

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

CivilLITIGATION

High court decisions a boon for employers under Title VII

In June, the United States Supreme Court issued two decisions under Title VII of the Civil Rights Act of 1964 (Title VII), both good news for employers. First, the court narrowed the definition of “supervisor” to include only employees with the authority to take tangible employment actions against the alleged victim of harassment. Second, the court narrowed the causation standard for retaliation under Title VII, making it harder for employees to succeed on retaliation claims.

In *Vance v. Ball State University*, the court, for the first time, defined the term “supervisor” for the purposes of employment discrimination and harassment litigation. The court made it more difficult to hold employers liable for the actions of their supervisors, unless the supervisor is authorized to take tangible employment actions against the employee.

In *Vance*, the employee sued her employer, claiming that someone she alleged to be her supervisor subjected her to a racially hostile work environment in violation of Title VII. In upholding the dismissal of the plaintiff's claims, the court first looked to two of its prior decisions which established the standard of employer liability for harassment under Title VII, depending on the harasser's identity.

In its prior rulings, the court held that if the harasser was a co-worker, the employer would be liable only if it knew or should have known of the harassment and was negligent in addressing the conduct. On the other hand, if the harasser was a supervisor, the employer would be strictly liable if the harassment resulted in a tangible employment action.

If, however, the harassing conduct did not result in a tangible employment action, the employer would still face liability but could refute it by proving that it exercised reasonable care to

prevent and correct any harassing behavior, and that the victim employee unreasonably failed to take advantage of preventative or corrective opportunities offered by the employer.

While the defending employer retained the burden of proof in establishing reasonable care when supervisors engaged in discriminatory conduct, the duty to prove employer negligence in correcting or remedying the offensive behavior by co-workers fell to the suing employee.

The *Vance* court defined “supervisor” by finding that only those employees who have the authority to take tangible employment actions — hire, fire, promote, demote, transfer, discipline, reassign with significantly different responsibilities, or make a decision which causes a significant change in benefits — with respect to the victim, are considered supervisors. The court, in issuing this bright line rule, expressly rejected the EEOC's definition of supervisor for a more strict definition.

On the same day that it issued the *Vance* decision, the court also issued another significant employment decision, *Univ. of TX Southwestern Med. Ctr. v. Nassar*, where it determined how retaliation claims under Title VII of the Civil Rights Act will be analyzed. The court held that Title VII retaliation claims must be proved according to the traditional principles of but-for causation, not the lessened motivating-factor test that governs Title VII discrimination claims.

The *Nassar* plaintiff alleged that he was retaliated against for complaining of discrimination. The trial jury was instructed that retaliation claims, like discrimination claims, require only a showing that retaliation was a motivating factor for the action,

Continued ...



By **JENNIFER A. SHOEMAKER**
Daily Record
Columnist

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

rather than its but-for cause. The jury returned a verdict for the plaintiff, which was upheld by the 5th Circuit.

The Supreme Court vacated the 5th Circuit's decision and concluded that the statute requires proof that retaliation is the "but-for" cause of the adverse employment action, rather than simply "a motivating factor" for the adverse employment action. The court reviewed the common law and concluded that it is "textbook tort law" that a plaintiff ordinarily must provide that the harm "would not have occurred in the absence of — that is, but for — the defendant's conduct."

The court noted that Title VII's status-based discrimination provision was expressly amended in 1991 to provide that "race, color, religion, sex, or national origin" need only be "a motivat-

ing factor" for an employment practice in order to establish that the employment practice is unlawful, but Title VII's retaliation provision was not similarly amended.

Noting that retaliation claims are being made with increasing frequency, the court found that the "but-for" causation standard also struck the appropriate balance between protecting the rights of employees and protecting employers from frivolous claims.

While both decisions can be seen as a "win" for employers, as always, employers must remain vigilant about harassment and discrimination in the workplace.

Jennifer A. Shoemaker is an associate in Underberg & Kessler LLP's Litigation and Labor & Employment Practice Groups. She concentrates her practice in the areas of employment and family law.