

IMPACT OF SUPREME COURT PRO-EMPLOYER TITLE VII DECISIONS BLUNTED BY STATE LAWS

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The authors analyze two decisions by the U.S. Supreme Court that narrow the circumstances under which employers can be held liable for retaliation or harassment claims under Title VII of the Civil Rights Act of 1964.

The U.S. Supreme Court issued two important decisions near the end of its term that narrow the circumstances under which employers can be held liable for retaliation or harassment claims under Title VII of the Civil Rights Act of 1964. In each case, the Court rejected broader Equal Employment Opportunity Commission (EEOC) interpretations of the law in favor of setting a higher bar for plaintiffs bringing federal claims. Employers should keep in mind, however, that the legal standards under many state and local laws may not be affected by the Supreme Court's rulings.

In *University of Texas Southwestern Medical Center v. Nassar*, the Court held that plaintiffs claiming retaliation for exercising rights protected by Title VII must show that the adverse action complained of would not have occurred "but for" illegal retaliation by the employer, refusing to extend to retaliation claims the more plaintiff-friendly "mixed motive" standard that is available for Title VII discrimination

claims. In *Vance v. Ball State University*, decided the same day, the Court held that employers are not presumptively vicariously liable for harassment committed by an employee who directs the day-to-day tasks of a complainant, if the harasser was not empowered to take a "tangible employment action" against the complainant.

The 5-4 majority opinions in each case suggest that the Court adopted these standards with an eye to lessening the litigation burden on employers, while the dissenting opinions, both authored by Justice Ginsburg, warn that the Court's decisions have undermined the remedial purpose of Title VII, leaving aggrieved employees unprotected.

Together, the *Nassar* and *Vance* decisions set a more employer-friendly structure for defending against Title VII harassment and retaliation claims, but employers would be well-advised not to relax their vigilance in seeking to reduce the kinds of conduct that give rise to such suits. This article describes the context of the Court's decisions, explains why the availability of state and local laws may blunt their impact, and provides key take-aways from the rulings.

**UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL
CENTER V. NASSAR—FOR TITLE VII
RETALIATION, PLAINTIFFS MUST
SHOW “BUT FOR” CAUSATION**

A History of Shifting Legal Standards

When first enacted in 1964, Title VII left unclear whether an employer could be liable for discrimination or retaliation if the plaintiff proved that the employer had illicit motives for the adverse action, but the employer could show that it would have taken the same action even in the absence of retaliatory or discriminatory animus. The choice between a “mixed motive” liability standard and a “but for” causation standard first came before the Supreme Court in 1989 in *Price Waterhouse v. Hopkins*, a gender discrimination case.¹ The Supreme Court held that, in mixed motive cases, employers could prevail against status-based discrimination claims if they could show that they would have taken the same adverse action absent a discriminatory motive. Congress rejected the *Price Waterhouse* approach in its 1991 amendments to Title VII, by adding a new section (§ 2000e-2(m)) to the statute, providing that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”² Although the 1991 amendments did preclude certain types of recovery in mixed motive cases, employers could no longer escape liability entirely once a plaintiff established that illegal bias played any role in the adverse employment decision.³

Despite these developments, it has remained unclear which causation standard applies to retaliation claims under Title VII. Some courts (and the EEOC) have determined that the mixed-motive framework created by § 2000e-2(m) applies equally both to retaliation claims and to status-based discrimination claims (for example, claims of discrimination based on sex, age, race, religion, or other protected characteristics). Other courts, however, have maintained that § 2000e-2(m) should apply only to status-based discrimination, and thus retaliation plaintiffs would need to prove causation under the heightened “but for” standard. This latter interpretation was bolstered by the Supreme Court’s 2009 decision in *Gross v. FBL Financial Services, Inc.*⁴ In *Gross*, the Court held that, absent a clear statement from Congress to the contrary, the words “because of” in the Age Discrimination in Employment Act (ADEA) require that plaintiffs show that age discrimination was the “but for” cause of any challenged employment action. This ruling suggested that plaintiffs bringing claims under other employment statutes that prohibit conduct “because of” a protected characteristic or retaliation, such as the retaliation prohibition in Title VII, might also be held to a “but for” standard, absent a clear statement by Congress to the contrary.

