

Supreme Court Makes it Harder for Employees to Bring Suits Under Title VII

August 15, 2013

The Potential Implications for Educational Institutions

Last month, at the close of its October 2012 term, the Supreme Court issued two important rulings in Title VII employment discrimination cases that make it substantially more difficult for employees claiming retaliation or a hostile workplace environment to bring, and win, those claims.

While both *Vance* and *Nassar* are Title VII cases that apply broadly to all employers, educational institutions should closely attend to their implications in view of their unique employment and advancement structures and the complex partnerships they enter into.

In *Vance v. Ball State University*, the Supreme Court adopted a narrower definition of “supervisor” than some federal courts and the Equal Employment Opportunity Commission had been using, with the result that employees bringing future discrimination claims will be required to meet a heavier burden in order to succeed. In *University of Texas Southwestern Medical Center v. Nassar*, the Court interpreted Title VII to require an employee bringing suit against his employer for retaliation to show “but-for” causation, a higher standard requiring employees to show that their underlying claims of discrimination were not just *one* reason for a later adverse employment action, but *the* reason.

Implications for Educational Institutions

Vance should be of particular interest to educational institutions, which unlike many businesses, utilize unique employment, advancement and tenure systems based on employment relationships that do not mirror those in private companies. The American Council on Education (ACE) filed an amicus brief on behalf of several college and university groups in support of the more rigid definition of “supervisor” based on its concern that the broader, elastic definition would expansively expose education institutions to vicarious liability. For example, because professors at colleges usually have the authority to recommend advancement or tenure for other professors, the acts of every professor may subject academic institutions to vicarious liability under the broader definition of supervisor. With the Court’s adoption of a more narrow definition in *Vance*, such concerns seem to be alleviated, at least to a degree.

As a general matter, the ruling establishes a clear line between those who can make specific, concrete employment decisions, and those who cannot. On the other hand, educational institutions should also be cautious about an added caveat that the Court mentioned in passing: in situations where an employer concentrates decision making authority in a small number of individuals, and those individuals make employment decisions in substantial reliance on the reports of employees, the reporting employees may be held to have been delegated the authority to take tangible employment action, and thus be deemed “supervisors.” While the spirit of the decision seems to set a high bar as to when this caveat will apply, the Court leaves the question open. The likely litigation over this question is something that educational institutions will need to monitor in the future.

Educational institutions should also consider the possible implications of *Nassar*, which involved a university’s partnership with a private institution, an arrangement that has become increasingly common in the education industry. Not unlike the situation in *Vance*, Title VII claims lie against an educational institution that takes an action to affect the employment status of one of its current or former employees, even if that individual is employed at another entity with which the academy is embedded.

The ACE also filed an amicus brief in *Nassar*, arguing in support of the higher but-for causation standard. According to the ACE, the lower standard would interfere with the academic freedom of educational institutions by allowing disgruntled employees to bring academic fights, disguised as retaliation suits, into the courts. By allowing more cases to be dismissed at the summary judgment phase, the ACE argued, educational institutions will be assured that employment decisions made on academic grounds will not result in expensive full blown litigation every time there is minimal evidence of retaliation. The Court’s ruling, according to ACE’s arguments, stands as a major

victory for the academic freedom of educational institutions.

While both *Nassar* and *Vance* have been well received by educational institutions, it should be noted that these cases involve interpretations of the federal anti-discrimination law. There are likely lower thresholds for liability depending on the anti-discrimination laws of the states where such institutions are located. It thus remains important that employers take the decisions as a reminder to have formal training, policies, reporting systems and procedures in place to address any potential complaints that arise. An employer taking proactive steps to prevent a discriminatory workplace environment or discriminatory employment actions remains the best defense against liability.

More on the Cases

Vance

Vance involved the Title VII claim of an African-American woman employed in the catering division of Ball State University. Maetta Vance claimed that a fellow employee, Saundra Davis, created a racially hostile work environment.

At issue in *Vance* was a split among federal courts as to the proper definition of “supervisor” as to a Title VII cause of action alleging a discriminatory work environment. Under the established framework, if the employee accused of creating a hostile work environment was the victim’s co-worker, the employer would only be liable if the employee could show that the employer was negligent in controlling workplace conditions. On the other hand, if the accused employee was a supervisor, the employer would be subject to heightened, vicarious liability.

