SUPERVISORY AUTHORITY AND "BUT FOR" CAUSATION UNDER TITLE VII

Are Employees or Employers Better Protected?

November 15, 2013

Hon. Thomas M. Coffin
United States Magistrate Judge, District of Oregon
Courtney Angeli
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University of Southwestern Texas Medical Center v. Nassar, 133 S.Ct. 2517 (2013)

Standard for retaliation claims: "but for" causation, not "motivating factor."

Vance v. Ball State University,
133 S.Ct.2434 (2013)

Narrows definition of “supervisor” for whose discrimination the employer is vicariously liable.

Nassar—Background

- Plaintiff physician claimed adverse action in retaliation for complaining about discrimination.
- Employer said that, regardless of any retaliatory intent, it would not have hired him anyway.

Nassar—Background

- Jury returned verdict for plaintiff.

- The Fifth Circuit affirmed, saying retaliation claim needs to be a "motivating factor," not the "but for" cause.

Nassar—Question for the Supreme Court

What standard of proof applies—must plaintiff prove that retaliation was a "motivating factor" in the decision or must he prove that he would have gotten the job "but for" the retaliatory conduct?

Nassar—Majority's Opinion

- Kennedy, with Roberts, Scalia, Thomas, and Alito joining.
- General tort law standard is 'but for" causation—i.e. plaintiff must show "but for" the illegal act, injury would not have occurred.

Nassar—The Majority's Opinion

- Majority considered whether Congress intended a different standard.

- Evaluated prior cases and 1991 amendments to Title VII, which overruled *Price Waterhouse,* etc.

Nassar—The Majority's Opinion

- The 1991 Amendment stated that a plaintiff proved discrimination by establishing that "race, sex, color, or national origin" was a "motivating factor;" employer's showing it would have taken same action anyway shielded it from damages but not injunctive relief or attorneys' fees.

Nassar—The Majority's Opinion

- Majority held that the 1991 amendment applied **only** to Title VII status-based claims and **not** retaliation claims.

- Statutory interpretation: Congress didn't modify the retaliation provision.

Nassar—The Majority's Opinion

- Said prior decisions construing discrimination statutes to include retaliation did not control because Title VII expressly mentions retaliation and treats it as different from status-based discrimination.

Nassar—The Majority's Opinion

- Majority says stricter proof for retaliation claims makes sense because of "ever-increasing frequency" of such claims (more than 31,000 in 2012).
- Worried lesser standard would lead to opportunistic retaliation claims.
- Rejected EEOC position.

Nassar—Dissent

- Emphasized “symbiotic relationship between proscriptions on discrimination and proscriptions on retaliation.”

- Questioned argument that in strengthening Title VII, Congress intended to exclude retaliation from loosening causation standards.

Nassar—The Dissent

- Said the Court should have construed retaliation provision—which says nothing on the causation standard—in concert with the rest of Title VII.

- Requiring different standards for different claims will cause confusion.

Nassar—Impacts

- Does decision benefits employers by giving plaintiffs higher burden of proof?

- Under mixed motive analysis, burden of production shifts to employer to show it would have taken same steps.

- With “but for” analysis, burden stays on plaintiff.

Nassar—Impacts

- *Nassar* ignores that most acts of retaliation are truly mixed motive decisions.

Nassar—Impacts

- Will "but for" standard increase difficulty of surviving summary judgment?
- Court recently held in an ADEA (age) discrimination case that *Nassar* did not fundamentally increase the evidence plaintiff must provide to defeat summary judgment. *Parris v. Wyndham Vacations Resorts, Inc.*, CIV. 11-00258 SOM, 2013 WL 5719475 (D. Haw. Oct. 18, 2013).

Nassar—Does Oregon Law Follow?

- Oregon uses “substantial factor” test in evaluating claims brought under Oregon’s anti-discrimination statute ORS 659A.030 UCJI No. 59A.02-03.

- Oregon courts have described the “substantial factor” causation standard as a “but for” test. *Estes v. Lewis and Clark College,* 152 Or. App. 372 (1998).

Nassar—Does Oregon Law Follow?

