Advisory

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Supreme Court Issues Two Employer-Friendly Decisions Interpreting Title VII

Employers scored major victories in a pair of Title VII cases decided by the U.S. Supreme Court on June 24, 2013: ***Vance v. Ball State University***, in which the Court narrowly defined "supervisors," thus potentially limiting the scope of employer liability in workplace harassment cases; and ***University of Texas Southwestern Medical Center v. Nassar***, holding that plaintiffs asserting retaliation claims must establish traditional "but-for" causation, rather than a lesser "motivating factor" causation standard applicable to status-based discrimination claims.

The 5-4 decision in ***Vance v. Ball State University***, authored by Justice Alito, clarifies who is and who is not a "supervisor" under Title VII, which in turn dictates the proof requirements applicable in a given harassment case. Title VII imposes liability in harassment cases differently based on the status of the alleged harasser. If the harasser was the victim's co-worker, the employer is only liable if the employer itself was negligent by, for example, knowing of the misbehavior and failing to take appropriate remedial measures. But if an employee suffers harassment at the hands of a "supervisor," the rules change, allowing for vicarious employer liability if the harasser is aided in the harassing conduct by his or her agency relationship with the employer. This means that if the supervisor's harassment results in a tangible adverse employment action, the employer is strictly liable; if there is no tangible employment action, the employer may avail itself of an affirmative defense by showing that (1) it exercised reasonable care to prevent and correct harassing behavior and (2) the complaining employee unreasonably failed to take advantage of available preventative or corrective measures.

Resolving a question left open in the two 1998 decisions that established this analytical paradigm, namely *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, the Supreme Court rejected the EEOC's expansive definition of "supervisor", confining supervisory status to individuals having authority to grant or deny tangible employment perquisites. Specifically, the Court ruled that an employer is vicariously liable for discriminatory harassment only where the harassing employee is empowered "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 holding, the Court rejected the EEOC's Enforcement Guidance, which linked supervisor status only to the ability to exercise significant direction over another employee's daily work – guidance the majority deemed "nebulous" and "a study in ambiguity." To the majority, the framework of *Ellerth* and *Faragher* contemplates a "unitary category of supervisors ... with the authority to make tangible employment decisions" – and not a second category

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of supervisors who lack such authority but who nonetheless exert considerable authority over co-workers. The Court noted that most workplace harassers – including ordinary, non-supervisory co-workers – are aided in some way by the existence of an agency relationship with the employer, thus "something more" is necessary to warrant vicarious liability under the *Ellerth/Faragher* framework: "The ability to direct another employee's tasks is simply not sufficient."

The Court again split 5-4 in ***University of Texas Southwestern Medical Center v. Nassar***, with Justice Kennedy penning the majority opinion. The issue in this case was whether a plaintiff asserting a Title VII retaliation claim must prove but-for causation (the traditional test) or whether she may instead meet the less stringent "motivating factor" test that Congress, by way of a 1991 amendment to Title VII, adopted for claims of discrimination based on race, color, religion, sex, or national origin (status-based claims). The majority adopted the more demanding but-for causation standard.

In addition to barring discrimination based on race, color, religion, sex, or national origin in § 2000e-2(a) (status-based discrimination), § 2000e-3(a) of Title VII also prohibits discrimination "because of" an employee's having opposed, complained about, or sought remedies for, unlawful workplace discrimination (retaliation). Here, the Court had to grapple with the meaning of the term "because of" in § 2000e-3(a). The debate had its genesis in *Price Waterhouse v. Hopkins*, a 1989 decision where the Court adopted a burden-shifting framework for status-based discrimination claims under Title VII predicated on a traditional but-for analysis. Shortly thereafter, Congress codified a watered-down version of this burden shifting framework in the Civil Rights Act of 1991. Under the 1991 Act, "an unlawful employment practice is established when the [plaintiff] establishes that race, color, religion, sex, or national origin was a motivating factor for any employment practice…." If the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor," the plaintiff may obtain declaratory and injunctive relief, but not damages. Emphasizing that Congress did not similarly modify Title VII's anti-retaliation provision, leaving the "because of" phraseology in § 2000e-3(a) untouched, the majority determined that the plain language Congress chose indicates an intent to limit the "motivating factor" test to status-based discrimination claims (i.e., "race, color, religion, sex, or national origin was a motivating factor…"). This interpretation was further supported by *Gross v. FBL Financial Services, Inc.*, where the Supreme Court – relying on various dictionary definitions and basic tort law causation concepts – had found that similar "because of" language in the Age Discrimination in Employment Act required proof of but-for causation.

Although the Court's decisions coincided with what many employers and management-side employment law practitioners believed the law to be, the potential consequences for employers would have been significant had the Court sided with the EEOC in either or both cases. In other words, these decisions bring a very welcome sigh of relief.