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Employment Law Alert

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New Supreme Court Rulings on Title VII: Who's a "Supervisor" and What's the Causation Standard for Retaliation Claims?

The U.S. Supreme Court released two decisions on June 24, 2013 that resolve splits in authority on key issues arising under Title VII: *Vance v. Ball State Univ.*, No. 11-556, which holds that a "supervisor" for purposes of the *Faragher/Ellerth* test for employer harassment liability is an employee who can take "tangible employment actions against the victim," *i.e*., those that involve a "'significant change in employment status'"; and *University of Texas Southwestern Med. Ctr. v. Nassar*, No. 12-484, which holds that the "but for" causation standard, rather than the "motivating factor" standard, applies in retaliation actions. In both cases the Court split along conservative-liberal lines and rejected the positions taken by the Equal Employment Opportunity Commission (EEOC). These decisions likely will increase the incentive for plaintiffs to rely whenever possible on California's Fair Employment and Housing Act (FEHA) rather than Title VII.

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Vance v. Ball State Univ.

In *Vance*, the Court noted that an employer generally is liable under Title VII for harassment committed by the plaintiff's co-worker only where the employer knew of or should have known of the harassment and failed to take remedial action. However, where the alleged harasser is a "supervisor," the outcome depends on additional factors. Under the Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), an employer may be vicariously liable for the supervisor's acts in two instances: (i) the supervisor takes a "tangible employment action" against the alleged victim; or (ii) the employer fails to prove an affirmative defense, requiring evidence that (a) it "exercised reasonable care to prevent and promptly correct any harassing behavior," and (b) the "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities" the employer provided.

The Court adopted the narrower test for "supervisor" status that at least three circuit courts and numerous states have used. As the Court explained, a supervisor is an employee who has the authority 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.'" The Court observed that resolution of whether an employee is a supervisor should be straightforward in most cases and will ordinarily depend on documentary evidence. This test thus should simplify litigation of harassment cases and, to the extent not dismissed on summary judgment, it should reduce the risk of jury confusion. In contrast, the Court called the broader standard urged by the EEOC -- defining a supervisor as an employee whose authority is "'of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment'" -- as a "study in ambiguity" that depends on consideration of various factors having no clear meaning.

Vance's impact on harassment cases based on FEHA is, unfortunately, likely to be limited. FEHA imposes strict liability on employers for harassment committed by a supervisor and defines "supervisor" in a manner that resembles the EEOC standard *Vance* rejected. *See* Cal. Govt. Code § 12926(s); *Chapman v. Enos*, 116 Cal. App. 4th 920, 930-31 (2004) (holding that an employee having the authority to direct other employees' day-to-day duties is a "supervisor" even if he or she does not have the power to take tangible employment actions, such as hiring, firing, or ordering transfers).

University of Texas Southwestern Med. Ctr. v. Nassar

Nassar's holding that the "but for" causation standard applies in Title VII *retaliation* cases principally rests on the Court's analysis of how Congress has addressed the causation requirement in different sections of Title VII and the Court's earlier decision in *Gross v. FBL Financial Services*, *Inc.*, 557 U.S. 167 (2009), which holds that the "but for" standard applies under the Age Discrimination in Employment Act (ADEA).

All of Title VII's substantive provisions prohibit actions taken "because of" an employee's "status" --race, color, religion, sex, or national origin -- or conduct in opposing discrimination or making or supporting a complaint of employment discrimination. Although *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), lacked a majority opinion, a majority of the justices agreed that a plaintiff could establish "status-based" discrimination by proving that his or her status was a "motivating" or "substantial factor" in the employer's action. Just two years later, Congress amended Title VII to provide that liability could be established even if the employee's status was just a "motivating factor" in the employer's decision.

In *Gross*, the Court returned to this general causation issue because the ADEA likewise prohibits discrimination that occurs "because of" an employee's age. The Court emphasized that although Congress had amended Title VII by adding the "motivating factor" standard to the provisions addressing status-based discrimination, it did not include similar language in other provisions of Title VII that address discrimination generally or in the ADEA, which it amended at the same time. Thus, the Court inferred that the differing statutory language indicated that Congress intended that different rules would apply. For this reason, *Gross* declined to return to the *Price Waterhouse* standard for claims under the ADEA. Rather, *Gross* held that the ADEA requires a "but for" causation standard, since that test best fits the ordinary meaning of the "because of" requirement.

Likewise, in *Nassar*, the Court reiterated that Congress's legislative response to *Price Waterhouse* is significant, both for the statutory language it added and the language it left undisturbed. Once again, the Court explained that Congress's deliberate decision to insert the "motivating factor" standard into just the provisions addressing status-based discrimination strongly indicates that it intended that the phrase "because of," as used in other parts of Title VII (including those addressing retaliation), would be interpreted according to its ordinary meaning. The Court buttressed its holding by observing that employees are pursuing an ever-increasing number of retaliation claims and that a lesser, "motivating factor" causation standard could "contribute to the filing of frivolous claims," lead to abuse, and burden the "efforts by employer, administrative agencies, and courts to combat workplace harassment."

Nassar's effect on retaliation cases under California's FEHA is uncertain at this time. Like Title VII, FEHA's provisions regarding status discrimination and retaliation use the phrase "because of" to express the causation requirement. However, FEHA has not undergone anything similar to Congress's response to the *Price Waterhouse* decision, which was all-important to the results in *Gross* and *Nassar*. Further, in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013), a sex discrimination case, the California Supreme Court, after finding that "because of" is ambiguous, held that a plaintiff must prove that discrimination was a substantial factor in motivating the employer's action. According to the court, this standard best promotes FEHA's stated purposes of providing a remedy for discriminatory practices and deterring repetition of those practices. It remains to be seen whether, in light of

Nassar, the California courts will construe the "because of" requirement differently for retaliation cases.

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