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EMPLOYER NEWSLETTER

THE IMPACT OF TWO RECENT SUPREME COURT DECISIONS ON EMPLOYERS

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The U.S. Supreme Court handed down two (2) decisions very favorable to employers on June 24, 2013. One decision, *University of Texas Southwest Medical Center v. Nassar*, will make it much harder for employees to prove claims for "retaliation." The other decision, *Vance v. Ball State University*, narrowed the definition of "supervisor." That definition is crucial. If a "supervisor" engages is unlawful discrimination, the employer, which empowered him, is held strictly liable for the rogue supervisor's actions. Conversely, if a coworker engages in discrimination, the employer is liable only if it was "negligent" in failing to prevent or correct the discrimination.

SUMMARY OF THE DECISIONS

University of Texas Southwestern Medical Center v. Nassar. Dr. Nassar, a professor and physician of Middle Eastern descent at the University's Medical Center, sued for Title VII[1] discrimination and retaliation after he was denied a position at the University's medical clinic. Dr. Nassar claimed that the University did not hire him because, during his prior employment with the University, he complained about discrimination. The University argued that in order for Dr. Nassar to win his retaliation case, he had to prove that "but for" his prior discrimination complaints, he would have been hired. Dr. Nassar disagreed, and he argued that he needed only to establish that his prior complaints were a "motivating factor" in the University's decision not to hire him. The Court agreed with the University and adopted the more rigorous "but for" causation standard. Looking forward, plaintiffs bringing Title VII retaliation claims must now show that "but for" their participation in protected activity, they would not have suffered retaliation.

In reaching its decision, the Court analyzed the history, structure and text of the Civil Rights Act of 1991, which codified the "motivating factor" test as it applies to traditional Title VII claims. However, because Congress did not specifically address "retaliation" claims under Title VII when it passed the Civil Rights Act of 1991, the Court refused to apply the "motivating factor" test to those types of claims. The Court also explained that subjecting retaliation claims to a stricter proof standard made practical sense because retaliation claims have skyrocketed in recent years. In 2012, 31,000 cases (comprising 38% of all charges filed with the EEOC) included a claim of retaliation. The Court openly worried that under a lesser causation standard an

[1] Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, relation, sex and national origin.

employee who foresaw that he was about to be fired, could make an unfounded claim of discrimination to set up a retaliation claim, if and when he was fired.

Vance v. Ball State University. Maetta Vance worked in dining services for ten years at Ball State University as the only African American in that department. She alleged racial discrimination by Saundra Davis, whom Ms. Vance claimed was her supervisor. The University disputed that claim, and argued that Ms. Davis was never given formal authority to be a supervisor and, at most, directed only the day-to-day activities of the dining room kitchen.

As mentioned above, in federal employment discrimination law a crucial issue is whether the alleged "bad actor" was a supervisor or a mere coworker. In deciding the issue, the Court agreed with the University and held that a "supervisor" for purposes of retaliation is someone who the employer has empowered to "take tangible employment actions against the victim." A "tangible employment action" causes 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.

IMPACT ON EMPLOYERS

The *Nassar* and *Vance* decisions are clear victories for employers. Both decisions will make it harder for plaintiffs to prove their cases. But, perhaps more important, they will make it easier for judges to dismiss retaliation cases before they go to trial – thus reducing the cost and complexity of defending them as well as reducing the settlement value of many others.

While these decisions favor the employer, they do not eliminate an employer's need to prevent discrimination and retaliation claims by (a) adopting sound policies and practices; (b) providing regular training; (c) conducting and documenting performance reviews; (d) developing job descriptions and defining supervisory positions; and (e) taking appropriate action when complaints arise.

Please let us know if whenever we can help you with these types of issues.