The Court in *Vance* adopted a significantly narrower, bright-line definition of “supervisor” for Title VII purposes, holding that supervisors are only those individuals empowered to take tangible employment actions against the victim. In explicating this definition, the Court held that it is not enough for an individual merely to have power to exercise significant direction over the complaining employee’s daily work. In practical terms, unless the person creating the hostile work environment is someone with the authority to hire, fire, promote, demote, reassign or otherwise effect a significant change in the terms and conditions of the employee’s employment status, the complaining employee will have the burden of proving the employer’s negligence in controlling workplace conditions. This standard is likely to result in more cases being dismissed before trial if the alleged harasser does not fit the narrower *Vance* definition of supervisor and the court concludes that the facts fail to establish the employer’s negligence in managing the workplace. As to cases that go to trial, the employee will be required to meet this higher burden of proof in order to win.

While the Court’s opinion has been generally well received by employers, the Court did leave open one important caveat, suggesting that employers will not be able to shield themselves from heightened liability simply by concentrating the authority to make tangible employment decisions in a small number of isolated individuals. The Court noted that an employee might be deemed a supervisor if, while not having direct authority to make final employment decisions, the individual is heavily relied on for substantial input into those decisions. The limits and boundaries of this caveat remain untested and is likely to be the subject of future litigation. Unless narrowly parsed, this caveat could swallow the new rule.

Nassar

Nassar involved a medical school’s connection to a partner hospital’s withdrawal of an employment offer to a doctor and former medical school faculty member. The University of Texas Southwestern Medical Center had an agreement with a local hospital whereby students at the medical school engaged in clinical work at the hospital. As part of this agreement, the hospital was required to offer empty staff physician posts to the medical school’s faculty.

Naiel Nassar was both a member of the medical school’s faculty and a staff physician at the hospital. Convinced that his supervisor at the medical school was biased against him based on his religion and ethnic heritage, he arranged to resign his position at the medical school but to continue to work at the hospital. After Nassar made allegations of his supervisor’s discriminatory biases in a letter to several school officials, one such official openly expressed his consternation at the letter and subsequently protested the hospital’s offer of employment to Nassar, asserting that it violated the school’s agreement with the hospital that the hospital require all staff physicians to also be a medical school faculty member. After the hospital withdrew its offer to Nassar, he brought suit against the school, claiming that the school official’s efforts to prevent the hospital from hiring him were in retaliation for complaining about harassment.

Under Title VII, employees have a remedy against their employer if the employer engages in certain unlawful employment practices,

among them (1) status-based discrimination, where an employer makes an employment decision on the basis of an employee's membership in a protected class, such as race, color, religion, sex or national origin; and (2) retaliation against an employee for having previously opposed, complained of or sought remedies for unlawful workplace discrimination.

At issue in *Nassar* was the question of whether the lower "motivating factor" standard for status-based discrimination claims applies to Title VII retaliation claims. In a typical tort case, a plaintiff must show "but-for" causation, that is that the harm at issue would not have occurred in the absence of the defendant's wrongful conduct. In 1991, Congress amended the Civil Rights Act to lower the standard for status-based discrimination cases to the "motivating factor" standard. Under this standard, the plaintiff can win a Title VII claim if he or she can show that race, color, religion, sex, or national origin was one motivating factor for any employment practice, even if the employer had other, legitimate reasons for the decision.

The Supreme Court held that the lower "motivating factor" causation standard only applies to status-based discrimination cases and not to retaliation cases, such as the claim Nasser had brought. Instead, plaintiffs alleging retaliation under Title VII must prove but-for causation, requiring a showing that the employee's previous conduct (i.e., complaining of discrimination) was *the* primary reason for a future adverse employment action and not just *one of many* reasons.

Written by Michele A. Whitham, with summer associate Anderson Chang

RELATED INDUSTRIES

- [Education](#)

RELATED PRACTICES

- [Employment Discrimination & Harassment](#)
- [Labor & Employment](#)

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.