

Recent Supreme Court Cases Raise Bar for Plaintiffs Under Title VII

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Two cases decided by the U.S. Supreme Court at the end of its 2012-13 term, *University of Texas Southwestern Medical Center v. Nassar* and *Vance v. Ball State University*, will significantly alter the landscape of employment litigation under Title VII of the Civil Rights Act of 1964, the principal federal anti-discrimination law. The Court weighed in on the evidence required to sustain a retaliation claim (the fastest growing type of employment-related claim) and the definition of “supervisor” for purposes of imposing liability on employers. In both 5-4 decisions, the Court sided with employers.

In *Nassar*, the Court held that to prove a retaliation claim under Title VII, a plaintiff must demonstrate that the adverse employment action at issue would not have occurred “but for” the employer’s improper retaliatory motive. That is, a plaintiff must prove that his or her protected conduct (for example, complaining about discrimination in the workplace) was the primary cause of the adverse action, not simply one of the causes.

The Court reversed a jury verdict in favor of the plaintiff, which was based on a lower court’s ruling that retaliation only needed to be a “motivating factor” in the employment decision. The Court noted that this lower standard of causation, in which the plaintiff must prove only that an unlawful motive played a role in the decision (even if other, lawful reasons also played a role), is the appropriate standard for proving claims of discrimination under Title VII.

Retaliation, however, is covered under a separate portion of Title VII from the provision establishing the “motivating factor” test. The Court’s majority concluded that a different test should apply to retaliation claims, reasoning that the use of the phrase “because of” in the retaliation provision implies that retaliation for protected conduct must be the decisive factor motivating the employment action in order for it to be unlawful under Title VII. In explaining its decision, the Court noted that applying a lower standard could have the unwanted effect of encouraging frivolous discrimination claims.

In the other Title VII decision, *Maetta Vance*, an African-American catering employee at Ball State University, alleged that a white employee, Davis, had created a racially hostile work environment by glaring at her, physically blocking her, and making other unwelcome gestures. Vance ultimately filed a lawsuit against Ball State under Title VII. In it, she asserted that Davis was a supervisor whose actions created liability for the university.

The legal issue before the Court in *Vance* was the definition of the term “supervisor” for the purposes of Title VII. Under that law, employers are only liable for a hostile work environment created by a non-supervisor employee if they are negligent in handling the situation. On the other hand, an employer faces a more stringent standard of liability if a supervisor creates a hostile work environment affecting an employee.

The Court held that a supervisor for the purposes of establishing employer liability under Title VII is someone “empowered by the employer to take tangible employment actions against the victim.” A tangible employment action generally refers to changes in one’s employment status (via hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a significant change in benefits).

Because Vance’s alleged harasser did not have this power, she was not a supervisor, and the university was entitled to summary judgment in its favor. In reaching its decision, the Court explicitly rejected the Equal Employment Opportunity Commission’s (EEOC) interpretation of the statute, which defined “supervisor” as someone with the ability to exercise significant discretion over another’s daily work. In adopting a narrower, bright-line rule defining “supervisor,” the Court noted that a straightforward definition allows for more expedient

litigation and more consistency among lower federal courts.

Both of these decisions highlight a broader trend by the Supreme Court to minimize the scope and breadth of federal civil litigation. Particularly in the employment context, the Court has expressed concern about the total volume of employment litigation and emphasized that more stringent requirements are necessary. *Nassar* creates a higher evidentiary hurdle for plaintiffs to recover on claims of retaliation, and *Vance* narrows the circumstances under which employers will be liable for wrongful conduct committed by their employees. One likely effect will be an increase in discrimination and retaliation cases brought in state courts under state anti-discrimination laws, which in many instances (including in Massachusetts) are more favorable for employees than federal law.

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