

# PUBLICATION

---

## Supreme Court Decides Two Significant Cases in Favor of Employers

June 24, 2013

**On June 24, 2013, the U.S. Supreme Court issued two decisions that will provide useful tools to employers in defending employment litigation.**

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court ruled that an employee must show "but for" causation to establish a retaliation claim under Title VII. The Plaintiff and the EEOC argued that the Plaintiff must only show that protected activity was a "substantial motivating factor" in the adverse employment action. The Plaintiff reasoned that discrimination cases only require the "substantial motivating factor" causation standard, and therefore, the same causation standard should apply to retaliation cases. The Supreme Court, in a 5 to 4 decision written by Justice Kennedy, strictly interpreted the retaliation provisions in Title VII and its 1991 Amendments. Since the statute refers to retaliation "because of" protected activity, the Court held that the higher "but for" causation is required to establish retaliation. Notably, the Court found the EEOC's enforcement guidance lacked "persuasive force." This decision will greatly assist employers defending retaliation claims because many lower courts had been applying the lower "substantial motivating factor" causation test to retaliation claims.

In *Vance v. Ball State University*, the Supreme Court clarified the meaning of "supervisor" in the context of harassment claims. *Vance* was a 5 to 4 decision written by Justice Alito. Under existing Supreme Court precedent, the analysis of whether the employer is liable for harassment differs, depending on whether the alleged harasser is a co-worker or a supervisor. If the harassment is committed by a co-worker, then the plaintiff has the burden of showing that the employer was negligent in failing to prevent or promptly correct harassment. However, if the harassment was committed by a supervisor, then the employer must affirmatively show that it (1) exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the employee failed to take advantage of any preventative or corrective opportunities provided by the employer. Therefore, the burden of proof in harassment cases differs significantly, depending on whether the alleged harasser is a co-worker or a supervisor.

In *Vance*, the Court held that in order to be considered a "supervisor" for the purpose of the harassment analysis, the alleged harasser must be "empowered by the employer to take tangible employment actions against the victim." The Court explained that such "tangible employment actions" include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Unless the harasser is empowered to take tangible employment action against the plaintiff, the plaintiff will bear the burden of establishing that the employer was negligent in failing to prevent or promptly correct the harassment.

As a result of this decision, employers will be less likely to be liable for harassment by individuals that marginally direct the plaintiff's day-to-day work, such as team leads or assistant managers.