The Oregon Court of Appeals clarified, "[t]he crux of the standard [in "mixed motive" claims], regardless of which phraseology is attached to [*i.e.* "but for," "substantial factor," or "factor that made a difference"], is whether, in the absence of a discriminatory motive, the employee would have been treated differently. *Hardie v. Legacy Health Sys.*, 167 Or. App. 425, 435-36 (2000) (partially superseded by statue on other grounds).

Nassar—Does Oregon Law Follow?

- A plaintiff could argue that Oregon's standard should not change as it never followed Title VII's "mixed motive" analysis.

- Unclear if plaintiffs with ORS 659A.030 claims will face higher burden of proof.

Nassar—Ramifications on Lack of Deference to EEOC interpretation?

Majority's lack of deference to EEOC is consistent with precedent, as courts can always reject agency interpretation that is statutory construction.

See, e.g. Chevron U.S.A, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (judiciary is final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent).

Nassar—Ramifications on Lack of Deference to EEOC interpretation?

- "But for" standard should apply to future EEOC investigations.

- Employers should assert this new standard in responses to charges.

Nassar—Practical Effect and Fixes

- Holding of *Nassar* is contrary to spirit of Title VII.

- Fix with federal legislation as suggested in dissent by Ginsburg; Congress could clarify that burden in retaliation claims same as in discrimination claims.

Nassar And Other Federal Statutes

- October 2013 District of Oregon decision declined to apply *Nassar's* "but for" standard in the absence of a clear indication that *Nassar* applied to ADA discrimination claims and used "motivating factor" standard in ADA case. *Siring v. Oregon State Bd. of Higher Educ.*, Case No. 3:11-cv-01407-SI, 2013 WL 5636718 (D.Or. October 15, 2013).
- July 2013 District of Michigan decision rejected *Nassar* standard in FMLA case. *Chaney v. Eberspaecher N. Am*., 12-13023, 2013 WL 3381437 (E.D. Mich. July 8, 2013)

Vance—Background

- Vance is African-American catering assistant at Ball State University.

- Claimed harassment. SJ granted on most claims because of employer's prompt corrective action. Remaining claim rests on vicarious liability of white catering specialist who "gave her a hard time at work by glaring at her, slamming pots and pans. . . and intimidating her . . .with "smiling" and "weird looks."

Vance—Background

Key to the Seventh Circuit's decision was its conclusion that Vance had not shown that she had made a complaint of racial bias by anyone who qualified as a supervisor under the law in the Seventh Circuit.

Vance—Background

- Applying the controlling Seventh Circuit standard that a supervisor is someone with the power to directly affect the terms and conditions of Vance's employment, the Court found that Davis was not Vance's supervisor.

Vance—Background

- Seventh Circuit reiterated that it had not joined other circuits in holding that the authority to direct day-to-day activity establishes liability under Title VII, which is the EEOC standard.

Vance—Question Presented to the Supreme Court

- Is a supervisor one who has **power to make a "tangible" job action** to make the employer liable, or **one giving day-to-day assignments** also was an agent of the employer?

Vance—The Majority's Opinion

- Justice Alito wrote majority opinion, Roberts, Scalia, and Kennedy joined and Thomas concurred (same majority as in *Nassar*).
- Held a supervisor is someone with the power to take "tangible employment actions" (hiring, firing, failing to promote, reassignment, or making a significant change in benefits) against the victim.

Vance—The Majority's Opinion

Unlike *Nassar*, *Vance's* holding is based on agency principles, and considers "supervisor" as the term is used in Court's prior decisions:

- *Burlington Industries, Inc. v. Ellerth*, 524 US 742 (1998)
- *Faragher v. City of Boca Raton*, 524 US 775 (1998).

Vance—The Majority's Opinion

- Prior opinions hold employer is directly liable for employee's harassment if it was "negligent in respect to the offensive behavior."
- Different rules apply when the harasser is a supervisor.
- Holding rests on general agency principles: "master" is liable for acts of "servant" when servant was aided in tort by agency relationship.

Vance—The Majority's Opinion

- A "supervisor" is someone "the employer has empowered" to "take tangible employment actions" against the victim—with financial impact.
- Majority says this is consistent with *Faragher* and *Ellerth*.

Vance—The Majority's Opinion

- Majority says its rule is easier than "murky" approach of EEOC and plaintiff.

