

EMPLOYMENT LAW UPDATE



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November 19, 2014

Vance v. Ball State University

It's a whole new "Ball" game.

The Issue:

Who qualifies as a
"supervisor" in a case in
which an employee
asserts a workplace
harassment claim?



Vance v. Ball State University

The Facts:



- Maetta Vance, an African-American female, was employed by Ball State (BSU) as a catering assistant.
- During her career, Vance lodged numerous complaints of racial discrimination and retaliation.
- Davis, a white woman, was employed as a catering specialist.
- Davis did not have the power to hire, fire, demote, promote, transfer or discipline Vance.

Vance v. Ball State University

Just the facts!



- Vance filed internal complaints with BSU and the EEOC alleging racial harassment and discrimination. Many of these complaints pertained to Davis.

Vance v. Ball State University

Seriously, more facts?

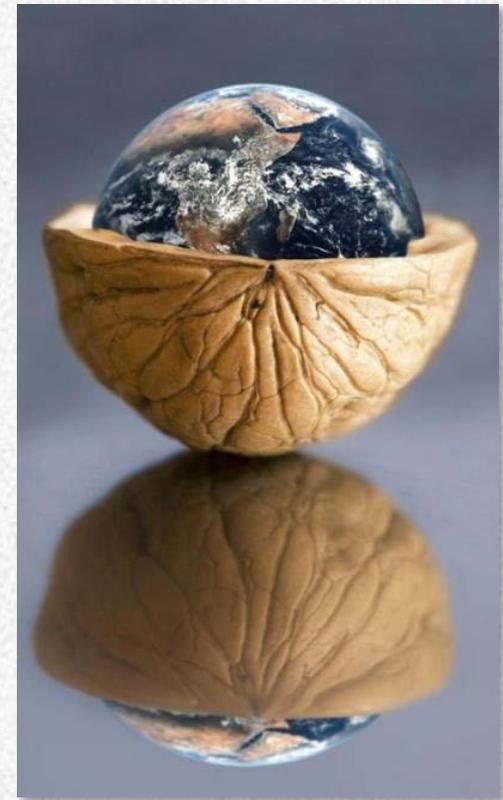
- Vance complained that Davis did the following:
 - Davis would give her a hard time by glaring at her, slamming pots, and intimidating her.
 - Davis blocked her on an elevator and “stood there with her cart smiling.”
 - Davis often gave her “weird” looks.



Vance v. Ball State University

Title VII in a Nutshell

Title VII makes it “an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”



Vance v. Ball State University

Just give me the low-down on Title VII harassment!

- Under Title VII, an employer's liability for harassment may depend on the status of the harasser.
 - Co-workers: Employer liable if it was negligent in controlling working conditions.



Vance v. Ball State University

The low-down continued.



What if the harasser is a “supervisor”?

- Supervisors can make an employer vicariously liable.
 - If the harassment culminates in a tangible employment action, the employer is strictly liable.
 - i.e., hiring, firing, failure to promote, reassignment with significantly different responsibilities, or significant changes in benefits.
 - If no tangible action is taken, the employer may escape liability by establishing:
 - (1) that the employer exercised reasonable care to prevent and correct any harassing behavior; and
 - (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided.

Vance v. Ball State University

- Both parties moved for summary judgment - and the district court entered summary judgment in favor of BSU.
- Vance appealed and the 7th Circuit affirmed.
- Vance applied for and was granted cert at U.S. Supreme Court.



Vance v. Ball State University

United States Supreme Court holding:

Supervisor status *requires* the power to hire, fire, demote, promote, transfer, or discipline an employee.

Vance v. Ball State University

The Holding

An employee is a “supervisor” for the purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.



Vance v. Ball State University

What does this mean?

- The client that you work for may be *vicariously liable* for an employee's harassment if the harassing employee can cause a:

“significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

University of Texas Southwestern Medical Center v. Nassar

- Dr. Nassar, of Middle Eastern descent, worked as Assistant Professor and Associate Medical Director of HIV/AIDS clinic at UTSW.
- His ultimate, but not direct supervisor began inquiring about and criticizing his productivity and billing practices.
- In his presence, she stated, "Middle Easterners are lazy."



University of Texas Southwestern Medical Center v. Nassar

- Nassar complained several times to the Chair of the Internal Medicine Department.
- Nassar applied for and obtained a promotion, with the support of his indirect supervisor.
- But, Nassar continued to believe she was biased against him due to his religion and ethnic heritage.



