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Supreme Court Issues Pair of Favorable Opinions for Employers, but Celebrations Should Be Tempered

By Michael Mishlove

For most employers, the expression "a good day at court" is an oxymoron, period. Nevertheless, it is pretty fair to say that employers had a good day at court Monday, when the Supreme Court handed down two opinions that decidedly weigh in favor of employers in certain Title VII actions. In [Vance v. Ball State University](#), the Court provided employers some measure of insulation from exposure to vicarious liability for unlawful harassment perpetrated by "supervisors" in violation of Title VII by adopting a narrow definition of the term "supervisor" that restricts the reach of that term to employees who have the power to take "tangible employment actions" (defined as "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'") affecting the victim. In [University of Texas Southwestern Medical Center v. Nassar](#), the Court held that employees who bring retaliation claims against their employers under Title VII must prove that retaliatory animus (that is, the intent or desire to retaliate) was the "but for" cause of the adverse action giving rise to the retaliation claim.

Both of these opinions establish hard and fast decisional standards to be used in Title VII actions that are beneficial to the interests of employers. By adopting the narrow definition of "supervisor" (as opposed to a more open-ended definition used by [some federal appellate courts and the EEOC](#) that extends supervisor status to

employees who oversee and direct subordinates' daily work) and by requiring proof of "but for" causation (as opposed to the less demanding requirement of proof that retaliation was "a motivating factor" in the adverse action), the Supreme Court's decisions in these cases will undoubtedly serve to rein in employers' liability in Title VII harassment and retaliation actions.

Until Monday's decision in *Nassar*, [employers in a number of states](#) were subject to liability in retaliation lawsuits if the plaintiff simply proved that a desire to retaliate was a factor in the adverse action to which the plaintiff was subjected -- regardless of how minimal a factor the retaliatory intent was in the decision and regardless of whether the employer would have taken the same action even in the absence of a retaliatory motive. Under *Nassar*, plaintiffs who sue their employers for retaliation under Title VII cannot prevail unless they establish they would not have been subjected to the adverse action "but for" the retaliatory motive. To understand the importance of *Vance*, one must understand that, under the burden-shifting standards established by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1988), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), employers are vicariously liable for harassment perpetrated by "supervisors." Thus, if a plaintiff establishes that the alleged harasser was a "supervisor" (and assuming no tangible employment action took place), the employer will be held vicariously liable for that person's unlawful conduct unless it can prove the affirmative defense established in *Ellerth* and *Faragher* 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. As an "affirmative defense," employers have the burden of proof as to this defense.

Conversely, when the alleged harasser is a non-supervisory co-worker, the employer is only liable if the plaintiff proves the employer was negligent in preventing the harassment -- and, the plaintiff has the burden of proving the employer's negligence by a preponderance of the evidence. Thus, the effect of *Vance* is that in Title VII suits involving alleged harassment by lead workers -- those employees who lack authority to hire, fire, etc. but do have the power to direct and oversee the work of subordinates (e.g., foremen, working supervisors, etc.) -- the burden of proof will remain with the plaintiff to prove that the employer was negligent. There is no question that these are very welcome decisions to employers as they both establish more demanding standards that make it more difficult for employees to win Title VII actions, and employers have good reason to celebrate these decisions.

Nevertheless, employers should be mindful of several considerations that might get lost if one focuses solely on the employer-friendly black-letter rules of law announced in these

decisions. So, instead of simply using this 60 Second Memo as a vehicle for spreading the good news, and without any intent to rain on the parade here, I am going to call attention to a matter or two that ought not be lost on employers as they celebrate the decisions. There is a very real sense in which *Vance* makes the ranks of non-supervisor lead workers a group warranting special consideration in employers' anti-harassment and equal opportunity compliance efforts. It is important to recognize that, while *Vance* restricts the class of employees with respect to which employers are subject to vicarious liability -- and, more specifically, excludes from "supervisors" all manner of employees however denominated who lack authority to hire, fire, etc. but do have the power to direct and oversee the work of subordinates -- the decision makes clear that an employer's delegation of the authority to oversee work of subordinates to "non-supervisor" lead workers is not immaterial to the question of that employer's liability for harassment perpetrated by such employees.

First, even when the harasser is not a supervisor, employers are still subject to liability if the plaintiff can prove the employer was negligent in failing to prevent the harassment. The totality of circumstances surrounding an employer's delegation of authority (however limited it might be) will be part of the negligence analysis. For example, a court may examine whether the employer, having decided to confer authority on lead workers to determine subordinates' work day, provided any additional harassment training to such persons before letting them loose to exercise discretionary authority affecting the daily work life of those who work under their direction. Indeed, the Supreme Court expressly instructed that in these cases, "the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent."

Additionally, as the Court expressly noted in *Vance*, when the authority to make tangible employment actions is confined to a small number of individuals, "those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee." In those situations, plaintiffs will undoubtedly argue that for all intents and purposes, the employer "effectively delegated the power to take tangible employment actions to the employees on whose recommendations [the supervisor] relies." Thus, in lawsuits involving circumstances of this sort, plaintiffs' lawyers will undoubtedly make the question of the "non-supervisor" lead-worker's role in the decision making process a focus of the litigation, and the resolution of this question is likely to be a hotly contested factual dispute that will not be easily amenable to determination by the court in summary judgment proceedings.

For employers with operations in the Second, Fourth, and Ninth Circuits (covering Alaska, Arizona, California, Connecticut, Hawaii,

Idaho, Maryland, Montana, Nevada, New York, North Carolina, Oregon, South Carolina, Virginia, Washington, West Virginia, and Vermont), where the federal appellate courts had previously extended the scope of the term "supervisor" to employees whom the employer has vested authority to direct and oversee the work of other employees, *Vance* changes the operative standard. In contrast, the standard adopted in *Vance* was already the controlling standard in the First, Seventh, and Eighth Circuits (covering Arkansas, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, and Wisconsin), and therefore *Vance* does not alter the legal terrain in those states at all.

Of course, employers should also keep in mind that each state may have its own fair employment law that uses a different definition of "supervisor" than the Supreme Court adopted in *Vance*.

In short, it is great that employers no longer face the prospect of vicarious liability for unlawful harassment perpetrated by the scores of employees who have been afforded some measure of discretionary authority over the work lives of their subordinates. But the reality of the matter is that there are literally scores of such employees in the nation's workplace and heretofore employers may not have given these workers any particular consideration in their anti-harassment and equal opportunity compliance efforts. It would be unwise to maintain that status quo in the wake of *Vance*, as the decision will undoubtedly make this group of employees the next major focus of litigious employees.

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