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LITIGATION RELIEF

While several high-profile cases captured the headlines, the United States Supreme Court handed down two decisions with ramifications for employers covered by equal employment opportunity laws. The decisions limit the scope of exposure for employers in certain situations.

Generally, if an equal employment opportunity complaint against a business involves race, color, religion, sex (including pregnancy), national origin, disability or genetic information, the business is covered if it has 15 or more employees who worked for the employer for at least twenty calendar weeks. If a complaint involves age discrimination, the business is covered if it has 20 or more employees who worked for the company for at least twenty calendar weeks.

In the first case, the Supreme Court tightened up the scope of who is a "supervisor" in harassment cases.

Under Title VII of the Civil Rights Act of 1964, an employer's liability for workplace harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling

working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action such 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, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

In *Vance v. Ball State University*, the plaintiff sued her employer, Ball State University (BSU) alleging that a fellow employee created a racially hostile work environment in violation of Title VII. The fellow employee could assign tasks to the plaintiff but could not hire, fire, demote, promote, transfer, or discipline the plaintiff.

The plaintiff's lawsuit relied upon Equal Employment Opportunity

Commission (EEOC) guidelines that stated: "An individual qualifies as an employee's "supervisor" if the individual has the authority to recommend tangible employment decisions affecting the employee or if the individual has the authority to direct the employee's daily work activities."

A federal District Court granted summary judgment to BSU. It held that BSU was not vicariously liable for the fellow employee's alleged actions because that individual, who could not take tangible employment actions against the plaintiff, was not a supervisor. An appeals court affirmed the decision and now the Supreme Court has agreed with the lower courts.

The Supreme Court said the EEOC's guidelines were too expansive and that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim.

In the second case, *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court dealt with the issue of claims of wrongful conduct by an employer based on retaliatory

actions taken by an employer when an employee complains of discriminatory activity. The Court concluded that there are two different standards of proof; one for the discriminatory activity and the other for the wrongful conduct based on retaliation.

In status-based discrimination claims, an employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. It is sufficient in such cases to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.

In the case before the Supreme Court, the plaintiff asserted, and EEOC guidelines suggested, that the same standard applied to wrongful conduct claims based on retaliation. The Court disagreed and held that a different standard applied; that retaliation claims must be proved according to traditional principles of but-for causation. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

The Court noted, "The proper interpretation and implementation of [the retaliatory claims section of the law] and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these

claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. EEOC, Charge Statistics FY 1997 Through FY 2012,

<http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race."

THE OLD FASHIONED WAY

As we all know, the longtime predictable behavior of Congress cannot be relied upon.

Long time congressional observers would always comb the Senate pages of the Congressional Record for the hours before a major recess to find a few kernels of surprises. These are unanimous consent agreements that are brought up and agreed to in nanoseconds by the majority leader (or delegate) and the minority. Probably nobody else in the chamber except the presiding officer. No discussion. Boom and it's done.

Haven't been a lot of those recently, so one late Thursday was interesting. The Senate approved the nominations of two commissioners to the Consumer Product Safety Commission. This one even caught some CPSC watchers by surprise, as one of the nominees had not even had a hearing before the committee of jurisdiction. The committee technically "discharged" the nominees without a vote on them.

CPSC's rules add some additional quirkiness to the scenario. The

CPSC is supposed to have five commissioners. Most of the time it has had less. It currently has three commissioners.

When a commissioner's term ends, the commissioner is permitted to serve an additional year.

Commissioners are nominated by the President for the advice and consent of the Senate. In recent years, the minority party in the Senate has been reluctant to confirm commissioners unless a majority party's nominee is paired with a minority party nominee.

All of which brings us to Thursday's surprise. They approved paired nominations. The CPSC will have five commissioners again for a few months. The Senate approved a Democrat and Republican to the Commission. Marietta S. Robinson is the Democrats' nominee and Ann Marie Buerkle is the Republicans' nominee. They join Democrats Robert Alder and Inez Tenenbaum and Republican Nancy Nord, whose "hold-over" year ends in October.

NOT THE OLD FASHIONED WAY

Last week, I opined that Congress would work out a last minute deal on the student loan rate increase. The situation had all the earmarks for a "get it done just before a recess" classic congressional play.

Missed that one. They did not. Look for a retroactive fix upon their return.

HAPPY JULY 4TH TO ALL!