



Supreme Court Delivers Two Late Term Victories to Employers

by Matt Lynch

Employers who lately have felt under siege by federal and state enforcement agencies can take comfort in two recent decisions by the United States Supreme Court. In *University of Texas Southwestern Medical Center v. Nassar*, a narrow Court majority held retaliation claims under Title VII to a stricter standard of proof than standard discrimination claims. In *Vance v. Ball State University*, the same majority narrowly defined "supervisor" for purposes of establishing an employer's vicarious, or strict, liability for harassment. Both decisions will make it more difficult for employees to establish claims of employment discrimination under federal law.

Who is a "Supervisor" under Title VII?

Maetta Vance was an African-American kitchen employee at Ball State University. Beginning in 2001, she claimed, her co-workers harassed her repeatedly with racial epithets. In addition, one person whom Vance regarded as a supervisor gave her the "cold shoulder" and allegedly treated her white co-workers more favorably. Another worker whom she regarded as a supervisor allegedly slapped Vance and used racial epithets. Vance complained, and her employer took some action in an effort to stop the behavior. Still, Vance sued, arguing under two 1998 U.S. Supreme Court decisions that Ball State was strictly liable for the conduct of its supervisors. Both a district court judge and the 7th Circuit Court of Appeals ruled that she had not proved racial bias or retaliation creating a hostile work environment because one supervisor's conduct was not racial in character, and the other individual was not a "supervisor" with authority to take explicit job action. She appealed the issue of supervisory status to the Supreme Court.

By a 5-4 majority, the Court held that a "supervisor" is someone whom "the employer has 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 reaching its holding, the Court reviewed its two 1998 decisions (*Faragher* and *Ellerth*) and noted that in both cases the supervisors had the power to take these actions, and those decisions took pains to highlight the distinction between supervisors and co-workers. The Court also rejected the approach taken by Vance and the EEOC in the lawsuit, which asked whether the harasser wields authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." The Court called that definition "murky," and "a study in ambiguity." To the Court, the "tangible employment action" standard it announced in *Vance* should provide clear guidance and encourage many cases to be settled before trial.

What is the Standard of Proof in Title VII Retaliation Cases?

University of Texas Southwestern Medical Center v. Nassar involved a University physician who did not get along with his supervisor, whom he accused of racial and religious bias. To resolve the situation, he attempted to resign his position with the University and become employed directly by an associated Medical Center, which would place him under a new supervisor. After he complained about the discrimination, Nassar alleged, University officials prevented him from becoming employed by the Medical Center. He sued for discrimination and retaliation. In the lower courts, Nassar argued that he only had to prove that retaliation was a "motivating factor" in the University's actions that resulted in him being denied the Medical Center job. The University argued that Nassar needed to show he would have gotten the job "but for" the retaliation, a much higher and more difficult standard to meet. In this case, the University noted that Nassar would not have been hired in any event because its agreement with the Medical Center required that all physicians be members of the University faculty. Lower courts had been divided on the standard of proof for retaliation, which led the Supreme Court to grant review.

To reach its decision, the Court analyzed the Civil Rights Act of 1991, which Congress passed to reverse several Supreme Court decisions interpreting Title VII and the standard of proof. One provision of the Act said that liability for discrimination is established when the plaintiff proves that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Furthermore, Congress provided that even if the employer could establish that it would have taken the same employment action in the absence of discriminatory motives, such a showing would simply shield the employer from damages, but not from injunctive relief or attorney's fees. The question for the Court in *Nassar*, therefore, was whether the "motivating factor" standard used in "status-based" discrimination cases extends to claims of retaliation. The Court said it did not.

First, the Court reasoned, the 1991 amendment expressly applies only to claims of discrimination on the basis of "race, color, religion, sex, or national origin." If Congress had intended to cover retaliation, it would have included it in that list. Second, Title VII addresses status-based discrimination and retaliation into two different provisions, and the 1991 amendment was passed as an amendment to the status-based provision. Third, the Court rejected the argument that, because retaliation can be seen as form of discrimination, there was no need for Congress to separately mention the retaliation provision. The Court noted that Title VII expressly discusses retaliation and treats it as different than status-based discrimination. The Court's majority believed the "but-for" standard makes practical sense because of the "ever-increasing frequency" with which retaliation claims are being filed (more than 31,000 in 2012). It expressed concern that under a lower causation standard, an employee who foresaw his or her employment termination could make an unfounded claim of discrimination to set up a retaliation claim if and when the termination occurred.

Limited Impact on Washington Employers

Under the Court's rulings, employers will be strictly liable only for the discriminatory actions of their "supervisors," *i.e.*, those who have the express authority to take significant actions affecting employees, such as hiring, firing, job promotions, reassignment, and changing employee benefits. In addition, plaintiffs will have to establish that their protected activity was a "but-for" cause of an adverse action by the employer, a more difficult task than simply showing their activity was a motivating factor. Congress may revisit these issues and overturn the Court's decisions in the future. Also, Washington employers must deal with our own state law that allows a plaintiff at trial to prove only that the alleged protected conduct was a "substantial factor" in the adverse action, a somewhat easier standard than that announced by the Supreme Court. Still, the Supreme Court's decisions will strengthen the hand of employers as they deal with federal claims of discrimination and retaliation.

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