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Employment Practices ALERT

Supreme Court Edition

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The U.S. Supreme Court recently ruled on a number of cases affecting employers. This alert contains a summary of three rulings employers should be aware of, and their implications for the workplace:

Supreme Court: Proving Title VII Retaliation Claim Requires "But-For" Causation

Adding to a recent string of victories for employers, the U.S. Supreme Court ruled on June 24, 2013 that claims for retaliation under Title VII of the Civil Rights Act of 1964, as amended, must be proved "according to traditional principles of but-for causation." University of Texas *Southwestern Medical Center v. Nassar*, No. 12-484 (Sup. Ct. June 24, 2013). The decision means that plaintiffs bringing Title VII retaliation claims will be required to prove that an employment action "would not have occurred" if not for the employer's retaliatory motive. It settles the question of causation in Title VII retaliation claims. More broadly, however, it also provides new evidence that the lessened "motivating-factor" standard, which allows plaintiffs to prevail as long as they can prove that discrimination was just one of many factors in an employment decision, is a unique statutory creation that is limited to Title VII race, color, religion, sex and ethnicity claims. This ruling effectively overrules the opposite position taken by the U.S. Equal Employment Opportunity Commission (EEOC), and therefore is unquestionably good news for employers.

The case arose from a dispute between a physician and his employer, a medical school. The medical school maintained an affiliation agreement with a hospital that permitted faculty members to fill all hospital staff positions. When the physician perceived that his newly-hired superior was discriminating against him based upon his religion and ethnicity, he resigned from the school and sought to become a full-time employee of the hospital. The hospital initially agreed, but withdrew its offer when a representative of the school protested. Although the school representative had a legitimate reason for opposing the offer (i.e., the affiliation agreement required that all staff physicians be faculty members of the school), he also publicly opposed the physicians' discrimination allegations and defended the accused superior. The physician subsequently sued the medical school and the hospital under Title VII, alleging that the hospital's decision to withdraw his offer was in retaliation for his speaking out about the alleged discrimination.

Title VII prohibits employment discrimination based upon seven factors. Five of the factors are protected characteristics (race, color, religion, sex, and ethnicity) and two are protected conduct (opposition to discrimination or support of another's opposition). In 1991, Congress amended Title VII to make clear that in cases involving the first five "characteristic" factors, the plaintiff need only show that a prohibited trait "was a motivating or substantial factor in the employer's decision," even if other factors also could explain the decision.

The question raised in Nassar was: does that burden of proof also apply to the latter two "conduct" factors? If the "motivating-factor" standard applied, plaintiff could prove his case by showing that the representative was in part retaliating because of his discrimination complaints; if the "but-for" standard applied, however, plaintiff most likely could not prove his case because the affiliation agreement also played an important role in the hospital's decision to withdraw the offer.

The majority, overruling the U.S. Court of Appeals for the Fifth Circuit, held that the stricter "but-for" test applies to retaliation claims, requiring a showing "that the harm would not have occurred" in the absence of the retaliatory motive. "Congress acted deliberately when it omitted retaliation claims from" the "motivating-factor" portion of Title VII," Justice Anthony Kennedy wrote for the majority, and "[i]f Congress had desired to make the motivating-factor standard applicable to all Title VII claims, it could have."

University of Texas Southwestern Medical Center v. Nassar, No. 12-484 (Sup.Ct. June 24, 2013)

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In Significant Title VII Harassment Decision, U.S. Supreme Court Limits Definition of "Supervisor"

An African American female who served in a university's dining services division filed a complaint against the university, alleging racial harassment and discrimination due to the actions of a white catering specialist who worked at the same location. The catering specialist did not direct the employee's day-to-day activities or have authority to hire, fire, demote or discipline the employee, but sometimes handed the employee her list of tasks and directed the employee in the kitchen. The employee alleged that the catering specialist was her supervisor and that the university was liable for the creation of a racially hostile work environment.

In the lawsuit against the employer, the central issue was whether the catering specialist was the employee's supervisor. This was significant because in previous cases, the U.S. Supreme Court has held that different rules apply where the harassing employee is the plaintiff's "supervisor." In cases of supervisory harassment, an employer can be held strictly liable when a supervisor takes a tangible employment action. In addition, even in cases when a supervisor's harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense.

The U.S. Court of Appeals for the Seventh Circuit held that the catering specialist was not the employee's supervisor because a supervisor's status requires "the power to hire, fire, demote, promote, transfer, or discipline an employee."

The Supreme Court agreed and 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." The Court specifically rejected the EEOC's definition of "supervisor," which required only that the individual have authority of sufficient magnitude to explicitly or implicitly assist the harasser in carry out the harassment. The Supreme Court criticized this definition as vague and held that it did not provide adequate guidance to employers or juries in determining the status of the harasser. Moreover, the Court noted that the bright-line definition accepted by the Court would streamline litigation and avoid the presentation of extensive evidence on the status of the harasser as well as the nature of the harassment.

