

## LABOR &amp; EMPLOYMENT

# ALERT

## UNITED STATES SUPREME COURT SETS FORTH NEW STANDARDS IN HARASSMENT AND RETALIATION SUITS UNDER TITLE VII

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On June 24, 2013, in two separate 5-4 opinions, the United States Supreme Court answered two unresolved questions under Title VII of the Civil Rights Act of 1964 (Title VII), the federal law that prohibits discrimination in employment decisions on the basis of race, color, religion, sex and national origin. Specifically, the Supreme Court held: (1) that an employee is a “supervisor” for purposes of an employer’s vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the alleged victim (i.e., the power to hire, fire, promote or make a decision causing a significant change in benefits); and (2) that in order to prevail on a Title VII retaliation claim, a plaintiff must establish that his or her protected activity was the “but-for” cause of the alleged adverse action by the employer, rather than just one of the employer’s motives in the decision. These new, stricter standards will make it more difficult for an employee to establish a claim of retaliation and to hold an employer liable for workplace harassment under federal law.

### **Vance v. Ball State University**

The holding in *Vance v. Ball State University*, 570 U.S. \_\_\_ (2013) is significant for employers because under Title VII, an employer’s liability for workplace harassment depends on the status of the harasser — whether he or she is a “supervisor” or a “co-worker” of the plaintiff. If the harassing employee is the victim’s co-worker, the employer is liable only if it was *negligent* in controlling the working conditions. However, different rules apply when the harasser is a “supervisor.” If the supervisor’s harassment culminates in a “tangible employment action” (e.g., termination, demotion, pay decrease, etc.), the employer is *strictly liable* (i.e., no defenses to liability if the harassment is proven). If no tangible employment action occurs, the employer may escape liability by establishing what is known as the “*Faragher-Ellerth*” affirmative defense (named after two previous Supreme Court rulings): (1) that the employer exercised reasonable care to prevent and correct any harassing behavior; and (2) that the plaintiff unreasonably failed to take advantage of the preventative or

corrective opportunities that the employer provided.

In this case, Maetta Vance, who worked as a substitute server in the University’s Banquet and Catering division, claimed that she was subjected to a racially hostile work environment in violation of Title VII based on certain interactions with a fellow University employee, Sandra Davis. Ms. Davis was employed as a catering specialist in the Banquet and Catering Division, and Ms. Vance alleged that Ms. Davis was her supervisor. While the parties vigorously disputed the precise nature and scope of Ms. Davis’ duties, they agreed that Ms. Davis did not have the power to hire, fire, demote promote, transfer or discipline Ms. Vance.

The Supreme Court ultimately rejected what it called the “nebulous” and “open-ended” definition of supervisor advocated by the EEOC and substantially adopted by certain Courts of Appeals, which tied supervisor status to the ability of the individual to “exercise significant discretion over another’s daily work.” The Supreme Court examined the use of the term “supervisor” in general usage and in other legal contexts (acknowledging that the meaning of the concept of a supervisor varies from one legal context to another), but ultimately concluded that the ability to supervise usually includes the ability to take tangible employment actions. The Court reasoned that negligence provides a better framework for evaluating an employer’s liability when a harassing employee lacks the power to take tangible employment actions (i.e., hiring, firing, promoting, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits). Here, because there was no evidence that the University empowered Ms. Davis to take any tangible employment actions against Ms. Vance (and because there was no evidence of negligence on the part of the University because it responded reasonably to the incidents of which it was aware), the Supreme Court affirmed the dismissal of Ms. Vance’s action.

### **University of Texas Southwestern Medical Center v. Nassar**

In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. \_\_\_ (2013), the Supreme Court was called upon to define

the proper standard of causation for Title VII retaliation claims on account of any employee having opposed, complained of, or sought remedies for unlawful workplace discrimination. Under existing precedent and the Civil Rights Act of 1991, an employee who alleges discrimination on the basis of race, color, religion, sex or national origin in hiring, firing, salary structure, promotion and the like (so-called “status-based discrimination”) need only show that the motive to discriminate was *one* of the employer’s motives, even if the employer also had other, lawful motives that contributed to the employer’s decision. The Supreme Court granted certiorari to address the question of whether this “lessened causation standard” is also applicable to claims of unlawful employer retaliation under Title VII.

