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ALERT

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CASE UPDATES

U.S. SUPREME COURT

To Qualify as a "Supervisor" under Faragher-Ellerth, Individual must be Employed by the Employer to Take Tangible Employment Actions against the Plaintiff

Maetta Vance was an African-American employee who worked as a server in the Ball State University Dining Services Department. A fellow employee, Saundra Davis, worked as a catering specialist. Davis did not have the power to hire, fire, demote, promote or discipline Vance. Vance filed racial harassment claims against Davis, alleging Davis was her supervisor. The district court ruled Davis was not a supervisor for the purposes of invoking the *Farager-Ellerth* presumption of employer liability. The Seventh Circuit affirmed.

Even though the employer conceded the Seventh Circuit's test was too narrow under *Faragher* and *Ellerth* and incompatible with the realities of the workplace, the conservative five-Justice majority affirmed in an opinion by Justice Alito. The Court assumed that *Faragher-Ellerth* applied to race harassment cases, but noted that a later Restatement of Agency had eliminated the "aided by existence of agency relation" provision under which *Faragher-Ellerth* had relied.

The majority noted that several circuits and the EEOC had ruled that a supervisor included anyone who exercised significant direction over another's daily work. The majority rejected this analysis because it depended on "case specific evaluation of numerous factors." The majority adopted the Seventh Circuit test because "supervisory status can be usually readily determined, generally by written documentation."

The majority recognized the term "supervisor" means different things in different contexts. It noted that the NLRB had taken a broad interpretation of "supervisor" under the NLRA, but dismissed it as "an outlier." The Court noted the NLRA had a different purpose than Title VII, so the definition under the NLRA was not "controlling." Given that Title VII does not use the term "supervisor," the majority held it was free to define it in the manner it thought was most consistent with the *Faragher-Ellerth* framework.

The majority held that *Faragher* and *Ellerth* contemplated "a sharp line" between co-workers and supervisors, and those cases assumed that the line was the ability to take tangible employment actions. Under the majority's standard, "the question of supervisor status, when contested, can very often be resolved as a matter of law before trial." The majority held that the EEOC test was too ambiguous and "would impede the resolution of the issue before trial." If not resolved before trial, a jury would have to be given alternative instructions depending on whether it found supervisory status or not. The majority claimed "the approach we take will help ensure that juries return verdicts that reflect the application of the correct legal rules to the facts."

In response to the dissent's charge that the decision in this case contradicted *Faragher* and *Ellerth* because under the majority's test, the individual's whose conduct was at issue in those cases might not qualify, the majority demurred that the briefs in that case "did not focus" on "the degree of authority that an employee must have in order to be classified as a supervisor." The majority claimed that its test was more appropriate because many companies "have abandoned a highly hierarchical management structure."

The majority responded to the concern that its decision will encourage employers to attempt to insulate themselves from liability by empowering only a few individuals to take tangible employment actions. The majority said that if an employer did that, it may well be held liable for employees who merely recommend tangible employment actions under the theory that the employer effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.

Justice Thomas concurred on the basis that even though he thought *Faragher* and *Ellerth* wrongly decided, the majority's rule "provides the narrowest and most workable rule for when an employer may be held liable for an employee's harassment."

Justice Ginsburg wrote the four-Justice dissent. It accused the majority of contradicting the analysis set forth in *Faragher* and *Ellerth*. The dissent noted that the Court's precedents had assumed, without deciding, that employees who direct subordinates' daily work are supervisors. Lead workers can easily use their positions to aid in their harassment.

The dissent would have upheld the EEOC's definition as a reflecting informed judgment and a body of experience construing the word "agent" under Title VII. The majority rule reduces the robust protections of Title VII, but isn't necessarily as "clear" and "workable" as it claims. The majority included "reassignment with significantly different responsibilities" as a tangible employment action. That is necessarily fact-dependent. The dissent recognized that the determination of supervisor status had to examine "the particular working relationship between the harasser and the victim."

