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Winds of Change

The United States Supreme Court Issues Two Favorable Decisions for Employers

August 1, 2013

Employment law has been fertile ground for the United States Supreme Court in recent years, with this year being no exception. On June 24, 2013, the Supreme Court issued two opinions that will have a dramatic affect on employment law litigation in the United States. The cases are *Vance v. Ball State University*, and *University of Texas Southwestern Medical Center v. Nassar.*

Vance was a race discrimination case. The plaintiff, Mattea Vance, was an African-American banquet worker at Ball State University who brought a complaint against a Caucasian co-worker alleging that the co-worker had directed a racial slur at her, as well as African-American students. In response to Ms. Vance's complaint, Ball State University issued a written warning to the co-worker. Thereafter, Ms. Vance continued to complain about the co-worker's actions; consequently, Ball State University conducted an investigation into the complaints which revealed no basis to take further action against the co-worker.

Ms. Vance subsequently filed suit against the university in federal court, alleging, among other things, the existence of a racially hostile work environment. The federal district court granted Ball State University's motion for summary judgment, holding that there was not enough evidence to prove a hostile work environment, and, more importantly, that the University was not liable for the alleged racist actions of the individual co-worker. Ms. Vance appealed the decision to the Seventh Circuit Court of Appeals which affirmed the district court's decision and concluded that there was no basis for employer liability on Ms. Vance's hostile work environment claim.

The key issue to be determined by the Supreme Court was whether Ms. Vance's co-worker qualified as her "supervisor." This determination is extremely important in a hostile work environment case because the test for liability is much stricter when the misconduct is engaged in by a supervisor, as opposed to a co-worker, *i.e.*, an employer is generally not vicariously liable for the unlawful discrimination committed by a non-supervisor, but an employer can be vicariously liable for unlawful discrimination against an employee committed by a supervisor.

The Supreme Court held that in order for a person to qualify as a "supervisor" the person had to have the authority to take a tangible employment action against an employee, *i.e.,* the individual must possess the authority to hire, fire, demote, promote, transfer or discipline the employee under his/her

supervision. In so ruling, the Supreme Court rejected the Equal Employment Opportunity Commission's (EEOC) employee friendly guidance which provides that a person can be a supervisor even though the person does not have the ultimate authority to take a tangible employment action against an employee, *e.g.*, pursuant to the EEOC guidance, a co-worker who directed an employee's work could be a supervisor.

This ruling is important for employers because the more restrictive definition of "supervisor" articulated by the Supreme Court means that fewer employees may create liability for their employers under Title VII, and therefore employers' exposure to Title VII liability is narrowed. Employers, however, should note that an employer may be found liable for unlawful harassment if it is negligent with respect to such conduct between employees. In other words, employers cannot ignore unlawful conduct of a non-supervisor.

In the second case, the plaintiff, Dr. Nassar, a former faculty member of the University of Texas Southwestern Medical Center alleged he faced hostile treatment from a hospital superior because of his religion and ethnic heritage. Dr. Nassar further claimed he had been retaliated against—his employer denied him a job—because he complained of discrimination in a prior resignation letter. Specifically, Dr. Nassar's resignation letter stated that his supervisor made derogatory comments about his Middle Eastern descent.

The Supreme Court took the case to determine the evidentiary standard for judging Title VII retaliation claims. University of Texas Southwestern Medical Center argued that Dr. Nassar had to prove that engaging in the protected activity—complaining of discrimination—was the sole motivating factor for the alleged adverse employment action. Conversely, Dr. Nassar argued he need only show that engaging in the protected activity was a motivating factor, not necessarily the only factor, for the alleged adverse employment action.

The Supreme Court sided with the employer and held that in order for an employee to succeed on a claim for unlawful retaliation under Title VII, an employee must prove that it was his/her protected activity that was the "but for" cause for the adverse employment action. Put differently, if the employee had not engaged in the protected activity, he/she would not have suffered the adverse employment action. Protected activities include: 1) making a claim of harassment; 2) participating in a workplace harassment investigation; or 3) objecting to an employer's practice the employee believes to be unlawful under Title VII.

This ruling is important for employers because the "but for" standard adopted by the Supreme Court in Title VII retaliation cases is much higher than the motivating factor standard previously used in some circuit courts, *i.e.*, it is now much tougher for a plaintiff to prevail on a retaliation claim because his/her burden of proof is much higher. In practice, this will provide employers with a powerful weapon to defend against retaliation claims, and ultimately weed out a large number of these claims.

The practical effect of *Vance* and *Nassar* is that it will be more difficult for employees to prove they have suffered employment discrimination. Alternatively, employers are provided greater protection to these types of claims. The true impact of these cases, however, will not be determined until claims are litigated under the new, employer friendly standards. Until then, 2013 was definitely a big year for employers.

If you have any questions about the *Vance* or *Nassar* cases, or any other employment law issues, feel free to contact Allen L. Hutson or any other member of Crowe & Dunlevy's Labor & Employment practice group.

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