In this case, Naiel Nasser, a medical doctor, worked as a member of the University’s faculty and as a staff physician at Parkland Memorial Hospital. Dr. Nasser claimed retaliation after the University rescinded a job offer for a vacant staff physician position following his complaints of alleged harassment based on religion and ethnic heritage by his colleague Dr. Levine. Here, there was arguably evidence of “mixed motives” on the part of the University in rescinding the job offer. On the one hand, Dr. Nasser was technically ineligible for the staff physician job because he has resigned from his teaching position (and the University’s agreement with the Hospital required that such positions be offered to current faculty members). On the other hand, Dr. Levine’s supervisor admittedly objected to the job offer at least in part because he wanted Dr. Levine “publicly exonerated” with respect to Dr. Nasser’s allegations of harassment.

The Supreme Court examined the text, structure and legislative history of Title VII in detail before concluding that a retaliation claim must be proven according to traditional principles of “but-for causation,” not the lessened causation test (“motivating factor”) applicable to status-based discrimination claims, such as claims for race, sex or religious discrimination. Thus, in order to prevail on a Title VII retaliation claim a plaintiff must prove that the plaintiff’s protected activity was *the cause* for the wrongful actions taken by the employer, not just a motivating factor in the decision. Because this new standard substantially affected Dr. Nasser’s ability to establish retaliation, the Supreme Court remanded the case for further proceedings consistent with the opinion.

### **Practical Implications of Both Decisions**

The Supreme Court’s decisions in *Vance* and *Nasser* continue the mostly pro-employer trend of the Roberts Court. Moreover, the Supreme Court clearly focused on practical considerations in both decisions, including the fair and responsible allocation of judicial resources, more workable standards that will help streamline litigation and even reduce the number of frivolous

claims, and the legitimate interests of both employers and employees.

For example, in *Vance*, the Supreme Court pointed out that because an individual’s supervisory status will now be more clear, the “parties will be in a better position to assess the strength of a case and to explore the possibility of resolving the dispute.” The Supreme Court went a step further in *Nasser*, remarking that its retaliation holding “is of particular significance because claims of retaliation are being made with ever-increasing frequency.” The Supreme Court cited EEOC statistics showing that the number of retaliation charges has nearly doubled in the past 15 years “outstripp[ing] those for every type of status-based discrimination except race,” adding that the stricter causation standard it announced in *Nasser* could lead to less frivolous claims being filed and could make it easier for employers to dismiss “dubious” retaliation claims at the summary judgment stage.

Both decisions also reinforce the importance of establishing and enforcing policies against workplace discrimination and harassment (with clear reporting procedures and prohibitions against retaliation), immediately investigating all employee complaints of discrimination and harassment, and promptly taking the appropriate corrective action taken to address the situation — along with management training on these policies and procedures. Although the class of employees who will be deemed supervisors has narrowed, the standards for employer liability for a supervisor’s conduct remain unchanged. Moreover, an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment. Furthermore, even under the stricter “but for” causation standard for retaliation claims, proper training and documentation of employees’ performance, misconduct or other issues that could subject the employee to an adverse employment action remains critical in defending against such claims.

While these two Supreme Court decisions will certainly make it more difficult for employees to establish a claim of retaliation or vicarious liability for workplace harassment under federal law, it is important to remember that standards under state and local laws may be more employee-friendly. Therefore, the best way employers can avoid and defend against discrimination and harassment claims is to have the proper anti-discrimination and anti-harassment policies in place and to train their employees about such policies in order to prevent such claims from occurring in the first place.

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