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ALERT

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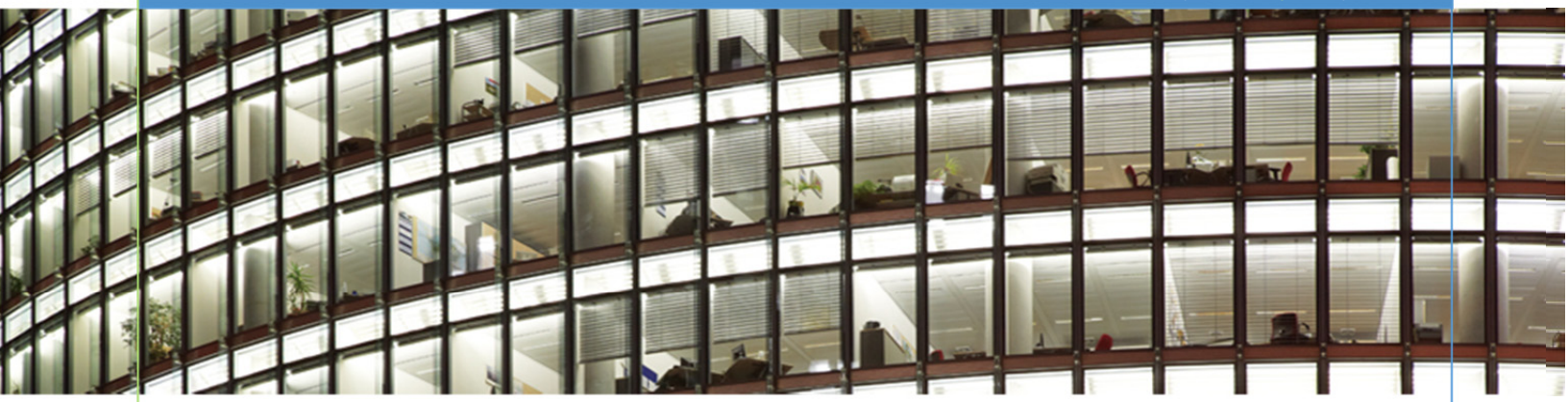

In a Pro-Employee World, U.S. Supreme Court Rulings Offer Employers Hope

In a pair of important opinions released last week, both of which are helpful to employers, the U.S. Supreme Court raised the bar for employees asserting claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. _, No. 12-484 (2013), the Court ruled that an employee claiming retaliation must do more than show that retaliatory animus was a "motivating factor" for discipline – it must be the "but-for" cause. In *Vance v. Ball State University*, 570 U.S. _, No. 11-556 (2013), the Court ruled that for employers to be held vicariously liable for the actions of a "supervisor," the plaintiff must demonstrate that the "supervisor" had power to take a "tangible employment action," such as transferring or terminating the employee. Authority merely to direct aspects of the employee's work will not suffice.

Nassar and *Vance* represent significant victories for employers faced with Title VII retaliation and discrimination claims. The heightened requirements that charging employees now face should enhance an employer's prospects for obtaining summary judgment and, failing that, impose a more rigorous hurdle for plaintiffs at trial.

Nassar Imposes More Stringent "But-For" Causation Test for Title VII Retaliation Claims

Plaintiff in *Nassar* was a physician of Middle Eastern descent. The defendant university hired him as a member of its medical faculty, and under the terms of the university's affiliation agreement with a local hospital, the plaintiff also worked at the hospital as a staff physician. The plaintiff alleged that the University's Chief of Infectious Disease Medicine harassed him because of her discriminatory "bias against Arabs and Muslims." The plaintiff ultimately resigned from the university faculty, and accused his superior of discriminatory bias in his letter of resignation, which he sent to the university's chair of Internal Medicine and other faculty members. The chair was allegedly dismayed by the public accusations

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of discrimination, and said that the chief must "be publicly exonerated" of the charges against her. When he learned that plaintiff had been offered a staff physician position at the hospital, the chair objected that the affiliation agreement required all staff physicians to also be faculty members, and the hospital therefore withdrew its offer to plaintiff.

Plaintiff brought suit under Title VII, 42 U.S.C. § 2000e, alleging that he had been constructively discharged by reason of the chief's discriminatory harassment, and that the chair subsequently allegedly retaliated against him for complaining of that harassment. A jury found for plaintiff on both claims, but the Fifth Circuit affirmed only as to the retaliation claim, holding that retaliation claims under Title VII required a showing merely that retaliation was a "motivating factor" for an adverse employment action rather than its "but-for" cause.

The Supreme Court vacated that decision, concluding that "the text, structure and history of Title VII demonstrate that a plaintiff making a retaliation claim … must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." The Court reasoned that because Title VII's anti-retaliation provision appears in a different section from the status-based discrimination ban, which utilizes the lesser "motivating factor" causation test, the "but-for" standard applies to Title VII retaliation claims. Accordingly, "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." To establish a retaliation claim, employees must now show that their employer would not have taken the challenged employment action but for the employee's protected activity.

Vance Limits "Supervisors" to Those with Power to Take a Tangible Employment Action

In a second critical decision for employers, plaintiff in *Vance*, an African-American woman, worked in the university's Banquet and Catering Division of Dining Services. Plaintiff alleged that a fellow employee, a white woman named Davis, harassed and intimidated her because of her race. Plaintiff sued under Title VII, alleging that her white co-worker created a racially hostile work environment. "The parties vigorously dispute[d] the precise nature and scope of Davis' duties, but they agree[d] that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance."

The District Court granted defendant summary judgment, holding the university was *not* vicariously liable for Davis's alleged actions because she could not take tangible employment actions against the plaintiff and therefore was not a "supervisor." The Seventh Circuit affirmed, and the Supreme Court granted certiorari to decide "who qualifies as a 'supervisor'" under Title VII. The Court held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII [only] if he or she is empowered by the employer to take tangible employment actions against the victim" and affirmed.

In analyzing when an employer is vicariously liable for the actions of its employees, the Court defined "tangible employment actions" to include effecting "'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.'" The Court specifically rejected the EEOC's definition of "supervisor," which tied "supervisor status to the ability to exercise significant direction over another's daily work[,]" as "a study in ambiguity." Hence, under Title VII, if an employee is not authorized to impose tangible employment actions against another, the employer cannot be vicariously liable for the subject employee's alleged harassment.

Vance enhances an employer's ability to limit the company's responsibility for harassment. Employers should remain mindful of the duties of their employees, ensuring that only key management and supervisory personnel possess the power to effect a "significant change in employment status". Clear definitions of an employee's responsibilities should greatly limit any future claims of vicarious liability against employers. This more precise definition of "supervisor" should, like *Nassar*, increase the likelihood of dismissal at the summary judgment stage and help obtain favorable in limine and trial rulings.

Conclusion

Nassar and *Vance* afford significant advantages to employers defending against discrimination and retaliation claims. Importantly, although the decisions themselves were concerned with claims arising under federal anti-discrimination (not just Title VII) laws, the Court's reasoning may well find acceptance among state courts, which frequently apply the Title VII analysis to claims asserted under analogous state laws. *Nassar* and *Vance* are likely to prove valuable tools to employers defending against claims of discrimination and/or retaliation, increasing both the prospects of obtaining summary judgment and, if necessary, the odds of success at trial.

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