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U.S. Supreme Court requires "but for" causation standard in Title VII retaliation claims

By Jon D. Hoag, SmithAmundsen LLC, St. Charles, Illinois

In 1995, Naiel Nassar ("Nassar") was hired to work as a member of the University of Texas Southern Medical Center's ("University") faculty and as a staff physician at Parkland Memorial Hospital ("Hospital"). The University had an affiliation agreement with the Hospital by which the Hospital permitted the University's students to obtain clinical experience. In addition, the affiliation agreement required the Hospital to offer empty staff physician posts to University faculty members.

Nassar specialized in internal medicine and infectious diseases. In 2004, the University hired Dr. Beth Levine ("Levine") as its Chief of Infectious Disease Medicine. Levine became Nassar's ultimate superior. Notwithstanding that Nassar obtained a promotion in 2006 with help from Levine, Nassar believed that Levine was biased against him based on his religion and ethnic heritage (Nassar is of Middle Eastern descent). On multiple occasions Nassar met with Levine's supervisor, Dr. Gregory Fitz ("Fitz"), to complain about Levine's harassment. Nassar alleged that Levine unjustifiably scrutinized his billing prac-

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Fifield and Enterprise Finance Group, Inc. v. Premier Dealer Services, Inc.: Two years of continuous employment necessary to enforce postemployment restrictive covenants

By Ayla N. Ellison

Introduction

The First District Appellate Court, in its recent decision in *Fifield and Enterprise Finance Group, Inc. v. Premier Dealer Services, Inc.*,[1] held that a noncompetition agreement is not valid and enforceable if an employee is fired or resigns within two years. Illinois companies can still require newly hired workers to sign noncompetition agreements, but if the employee is employed for less than two years the restrictive covenant will lack the consideration necessary to be enforceable by an employer. There must be two years of continuous employment to be considered adequate consideration to support a postemployment restrictive covenant.

Factual Background

Premier Dealer Services, Inc. ("Premier") made an offer of employment to Fifield ("Plaintiff"). As a condition to employment, Premier required Plaintiff to sign an employment agreement that contained both a noncompetition and a nonsolicitation provision that lasted two years. After

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U.S. Supreme Court requires "but for" causation standard in Title VII retaliation claims

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tices and made derogatory comments such as that "Middle Easterners are lazy."

In response to this alleged harassment, Nassar engaged in direct negotiations with the Hospital to remain employed with the Hospital without being on the University's faculty. The Hospital agreed to this arrangement, so Nassar submitted a letter of resignation to the University. In the letter, Nassar stated that he was resigning because of harassment by Levine, which stemmed from religious, racial and cultural bias against Arabs and Muslims. Fitz was alarmed by Nassar's public humiliation of Levine (the letter was sent to multiple people including Fitz) and Fitz stated that Levine needed to be publicly exonerated. When Fitz learned that the Hospital agreed to keep Nassar employed as a staff physician, Fitz objected and asserted the Hospital's offer was inconsistent with the affiliation agreement. The Hospital withdrew its employment offer to Nassar.

In response to the Hospital's withdrawal of its employment offer, Nassar filed an administrative charge of discrimination. Nassar asserted two separate claims under Title VII. His first claim was that Levine's racially and religiously motivated harassment resulted in his constructive discharge from the University. Nassar's second claim was that Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Levine's harassment, in violation of § 2000e-3(a). After exhausting his administrative remedies, Nassar pursued his claims in federal court. A jury found in favor of Nassar. On appeal, the Fifth Circuit found there was insufficient evidence to support Nassar's constructive discharge claim, but affirmed the retaliation finding. Importantly, the Fifth Circuit affirmed the retaliation finding on the theory that retaliation claims, like claims of status-based discrimination, require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its "but-for" cause.

The U.S. Supreme Court granted *certiorari* to determine the proper standard for causation for Title VII retaliation claims. In a 5-4 decision, the Court concluded that Title VII retaliation claims require a "but-for" causation standard. The Court focused its analysis on the Civil Rights Act of 1991, which amended Title VII to lessen the causation standard for "status-based" discrimination; allowing an individual to establish a violation by showing race, color, religion, sex, or national origin was a "motivating factor" for the employment practice. The Court stressed that Title VII's antiretaliation provision (i.e. § 2000e-3(a)) appears in a separate section from Title VII's ban on status-based discrimination, and Congress did not amend § 2000e-3(a) to apply the "motivating factor" standard. The Court noted that Title VII is a detailed statutory scheme and if Congress wanted the motivating-factor standard to apply to all Title VII claims, it would have expressly set forth this standard in clear textual terms.

