SUMMER 2013 NEWSLETTER

FEDERAL EMPLOYMENT UPDATE

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U.S. SUPREME COURT

University of Texas Southwestern Medical Center v. Nassar, 2013 U.S. LEXIS 4704 (2013)

In order to prevail on a Title VII retaliation claim, a plaintiff must show that, "but for" having engaged in a protected activity under Title VII, he would not have suffered an adverse employment action.

Dr. Nassar was both a University faculty member and a Hospital staff physician at the University of Texas Southwestern Medical Center ("UT Southwestern"). UT Southwestern has an affiliation agreement with Parkland Memorial Hospital, which requires the Hospital to offer vacant staff physician posts to University faculty members. On multiple occasions, Dr. Nassar met with the Dr. Fitz, a UT Southwestern Chair and supervisor of a Dr. Levine, to complain that Dr. Levine, Dr. Nassar's ultimate, though not direct, supervisor, was biased against him on account of his religion and ethnic heritage. Eventually, Dr. Nassar tried to arrange to continue working at the Hospital without also being on the University's faculty. After discussing this with the Hospital, Dr. Nassar resigned his teaching post and sent a letter to Dr. Fitz (among others), which stated that the reason for his departure was Dr. Levine's alleged harassment. Dr. Fitz became upset with the letter because he considered Dr. Levine to have been publicly humiliated by the letter. The Hospital offered Dr. Nassar a job as a staff physician, as it had indicated it would. Upon learning of the offer with the Hospital, however, Dr. Fitz protested to the Hospital, asserting that the offer was inconsistent with the affiliation agreement's requirement that all staff physicians also be members of the University faculty. The Hospital withdrew its offer to Dr. Nassar. Dr. Nassar filed suit alleging, in part, a Title VII retaliation claim alleging that Dr. Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Dr. Levine's harassment.

In a 5-4 decision, the Supreme Court held that a plaintiff must establish in a retaliation claim that, "but for" engaging in a protected activity, he would not have suffered an adverse employment action. The Court reached its decision based, in large part, because the text of Title VII requires a plaintiff to show that an adverse employment action took place <u>because</u> of the plaintiff's having engaged in a protected activity.

Vance v. Ball State University, 2013 U.S. LEXIS 4703 (2013)

An employee is a "supervisor" for purposes of finding vicarious liability against an employer under Title VII if she is empowered by the employer to take tangible employment actions against the complaining plaintiff.

Maetta Vance, an African-American female, claimed that Saundra Davis, a white female, harassed her and created a racially hostile work environment. Vance was a full-time catering assistant for Ball State University ("BSU"), and Davis was employed as a catering specialist for BSU. Importantly, Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. Vance filed suit, claiming that Davis was her supervisor and that BSU was liable for Davis' creation of a racially hostile work environment. BSU argued that it could not be held vicariously liable because Davis could not hire, fire, demote, promote, transfer, or discipline Vance and, as a result, Davis was not Vance's supervisor.

In a 5-4 decision, the Supreme Court ruled that (1) an employee was a "supervisor" for purposes of vicarious liability under Title VII if she was empowered by the employer to take tangible employment actions against the victim, and, in the present case, (2) there was no evidence that BSU had empowered Davis to take any tangible employment actions against the employee.

FIFTH CIRCUIT COURT OF APPEALS

Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 2013 U.S. App. LEXIS 10934 (2013)

The Fifth Circuit, in deciding an issue of first impression in the Circuit, adopted the threshold-remuneration test to determine whether a volunteer can be considered an employee for purposes of Title VII. Title VII allows suits by employees, not volunteers.

Rachel Juino ("Juino") was a volunteer firefighter for the Livingston Parish Fire District No. 5 ("District 5") from November 2009 to April 2010. In that position, Juino received the following benefits while working at District 5: $2.00 per fire/emergency call; a life insurance policy; a full firefighter's uniform and badge; firefighting and emergency response gear; and firefighting and emergency first-response training. Juino alleged that during her tenure, a fellow firefighter subjected her to sexual harassment on several occasions. Juino claimed that after reporting this conduct to superiors, no disciplinary action was taken, but that she was terminated. Juino filed suit alleging, among other claims, sexual harassment and retaliation under Title VII. District 5 argued, in part, that Juino's status as a volunteer rendered her Title VII claims non-cognizable.

The Fifth Circuit held that Juino was not an "employee" within the meaning of Title VII. In reaching this decision, the court adopted the threshold-remuneration test which teaches that (1) remuneration may consist of direct (wages) or indirect (benefits) compensation; (2) if there is no remuneration, courts will not look to the common law agency test; and (3) if there is remuneration, then courts will apply the common law agency test. As a threshold matter, the court looked to whether the plaintiff-volunteer (Juino) had received remuneration supporting a plausible employment relationship. All Juino could point to as remuneration was $78.00 in compensation for responding to 39 calls ($2.00/call), a life insurance policy, a uniform and badge, and training. The Fifth Circuit did not consider this to be remuneration, as the benefits

were found to be "purely incidental to her volunteer service." As she could show no remuneration, Juino was not an "employee" under Title VII and could not assert such a claim.

***EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 2013 U.S. App. LEXIS 10933 (2013)**

Lactation, the physiological process of secreting milk from mammary glands directly caused by hormonal changes associated with pregnancy and childbirth, is a related medical condition of pregnancy for purposes of the Pregnancy Discrimination Act ("PDA"). For this reason, a claim by a former employee that she was discharged because she was lactating or expressing milk stated a cognizable sex discrimination claim under Title VII, as amended by the PDA.

Donnicia Venters ("Venters") was an account representative/collector at Houston Funding from March 2006 until she was fired in February 2009. In December 2008, she took a leave of absence due to the birth of her child. Houston Funding had no maternity leave policy, and Venters and her supervisors did not specify a date for her return. Shortly after giving birth, Venters told Harry Cagle ("Cagle"), Houston Funding's Limited Partner, that she would return to work as soon as her doctor released her. However, Venters suffered complications from her C-section and was required to stay home through mid-February. Throughout her time out of the office, Venters maintained regular contact with her supervisor. In one conversation, Venters told her supervisor, Fleming, that she was breastfeeding her child and asked him to ask Cagle whether it might be possible for her to use a breast pump at work. Fleming stated that he asked Cagle and Cagle said "no". On February 17, 2009, Venters called Cagle, asking if she could come back to work and again asked whether she could use a back room to pump breast milk. Cagle responded that that they had filled her spot. On February 20th, Houston Funding mailed a termination letter dated February 16th to Venters, stating that Venters was discharged due to job abandonment, effective February 13th.

Venters filed a charge of sex discrimination with the EEOC, who, on behalf of Venters, sued Houston Funding alleging a violation of Title VII, claiming that Houston Funding unlawfully discharged Venters because she was lactating and wanted to express milk at work.

The Fifth Circuit held that discriminating against a woman who is lactating or expressing breast milk states a cognizable Title VII sex discrimination claim. The court reasoned that imposing adverse employment actions based on lactation and expressing breast milk "clearly imposes upon women a burden that male employees need not – indeed, could not – suffer."