The Supreme Court Adopts a Strict Causation Standard

In *Nassar*, the Supreme Court resolved the split and decided that, as with the ADEA, the words “because of” in Title VII’s anti-retaliation provision mean that plaintiffs claiming retaliation for exercising rights protected by Title VII must

show that the retaliation was the “but for” cause of the challenged employment action. That is, it is not sufficient for a plaintiff to show that retaliation contributed to an adverse employment action. Rather, a plaintiff must show that the challenged employment action would not have happened absent retaliation—a much higher burden. In reaching its decision, the Court relied on its interpretation of the text and structure of the statute and the 1991 amendments, as well as on common law principles of causation in tort actions.

The Court acknowledged that the EEOC’s guidance manual has endorsed a motivating-factor causation standard for retaliation claims, but the Court declined to show deference to the agency’s interpretation, characterizing the EEOC’s rationale in the manual as “lack[ing] persuasive force.” The Court suggested that broader interpretations of actionable retaliation are responsible for the “ever-increasing frequency” of retaliation filings, noting that the number of retaliation claims filed with the EEOC “has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012.” The Court cautioned that a lessened causation standard could induce workers who know they will soon face an adverse employment action, such as termination or demotion, to file an unfounded discrimination claim so that the threat of a retaliation claim could be used to “forestall that lawful action.” Clearly sympathizing with employers, the Court explained that its higher causation standard was justified in order to make it less “difficult to dismiss dubious claims at the summary judgment stage” and

to avoid “rais[ing] the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.”

Dissent Urges Congress to Act

The sympathies of the four dissenting justices, in contrast, lay with employees whose willingness to “speak out against employment discrimination” may be chilled by concern about retaliation. The dissent faulted the majority opinion for failing to recognize that “retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it.” The dissenting justices would have shown deference to the EEOC’s longtime interpretation of the statute and held that § 2000e-2(m) applies to both status-based discrimination and to retaliation claims under Title VII. Alluding to Congress’s response to the *Price Waterhouse* decision, the dissent urged Congress to take action again, opining that this “misguided judgment . . . should prompt yet another Civil Rights Restoration Act.” Given that any congressional action on this subject is highly unlikely in the current political climate, however, plaintiffs claiming retaliation for exercising rights protected by Title VII will face a heightened causation standard for the foreseeable future.

VANCE V. BALL STATE UNIVERSITY—“SUPERVISOR” IS DEFINED NARROWLY

Separate Liability Standards for Supervisory and Co-Worker Harassment

Fifteen years ago, in *Burlington Industries, Inc. v. Ellerth*⁵ and *Farragher v. Boca Raton*,⁶ the Supreme Court established the framework

for when employers may be held liable under Title VII for workplace harassment. Under this framework, where harassment is committed by a co-worker, the employer will be liable only if it was negligent with respect to preventing or stopping the harassment. By contrast, employers will be held strictly liable for harassment committed by a supervisor that results in a tangible employment action, such as termination or denial of a promotion. When supervisory harassment does not result in a tangible employment action, the employer will still be presumptively vicariously liable, unless it can establish an affirmative defense by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided.

The *Ellerth* and *Farragher* decisions relied on traditional agency principles in establishing different legal regimes for evaluating harassment committed by supervisors or committed by co-workers. As stated in the *Ellerth* decision, “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relationship.”⁷

Farragher and *Ellerth* did not, however, define when an individual qualifies as a “supervisor” rather than a mere co-worker. In the years since, two competing definitions have emerged. Led by the EEOC, many courts have broadly held that a supervisor is anyone with authority to take tangible employment actions

or to direct an employee’s daily work activities. Other courts have limited the definition to only those who have authority to take tangible employment actions.

