

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

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SUMMARY

Two recent U.S. Supreme Court cases defined “supervisor” for purposes of discriminatory harassment claims and adopted the “but for” causation standard for retaliation claims. The rulings will have limited effect in California because they apply to federal claims under Title VII but not claims brought under California’s Fair Employment and Housing Act (FEHA).

If you have any questions about the issues raised by the *Vance* or *Nassar* decisions, please contact:

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This legal advisory is issued by the Office of the General Counsel to provide updates regarding important legal and regulatory developments that affect the University. For additional information or assistance with a specific legal matter, please contact the Office of the General Counsel.

TWO RECENT SUPREME COURT CASES FAVORING EMPLOYERS ARE LIKELY TO HAVE LIMITED EFFECT IN CALIFORNIA

Two U.S. Supreme Court cases decided June 24, 2013 narrowed the scope of employer liability in actions filed under Title VII, the federal statute that prohibits discrimination based on race, color, religion, sex, and national origin, as well as retaliation against an employee who has opposed or complained of such discrimination. In California, employees typically bring discrimination and retaliation claims under California’s Fair Employment and Housing Act (FEHA) rather than Title VII. As a result, these decisions may have little effect on the University.

In *Vance v. Ball State University*, the Supreme Court decided who qualifies as a “supervisor” in Title VII harassment cases, an essential question because employers are vicariously liable for a supervisor’s discriminatory harassment. The Court held that supervisors are only those with the authority to “take tangible employment actions against the victim...such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.” The Court rejected a broader definition found in Equal Opportunity Employment Commission (EEOC) guidance that would include employees authorized to direct the victim’s daily work activities.

California’s FEHA contains a broader definition of “supervisor” than the one adopted in *Vance*, and specifically states that a supervisor includes a person who has responsibility to direct other employees. California courts have relied on this definition to hold that the authority to direct the plaintiff’s day-to-day work could be sufficient to find supervisor status. A claim filed under California law rather than Title VII could therefore yield a different outcome on the issue of supervisory status and, in turn, employer liability.

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In *University of Texas Southwest Medical Center v. Nassar*, the Supreme Court adopted a strict causation standard for retaliation claims, holding that an employer is not liable under Title VII for retaliation if it would have taken the same action even if the employee had not engaged in the protected conduct of complaining about discrimination. The Court held that this causation standard – known as “but for” causation – governs Title VII retaliation claims even though a less rigorous standard – which would impose liability if the protected conduct was simply “a motivating factor” – governs Title VII discrimination claims.

The California Supreme Court recently clarified the causation standard for FEHA discrimination claims in a 2013 case, *Harris v. City of Santa Monica*, holding that a plaintiff must prove that her protected status was a “substantial motivating factor” for the employer’s adverse job action in order to recover money damages. Unlike Title VII, FEHA uses the same language to articulate the causation standard for discrimination and retaliation claims. While it is possible that California courts will be influenced by the Supreme Court’s analysis in *Nassar* and adopt a different causation standard for retaliation claims, it is more likely that they will apply the *Harris* standard to both discrimination and retaliation claims under FEHA.