- Majority specifically noted that its standard is more clearly applied at summary judgment.

Vance—The Dissent

Ginsburg dissent says: “The limitation the Court decrees diminishes the force of [prior decisions], ignores conditions under which members of the work force labor, and disserves the objection of Title VII to prevent discrimination from infecting the Nation’s workplaces.”

Vance—The Dissent

- In the “real world” employee confronting supervisor risks retaliation.
- Employees may be reluctant to blow the whistle on supervisor.
- Because it is unlikely that an employer will know of and take corrective action regarding harassment, negligence standard does not protect workers.

Vance—Impacts

- Victory for employers?
- Limits the circumstances of strict liability, and likely applicable to other federal anti-discrimination statutes.
- Will not apply to the NLRA as Justice Alito distinguished Title VII's supervisory status from the NLRA supervisory status.
- More clarity for jurors / litigants?

Vance—Impacts

What will relevant evidence consist of in supervisory status evaluation?

Is there a risk of employers consolidating power in only a few to limit exposure to vicarious liability?

Vance—Impacts in Oregon

The Ninth Circuit had extended the scope of the term “supervisor” to include employees with whom the employer had vested authority to direct and oversee the work of other employees, so *Vance* will change the operative standard in federal cases filed in Oregon.

Vance—Impacts in Oregon

- Oregon Bureau of Labor and Industry (BOLI) has codified *Faragher* / *Ellerth* in OAR 839-005-0030(4) & (5) and OAR 839-005-0010.
- Oregon state courts have already adopted *Ellerth* and *Faragher, see e.g. Garcez v. Freightliner Corp*., 188 Or.App.397, so likely will follow *Vance* as well.

Vance—Impacts on Cat's Paw Theory of Liability

- It is not clear how *Vance* effects the analysis of "cat's paw" theory (also called "rubber stamping" rule) liability.

- The "cat's paw" theory allows employers to be held liable for tangible employment actions even if the person making the decision had no discriminatory motive toward the employee affected. *Staub v. Proctor Hospital,* 131 S.Ct. 1186 (2011).

Vance—Impacts on Cat's Paw Theory of Liability

- In *Staub* dissent, Alito and Thomas mostly agreed with "cat's paw" theory, but argued an employer should be able to escape liability if it independently investigated before relying on potentially discriminatory recommendation.

- *Staub* did not address whether the "cat's paw" theory could apply to co-workers with a discriminatory motive, so how does it fit with *Vance?*

Vance—Impacts on Admissibility of Statements

- *Vance* may impact whether someone's statements are admissions subject to the hearsay rule.
- Under Fed. R. Evid. 801(d)(2)(D) statements made by the agent of a party opponent are not hearsay.
- Before *Vance,* courts focused on whether the employee (supervisor or not) has had some "significant involvement in the employment decision."

Vance—Impacts on Admissibility of Statements

Most pre –*Vance* cases take a broader view of agency under Rule 801, holding that even employees who are not supervisors can be agents when there is evidence that the statement proffered reflects some kind of participation in the employment decision. *See e.g.*, *Yates v. Rexton*, 267 F.3d 793, 802 (8th Cir. 2001). (An employee need not be an actual decision-maker to be an "agent" under the rule. "Significant involvement, either as advisor or other participant in a process leading to a challenged decision," may be sufficient to establish agency under Rule 801(d)(2)(D)).

Vance—Impacts on Admissibility of Statements

Vance might cause courts to interpret Rule 801(d)(2)(D) more narrowly to require that an employee have the authority to hire or fire in order to establish agency.

Family Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA) Burdens of Proof

- Some good news for plaintiffs.
- Employees returning from FMLA/OFLA leave are entitled to reinstatement with very few exceptions.
- The Ninth Circuit reinforced this in *Sanders v. City of Newport*, 657 F.3d 772 (2011).

FMLA/OFLA

- In *Sanders*, the Ninth Circuit held that employers have the burden of proof to justify failure to reinstate an employee returning from FMLA/OFLA leave.

- Under FMLA/OFLA, employers can avoid liability for denial of reinstatement only if they can show a legitimate reason for doing so.

- An employer denying reinstatement has the burden of proof to justify its decision to deny reinstatement.

QUESTIONS?