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Briefly

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U.S. SUPREME COURT LIMITS TITLE VII RETALIATION CLAIMS

Bob E. Lype

"This decision is regarded as an important victory for employers, because it will limit retaliation claims."

In a decision issued on June 24, 2013 (Univ. of Texas Southwestern Medical Center v. Nassar), the U.S. Supreme Court significantly limited the scope of Title VII retaliation claims. This decision is regarded as an important victory for employers, because it will limit retaliation claims.

In short, the Court held that Title VII retaliation claims require proof of "but for" causation (i.e., that the desire to retaliate was the "but for" cause of the challenged employment action), rather than permitting the plaintiff employee to proceed when retaliation was one "motivating factor" for the employment action, but the employer also had other, lawful motives for the action (i.e., "mixed motives").

Following the Supreme Court's 1989 decision in Price Waterhouse v. Hopkins, and following passage of the Civil Rights Act of 1991, a plaintiff employee in Title VII discrimination case may rely upon proof that the employer's motive to discriminate was one of the employer's motives, even if the employer also had other lawful, legitimate motives for the action it took.

In the Nassar case, the Supreme Court explained that the retaliation provisions in Title VII are found in a different section of Title VII, which was not amended by the Civil Rights Act of 1991. The Court also found that Congress had intended to follow traditional tort law's "but for causation" standard for retaliation claims under Title VII.

As a result, it almost certainly will be more difficult for plaintiff employees to prevail in Title VII retaliation claims, because the employee will have to prove that the desire or intention to retaliate was the "but for" cause of the challenged employment action. If the employer also had other legitimate, lawful reasons for the employment action, then even if the desire to retaliate against the employee for complaining about discrimination, etc., was an additional motivation, the employer's decision should not result in liability for unlawful retaliation.

It will be interesting to see how this clarified standard will be applied by trial courts and by the Courts of Appeals over the coming years.

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U.S. SUPREME COURT CLARIFIES TITLE VII SEXUAL HARASSMENT STANDARD

Edward H. Trent

"In *Faragher* and *Ellerth*, the Supreme Court held that an employer is vicariously liable for a supervisor creating a sexually hostile work environment."

In an opinion announced on Monday, June 24, 2013, the United States Supreme Court clarified who qualifies as a supervisor for Title VII purposes. In *Vance v. Ball State University*, 570 U.S. ___ (2013), the Court was asked to review the granting of a motion for summary judgment in a racial harassment case brought by Maetta Vance, an African-American woman serving as a full-time catering assistant, based on claims she was harassed by fellow Ball State University employee Saundra Davis, a white woman serving as a catering specialist. The issue before the Court was the proper standard to apply in determining whether Davis was a supervisor or a co-worker. The reason the answer to this question was significant was because the answer would determine whether Vance's allegations were reviewed to determine whether Ball State University was "negligent" in failing to protect against unlawful harassment or whether Ball State University would be required to prove an affirmative defense under *Faragher v. Boca Raton*, 524 U. S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), in order to avoid liability.

In *Faragher* and *Ellerth*, the Supreme Court held that an employer is vicariously liable for a supervisor creating a sexually hostile work environment. If the supervisor took "tangible employment action" against the victim, then the employer was strictly liable. If no tangible employment action was taken, then the employer could avoid liability by proving an affirmative defense of "(1) employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided." Opinion p. 1. In situations of harassment by a co-worker, the employer is only liable if it was "negligent in controlling the workplace condition." Id.

The Court was faced with two competing standards for determining whether an employee was a "supervisor." The competing standards were (1) whether the employee was "empowered by the employer to take tangible employment action against the victim," or (2) the EEOC's standard of whether the employee had "the ability to exercise significant direction over another's daily work." Opinion p. 2, 9. While all justices doubted that the alleged harasser met either definition of supervisor, the Court split 5-4 on which standard should control, with the "empowered by the employer to take tangible employment action against the victim" prevailing as a more certain standard and one that could be resolved more easily as a matter of law on summary judgment before trial. Opinion p. 20-21.

For employers, it is important to remember what the standard means. To begin with, "tangible employment action" has been defined to mean "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." Opinion p. 6-7. So, while "team leads" or others who direct or hand out daily task assignments may not meet the definition of "supervisor," those who hold power over another's employment by being able to affect whether they are promoted, reassigned, or even terminated are likely to still meet the definition of supervisor. The majority even left open the possibility that those who have significant influence over those decisions, even if they cannot take the action themselves, may qualify as a "supervisor," so consolidating formal authority in a few people may not narrow the field for a *Faragher* and *Ellerth* analysis in response to a claim of harassment.

Two final points are worth considering. First, the Court did not alter the definition of actionable harassment. It remains that a plaintiff "must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered." Opinion p. 5. Without deciding, but accepting as a logical extension, the Court applied the Faragher and Ellerth analysis in a claim of racial harassment.