“Supervisor” Defined Narrowly, Limiting Presumptive Vicarious Liability

In *Vance*, the Supreme Court adopted the narrow view and held that “an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII only if he or she is empowered to take tangible employment actions against the victim.” The majority reasoned that the broader view was too “nebulous” and would thus “frustrate judges and confound jurors.” By contrast, according to the majority, the narrow definition will allow determinations of whether an individual qualifies as a supervisor to “often be resolved as a matter of law before trial,” thus simplifying the work of the jury. The Court focused on the burden to the parties of adopting a “vague[r]” standard: “With the issue still open when trial commences, the parties would be compelled to present evidence and argument on supervisor status, the affirmative defense, and the question of negligence.”

The majority opinion is notable for the attention it paid to responding to the arguments of the dissent, which criticized the Court’s opinion as “blind to the realities of the workplace.” The dissent noted that prior Supreme Court decisions initially adopted the distinction between supervisors and co-workers because, when “[e]xposed to a fellow employee’s harassment, one can walk away or tell the offender to ‘buzz off.’” By contrast, “[a]n employee who confronts her harassing supervisor risks, for

example, receiving an undesirable or unsafe work assignment or an unwanted transfer.” According to the dissenters, this is true regardless of whether a “supervisor” has authority to take tangible employment actions because “[a] supervisor with authority to control subordinates’ daily work is no less aided in his harassment... by the power vested in [him] as [an] agent” of his employer “than is a supervisor with authority to fire, demote, or transfer.” The dissent warned that the majority opinion will result in “a diminished incentive to train those who control their subordinates’ work activities and schedules, *i.e.*, the supervisors who ‘actually interact’ with employees.”

Caveats Prompted by Dissent’s Concerns

In response to these concerns, the Court’s opinion included multiple examples of why employers cannot “insulate themselves from liability by empowering only a handful of individuals to take tangible employment actions.” Employers trying this gambit will find that the few decisionmakers “will likely rely on other workers who actually interact with the affected employee” in making their decisions. Under those circumstances, the Court opined, “the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.” In addition, the Court observed that, in certain situations, the vicarious liability standard applicable to supervisors may extend to co-workers who oversee the day-to-day activities of other employees, but whose job descriptions do not include the authority to take tangible employment actions. For example, assignment of

“significantly different work responsibilities” by a higher level co-worker may rise to the level of a tangible employment action “[i]f that reassignment had economic consequences, such as foreclosing [the lower level employee’s] eligibility for promotion.” Based on these caveats, the dissent warned that the Court mischaracterized its new definition of supervisor status as “clear” and “workable,” because the many ways in which lower level decisions could have “economic consequences” leave “many questions unanswered” about where to draw the line between supervisors and co-workers.

Despite the persistence of some ambiguity with the Court’s new standard, all federal courts will now be required to apply what Justice Thomas’s concurring opinion described as “the narrowest ... rule for when an employer may be held vicariously liable for an employee’s harassment.” Nonetheless, as the *Vance* court notes, even if the harasser is not regarded as a supervisor, the employer can still be held liable if the plaintiff can show that the employer was negligent in allowing the harassment to occur. In addition, to the extent that the conduct of a non-supervisory harasser significantly affects the tangible employment actions that supervisory employees decide to take, employers will still find themselves embroiled in expensive factual disputes about the employers’ level of responsibility for harassment perpetrated by non-supervisory employees.

Broader State and Local Discrimination Laws May Keep Litigation Risk High for Employers

The Supreme Court’s holdings in *Vance and Nassar* apply to federal claims brought under Title VII. Many employers, however, may also be

subject to harassment and retaliation claims brought under state or local anti-discrimination laws that include legal standards more favorable to employees. For example, California’s Fair Employment and Housing Act (FEHA), California’s state-law counterpart to Title VII, provides a more expansive definition of the term “supervisor” than was recognized by the Court in *Vance*. FEHA provides that a supervisory relationship may be found not only where an individual has the power to effectuate the kinds of tangible employment actions such as those discussed in *Vance*, but also where the individual has the authority to “assign, reward, or discipline” other employees, or the “responsibility to direct” them, using independent judgment.⁸

California courts interpreting this provision have noted that FEHA provisions must be construed broadly to protect employees’ rights to seek and hold employment without discrimination.