In addition, the Court relied on its relatively recent holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) where the Court determined that the ADEA required proof that age was the but-for cause of the prohibited conduct. In *Gross*, the Court had to decipher the standard for proving discrimination was "because of" age in violation of the ADEA. The Court concluded that "because of" age meant that age was the reason the employer decided to act and was the "but-for" cause of the employer's decision. *Gross*, 557 U.S. at 176. Likewise, Title VII's antiretaliation provision makes it unlawful for an employer to take adverse employment action against an employee "because of" certain criteria. The Court noted that there are no meaningful textual differences between Title VII's antiretaliation provision and the text at issue in *Gross*, and thus, an employee must establish that the desire to retaliate was the "but-for" cause of the challenged employment action.

The majority further supported its conclusion by pointing out that retaliation claims have been increasing and have nearly doubled over the past 15 years. The majority stated that giving Congressional intent to the causation standard for retaliation claims was important because lessening the causation standard could contribute to the filing of frivolous claims. For example, if an employee knew that he or she was about to be fired for poor performance, demoted, or transferred, he or she might be tempted to make an unfounded charge of discrimination and then claim retaliation when the employer takes adverse action. The majority expressed concern that employers would face increased cost and difficulty in prevailing against such claims if a lessened causation standard were applied to retaliation claims. In addition, a further increase in retaliation claims would siphon resources from employers, administrative agencies and the courts which would affect efforts to combat workplace harassment.

The Court's ruling that employees must establish retaliation is the "but-for" cause and not simply a "motivating factor" of the adverse action is a victory for employers. That being said, the Court was sharply divided and the dissent issued biting criticism of the majority's analysis. The dissent stressed that status-based and retaliation claims under Title VII have always "traveled together" and the majority erred by splitting the causation standards between these types of claims under Title VII. The dissent concluded by calling on Congress to once again amend Title VII through a Civil Rights Restoration Act and make it clear that the same causation standard applies to all Title VII claims. On July 30, 2013, Congress responded and The Protecting Older Workers Against Discrimination Act was reintroduced in the House and Senate. The legislation sets out to reverse the holdings in *Gross* and *Nassar*. Prior attempts to reverse the holding in *Gross* did not advance, but only time will tell if the recent *Nassar* decision will give this type of legislative effort further momentum.

University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013). ■

Fifield and Enterprise Finance Group, Inc. v. Premier Dealer Services, Inc.: Two years of continuous employment necessary to enforce postemployment restrictive covenants

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negotiations between Plaintiff and Premier, the noncompetition and nonsolicitation provisions of the final employment contract extended for two years unless Plaintiff was terminated without cause within his first year of employment. In that case, the restrictive provisions did not apply.

Plaintiff began his employment at Premier on November 1, 2009, and he resigned from his position on February 10, 2010.

Proceedings below

On March 5, 2010, Plaintiff and his new employer filed a complaint in the Circuit Court of Cook County for declaratory relief. The complaint requested the Court declare the noncompetition and nonsolicitation provisions of the Plaintiff's employment contract unenforceable as a matter of law for lack of adequate consideration.

Premier filed an answer, affirmative defenses, and a counterclaim seeking to enforce the noncompetition and nonsolicitation provisions.

After argument, the trial court granted Plaintiff's motion for summary judgment. The Court held that the noncompetition and nonsolicitation provisions Plaintiff signed were unenforceable as a matter of law for lack of consideration. Premier appealed.

Appellate Court affirmed

The First District affirmed the trial court and found that the two year noncompetition and nonsolicitation terms of the Plaintiff's employment contract were unenforceable for lack of consideration.

A. The restrictive covenants were unenforceable despite the Plaintiff signing his employment contract before beginning employment

On appeal, Premier first argued that the two year consideration rule recognized by Illinois courts did not apply because the Plaintiff signed the restrictive covenants before he was hired.