University of Texas Southwestern Medical Center v. Nassar

- Nassar tried to arrange to work for the hospital without being on UTSW faculty.
- The hospital indicated that might be possible, but overlooked an agreement with UTSW that required hospital physicians to serve on faculty.



University of Texas Southwestern Medical Center v. Nassar

- Nassar resigned his faculty position, expecting to be able to continue to stay on as a hospital staff physician.
- After heavy opposition from UTSW, the hospital withdrew its offer to Nassar.



University of Texas Southwestern Medical Center v. Nassar

- Nassar exhausted his administrative remedies, and filed suit in U. S. District Court.
- Nassar asserted two claims:
 - First, he alleged that he was constructively discharged due to discrimination based on his religion and race.
 - Second, he alleged that UTSW retaliated against him by requiring the hospital to withdraw its offer because he complained about his indirect supervisor's discrimination.



University of Texas Southwestern Medical Center v. Nassar

- The jury found in favor of Nassar on both claims and awarded him:
 - \$400,000 in backpay, *and*
 - more than \$3,000,000 in compensatory damages.
- The District Court reduced the compensatory damages to \$300,000.



University of Texas Southwestern Medical Center v. Nassar

- UTSW appealed and the 5th Circuit affirmed in part and vacated in part.
- Regarding the first claim, the 5th Circuit found that Nassar had submitted insufficient evidence of constructive discharge and vacated that portion of the verdict.
- The court affirmed the retaliation finding, by determining that Nassar showed retaliation was a “motivating factor” for the adverse employment action.



University of Texas Southwestern Medical Center v. Nassar

- Nassar appealed to the United States Supreme Court.
- The issue decided by the Supreme Court was the correct ***standard of proof*** for a Title VII ***retaliation claim***.



University of Texas Southwestern Medical Center v. Nassar

- To understand the Court’s reasoning, background information is necessary.
- Courts have struggled with whether a claimant must establish discrimination under a “but for” or a “motivating factor” standard of proof.



University of Texas Southwestern Medical Center v. Nassar

What's the difference?

- Under the “but for” standard, a plaintiff must show that an adverse employment action would not have occurred “but for” unlawful discrimination.
- Under the “motivating factor” standard, a plaintiff can show that unlawful discrimination was the “motivating factor” for an adverse employment action.



University of Texas Southwestern Medical Center v. Nassar

- In the Civil Rights Act of 1991, Congress amended Title VII to reduce the standard of proof for claims alleging race, color, religion, sex and national origin discrimination to the “motivating factor” standard.
- The new provision states:
“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”



University of Texas Southwestern Medical Center v. Nassar

- Because the new provision does not include a reference to retaliation, the Court concluded that the lower standard of proof, e.g., motivating factor, does not apply to retaliation claims.
- The Court held that to prevail on a Title VII retaliation claim, a plaintiff must prove that an adverse employment action would not have occurred “but for” unlawful retaliation.



City of Austin v. Chandler

In *Chandler*, a group of public safety officers over age 40, who had worked for the Public Safety Emergency Management Department (PSEM), sued the City of Austin (COA), claiming COA's method of consolidating PSEM into the City of Austin Police Department (APD) had a disparate impact on older PSEM employees.



City of Austin v. Chandler

- Prior to 2009, PSEM was a separate non-civil-service agency encompassing COA's airport, park, and municipal court operations.
- There was a wide range of compensation packages within PSEM, in part due to PSEM officers' eligibility for a wider range of pay stipends based on various certifications, education levels, and types of assignments.



City of Austin v. Chandler

- In 2006, the City began working to consolidate PSEM into the Austin Police Department (APD).
- APD wanted to create a uniform chain of command and improve the City's ability to meet its law enforcement needs.



City of Austin v. Chandler

- The City entered into a Consolidation Agreement with the union that represented APD officers.
- PSEM employees were not represented in negotiations because they were not yet APD employees and not part of the union.



City of Austin v. Chandler

- Under the Consolidation Agreement,
 - no PSEM employee could transfer to APD at a rank higher than “officer,” and
 - no PSEM employee could start with a base salary higher than that of an APD officer with 16 years of experience.



City of Austin v. Chandler

- Also, PSEM employees could be credited with only a maximum of 3 years of PSEM service as APD service.
- APD required 5 years of service for employees to take promotion exams.
- Therefore, PSEM employees, regardless of rank or years of experience, would not be eligible for promotion for at least 2 years after consolidation.

