SWANSON, MARTIN & BELL, LLP

Employment Litigation and Counseling Newsletter

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Good News and Bad News for Illinois Employers

Just the Basics:

1. Plaintiffs claiming retaliation for exercising rights protected by Title VII now face a heightened causation standard.
2. The definition of a supervisor is now limited only to those who have authority to take tangible employment actions.
3. Two years of continued employment is required to constitute adequate consideration in support of a restrictive covenant, regardless of whether an employee resigns or is terminated.

The Good News: Two Employer-Friendly Supreme Court Decisions

The Supreme Court of the United States (SCOTUS) this June issued two decisions in employment law cases that handed employers what could be considered victories by raising the bar on plaintiffs claiming retaliation or harassment under Title VII of the Civil Rights Act of 1964.

Standard for Proving Retaliation

In the *University of Texas Southwestern Medical Center v. Nassar*, Naiel Nassar was a physician of Middle Eastern descent who was both a University of Texas Southwestern faculty member and a hospital staff physician. Mr. Nassar resigned his teaching post claiming racial and ethnic harassment by his supervisor. Following his resignation, a prior job offer extended to him at a University-affiliated hospital was withdrawn. As a result, Mr. Nassar filed suit against the University of Texas Southwestern Medical Center alleging two violations of Title VII: (1) that his supervisor engaged in religiously and racially-motivated harassment resulting in his constructive discharge from the University, and (2) that the efforts to prevent the new hospital from hiring him were in retaliation for his complaining about his supervisor's harassment. Title VII prohibits employer retaliation because "[an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge." The jury found in favor of Mr. Nassar on both claims. The Fifth Circuit Court of Appeals affirmed the retaliation claim, finding that the claim required only a showing that retaliation was a "motivating factor" for the adverse employment action.

SCOTUS held that an employee claiming he was retaliated against for exercising rights protected by Title VII must show that the adverse action taken against him, such as demotion or termination, would not have occurred "but for" the cause of the adverse action, not the lessened "motivating factor" causation test applied by the Fifth Circuit. Thus, it is no longer sufficient for an employee to show that retaliation merely contributed to the decision to undertake an adverse employment action. Instead, the employee must show that the challenged employment action would not have happened absent the retaliatory motive. This is a much higher burden than the previous standard espoused by many courts and the Equal Employment Opportunity Commission (EEOC) in its guidance manual.

The questions to employers now are:

1. Did an employee engage in a protected activity?
2. Was an adverse action taken against that employee?
3. Would the adverse employment action have happened absent the retaliation?

Prior to the decision in *Nassar*, the third question had been, did the retaliation contribute to the adverse action? Thus, plaintiffs claiming retaliation for exercising rights protected by Title VII face a heightened causation standard. This is good news for employers.

Narrowed Definition of Supervisor for Purposes of Claiming Sexual Harassment

In a separate action, *Vance v. Ball State University*, the Supreme Court addressed when an employee is considered a "supervisor" for purposes of vicarious liability under Title VII. Under Title VII, employers may be held liable for workplace harassment where the harassment is committed by a co-worker or by a supervisor. This distinction is significant. If the harassment is committed by a co-worker, an employer will only be liable if it was negligent with respect to preventing the harassment. In contrast, employers will be held strictly liable for harassment committed by a "supervisor" that results in a tangible employment action, such as termination or denial of promotion. Even if the supervisory harassment does not result in a tangible employment action, an employer will still be presumed vicariously liable, unless they can establish an affirmative defense by showing: (1) that it exercised reasonable care to prevent and promptly correct harassing behavior; and (2) that the plaintiff unreasonably failed to take advantage of preventative or corrective opportunities that were provided.

In *Vance*, SCOTUS held that Maetta Vance's alleged harasser was not a supervisor for purposes of vicarious liability and that "an employee is a supervisor for purposes of vicarious liability under Title VII only if he or she is empowered to take tangible employment actions against the victim." It opined that this narrow definition will allow determinations of whether an individual qualifies as a supervisor before trial, thereby simplifying the work of the jury. Prior to the decision in *Vance*, many courts and the EEOC broadly held that a supervisor is anyone with authority to take tangible employment actions or to direct an employee's daily work activities. That definition has now been limited to only those who have authority to take tangible employment actions. This narrower rule applied in determining whether an employer should be held vicariously liable for a supervisor's harassment of an employee versus a co-worker's harassment of a co-worker. Again, this is good news for employers.