The Appellate Court soundly rejected Premier's first argument. The Court cited to *Brown & Brown, Inc. v. Mudron*[2] and held that it did not matter whether Plaintiff signed the restrictive covenants before or after he was hired since the noncompetition and nonsolicitation provisions clearly governed the Plaintiff's post employment conduct.

B. Employment itself is not adequate consideration to enforce a postemployment restrictive covenant

Premier's second argument on appeal was that the noncompetition and nonsolicitation provisions of the employment agreement were enforceable because there was adequate consideration given to support the provisions. Premier argued that the offer of employment itself was sufficient consideration to support the restrictive covenants.

The Appellate Court rejected this argument as well. The Court began by stating the elements of an enforceable restrictive covenant. The Court noted that postemployment restrictive covenants must be: (1) ancillary to a valid contract; and (2) supported by adequate consideration.[3] The Court once again followed *Brown & Brown, Inc.*, and held that at-will employment can constitute an "illusory benefit" and that "continued employment for two years or more" was necessary to constitute adequate consideration to support a postemployment restrictive covenant.[4]

Implications of *Fifield*

By inviting employees to breach restrictive covenants with impunity, *Fifield* could prove to be troublesome for employers. As long as an employee resigns within two years of their start date, *Fifield* supports the notion that restrictive covenants will not stick to employees. Additionally, by viewing at-will employment as an "illusory benefit" this case also suggests that at-will employment is insufficient to constitute consideration to enforce postemployment restrictive covenants. ■

1. 2013 IL App (1st) 120327
2. 379 Ill.App.3d 724, 728 (2008)
3. *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.,* 292 Ill.App.3d 131, 137 (1997).
4. 379 Ill.App.3d 724, 728 (2008).

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New rules enforcing Illinois non-competes—Now easier or harder?

By Richard A. Sugar

In a recent trifecta of Illinois Appellate Court cases, judges have altered the landscape in Illinois regarding the lengths to which employers can go to protect their customers, clients, patients, and marketplace from competition originating from former employees.

Non-Compete Must Be Reasonable and Based on Adequate Consideration

The landscape began to change in 2011 when the Illinois Supreme Court issued the decision, *Reliable Fire Equipment Co. v. Arredondo*. The Supreme Court acknowledged that, generally, any contract in restraint of trade is void as against public policy. The Court said a restrictive covenant, which is ancillary to a valid employment relationship, will be upheld if the restraint is reasonable and is supported by consideration. But the Court said a restrictive covenant is "reasonable" only if it (i) is no greater than is required for the protection of a legitimate business interest of the employer; (ii) does not impose undue hardship on the employee; and (iii) is not injurious to the public.

While citing this three-prong test for determining the reasonableness of a restrictive covenant, the Court said its application is unstructured and contains no rigid formula, meaning that reasonableness must be decided on a case by case basis. The Court specifically rejected earlier Appellate Court pronouncements which either ignored the legitimate business interest part of the three-prong test, or which created rigid, formulaic tests to determine whether a legitimate business interest existed at all. Instead, the Court said factors to be considered in weighing the totality of circumstances to discover a legitimate business interest include, but are not limited to, the near permanence of customer relationships, the employee's acquisition of confidential information through his employment, and the time and place restrictions.

Adequate Consideration

In the June 24, 2013 Illinois Appellate Court decision of *Fifield v. Premier Dealer Services*, the First District Illinois Appellate Court set down a new rule for determining whether a restrictive covenant is supported by adequate consideration so as to make it enforceable. The Court held that an employee, who can be fired at will, needs to be employed for no less than two years, or must receive some other compensation, in order for a restrictive covenant to succeed in blocking him from competing with his former employer. It is not enough, said the Court, for an employee just to be hired, or just to be retained in employment, to enforce a non-compete covenant. Surprisingly, the employee in *Fifield* negotiated the terms of his non-compete prior to his hire, eliminating its application if he was fired without cause during the first year of his employment. Moreover, the non-compete was limited to two years, post-employment, and had a geographical scope limit of the 50 states of the United States. Even though the employee quit after 31/2 months of employment, the Court nonetheless held there must be two or more years of continued employment to constitute adequate consideration in support of an employee's restrictive covenant.

