

BURR ALERT

Historic Supreme Court Term Includes Two Favorable Decisions for Employers

E. Travis Ramey

July 2013

News agencies flocked to Washington D.C. to witness the end of the United States Supreme Court's October 2012 term expecting something momentous. Handing down historic decisions on such controversial issues as affirmative action, the Voting Rights Act, and same-sex marriage, the Court did not disappoint. Potentially overshadowed by those decisions, however, were two decisions of the Court favorable to employers. Both decided on June 24, 2013, by 5–4 majorities, the Court's decisions in *Vance v. Ball State University* and *University of Texas Southwestern Medical Center v. Nassar* provide employers facing employment discrimination lawsuits a better chance of a favorable outcome.

The *Vance* decision discussed who qualifies as a supervisor in a workplace harassment case. Employers generally bear greater responsibility to prevent workplace harassment by a supervisor. If the harasser is a coworker, and not a supervisor, an employer may be held liable only if it was negligent in how it controlled working conditions. In *Vance*, the Supreme Court held that an employee counts as a supervisor only if he or she has authority to take "tangible employment actions" against the alleged harassment victim. The Court defined a tangible employment action as 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." If the alleged harasser lacks that type of authority, then the employer cannot be held vicariously liable for his or her actions.

The *Nassar* decision dealt with proving causation in a retaliation case. Retaliation cases generally require proof that an employee has engaged in some sort of protected conduct and, because of that conduct, the employer has taken some adverse action against the employee. The United States Court of Appeals for the Fifth Circuit had held that it was enough for an employee to show that protected conduct was a motivating factor in the employer's decision. In *Nassar*, the Supreme Court disagreed, instead holding that the employee must prove that the protected conduct was a but-for cause of the adverse action. As a result, if the employer would not have taken the adverse action "but for" the protected conduct, it can be liable. But, if an employer would have taken the same action absent the protected conduct, it cannot be held to have retaliated against the employee.

What do these decisions mean for employers? In the daily operation of their business, probably not much. It is still important for employers to have solid harassment policies in place that contain a reporting procedure. It is still important for employers to be careful when assigning

supervisory responsibility and when giving employees job titles that make them sound like supervisors. It is also still important to carefully document the reasons for taking an adverse action against an employee.

Nevertheless, these decisions should increase the likelihood of an employer prevailing in harassment cases and in retaliation cases. By limiting the number of employees who will qualify as supervisors, the Supreme Court has reduced the burden of defending against some workplace harassment suits. By requiring employees to prove that their protected conduct was the actual cause of an adverse action, the Court decreased the ability of a problem employee to avoid adverse action by engaging in protected conduct.

Ultimately, only time will tell the significance of *Vance* and *Nassar*. After several employee-friendly decisions from the Supreme Court in recent years, however, these two decisions are a welcome step in the right direction.

FOR MORE INFORMATION, CONTACT:

[E. Travis Ramey](#) in Birmingham at (205) 458-5489 or tramey@burr.com
or the Burr & Forman attorney with whom you regularly work.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.