It should be noted, however, that job definitions and duties alone may not be determinative of supervisory status. The Court noted that "if an employer does attempt to confine decision-making power 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." Under those circumstances, the Court found that the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies. Accordingly, an employer will have to consider which employees provide input into tangible employment decisions, as well as the final decision makers, in evaluating supervisory liability.

Ultimately, this case is a victory for employers. It provides clarity to the definition of a "supervisor" which will also give employers greater predictability of success in harassment actions. That being said, employers should consult with counsel to evaluate their current employment structure in light of this decision.

Vance v. Ball State University, No. 11-556 (Sup. Ct. June 24, 2013)

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Good News for Employers: Supreme Court Approves Class-Action Arbitration Waiver

In a significant victory for businesses and employers, the U.S. Supreme Court ruled on June 20, 2013, that a class-action waiver in an arbitration agreement is valid and enforceable under the Federal Arbitration Act (FAA) even if the costs of prosecuting the claim on an individual basis are financially impracticable. *American Express Co. et al. v. Italian Colors Restaurant et al.,* Case No. 12-133 (June 20, 2013). The majority based its ruling on two findings: (1) that the federal statute at issue did not expressly override the FAA's preference for enforcing private arbitration agreements as written; and (2) that the financial burdens imposed on individual claimants did not require application of the "effective vindication" rule, which permits courts to invalidate arbitration agreements that prevent a party from effectively pursuing a remedy provided by federal law.

In short, the Court determined that waiving the right to prosecute a claim on a class-wide basis, with multiple parties sharing the financial burdens, is not the same as waiving the right to the claim itself, the latter of which would be impermissible under the FAA. “The fact that it is not worth the expense involved in proving a statutory remedy,” Justice Antonin Scalia wrote for the majority, “does not constitute the elimination of the right to pursue that remedy.” The decision opens the door for businesses and employers to expand their use of class-action waivers in their arbitration agreements as they pertain to other federal claims.

In *Italian Colors,* a group of merchants each separately signed a commercial arbitration agreement with a credit card company that required arbitration of claims but provided that such arbitration would be unavailable “on a class basis.” Despite the agreement, the merchants filed a class-action lawsuit against the company, alleging violations of federal antitrust laws. The credit card company moved to compel individual arbitration of the claims. The merchants, in turn, argued that the agreements that they signed were unenforceable under the FAA. Their theory was that the burdensome costs of individual arbitration effectively denied them the right to their federal antitrust remedy. They alleged that proving a claim would require expensive expert analysis and cost several hundred thousand dollars, and that each claimant would stand to be awarded about $40,000 at most. The U.S. Court of Appeals for the Second Circuit agreed, finding that the arbitration agreements were invalid under the FAA due to the “prohibitive costs” that they imposed and that the class-action suit therefore should go forward. The credit card company appealed.

In a 5-3 decision, the Supreme Court reversed the Second Circuit’s decision and upheld the arbitration agreements. Justice Scalia, writing for the majority, began by noting that the FAA was designed by Congress to ensure that arbitration remains “a matter of contract.” Therefore, the majority observed, courts are compelled to “rigorously enforce” parties’ private arbitration agreements, with just two exceptions: where a separate federal statute expressly overrides the FAA and where an arbitration agreement is so restrictive that it prevents “effective vindication” of a federal cause of action.

The majority found that neither exception applied in this case. First, the justices found that the federal antitrust statutes at issue — the Sherman and Clayton Acts — contained no express intention on the part of Congress to override the FAA’s “usual rule” favoring private agreements. It therefore would be “remarkable for a court to erase that expectation,” Justice Scalia wrote. Second, the majority found no basis to conclude that the “effective vindication” of a federal statutory right was being prevented in this case. That exception, Justice Scalia wrote, “would certainly cover a provision . . . forbidding the assertion of certain statutory rights” and would “perhaps” cover a situation in which filing and administrative fees “make access to the forum impracticable.” But a class-action waiver such as the one in this case “merely limits arbitration to the two contracting parties,” he concluded, and does not cut off access to the forum itself. Thus, notwithstanding any financial burdens for an individual claimant, a class-action waiver is permissible and does not prevent “effective vindication” of a federal claim.

Italian Colors provides a new tool for employers and businesses as they draft arbitration agreements. Provided that an agreement does not require express waiver of federal rights or create unreasonable barriers to prosecuting a claim in the arbitration forum, a provision such as a class-action waiver is valid and enforceable. The argument that individual employees or customers would not have the financial incentive or capability to prove their federal claims individually is insufficient to invalidate such

provisions, which now may be applied to class waivers regarding some federal discrimination and employment-related statutes.

American Express Co. et al. v. Italian Colors Restaurant et al., Case No. 12-133 (June 20, 2013)

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