City of Austin v. Chandler

- The PSEM employees and COA provided conflicting statistical analysis regarding the effect of the Consolidation Agreement on older PSEM employees.



City of Austin v. Chandler

- PSEM employees' expert argued that in the consolidation, PSEM employees under age 40 lost 3.7 years of service but employees 40 or older lost 6.5 years.
- In addition, because seniority factored heavily into an APD officer's base pay, the disparity resulted in PSEM employees under 40 receiving a 15.61% pay increase, but employees 40 or older receiving only a 5.61% increase.



City of Austin v. Chandler

The Trial Court

- The jury found in favor of the PSEM employees.
- COA appealed, arguing:
 - Trial court did not have jurisdiction because the PSEM employees failed to claim disparate impact at the EEOC,
 - Evidence did not support the jury finding in favor of PSEM employees, and
 - Trial court failed to properly instruct the jury on causation.



City of Austin v. Chandler

- The Court of Appeals affirmed the trial court's decision.
- The Court reviewed the claimants' letters to the EEOC and found that the letter sufficiently raised the issue of disparate impact.



City of Austin v. Chandler

- The Court also found that claimants provided sufficient evidence of disparate impact.
- Under prior case law, the claimants were required to:
 - Isolate and identify the specific employment practice challenged,
 - Demonstrate a statistical disparity that the practice has on a protected class, and
 - Demonstrate a causal link between the practice and the disparity.

City of Austin v. Chandler

- The Court found that the PSEM employees:
 - identified and challenged the Consolidation Agreement,
 - Introduced ample evidence of the disparate effect on older PSEM employees, and
 - Showed that the disparate impact was caused by the method of workforce consolidation in the Consolidation Agreement..



Texas Whistleblower Act

In 2013, the Texas Supreme Court released two decisions on the Texas Whistleblower Act on the same day:

- *University of Texas Southwestern Medical Center v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), and
- *Texas A& M University Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013).

University of Texas Southwestern Medical Center v. Gentilello

- Gentilello was a professor of surgery at UTSW.
 - He reported to his supervisor that residents at a hospital served by UTSW were violating Medicare and Medicaid requirements and procedures by treating and operating on patients without the supervision of an attending physician.
- After reporting the alleged violations, Gentilello was stripped of his faculty chair position.

University of Texas Southwestern Medical Center v. Gentilello

- Gentilello filed suit under the Texas Whistleblower Act.
- The Texas Supreme Court held that unlike other whistleblower statutes, the Texas Whistleblower Act does not provide protection for internal reports.

University of Texas Southwestern Medical Center v. Gentilello

The Court noted that to prove a violation of the Texas Whistleblower Act, a plaintiff must establish:

- he/she is a public employee,
- who reports in good faith a violation of law,
- to an appropriate law enforcement authority.

University of Texas Southwestern Medical Center v. Gentilello

An “appropriate law enforcement authority” is a unit of government that the employee believes in good faith is authorized to:

- regulate under or enforce the law alleged to be violated in the report; or
- investigate or prosecute a violation of criminal law.

Gentilello’s supervisor was not an appropriate law enforcement authority.

Texas A & M University Kingsville v. Moreno

- Gertrud Moreno sued her employer, Texas A & M University-Kingsville (TAMUK), alleging she was terminated in violation of the Texas Whistleblower Act.
- Moreno claimed her supervisor fired her because Moreno reported to the TAMUK president that her supervisor's daughter illegally received in-state tuition.

Texas A&M Kingsville v. Moreno

The Issue:

Who qualifies as an
“appropriate law-
enforcement authority”
under the Texas
Whistleblowers Act?

Texas A&M Kingsville v. Moreno

- Citing *Gentilello*, the Supreme Court stated the Texas Whistleblower Act requires an employee to make a good-faith report of a violation of law to an "appropriate law enforcement authority."
- The Court held that the TAMUK president was not an "appropriate law enforcement authority."

Texas A&M Kingsville v. Moreno

The Court stated that a supervisor is not an appropriate law-enforcement authority where the supervisor lacks authority "to enforce the law allegedly violated ...against third parties generally."

Parker v. Cooper Tire

- Jimmy Parker was employed by Cooper Tire for ten years.
- In November 2007, Parker missed work when he was hospitalized with flu symptoms.
- A month later, Parker was hospitalized again and diagnosed with cirrhosis of the liver, which caused liver failure.
- Parker's condition caused him to miss work, and Parker claimed that he notified Cooper Tire--to the extent he was able to--about his absences.
- Cooper Tire claimed that Parker failed to report his absences, but was inconsistent in its reporting of the dates on which Parker failed to call in.

