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Labor & Employment Law Alert - A Good Day For Employers – Supreme Court Issues Two Favorable Decisions

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June 24, 2013 turned out to be a busy day for the United States Supreme Court, which issued two decisions directly affecting employers. This Barnes & Thornburg labor and employment legal Alert takes a close look at both decisions, and offers perspective on what the decisions mean for employers around the U.S.

Supreme Court Endorses Narrow Definition of "Supervisor" in Discrimination Claims

The Supreme Court provided much-anticipated clarity for lower courts and employers when it ruled that an employer may be vicariously liable for a supervisory employee's harassment (to the extent that it did not culminate in a tangible adverse employment action) only when the employer has empowered the employee to take tangible employment actions against the alleged victim of the harassment. And in the process, the Court soundly rejected the EEOC's enforcement guidance as "nebulous" and unpersuasive.

The ruling in *Vance v. Ball State Univ.*, 570 U.S. ___ (June 24, 2013) ("*Vance*"), resolved an issue that the Court left open in its pair of 1998 cases, *Faragher v. Boca Raton* and *Burlington Indus., Inc. v. Ellerth* - that is, the question of who is a supervisor for purposes of holding an employer vicariously liable for workplace harassment. The definition of a "supervisor" for purposes of imposing liability had resulted in some appellate courts' following the EEOC's expansive guidance with others, including the Seventh Circuit in the Vance case, taking a narrower view.

Under the familiar standard from those two earlier landmark sexual harassment cases, an employer is liable if a non-supervisor employee (that is, a co-worker) engages in harassment and the employer is negligent in learning of the conduct and failing to correct it. However, the standard for supervisors is different – an employer is strictly liable if the supervisory engages in harassment tied to a tangible employment action, but an employer may be able to assert an affirmative defense if the harassment did not result in a tangible employment action. That is, the employer may escape Title VII liability if it can establish both (1) that it exercised reasonable care to prevent and correct harassment and (2) that the plaintiff unreasonably failed to take advantage of such measures.

Thus, the definition of "supervisor" became a source of litigation that percolated in trial courts and up to the appellate courts following Faragher and Ellerth. The Supreme Court in *Vance* clearly was cognizant of the practical implications of defining "supervisor." Indeed, the majority opinion articulated at length how its definition would assist courts and juries in

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deciding harassment cases. In particular, the majority stated that "under the definition of supervisor that we adopt today, the question of supervisory status, when contested, can very often be resolved as a matter of law before trial."

The Supreme Court divided 5-4 in deciding the *Vance* case, with a strong dissent from the Justices in the minority. Given that the case involved statutory interpretation of Title VII and the starkly contrasting positions of the Justices, the matter could become ripe for Congressional action, as occurred after the Court's controversial ruling in the Ledbetter case that became a catalyst for the Lily Ledbetter Equal Pay Act.

While the ruling in *Vance* unquestionably is helpful for employers who face the day-to-day task of preventing and correcting workplace harassment, employers also must continue to ensure that they not only have policies in place but that they are vigilant in training and enforcement with respect to non-discrimination and anti-harassment policies. Moreover, because strict liability still attaches for unlawful harassment tied to a tangible employment action, and because some states (notably Illinois), do not follow the same definition of supervisor as the definition laid out so clearly in Vance, employers should remember that prevention remains a key component for ensuring a non-discriminatory workplace.

Supreme Court Requires But-For Causation in Title VII Retaliation Claims

In a separate decision, the Supreme Court held that a plaintiff bringing a retaliation claim under Title VII must demonstrate "but for" causation, not merely that retaliation was a "motivating factor."

In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ____(June 24, 2013) ("*Nassar*"), a physician of Middle Eastern descent claimed that he was denied employment at a medical center in retaliation for complaining that his supervisor discriminated against him due to bias against Arabs and Muslims. The question before the Supreme Court was whether the "motivating factor" standard of causation that applies to discrimination claims under Title VII also applies to claims of retaliation. The Court's answer was that it does not.

Writing for the majority and relying on the plain language, structure, and history of Title VII, Justice Kennedy explained that the "motivating factor" standard applies only to claims of "status-based discrimination," i.e. claims of discrimination based on race, color, religion, sex, and national origin. The majority noted that given the "ever-increasing frequency" of retaliation claims, lessening the causation standard could "contribute to the filing of frivolous claims, which would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harassment." In addition, by deciding that "but for" causation is required, the Court, as it did in *Vance*, refused to give deference to the Equal Employment Opportunity Commission's position on the ground that its explanations lacked persuasive force.

Writing for the dissent and joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg took issue with the majority's sharp distinction between retaliation and status-based discrimination as conflicting with precedent, stating that "[u]ntil today, the Court has been clear eyed on just what retaliation is: a manifestation of status-based discrimination."

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The dissent criticized the majority's adoption of different causation standards for claims brought under the same statute as likely to create confusion for trial judges and jurors. "Of graver concern" to the dissent, however, was its view that the majority's decision turned a provision adopted by Congress to strengthen protections against workplace discrimination into a measure that "permits proven retaliation to go unpunished."

As we have discussed, the Supreme Court's decision in *Nassar* has been highly-anticipated. While the Court was divided, its decision provides not only much-needed clarity on the standard of proof required in "mixed-motive" cases alleging retaliation under Title VII but also a significant victory for employers. Together with *Vance*, the Court's decision in *Nassar* made June 24, 2013 a good day to be an employer.

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