Legitimate Business Interest

In the April 15, 2013 First District Illinois Appellate Court decision of *Gastroenterology Consultants of the North Shore, S.C. v. Meiselman*, the Court precluded an employer from enforcing a restrictive covenant against a physician-employee who left, because the employer did not establish a legitimate business interest in need of protection based upon the totality of the circumstances. The employee had signed an employment agreement containing a restrictive covenant which prohibited him, for a period of 36 months following termination of employment, from soliciting or treating any patients within a 15-mile radius of each of the employer's offices and Evanston Hospital facilities. However, the employee had practiced gastroenterology in the same geographical area for 10 years prior to being employed by the employer, treating thousands of patients. After employment, the employee continued to treat patients and accept referrals from sources with whom he had developed relationships prior to his affiliation with the employer, and continued to preserve his independent relationships with his patients. The employer was not materially involved with the employee's practice, and his compensation was based upon the revenue generated by his independent practice. The employee also maintained his own office and had his own telephone number. Accordingly, the Court held that the employer never established a "near permanent relationship" with the patients treated by the employee, so the employer had no legitimate business interest to protect.

Undue Hardship on Employee Beyond What is Needed to Protect Legitimate Business Interest

In the May 8, 2013 First District Illinois Appellate Court decision, *Northwest Podiatry Center Ltd. v. Ochwat*, that Court addressed the circumstances of an employee who was subject to a restrictive covenant for a period of 36 months after employment terminated and within a five-mile radius of the offices of the employer. The restrictive covenant also required that the employee surrender all clinical privileges at any hospital or ambulatory surgical center at which employee held clinical privileges. The Appellate Court held that the lower court erred in imposing an injunction on the employee requiring clinical resignation without any temporal limitations. The Court pointed to the erroneous lower court order that required the employee to permanently resign all clinical privileges at the restricted facilities forever. Therefore, without a temporal restriction, the Court said that such a restrictive covenant is unreasonable as a matter of law.

TIPS: These cases remind us that there are several prerequisites to enforcing a non-compete restraint upon employees in Illinois. First, the restraint must be reasonable. The reasonableness of employee restrictive covenants is generally based on intensive factual scrutiny by the courts which must now apply a loosely defined three-prong test. To be reasonable, one of the prongs of the test requires that the covenant must be no greater than necessary to protect employer's necessary and legitimate business interests. To have such an interest to protect, the totality of circumstances must demonstrate such an interest. Facts relevant to prove a necessary and legitimate business interest include the

near permanence of employer's relationships with customers, the protection of employer's confidential information, and the reasonable limitations of time and geographical scope on the restraint.

Second, the covenant must be supported by adequate consideration—extended employment for at least two years, or some other remuneration.

Unspoken in this trilogy of cases are the exact parameters of "undue hardship on the employee" and "injury to the public", the other two prongs of the Illinois Supreme Court reasonableness test. It may very well be that these latter two prongs of the test are so inexplicably linked to the "necessary and legitimate business interest" prong that they are implicit considerations in applying the "necessary and legitimate business interest" prong itself. However, the safer approach is to explicitly address all three prongs. Therefore, in drafting a restrictive covenant, or pleading to enforce a restrictive covenant, it will be advisable to recite the specific, detailed facts which satisfy all three prongs of the Illinois Supreme Court test, and which a judge can refer to, in determining the enforceability of the covenant. ■

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The Supreme Court's *Vance v. Ball State University* decision—Who is a supervisor for purposes of Title VII?

By Carlos S. Arévalo

On June 24, 2013, the Supreme Court issued its decision in *Vance v. Ball State University*.[1] The decision authored by Justice Samuel Alito held that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.

Petitioner Maetta Vance is an African-American woman who began working for Ball State University (BSU) as a substitute server in the school's dining services department in 1989. Ms. Vance was subsequently elevated to a full-time catering assistant in 2007. The Court's opinion indicates that Vance had a history of racial discrimination and retaliation complaints over the course of her employment. However, relevant to Court's decision is a series of incidents in late 2005 and 2006 that resulted in Vance filing internal complaints and EEOC charges. These incidents involved Saundra Davis, a fellow employee at BSU who is a white woman. Vance specifically complained that Davis "gave [Vance] a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." Vance also claimed that Davis would "smile at her," "blocked" her on an elevator and gave her "weird looks."[2] The Supreme Court opinion does not offer further details, but simply relates that Vance's workplace strife persisted despite BSU's efforts to address the problem.[3] Ultimately, Vance filed a complaint in the United District Court for the Southern District of Indiana alleging that she was subjected to a racially hostile work environment in violation of Title VII and that BSU was liable for Davis' creation of such an environment.