The dissent opined that the majority's shift of the *Faragher* and *Ellerth* framework in an employer friendly direction will leave many harassment victims without an effective remedy because the negligence standard may not apply where an employer lacks actual or constructive notice of a harassing employee's conduct.

The dissent would have remanded the case for application of the EEOC definition, which it suggested the plaintiff would be unlikely to meet. Even though Davis's job description described her as leading and directing, the evidence in the case suggested this wasn't really the case. The dissent stated that the "supervisor status inquiry should focus on substance, not labels or paper descriptions."

Vance v. Ball State University, --- S. Ct. --- (6/24/13).

Plaintiff Must Show "But-For" Causation for Title VII Retaliation Claims

In *University of Texas Southwestern Medical Center v. Nassar*, the Court ruled that the "but for" standard of causation applied for claims alleging retaliation under Title VII of the Civil Rights Act of 1964; 42 U.S.C. §2000e-3(a). The Court rejected the "motivating factor" standard which applies to "status based discrimination" pursuant to 42 U.S.C. §2000e-2(a).

In *Nassar*, the Plaintiff was a medical doctor of Middle Eastern descent who specializes in internal medicine and infectious diseases. He was employed by the University of Texas Southwestern Medical Center as a member of the University's faculty and a staff physician. He alleged that his new supervisor was biased against him on account of his religion and ethnic heritage; a bias manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that "Middle Easterners are lazy." In an effort to avoid his perception of ongoing discrimination, he resigned his teaching post, and sent a letter of explanation in which he asserted that the reason for his resignation was harassment which "stems from . . . religious, racial and cultural bias against Arabs and Muslims." The administrator to whom the letter was sent expressed grave concern about

Plaintiff's letter, and insisted that the allegedly biased supervisor had been publically humiliated and needed to be exonerated. After the hospital originally granted Plaintiff staff physician privileges, the University then revoked the offer based upon an objection by the administrator who had received Plaintiff's letter alleging discrimination.

Plaintiff filed suit alleging a status based discrimination claim (constructive discharge) under §2000e-2(a) and a retaliation claim under §2000e-3(a). The jury awarded Plaintiff $400,000 in backpay and more than $3 million in compensatory damages, later reduced to $300,000. The University appealed. The Fifth Circuit reversed the status based discrimination based upon insufficient evidence. It affirmed the retaliation claim relying upon the "motivating factor" standard of causation. The Supreme Court granted certiorari on the issue of causation.

The Supreme Court first discussed the history of Title VII, including *Price Waterhouse*, the Civil Rights Act of 1991, and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009)(holding that the "but for" standard of causation applied under the ADEA). In *Gross*, the Court observed that the ADEA was not amended by the Civil Rights Act of 1991, and if Congress had intended for the "motivating factor" standard to apply it would have done so. The Court in *Gross* rejected the plurality opinion in *Price Waterhouse* that the language "because of" required a "motivating factor" standard of causation.

The Court in *Nassar* relied upon *Gross*, the textual difference between the different sections of Title VII, and Congress' failure to incorporate the "motivating factor" standard into the retaliation section of Title VII. "Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."

"When Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within §2000e-2, which contains Title VII's ban on status-based discrimination . . . ." The Court concluded that if Congress intended to include the "motivating factor" standard for all Title VII claims, it would have done so. This is the same reasoning relied upon in *Gross*.

The Court found the language and structure of Title VII so conclusive that it declined to adopt the traditional deference paid to the EEOC as the administrative agency charged with the statute's implementation. The Court explicitly rejected Plaintiff's argument that *Price Waterhouse* controlled: "Given the careful balance of lessened causation and reduced remedies Congress struck in the 1991 Act, there is no reason to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage."

The Court concluded: "The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under §2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." The Court remanded to the Fifth Circuit for a determination about whether the heightened "but for" standard was satisfied.

Justice Ginsburg dissented. She reasoned that "[r]etaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it." She also lamented the difficulty of charging jurors with different standards of causation in the same case where both status based discrimination and retaliation are claimed. After dissenting from the Court's statutory interpretation, reliance upon *Gross*, and the failure to rely upon *Price Waterhouse* and the EEOC Guidance Manual, Justice Ginsburg encouraged Congress to pass remedial legislation: "Today's misguided judgment, along with the judgment in *Vance v. Ball State Univ.*, should prompt yet another Civil Rights Restoration Act."