Parker v. Cooper Tire

Parker's failures to report were as follows:

Dates	Failure to report for shift	Did he report absence
November 14, 15 , 16	No	Yes
November 20, 24, 25	No	No; hospitalized
November 28, 29		Yes, wife reported
November 30		Yes, but not scheduled to work
December 4		Reported on Dec. 3, for Dec. 4, told to report on Dec. 4, failed to report
December 7		Yes; hospitalized

Parker v. Cooper Tire

Watch out for this issue.

- On December 12, Parker submitted forms for FMLA leave.
- On December 20, Parker provided Cooper Tire with letter from his doctor stating he had “severe and possibly end-stage liver disease,” would require a liver transplant, and was “at least temporarily, totally disabled.”

Parker v. Cooper Tire

He was fired the very next day!

Parker was discharged the next day, December 21, for failing to report absences.

- Cooper claimed that Parker had failed to report his absences on November 14, 12, and 20 and that he was terminated in accordance with Cooper’s “three unreported absences” policy.
- Cooper attempted to correct the “no report” days in a letter dated January 4, which stated that Parker actually failed to report on November 28, 29 and December 3.

Parker v. Cooper Tire

- On January 31, Cooper held a peer review, in which Parker’s supervisor testified that the second batch of “no report” days also was incorrect because Parker had failed to report on November 20.

Also, the Power Point showed that Parker failed to report on December 4, not December 3.

Parker v. Cooper Tire

Let's File Suit!

Parker sued claiming he was wrongfully terminated.

- He argued that Cooper terminated him in violation of the FMLA and in order to prevent him from collecting disability and medical benefits in violation of the ERISA anti-retaliation provision.

Parker v. Cooper Tire

- Parker dismissed his FMLA claim at the district court level.
- The District Court granted summary judgment on his ERISA anti-retaliation claims because Parker failed to show the “specific intent to interfere with his ability to obtain ERISA benefits.”
- Apparently, Parker failed to apply for long-term disability benefits.

Parker v. Cooper Tire

- The Fifth Circuit initially issued an opinion in favor of Parker.
 - The Court first stated that **"it would be unconscionable to require that employee--who, but for his new disability *was qualified* for his position--to demonstrate that he was qualified for his position at the time of his termination in order to prove a retaliation claim."**
 - The Court stated that a jury could find it was suspicious that Parker was terminated the day after he delivered his doctor's note.

Parker v. Cooper Tire

Cooper Tire requested a rehearing, and on rehearing, the Fifth Circuit, sitting *en banc*, found for Cooper Tire.

- The Court reversed itself and dismissed Parker's retaliation claims.
 - Even after the Court's strong language in its vacated opinion, the Court held that all of Parker's ERISA claims failed.
 - Surprisingly, the Court held that Parker was unqualified for his job, after his disability.
 - This ruling means that under the ERISA anti-retaliation statute, you must be qualified for your position at the time of termination.

Parker v. Cooper Tire

Although Cooper Tire ultimately prevailed, this case demonstrates that human resources must be very cautious when documenting a reason for termination.

The confusion over the dates on which Parker failed to call-in absent nearly resulted in a negative outcome for Cooper Tire.

Melendez v. Houston ISD

Employees with Addiction Problems



- **The Issue:**

- The Houston Court of Appeals was tasked with deciding whether a recent opiate addiction was excluded by the Texas Commission on Human Rights Act.

Melendez v. Houston ISD

The Facts

- Melendez was employed as a clerk, providing secretarial support.
- She was sent by the school nurse to the hospital because she was “acting kind of funny.”
- Claimed she had taken pain pills on an empty stomach.
- An investigation revealed that she previously had an opiate addiction.
- She was treated in the hospital for an opiate addiction.
- She resigned when she came back to work.

Melendez v. Houston ISD

The Takeaway

- Under the Texas Commission on Human Rights Act, “a current condition of addiction to the use of alcohol, a drug, an illegal substance or a federally controlled substance is excluded.”
- “Melendez’s addiction was sufficiently recent at the time of her purported termination for HISD to reasonably believe that her addiction was ongoing and interfering with the essential functions of her job.”

Ballard v. Chicago Park District

Vegas, he's finally talking about something interesting!