The Bad News: Two Years Continued Employment Required to Constitute Adequate Consideration to Support Enforcement of Restrictive Covenants in Employment Agreement

The Illinois First District Court of Appeals recently decided a matter involving restrictive covenants that is not good news for employers. Prior to October 2009, Eric Fifield was employed by Great American Insurance Company (GAIC). He was assigned to work exclusively for Premier Dealership Services (PDS), a GAIC subsidiary. In October 2009, GAIC sold PDS to a company called Premier. In late October 2009, Premier made a new offer of employment to Mr. Fifield. As a condition of his employment, Premier required Mr. Fifield to sign an "Employment Confidentiality and Inventions Agreement" which included non-solicitation and non-competition provisions. Mr. Fifield negotiated with Premier and the parties agreed to add to the agreement a provision stating that the non-solicitation and non-competition provisions would not apply if Mr. Fifield was terminated without cause during the first year of his employment. Mr. Fifield resigned three months after he signed the agreement.

In *Fifield, et al. v. Premier Dealer Services Inc.*, the Circuit Court of Cook County entered an order granting a motion for declaratory relief filed by Fifield finding the restrictive covenants unenforceable. The court in *Fifield* held that at least two years of continued employment is required to constitute adequate consideration in support of a restrictive covenant, whether the employee resigns or is terminated. Thus, despite the fact that Mr. Fifield resigned after only three months of employment, he was not bound by the non-solicitation and non-interference provisions in the employment contract.

In *Fifield*, the Appellate Court affirmed the judgment of the Circuit Court of Cook County. In so doing the Appellate Court reasoned: "In order for a restrictive covenant to be valid and enforceable, the terms of the covenant must be reasonable. However, before even considering whether a restrictive covenant is reasonable, the court must make two determinations: (1) whether the restrictive covenant is ancillary to a valid contract; and (2) whether the restrictive covenant is supported by adequate consideration." Under Illinois law, continued employment for a substantial period of time beyond the threat of discharge is sufficient consideration to support a restrictive covenant in an employment agreement. Now, anything less than two years is not a "substantial period" and will likely result in non-enforcement of the restrictive covenants.

Practical Advice for Employers Post-*Nassar*, *Vance* and *Fifield*

Vance and *Nassar* apply only to federal claims brought under Title VII. Unlike Title VII, the Illinois

Human Rights Act (IHRA) specifically prohibits sexual harassment in employment as a separate violation. The definition of "sexual harassment" under the IHRA is generally consistent with the standard enunciated in the Title VII cases on the subject. The IHRA, however, makes employers liable for harassment by supervisors in cases in which – under the narrower definition of supervisor per *Vance* – federal law would not. These holdings may reduce the number of claims for retaliation and harassment Title VII, but may result in an increased number of these claims being brought under state anti-discrimination statutes.

In light of the *Vance* and *Nassar* rulings, employers should:

1. Consult with legal counsel to determine whether different standards exist under state or local laws at their location(s).
2. Determine who constitutes supervisors and if they have responsibility for hiring, firing, promotion and salary changes.
3. Prepare proper position descriptions for each supervisor to reduce the risk of vicarious liability per *Vance*.
4. Counsel human resources personnel to document employee termination discussions and the basis for the decision so as to defeat a claim that retaliatory motivation was the determinative factor in any adverse action.

Finally, in light of the *Fifield* decision employers should have legal counsel review their restrictive covenants to see if there is a creative way to create substantial consideration – whether by a one-time monetary payment or otherwise - in the absence of two years of continued employment.

For more information on these recent rulings and how they may affect your business, please contact Swanson, Martin & Bell, LLP's Employment Litigation and Counseling Group attorneys:

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