Similarly, the New York City Human Rights Law broadly imposes vicarious liability on an employer when (1) the harassing employee “exercised managerial or supervisory responsibility,” (2) the employer knew about the harassment and acquiesced in it or failed to immediately take corrective action, or (3) the employer should have known about the harassment and failed to exercise reasonable diligence to prevent it.⁹

The upshot is that an employee may be able to impose liability on an employer for harassment under a state or local anti-discrimination statute, even if that claim would fail under federal law.

Similarly, the Court's holding in *Nassar* that Title VII retaliation claims are subject to a higher causation standard than discrimination claims may not reflect the legal standard under state and local laws. For example, in *Propp v. Counterpart International*, the District of Columbia Court of Appeals held that a plaintiff claiming retaliation under the District of Columbia Human Rights Act could prevail by proving that the employer's actions "were motivated in substantial part by retaliatory reasons, even if they were motivated also by legitimate business reasons."¹⁰ In other jurisdictions, it remains to be seen whether courts interpreting state and local statutes will adopt the Supreme Court's holding in *Nassar*. Many states and localities may choose not to follow the federal standards.

In early 2013, for example, in *Harris v. City of Santa Monica*,¹¹ the California Supreme Court held that the "mixed motive" defense applies in discrimination cases brought under FEHA, and declined to impose a "but for" causation standard, as many employers had hoped. Instead, a FEHA plaintiff must prove that discrimination was a "substantial motivating factor" in the employer's adverse decision. *Harris* did not involve a retaliation claim, however, and the court did not express an

opinion as to whether the standard it announced would apply to retaliation claims brought under FEHA.

Accordingly, the Supreme Court's holdings in *Vance and Nassar* ultimately may not reduce the number of retaliation and harassment claims lodged against employers. Rather, these decisions may serve only to push plaintiffs away from Title VII and towards any applicable state and local equivalents, either in lieu of Title VII claims or as additional claims. Employers should, therefore, not view these decisions as permission to relax the policies and safeguards they have adopted against harassment and retaliation. These measures remain critical both to protect employees against illegal treatment and to strengthen employers' defenses against legal claims based on their employees' misconduct.

PRACTICAL LESSONS FOR EMPLOYERS

To benefit from these rulings, employers can take some immediate steps to reduce their risk of legal liability from federal harassment or retaliation suits:

- Employers should review the position descriptions of employees whose responsibilities include some oversight of other workers.

The position descriptions should clearly identify the employees' level of responsibility for hiring, firing, promotion, and salary changes. For example, a position description could specify that an employee is expected to provide performance feedback on co-workers to supervisory employees. Such documentation can help reduce factual disputes about which employees fall within the definition of a "supervisor" under the standards in *Vance*.

- Employers should promptly document, in a memorandum to the file or an email to Human Resources, any discussions about whether to terminate an employee, along with the rationale for the employer's decision. If an employee lodges a complaint or engages in protected activity during the period between the internal discussion of termination and implementation of that decision, such contemporaneous documentation could defeat a claim that retaliatory animus was the determinative factor in the employee's discharge.
- Employers should consult with legal counsel to determine whether they are subject to heightened legal standards under state or local laws at any of their employee locations.

Endnotes

¹ 490 U.S. 228 (1989).

² 42 U.S.C. § 2000e-2(m).

³ Under the 1991 amendments, a plaintiff in a mixed motive case who cannot establish "but for" causation may be awarded attorney's fees and costs, declaratory relief, and some forms

of injunctive relief, but is not entitled either to monetary damages or to a reinstatement order. 42 U.S.C. § 2000e-5(g)(2).

⁴ 557 U.S. 167 (2009).

⁵ 524 U.S. 742 (1998).

⁶ 524 U.S. 775 (1998).

⁷ *Ellerth*, 524 U.S. at 763.

⁸ Cal. Gov't. Code § 12926(s).

⁹ N.Y.C. Admin. Code § 8-107(13)(b).

¹⁰ 39 A.3d 856, 870 (D.C. 2012).

¹¹ 56 Cal. 4th 203 (2013).

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