- **The Issue:**

Does the Family and Medical Leave Act extend to a Vegas vacation?



Ballard v. Chicago Park District

Seriously, the background?

- Ballard's mother was diagnosed with end-stage congestive heart failure and began receiving hospice support.
- Ballard was her mother's primary caregiver.
- Ballard's mother's dying wish was a trip to Las Vegas.
- Ballard was terminated.

Ballard v. Chicago Park District

Lessons Learned

- Under this decision, the FMLA is not limited geographically.
- Ballard provided her mom's "basic medical, hygienic, and nutritional needs did not change while she was in Las Vegas, and Ballard continued to assist her with those needs during the trip."

Ballard v. Chicago Park District

The Most Important Fact!

So ... Ballard actually returned home from Vegas as a winner!



Haybarger v. Lawrence County Adult Probation & Parole

Instructing your supervisors on ADA issues.

- Haybarger has Type II diabetes, heart disease and kidney problems.
- Her supervisor commented in her review that she needed to improve her health and absences.
- She was placed on probation and terminated.

Haybarger v. Lawrence County Adult Probation & Parole

What you need to know in Texas

- The Fifth Circuit and Third Circuit courts have already decided that a supervisor at a public entity may be liable under the FMLA.
 - In the Fifth Circuit, a supervisor may be liable if
- Would the Seventh Circuit join suit?

Haybarger v. Lawrence County Adult Probation & Parole

The Holding

- In the Third Circuit, a public sector supervisor may be liable for violations of the FMLA.
 - An employer includes “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.”

Haybarger v. Lawrence County Adult Probation & Parole

Why do I care? It's not even Texas.

- This is an issue that may go to the Supreme Court and directly impacts human resource professionals.
- If a public supervisor “independently exercises control over the work situation,” then they are considered an employer under the FMLA.

Feist v. State of Louisiana D.O.J.

Instructing your supervisors on ADA issues.

- Pauline Feist was diagnosed with arthritis of the knee.
- She requested on-site parking, but was denied.
- She filed an EEOC charge, and was terminated.

Feist v. State of Louisiana D.O.J.

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- **The Issue:**

Was the proposed accommodation of a parking space reasonable?

Feist v. State of Louisiana D.O.J.

The Americans with Disabilities Act

- The ADA prohibits covered employers from “discriminating against a qualified individual on the basis of disability.”
- Disability includes the failure to make “reasonable accommodations...”

Feist v. State of Louisiana D.O.J.

The Holding: Reasonable accommodations are not just limited to essential job functions.

- Accommodations that make a workplace “readily accessible and usable” (e.g., parking spaces) by the employee can also be reasonable accommodations.



Bland v. Roberts

The First Amendment battles Facebook!

- During an election for Sherriff, several members of the Sherriff's Office supported the opponent.
 - The evidence of their support included clicking the “like” button on Facebook, commenting on the campaign's Facebook page, and pictures posted on the opponent's Facebook page.

Bland v. Roberts

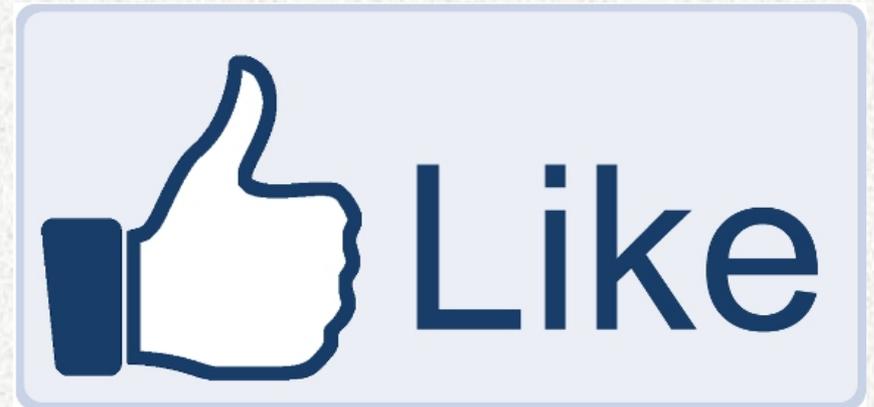
- The district court granted summary judgment in favor of the incumbent Sherriff.
- On appeal, the Court recognized that the actions of the deputies were noted by the Sherriff.



Bland v. Roberts

Why does this matter?

- Now, clicking the “like” button on Facebook is protected speech.



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