# CLIENT ALERT

## WHAT EMPLOYERS REALLY NEED TO KNOW ABOUT THE TWO RECENT SUPREME COURT WORKER BIAS CASES

**By: Marc R. Engel, Esq.**

By now, most employers and business advisors generally are aware of the pair of Supreme Court decisions announced in late June that have garnered considerable media attention. To briefly recap, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that an individual who alleges retaliation under Title VII of the Civil Rights Act of 1964 for opposing an unlawful employment practice or action or participating in an investigation, proceeding, or hearing under Title VII needs to satisfy a stricter standard of proof. It must be shown that the action was actually motivated by the employee's discrimination complaint; in other words, the "but for" cause of the adverse employment action taken. The Supreme Court's decision in *Nassar* resolved a split in the federal circuit courts concerning whether this stricter standard should apply, or whether a softer standard requiring only that the employee demonstrate that the discrimination complaint was a motivating factor would be sufficient.

In *Vance v. Ball State University*, the Supreme Court established a new definition of "supervisor" for purposes of determining an employer's liability under Title VII. The majority decision, written by Justice Alito, applied a narrower definition of "supervisor": Only a person with the authority to hire, fire, promote, demote, transfer, or discipline workers qualifies as a supervisor. It was not sufficient, the Supreme Court ruled, to impose vicarious liability on an employer if the individual merely oversaw the work of the plaintiff. The definition of supervisor is significant because a company faces greater liability if the supervisor, as opposed to a non-supervisory employee, engages in discriminatory behavior.

Viewed together, these cases have been widely viewed as raising the bar for employees in worker bias cases. Although the decisions in *Nasser* and *Vance* are certainly welcome news for employers, it is not the time for employers to relax.

**Then what do employers *really need to know* about these two decisions?**

(1) They may have limited impact. These decisions apply only to retaliation claims based upon Title VII. Other anti-discrimination statutes, including the Americans with Disabilities Act (ADA), have different statutory frameworks and proof requirements. For example, under the ADA, individuals attempting to prove retaliation have an easier burden as they must establish only that the complaint

or protected conduct engaged in by the employee was a motivating factor in the adverse employment action (i.e., termination, demotion, transfer, etc.) taken by the employer.

(2) A crazy quilt of anti-discrimination statutes remains. Many employment claims are brought under *state and local* anti-discrimination statutes that may also have different statutory frameworks and different standards of proof. For example, an employee alleging unlawful retaliation under Maryland's state anti-discrimination statute need only prove that the protected conduct taken by the employee was a motivating factor. Whether the Supreme Court's decision in *Nassar* will prompt consideration of reversal of the current state of Maryland law on this issue (particularly since the Maryland statute is largely predicated upon the federal statute) remains to be seen.

(3) Reviewing job descriptions is a must. It is critically important that employers review and revise job descriptions to make sure that they accurately reflect the responsibilities of employees and, in particular, supervisors particularly in light of the Supreme Court's decision in *Vance*.

(4) Careful selection of supervisors is required. Since employers will face significant liability for the actions of their supervisors, it is important that they are very careful in selecting individuals for a promotion to supervisor. The fact that the individual has excelled in a certain "worker" capacity does not necessarily mean that the same individual has the skillset needed to be an effective supervisor.

(5) Training, training, training. Employers need to train all managers and supervisors on how, when, and why claims for discrimination and retaliation are filed.

(6) Document, document, document. Documentation of performance related issues will remain important for employers. Many retaliation claims are filed because of the perception by employees that their complaints about certain conduct resulted in an adverse employment action. Employers that (i) properly train supervisors on how to handle personnel issues and (ii) properly and timely communicate – in writing -- performance issues with employees substantially diminish the risks that retaliation claims will be successful.

(7) Effective coordination is vital. Managers and supervisors need to understand the importance of working effectively and collaboratively with human resource professionals to determine when and under what circumstances adverse employment decisions should be made and implemented. A coordinated approach to performance-related issues is one of the smartest measures that employers can take to position themselves to prevent retaliation claims.

(8) Insurance issues. Employers need to continue to explore the full scope of available insurance coverages for discrimination and retaliation claims, such as Employment Practices Lacking Insurance (EPLI) and insurance for individual executives and supervisors.

**What's next?**

Like other recent employment discrimination decisions issued by the Supreme Court, the decisions in *Nassar* and *Vance* likely will raise as many or more questions as they resolve. Whether these decisions, as Justice Alito predicted in *Vance*, will substantially reduce the number of retaliation claims that are filed remains to be seen. There can be little doubt that plaintiffs' attorneys will attempt to navigate around these decisions. Employers who assume they no longer need to fear retaliation claims do so at their peril. It is important that executives and their business advisors understand the importance of committing the time and resources of experienced personnel (including counsel) to create effective job descriptions and other employment documents; to conduct effective training of managers, supervisors, and employees; and to educate staff as to when, why, and how retaliation claims are filed. Employers who take the measures outlined above will be positioned best not only to reduce the likelihood of the filing of retaliation claims, but to successfully defend such claims if they are filed.

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