While the nature of Davis' duties was an issue in the case, there was no dispute that Davis did not have the power to hire, fire, demote, promote, transfer or discipline Vance. Both parties moved for summary judgment and the District Court entered summary judgment in favor of BSU explaining that BSU could not be held vicariously liable for Davis' action because Davis was not Vance's supervisor pursuant to the Seventh Circuit's precedent. The District Court also found that BSU had responded reasonably to Vance's complaints. The Seventh Circuit subsequently affirmed.[4] It relied on precedent set in *Hall v. Bodine Elect. Co.*, where it established that absent an entrustment of a least some authority to hire, fire, demote, promote, transfer, or discipline, an employee does not qualify as a supervisor for purposes of imputing liability to the employer.[5] In addition, the Seventh Circuit concluded that Davis was not Vance's supervisor and that Vance would not recover because BSU was not negligent with respect to Davis' conduct.[6]

Justice Alito framed the issue in *Vance* as deciding a question left open by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*[7] and *Faragher v. Boca Raton*.[8] Specifically, and as alluded to above, the open question was the definition of "supervisor" for purposes of a claim of workplace harassment under Title VII.

In *Ellerth* and *Faragher*, the Supreme Court held that an employer might be vicariously liable for its employee's creation of a hostile work environment in two different types of situations. First, an employer is vicariously liable when a supervisor takes a tangible action affecting the employee's status such as hiring, firing, failing to promote or causing a change in benefits. In this situation, the Court maintained, it is appropriate to hold the employer strictly liable. A second situation occurs when an employer can be held vicariously liable even if the supervisor's harassment does not result in tangible employment, because: 1) the employer cannot demonstrate that it exercised reasonable care to prevent and promptly correct any harassing behavior and 2) the employee failed to take advantage of any preventive or corrective action by the employer.[9]

In *Vance*, the Court noted that as a result of *Ellerth* and *Faragher*, the critical question is whether an alleged harasser is a "supervisor" or a co-worker and acknowledged the existence of a conflict between the lower courts about the meaning of supervisor. The court identified the First, Seventh and Eighth Circuits as those maintaining that an employee is not a supervisor unless he or she has the power to hire fire, demote, promote, transfer or discipline the victim.[10] The Second, Third and Fourth Circuits, on the other hand, have followed a more "open-ended" approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise direction over the employee's work.[11] To resolve this conflict the *Vance*

court held that an employer may be vicariously liable for an employee's harassment "only when the employer has empowered that employee to take tangible employment actions against the victim, i.e. to effect 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.'" In addition, the court rejected the EEOC's definition of supervisor as "nebulous."[12]

Writing for the minority view, Justice Ginsburg indicated that the EEOC's Enforcement Guidance was formulated as a result of the *Ellerth* and *Faragher* decisions and that such guidance addressed the qualifications of a supervisor as "an individual who is authorized to undertake or recommend tangible employment decisions… *or* an individual who is authorized to direct the employee's daily work activities."[13] Justice Ginsburg saw the majority opinion as one that diminished the force of *Ellerth* and *Faragher,* ignored the conditions under which members of the work force labor, and disserved the objective of Title VII to prevent discrimination from infecting the workplace. Accordingly, Justice Ginsburg would follow the EEOC Guidance and hold that the authority to direct an employee's daily activities establishes supervisory status under Title VII.[14]

Of course, the *Vance* decision has been the subject of many commentaries by the employment law bar. Most notably, however, is Judge Richard A. Posner's commentary noting that Justice Alito's majority opinion's narrow definition of supervisor as well as Justice Ruth Bader Ginsburg's broader definition in her dissenting opinion were both "vague" and simply not helpful.[15] Indeed, Judge Posner commented on the dissent's footnote reference to his opinion in *Doe v. Oberweis Dairy* in 2006.[16] This reference indicated that "[e]ven the Seventh Circuit, whose definition of supervisor the [Supreme] Court adopts in large measure, has candidly acknowledged that under its definition, supervisor status *is not a clear and certain thing*" particularly when dealing with an individual whose duties characterize him somewhere between a supervisor and a co-worker.[17]