Here, the Court did not address whether Vance's allegations met this standard even though the trial court found that the allegations failed to qualify for actionable harassment. Because the Court of Appeals did not address the issue in affirming summary judgment in favor of Ball State University, the dissent suggested the Court of Appeals be allowed to do so upon remand before reaching the supervisor question. Opinion, Ginsburg, J. dissenting, p. 20, fn. 8. Vance's allegations were that she was subjected to "weird looks" and that Davis would "glare at her" and "slam" pots and pans

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GET READY FOR OSHA'S NEW HAZCOMM RULES

TRAINING DEADLINE: DECEMBER 1, 2013

Mary Moffatt Helms

"The new standard covers over 43 million workers who produce or handle hazardous chemicals in more than five million workplaces across the United States."

By December 1, 2013, U.S. employers must be ready to comply with new hazard communications ("HazComm") standards. The new rules bring the United States into alignment with other countries that have signed onto the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS). They replace and expand upon OSHA's current hazard communication standard, first adopted in 1983, that required employers to alert workers to potentially dangerous chemicals and other substances to which they could be exposed in the workplace.

The new Globally Harmonized System still requires chemical manufacturers and importers to evaluate the chemicals they produce, import, or use, and provide hazard information to employers and workers by putting labels on containers and preparing safety data sheets. The old OSHA standard allowed chemical manufacturers and importers to convey hazard information on labels and material safety data sheets in a format of their choosing. The new GHS rules mandate standardized criteria for classifying chemicals according to their health and physical hazards and specify hazard communication elements for labeling and safety data sheets.

Think you know a chemical when you see one? You might be surprised. Ammonia and Sulphuric Acid - those are easy. How about wood? Wood dust is a hazardous substance classified under the OSHA HazComm standard. Several years ago, Britain determined that workers exposed to dust from cherry wood experienced a slightly higher-than-average incidence of cancer, which led to a GHS labeling requirement. The message? Take another look at those 2x4's. Your workplace may be chock-full of materials requiring labels under the new standards.

The new standard covers over 43 million workers who produce or handle hazardous chemicals in more than five million workplaces across the United States. Phased implementation begins now, and when fully implemented, the new rules will require standardized labeling, including the use of symbols, designed to be understood even by workers with low and limited literacy. Standardized Safety Data Sheets ("SDS") will replace Material Safety Data Sheets ("MSDS") that have been in use for the past 20 years. OSHA anticipates that standardization will result in cost savings to American businesses and reduce trade barriers by harmonizing the U.S. with systems around the world.

All employers need to be aware of new training requirements. Employers could satisfy the current HazComm standard with one-time training, usually conducted at new employee orientation. To comply with the new standard, all employers who produce or use chemicals in the workplace must train all workers to recognize the new labels and symbols, and to use the safety data sheets, by December 1, 2013. Employers will be required to comply with all aspects of the new standard by June 1, 2016.

It's not too early to identify what will be required in your workplace. Existing HazComm materials will help you choose the correct labeling and SDS for potentially hazardous materials, update labeling, and plan and schedule training sessions.

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around her. Davis was accused of blocking Davis' access to the elevator and "smiling at her." Opinion p. 3. It is highly unlikely this would qualify as actionable harassment under Title VII.

The second point concerns the Court's comments on factors courts will consider in determining whether an employer is liable for co-worker harassment. On this issue, the Court made the following comment, "Evidence that an employer did not monitor the workplace, failed to respond to complaints, or effectively discouraged complaints from being filed would be relevant." Opinion p. 28. Accordingly, employers should review their anti-harassment policies, reporting procedures, and instructions to supervisors and managers on what to do in the event they witness or learn of conduct that violates the employer's policy. While there may be different legal standards to determine an employer's liability for harassment in the workplace depending on the status of the alleged harasser, employers should remember that there are no free passes on harassment regardless of whether the perpetrator is a supervisor or a co-worker.

U.S. SUPREME COURT TO DETERMINE LEGALITY OF NLRB RECESS APPOINTMENTS

Howard B. Jackson

"The Court of Appeals for the District of Columbia ruled that the appointments were not Constitutionally valid because they did not occur during "the Recess," which the Court ruled meant the time between Senate sessions."

In January of 2012 the President appointed three new members to the National Labor Relations Board ("NLRB"), Sharon Block, Terence Flynn, and Richard Griffin. These appointments took place during a three week Senate recess that was called by the Senate itself. In other words, the "recess" was during a break in the session, and was not "the Recess" between Senate sessions.

The Court of Appeals for the District of Columbia ruled that the appointments were not Constitutionally valid because they did not occur during "the Recess," which the Court ruled meant the time between Senate sessions. In addition, the Court ruled that the appointments were not valid because the vacancies did not "happen" during "the Recess." According to the Court of Appeals, the recess appointment power exists to fill vacancies that occur during the recess, and may not be used to fill vacancies that existed when the Senate session began.

The NLRB petitioned the U.S. Supreme Court to hear the case, and is of course urging reversal of the Court of Appeals' decision. As expected, the U.S. Supreme Court has agreed to hear the case and decide the issues. The Supreme Court's decision to hear the case was announced on June 24, 2013. Therefore, the parties will be given an opportunity to brief and argue the case. Unless the Supreme Court decides to move more quickly than usual, which it might do given the gravity of the issues, a decision is not likely before late this year, or perhaps next year.

In the meantime, the NLRB continues to carry on business as usual. The final impact of this battle on the NLRB's operations, and on decisions made by the Board members whose appointments are at issue, will not be known until after the Supreme Court issues its ruling.

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