Recent Decisions of Great Import to Employers

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U.S. Supreme Court's Title VII Decisions

On June 24, 2013, employers came up victorious in two important cases before the Supreme Court. In *Vance v. Ball State University*, No.11-556 (June 24, 2013), the Supreme Court significantly limited who qualifies as a supervisor for purposes of Title VII of the Civil Rights Act of 1964. Resolving a split among the circuit courts, the Court found that to be a supervisor, an individual must be empowered to take tangible employment actions against other employees, i.e., a supervisor must possess the authority "to effect '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.'" In doing so, the Supreme Court rejected the EEOC's and some courts' broader definition of supervisor encompassing individuals who exercise significant discretion over an employee's daily work.

The Supreme Court's decision changes the landscape for employers faced with Title VII harassment cases. As set forth in the milestone *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998) decisions, the standard for an employer's liability for harassment depends on whether the alleged harasser is a supervisor (vicarious liability), or merely a co-worker (negligence standard). If the alleged harasser is a co-worker, liability for the harassment will be imputed to the employer only if the employee can prove that the employer failed to take reasonable measures to prevent and correct the offending behavior. However, if the alleged harasser is a supervisor, liability may be imputed directly to the employer. The employer may then assert a two-pronged affirmative defense to avoid vicarious liability. To defeat liability, the employer must show that 1) it exercised reasonable care to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of preventive or corrective measures put in place by the employer or otherwise failed to avoid harm. The *Vance* court's limitation on the definition of supervisor means that employers will face less cases in which they will be found strictly liable for the actions of an alleged harasser. Moreover, the clarity provided by the Supreme Court will likely result in many more decisions before trial and as a matter of law as to the supervisory issue and its ramifications. While Justice Ginsburg, in her dissent, called on Congress "to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today," it remains to be seen as to whether Congress will take such action.

Employers also prevailed in an important retaliation case before the Supreme Court. In *University of Texas Southwestern Medical Center v. Nassar*, No.12-484 U.S. (June 24, 2013), the Supreme Court resolved the issue of the standard of proof in a Title VII retaliation case, finding that a plaintiff has a heightened burden of proof to show that retaliation was the "but-for" cause of an adverse employment action. The Supreme Court reversed the Fifth Circuit's finding that it was enough for the plaintiff to show that the retaliation was one "motivating factor" that caused the adverse employment action. The Court found that "the proper conclusion here...is that Title VII claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." In doing so, the Court reasoned that this heighted standard would aid in lessening the filing of frivolous employment discrimination claims, noting that the application of a lessened causation standard "would make it far more difficult to dismiss dubious claims at the summary judgment stage."

Interns: The *Fox Searchlight* Decision

Employers, however, have not fared well as to unpaid interns. In *Glatt v. Fox Searchlight Pictures Inc*., 11 Civ. 6784 (WHP) (S.D.N.Y. June 11, 2013), the Court held that two unpaid Fox interns were entitled to

compensation as employees pursuant to the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). Judge William Pauley found that the "trainee" exception does not apply to interns that performed work tasks that otherwise would have fallen to paid employees. Under this decision, employers seeking to provide unpaid internship positions must receive no "immediate advantage" from work performed by unpaid interns. The Court deferred to a Department of Labor fact sheet setting forth six criteria for determining an employer's obligation to compensate interns: 1) whether the employer provided the intern with training similar to what the intern would receive in a training environment; 2) whether the internship was intentionally structured to benefit the intern; 3) whether the intern's work displaced the work of regular employees; 4) whether the alleged employer received an "immediate advantage" from the intern's work (even if menial); 5) whether the interns are entitled to a job at the end of the internship; and 6) whether the interns understood they were not entitled to wages.

This decision already led to increased lawsuits by unpaid interns against for-profit private sector employers. Less than a week after the *Fox Searchlight* decision, a former Atlantic Records intern filed a class action wage case against the Warner Music Group. Shortly thereafter, two former W Magazine interns filed a proposed class action against Conde Nast Publications for unpaid wages. Employers can expect this trend to continue and should carefully review their intern programs.

New Twist in Sexual Harassment Defense

Finally, a recent Minnesota State Supreme Court case may signal an unwelcome trend for employers in sexual harassment cases. In *Rasmussen v. Two Harbors Fish Company*, No. A11-2178; 2013 WL 2221487 (Minn. Sup. Ct. May 22, 2013), the Court determined that the district court made errors of law in its determination that the defendant employer's conduct and "sexually based behavior" was not inappropriate since it was directed at both men and women. The Court noted that the plaintiff's claims were for sexual harassment which, in accordance with prior Minnesota Supreme Court precedent, do not "require proof that the conduct was directed at the victims because of sex." Accordingly, the Court distinguished between claims where a plaintiff complained of a hostile work environment based on gender discrimination, and claims where the plaintiff alleged that sexual harassment created a hostile work environment. In the former, the fact that comments are made to both male and female employees is significant because it shows that the inappropriate conduct did not target the plaintiff on the basis of gender. However, in sexual harassment claims, the Court found it irrelevant that inappropriate sexual comments were made to both male and female workers because the basis of that claim did not concern the complainant's gender but, rather, the harassing conduct itself. Thus, employers, at least in Minnesota for now, may no longer avail themselves of the so-called equal opportunity harasser defense.

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