University of Texas Southwestern Medical Center, v. Nassar, ___ S. Ct. ___ (6/24/2013).

WASHINGTON SUPREME COURT

PERC Does Not Provide an Adequate Remedy for Wrongful Termination for Union Activity

In *Piel v. City of Federal Way*, the Court 5-4 ruled that the remedies made available by the Public Employee Relations Commission (PERC) under RCW 41.56 did not foreclose the jeopardy element of the public policy tort. The Court distinguished and harmonized its prior holdings in *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), *and Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005), with *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000).

Justice Stephens wrote for the majority which included Justices Charles Johnson, Chambers, and Gonzalez, and Pro Tem Justice Seinfeld (because Justice Wiggins was recused). Justice James Johnson filed a dissenting opinion joined by Justices Fairhurst and Owens. Chief Justice Madsen filed a separate opinion concurring in dissent. All four dissenters had been in the majority in *Cudney*, along with Justice Charles Johnson.

In *Piel*, the Plaintiff was a law enforcement officer employed by the City of Federal Way. He was designated to manage the formation of a union of lieutenants. Shortly thereafter, he began to experience retaliation, including a reduction in his duties and targeting his unit for internal investigations. After the union was certified, he received poor evaluations, was demoted, and was later terminated. After filing a grievance, he was reinstated 14 months later. After returning to work, Piel allegedly expressed violent feelings against members of the Department. An investigation followed, and Piel was terminated for being untruthful about the things he allegedly said. Piel filed suit alleging wrongful discharge in violation of a clear mandate of public policy; that he was fired for engaging in protected union-organizing. The trial court granted summary judgment, and Plaintiff was granted direct review, which was stayed pending a final decision in *Cudney.*

The Court in *Piel* recognized that in *Smith*, the Court had allowed a Plaintiff's public employee's claim to go forward notwithstanding her failure to pursue administrative remedies through PERC. The Court recognized a key holding of *Smith* was that the public policy claim could not be foreclosed "simply because her administrative and contractual remedies may partially compensate her wrongful discharge." The Court rejected the employer's argument that *Smith* failed to address the jeopardy element, while *Korslund* and *Cudney* did. "The point of this discussion in *Smith* was to highlight the importance of having a tort remedy apart from the PERC remedy in order to advance public policy, not the plaintiff's personal compensation." Relying upon *Smith*, *Korslund* and *Cudney*, the Court held "[t]he adequacy of available remedies is the heart of jeopardy analysis in cases involving statutes that provide administrative schemes."

The Court ruled that a decision which failed to recognize the viability of the tort in cases despite the existence of statutory remedies would call into question a long line of cases, including: *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984); *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000); *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000); and *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). "An overbroad reading of *Korslund* and *Cudney* would fail to account for this long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes comprehensive administrative remedies. Importantly, neither case purported to overrule anything." "Each public policy tort

claim must be evaluated in light of its particular context."

Justice Madsen argued that neither *Smith* nor any of the other authorities relied upon by the majority addressed the jeopardy element with regard to whether the alternative sources adequately protect public policy. True to her prior decisions, Justice Madsen would have ruled that the remedies made available to the employee are irrelevant if the source of public policy provides a means to protect public policy: "When there are adequate means to protect the public policy regardless of whether an employer is exposed to the wrongful discharge tort claim, then a tort action should not be recognized since the public policy is not jeopardized by the employment action."

Justice James Johnson would have relied upon the very restrictive language in *Cudney*; that Plaintiff must "show that other means of promoting the public policy are inadequate and that the actions the plaintiff took were the 'only available adequate means' to promote the public policy." Justice Johnson otherwise agrees with Justice Madsen.

Piel v. City of Federal Way, ___ Wn.2d ___, ___ P.3d ___ (6/27/13).

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