



## **Employers Prevail on Important Title VII Cases**

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During the final week of its 2012 term, the U.S. Supreme Court issued two employer-friendly interpretations of Title VII. In the first, *Vance v. Ball State University*, the Court adopted a narrow definition of the term “supervisor” for purposes of employer liability. Under the definition, only employees who are authorized to take tangible employment actions against others are considered supervisors for purposes of Title VII. The second case, *University of Texas Southwestern Medical Center v. Nassar*, clarified what an employee must prove to prevail in a retaliation case. That case held that, to establish retaliation, the employee must show that his or her engagement in a protected activity was the “but-for” cause of the employers prohibited employment action. Said differently, had the employee not engaged in the activity, the employer would not have taken adverse employment action.

Title VII, part of the Civil Rights Act of 1964, prohibits discrimination in the workplace based upon an individual’s race, color, religion, sex or national origin. Under Title VII, employers are not only liable for their own discriminatory acts, they may also be held liable for the discriminatory and harassing acts of their employees. In 1998, the Supreme Court established different liability rules for employees who are supervisors, as opposed to those who are not supervisors. Under those rules, employers are vicariously liable for the discriminatory and harassing acts of supervisors. If a supervisor’s harassment results in a “tangible employment action,” the employer will be strictly liable. If no tangible employment action is taken, the employer may still be liable for the supervisor’s creation of a hostile work environment unless it can establish an affirmative defense. Under this defense, the employer will not be liable for the supervisor’s behavior if it can demonstrate that it took reasonable steps to prevent and correct harassment and the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities. However, in regard to acts of non-supervisor employees, employers are only liable if they were negligent (that is, the employer knew or should have known of the discrimination but did not take corrective action). See [Burlington Industries, Inc. v. Ellerth](#) and [Faragher v. Boca Raton](#). Until recently, it was unclear who qualified as a supervisor.

In [Vance v. Ball State University](#), the Supreme Court made clear that supervisors are employees authorized to take tangible employment actions affecting their subordinates, a definition already in use by the U.S. Court of Appeals for the First, Seventh and Eighth Circuits (which cover: Arkansas, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Puerto Rico, Rhode Island, South Dakota and Wisconsin). The Court described tangible employment actions as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits. The Court rejected the argument that individuals who have the ability to direct other employees’ daily work should be considered supervisors (a definition used by the U.S. Equal Employment Opportunity Commission).

The Court acknowledged that if an employer limits the authority to take tangible employment actions to a small number of people, those individuals will likely need to rely on non-supervisor employees when

deciding who to hire, fire or promote. In those circumstances, the Court opined, the employer may have effectively delegated to the non-supervisor employees the power to make tangible employment decisions and thus be vicariously liable for their actions. For example, if a Community Action Agency's executive director is the only employee who is authorized to hire, fire and promote employees, she will likely rely on the evaluations and recommendations of program directors to make those decisions. In these situations, a court may conclude that the CAA has effectively delegated authority to take tangible employment actions to the program directors and thus is vicariously liable for the discriminatory and harassing behavior of the program directors.

Even if a court finds that an employer did not effectively delegate the power to take tangible employment actions to a particular individual, the employer may still be liable if it acted negligently -- that is, the employer knew or should have known of harassment or discrimination by that individual and took no remedial or corrective action. Moreover, the Court said the amount of authority a non-supervisor employee has over others is relevant; and juries should be instructed to take into account the "nature and degree of authority" the harasser had when considering whether the employer was negligent. If a non-supervisor employee can discriminate or harass "by assigning unpleasant tasks or altering the work environment in objectionable ways," the Court suggested that a victim could prevail by showing that an employer was negligent in allowing the harassment.

Although the *Vance* decision will make it easier for employers to defend harassment cases, it does not affect employers' responsibility to prevent workplace harassment. Sound anti-harassment discrimination policies are an employer's first defense and they should be reviewed often to ensure they correspond with current workplace operations and revised as necessary if they do not (for example, by specifying a position to whom harassment reports should be made when that position no longer exists). Policies should provide multiple channels for reporting of harassment concerns (e.g., reporting to supervisors or to the HR department and, in certain circumstances, reporting to the board). If only one individual is authorized to receive complaints, problems may arise when that person is the subject of a complaint or perceived to be friendly with the subject of a complaint. Individuals responsible for receiving and reviewing complaints should regularly be trained on how to address them. Finally, employers should periodically evaluate their complaint procedures to ensure that they are regularly distributed to all employees, that employees understand them and know where to turn if they have complaints and that complaints are being promptly and properly addressed.

Employers should also review job descriptions for supervisor and manager positions and revise them as necessary to clarify whether or not each such position carries with it the authority to take tangible employment actions, such as hiring, firing, promoting and reassigning. Although job descriptions are not as important as workplace reality, they may be useful in cases where an individual's authority is unclear. Employers should continue to train all managers -- especially supervisors with the authority to take tangible employment actions -- on how to identify, prevent and correct harassment. Supervisors' training should include information on what can appropriately be considered when taking tangible employment actions and how to avoid making discriminatory decisions. For a more in-depth discussion of the Court's decision, see [The Supreme Court Clarifies Who is a Supervisor Under Title VII](#) by Littler Mendelson, a national labor and employment law firm.

Another section of Title VII, known as the anti-retaliation provision, prohibits employers from taking adverse employment action against employees because they engaged in particular protected activities. Those activities are opposing illegal practices and filing or supporting discrimination claims against the employer. However, it has been unclear whether the provision prohibits only adverse employment

action motivated solely by retaliation or all adverse employment actions in which retaliation was a factor.

The Court answered this question in [\*University of Texas Southwestern Medical Center v. Nassar\*](#). In this case, the Court held that retaliation must be the “but-for” cause of the adverse employment action. That is, to prevail in a retaliation suit, an employee must prove that had she not engaged in a protected activity, the employer would not have taken adverse employment action against her. This is a higher standard than that required for status-based discrimination (discrimination because of race, color, religion, sex or national origin). There, an employee must only show that his or her status was one factor that motivated a prohibited employment action.

The holding in *University of Texas* is more nuanced than *Vance* and does not appear to affect employers’ day-to-day implementation of their personnel policies and procedures. However, it does make it easier for employers to dispose of meritless retaliation cases early on. If an employer can demonstrate that its employment action was based on factors other than retaliation, it will prevail. Moreover, when the employer’s evidence is undisputed by the employee, the employer will be able to avoid trial regarding the retaliation charge. For more about the *University of Texas* decision, see [\*Supreme Court Limits Mixed-Motive Standard\*](#), by the national labor and employment law firm Fisher and Phillips, LLP.