In *Doe*, the facts involved a 16-year-old plaintiff who worked as a part-time ice cream server at the defendant's ice cream parlor. Her claim alleged that her supervisor, Matt Nayman, had harassed her sexually, culminating in sexual intercourse, for which he was prosecuted, convicted and ultimately imprisoned. Nayman had supervisory authority to direct the work of employees and could even issue disciplinary write-ups, but could not fire the employees. Judge Posner concluded in the *Doe* decision that "if forced to choose between the two pigeonholes, the court would be inclined to call Nayman a supervisor because he was often the only supervisory employee present in the ice cream parlor. He was thus in charge, and had he told his boss that one of the scooper girls was not doing a good job and should be fired, the boss would probably have taken his word for it rather than conduct an investigation."[18] In his commentary, Judge Posner also added that in *Doe*, the Seventh Circuit proposed a sliding scale, no longer viable as a result of *Vance*, where the employer's liability would depend on the extent of the authority the employer conferred on the employee. Judge Posner felt that a jury would be capable to make a sensible finding based on the specific facts of each case. As a final point, Judge Posner noted that Vance had a weak case, which serves as a reminder of an old law school adage that sometimes bad facts make bad law.

In any event, in *Vance* the majority opted to for a bright line test to determine who qualifies as a supervisor for purposes of Title VII over a case-by-case factual analysis. The question now becomes whether Congress will heed Justice Ginsburg's call to "correct this error and to restore the robust protections against workplace harassment." Stay tuned! ■

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1. 186 L. Ed. 2d 565; 2013 WL 3155228 (2013).
2. 2013 WL 3155228, * 3.
3. A more detailed description of Vance's allegations and factual background is found in the Seventh Circuit opinion. *See Vance v. Ball State University*, 646 F.3d 461, 466-468 (7th Cir. 2011).
4. 646 F.3d 461, 470 (7th Cir. 2011).
5. 276 F.3d 345, 355 (7th Cir. 2002).
6. 646 F.3d 473. Writing for the panel, Judge Wood acknowledged that the catering department at BSU was undoubtedly an unpleasant place for Vance between 2005 and 2007. However, he noted that the record reflected BSU promptly investigated Vance's complaints and responded appropriately and added that Title VII does not require an employer's response to "successfully prevent subsequent harassment."
7. 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998).
8. 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998).
9. 2013 WL 3155228, *5-6
10. *Id.* at * 7 (citations omitted).
11. *Id.*
12. *Id.*
13. *Id.* at *17, citing the *EEOC, Guidance on Vicarious Liability for Unlawful Harassment by Supervisors*, 8 BNA FEP Manual 405:7651 (Feb.2003).
14. *Id.*
15. Judge Richard A. Posner, *Court's Harassment Decision a Disappointment,* (June 2013), <http://www.pressofatlanticcity.com/opinion/commentary/richard-a-posner-courts-harassment-decision-a-disappointment/article_8128e579-c055-5f35-a01b-eefec45be8e6.html#facebook-comments>.
16. 456 F. 3d 704 (7th Cir. 2006).
17. 2013 WL 3155228, * 25, footnote 5.
18. 456 F. 3d 717.

Civil Rights Act decisions may limit workers' ability to sue for discrimination

By Tracy Douglas

In a pair of 5-4 decisions this past June, the Supreme Court limited the definition of supervisor and increased the standard of causation for retaliation under Title VII of the Civil Rights Act.[2] These decisions will make it easier for employers to defend against discrimination and retaliation claims. They may also limit the effectiveness of Title VII by restricting when the employer has strict liability for supervisor harassment and decreasing reports of harassment because employees fear retaliation, claims which must now be proved with but-for causation. This article will examine the rulings and discuss the impact on Civil Rights Act claims.

