

# **2013 YEAR IN REVIEW**

## **SIGNIFICANT DECISIONS IN 2013:** **EMPLOYMENT LAW UPDATE**

**By Frank Valenzuela**

### **U.S. SUPREME COURT**

#### ***University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (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 because of the plaintiff’s having engaged in a protected activity.

#### ***Vance v. Ball State University, 133 S. Ct. 2434 (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 Sandra 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**

***EEOC v. Boh Brothers Construction Co., L.L.C.*, 731 F.3<sup>rd</sup> 444 (5th Cir. September 27, 2013) (en banc)**

The Fifth Circuit, in an *en banc* decision, held explicitly for the first time that a plaintiff may establish the first-prong of same-sex sexual harassment claim, e.g., that the harassment be because of the plaintiff’s sex, with evidence of sexual stereotyping.<sup>1</sup>

Kerry Woods was an iron worker who was subjected to almost-daily verbal and physical mistreatment because he did not conform to his male supervisor’s view of how a man should act. Specifically, his supervisor called Woods “sex-based epithets like ‘fa—ot,’ ‘pu—y,’ and ‘princess’” two or three time a day; approached Woods from behind and simulated anal sex more than 60 times; exposed his genitals to Wood while smiling and waving; and suggested to Woods that he would place his penis in Woods’s mouth. Woods complained to his foreman two or three times, but he did not provide much detail because he was concerned about causing more conflict. After an incident of alleged misconduct by Woods, however, he met with a general superintendent for Boh Brothers and made all of his complaints in detail, in addition to suggesting that his supervisor was stealing material and shrimping on company time. During the meeting, no mention was made of Woods’s alleged misconduct and the superintendent agreed to look into the harassment. The superintendent sent Woods home without pay. Woods thought that he had been fired, but was then subsequently assigned to another project, and ultimately later

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<sup>1</sup> Though I think that this holding is the main reason why this decision is important in the development of Title VII case law, the decision also includes important discussions about the *Ellerth/Faragher* affirmative defense, why it did not shield the employer from liability, and about the conditions for the imposition of punitive damages in a Title VII case.

laid off. The superintendent's interview of Woods's claims consisted of two ten-minute oral interviews and the superintendent never contacted Boh Brothers' general counsel; in comparison, the allegation about stealing materials and time was extensively investigated.

The EEOC filed suit on Woods's behalf and prevailed at trial on its sexual harassment and retaliation Title VII claims. A three-judge panel of the Fifth Circuit overturned the jury verdict, but the Fifth Circuit then decided to hear the case en banc.

The Fifth Circuit began its analysis by examining principles of established the law. More precisely, it wrote that there are four elements to be established for hostile work environment claims when a supervisor's conduct is at issue: (1) the employee belongs to a protected class; (2) the employee was subject to unwelcome to sexual harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment, meaning that the conduct was sufficiently severe or pervasive to alter the victim employee's employment and create an abusive work environment.

In the context of same-sex discrimination cases, courts consider (1) whether the conduct was sex discrimination and (2) whether the conduct meets the standard for hostile work environment claims. It was well-established that in the context of heterosexual sex discrimination claims, gender stereotyping was sufficient to establish sex discrimination, and that sex discrimination claims can be asserted in situations where the harasser and victim are of the same sex. To show that discrimination was because of sex, and not merely offensive speech or conduct, the Supreme Court had laid out three ways to make such a showing in the same-sex context, but none of the three ways included by providing evidence of gender stereotype. In this case, the Fifth Circuit held that the three ways the Supreme Court laid out were not the exclusive ways of making the required finding and that evidence of gender stereotyping can be sufficient to establish that harassment had occurred because-of-sex.

Based on the evidence, the Fifth Circuit held that a reasonable jury could find that Woods was harassed because of his sex and that the conduct was sufficiently severe and pervasive to support Title VII liability.

### **TEXAS SUPREME COURT**

***Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, No. 10-0582, 2013 Tex. LEXIS 154 (Tex. Feb. 22, 2013)**

A plaintiff must show that he had a subjective *and objective* good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority" in order to be protected under the Texas Whistleblower Act. A plaintiff fails to show an objective good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority" when he admits to knowing that his supervisor only oversaw compliance with federal law and would have to report any violations of law to an external law-enforcement authority. The Texas Whistleblower Act ("the Act") is outward looking and does not protect purely internal reports. Finally, failure to establish a report to the "appropriate law enforcement authority" is a jurisdictional bar to suit.

Gentilello, a professor of surgery at The University of Texas Southwestern Medical Center (“UTSW”), was stripped of his faculty chair position sometime after reporting to his supervisor what he believed to be violations of Medicare and Medicaid requirements and procedures. Gentilello filed a whistleblower suit charging that his demotion was in retaliation for his reporting the violations to his supervisor. UTSW filed a plea to the jurisdiction, alleging that the suit was barred by governmental immunity because it lacked the Act’s jurisdictional elements. The lower courts denied UTSW’s plea to the jurisdiction, and UTSW filed an interlocutory appeal.

The Texas Supreme Court held that an employee must show a subjective and objective good-faith belief that he reported a violation of law to the “appropriate law enforcement authority.” In order to find an objective good-faith belief, the Court held that an employee’s belief must have been reasonable in light of the employee’s training and experience. Failure to make such a finding is a jurisdictional bar to suit. The Court found that the Texas Whistleblower Act gives a limited definition to “appropriate law enforcement authority” and only includes authorities that may regulate under or enforce provisions of law. This definition is more limited than the protection offered employees under federal or other state whistleblower statutes. The Court found that “the bare power to urge compliance or purge noncompliance” with legislative directives does not transform a supervisor, who can only take internal action to ensure that the entity complies with the law, into an “appropriate law enforcement authority.” Under that standard, the Court held that based on Gentilello’s training and experience, he could not have had a good-faith belief that his internal report satisfied the requirements of the Act. Finally, the Court rejected Gentilello’s claim that UTSW’s internal anti-retaliation policy was sufficient to establish his good-faith belief that he was reporting a violation of law to the “appropriate law enforcement authority.” The Court refused to broaden the applicability of the Texas Whistleblower Act to a purely internal report of a violation of law based on an entity’s commitment to internal compliance with the law. The Court held that UTSW’s immunity remained intact, and reversed the judgment of the court of appeals and dismissed for lack of jurisdiction.