, and that her employer was responsible for this discrimination.

In deciding *Vance*, the Southern District of Indiana had the opportunity to address a split in authority regarding the definition of “supervisor” for Title VII purposes. While some courts followed a narrow interpretation of supervisor, requiring traditional management duties of hiring, firing, promoting, or otherwise impacting the employee in a meaningful manner, other courts followed a broader definition of supervisor, as advocated by the plaintiff and the Equal Employment Opportunity Commission (EEOC) in *Vance*. The EEOC Enforcement Guidelines define a “supervisor” as an employee exercising sufficient authority to “assist” the employee in harassing the victim, an approach that is more lenient in vicarious liability determinations.

The Southern District of Indiana granted summary judgment in favor of BSU, stating that the University could not be held accountable for the specialist’s discriminatory behavior because the specialist did not have the authority to “hire, fire, demote, promote, transfer, or discipline” the victim, and because Vance could not prove negligence on the behalf of BSU. The Seventh Circuit affirmed, reiterating the District Court’s definition of a “supervisor” as one with the authority to meaningfully impact the employment status of the victim.

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The Supreme Court also affirmed the decision, adopting the definition of “supervisor” advocated by the lower courts and rejecting the more fluid approach advocated by the EEOC.

The Court explained that defining supervisors as only those capable of taking “tangible employment actions against the victim” would be a clear, “easily workable” standard compared to the “nebulous” standard advocated by the EEOC, which “would frustrate judges and confound jurors.”

In addition to clarifying the standard for courts to follow, the practical effect of the Court’s decision in *Vance* will be a limit on employer responsibility for the discriminatory actions of their employees. An employee with *some* authority over a victim of harassment will no longer implicate the employer as long as that authority does not include hiring, firing, promoting, demoting, or disciplining a victim of discrimination or harassment.

## Victory No. 2: Retaliation plaintiffs must prove “but for” causation.

Ever since the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, that plaintiffs in Title VII discrimination cases only had to prove that discrimination was a “motivating factor” in the adverse employment action underlying the plaintiffs’ claim, federal circuits have disagreed over whether this same standard applied in Title VII retaliation cases. Today, the Court provided a victory to employers everywhere by clarifying that plaintiffs must prove that Title VII retaliation provisions and similarly worded statutes require a plaintiff to prove “but-for” causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive).

In *The University of Texas Southwestern Medical Center v. Nassar*, the defendant employer sought to overturn a jury decision for retaliation in favor of Dr. Naiel Nassar. The Plaintiff, Nassar, previously lodged complaints of racial harassment that he alleged occurred during his tenure with the University. Later, Nassar resigned from his position at the University after being promised a job offer at Parkland Hospital, an affiliate of the University. (Nassar was instructed that the Hospital could not recruit active University employees, so the resignation was intended to be a procedural formality.) Nassar sued after the job offer was withdrawn, claiming that the University retaliated against him because of his prior harassment complaints by encouraging the Hospital to rescind the job offer. After a jury trial, Nassar was awarded more than \$3 million in damages. The Fifth Circuit Court of Appeals upheld the trial court’s finding that retaliatory motive was a motivating factor in the decision to rescind the job offer.

In a 5-4 decision, however, the Supreme Court held that Nassar must be required to prove that the job offer would not have been revoked *but for* a retaliatory motive. The Court, balancing the interests of employees and employers and interpreting the intent of Congress in enacting the retaliation provisions of Title VII, held that the “but for” causation standard should be applied in such cases. The ruling provides a big win to employers, who have previously faced an uphill battle in retaliation cases under the “motivating factor” standard, where employee-plaintiffs previously relied heavily upon the inference created simply from the temporal proximity between protected conduct (i.e., an internal complaint of harassment or discrimination) and an adverse action.



While both cases were hotly debated, and in both, Justice Ginsburg even called upon Congress to overturn the Court's decision, the rulings will nonetheless provide a much greater level of certainty to employers as they move forward in the defense of current and future Title VII claims.



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