An employer is strictly liable for a supervisor's harassment of the victim, but an employer is liable for co-worker harassment only if the employer was negligent in controlling conditions of the workplace.[3] An employer can escape liability for supervisor harassment if there was no tangible employment action taken against the victim and the employer can establish the affirmative defense that "1) the employer exercised reasonable care to prevent and correct any harassing behavior and 2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."[4] The issue before the court in *Vance v. Ball State University* was what qualifies a person to be a supervisor so that the employer has strict liability.[5]

The Supreme Court adopted the rulings of appellate courts that limited "supervisor" to someone who has the power to "take tangible employment actions against the victim."[6] The Equal Employment Opportunity Commission (EEOC) defined a supervisor more broadly as a person who was "authorized 'to undertake or recommend tangible employment decisions affecting the employee'" or a person who was "authorized 'to direct the employee's daily work activities.'"[7] The Court rejected the EEOC's guidance because "supervisor status would very often be murky" and would confuse juries. The definition adopted in this case includes the ability "to hire, fire, demote, promote, transfer, or discipline the victim" and the ability to "cause 'direct economic harm' by taking a tangible employment action."[8] The majority reasoned that this bright-line standard would make more sense to a jury because it would be clear whether a person had those powers in order to be a supervisor.[9]

Justice Ginsburg's dissent argues that the majority's approach will leave employees without recourse when they have co-workers who can assign tasks or alter the work environment but do not have the power to take tangible employment actions.[10] Ginsburg maintains that the new rule "diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective or Title VII to prevent discrimination."[11] While the majority argues that employees will still be able to prevail by showing the employer was negligent, Ginsburg points out that those claims are harder to win than a claim where the employer has strict liability.[12] By limiting who qualifies as a supervisor to those who can hire and fire employees, the majority restricts employer's strict liability, favoring employers over employees with a narrow definition of supervisor.

Similarly, in *University of Texas Southwestern Medical Center v. Nassar* the Supreme Court constrained claims for retaliation by requiring the plaintiff to show that "the desire to retaliate was the but-for cause of the challenged employment action."[13] This standard will require "proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[14] Retaliation is banned by 42 USC §2000e-3(a), and the Court decided that retaliation was not included in "any employment practice" language of §2000e-2(m), which is governed by the motivating factor analysis, where a plaintiff can prevail if "discrimination was one of the employer's motives, even if the employer also had other, lawful motives."[15] The Court reasoned that Congress could have made the motivating factor standard apply to retaliation, but it did not.[16] The Court rejected the guidance of the EEOC that retaliation claims were covered by the motivating factor standard under *Skidmore* deference analysis because it failed "to address the specific provisions of this statutory scheme" and was generic in the discussion of the causation standards.[17] The Court asserted that allowing a motivating factor standard would increase frivolous claims.[18]

Justice Ginsburg dissented, arguing that the "Court has seized on a provision, §2000e-2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation."[19] Ginsburg asserts that "any employment practice" would cover retaliation and that retaliation is a form of status-based discrimination.[20] The dissent contends that but-for causation will not mean that a plaintiff can't prove unlawful retaliation, but it will mean that "proof of a retaliatory motive alone yields no victory for the plaintiff."[21] Ginsburg also points out that "a strict but-for test is particularly ill suited to employment discrimination cases" and it may cause victims of harassment to not report it out of fear of retaliation.[22]

Together, the *Vance* and *University of Texas Southwestern Medical Center* majority opinions narrow the definition of supervisor and limit retaliation claims, making it easier for employers to defeat Title VII claims. However, as Justice Ginsburg's dissents point out, they may also have the effect of making it harder for employees to successfully sue employers and preventing legitimate claims from being brought because workers fear retaliation, which is now subject to a stronger causation standard. Limiting who qualifies as a supervisor for the purposes of strict liability and limiting retaliation to proof of but-for causation seem to favor employers and reduce the force of Title VII. Congress can overturn the Court's limitations of Title VII if Congress disagrees with what the Court has done. But with the current Congress and other issues, that will be hard to pass. ■

Tracy Douglas is staff attorney for the Governor's Office of Executive Appointments and a member of the Standing Committee on Women and the Law. The opinions expressed herein are solely those of the author and not those of the Governor's Office.

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1. *Vance v. Ball State University*, No. 11-

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556, slip op. (U.S. June 24, 2013), <http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf>; *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, slip op. (U.S. June 24, 2013), <http://www.supremecourt.gov/opinions/12pdf/12-484_o759.pdf>; 42 USC § 2000e–2.

2. *Vance*, No. 11-556, slip op.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, slip op.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*