While You Were Summering:
What the U.S. Supreme Court did During Your Summer Vacation
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Hopefully many of us had the opportunity to enjoy a nice, relaxing summer vacation free from the cares of the office (or at least a few hours free from the cares of the office). While you were vacationing, the United States Supreme Court issued three decisions which impact your human resource practices and defense of employment-related lawsuits.

**Windsor v. United States**

Although the Court’s decision in *Windsor v. United States* might not seem like an employment law case, the Court’s holding actually has broad implications in the area of employment law, particularly in the ever growing number of states that recognize same-sex marriage. In *Windsor*, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act (DOMA), which defined “marriage” under federal law as the union of a man and a woman and defined “spouse” as an individual of the opposite sex. The U.S. Supreme Court held that Section 3 of DOMA was an unconstitutional deprivation of equal liberty protected by the Fifth Amendment. This means that in states where same-sex marriage is legal, all federal benefits available to married couples must now also be available to same-sex married couples.

**What is the Significance of the Decision?**

The U.S. Supreme Court noted that its decision will affect over 1,000 federal laws, including employment laws like the Family Medical Leave Act (FMLA); the Consolidated Omnibus Budget Reconciliation Act (COBRA); the Employee Retirement Income Security Act (ERISA); and the Health Information Portability and Accountability Act (HIPAA). Already we have seen updates from the Department of Labor indicating that FMLA leave will be available to same-sex spouses. Similarly, the IRS recently announced that “same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes.” Because Ohio does not currently recognize same-sex marriage and a 2004 constitutional amendment actually prohibits same-sex marriage, the implication of the *Windsor* decision in Ohio remains to be seen; however, human resource professionals should stay on top of developments in Ohio and other states where employees are located.

**Vance v. Ball State University**

On June 24, 2013, the U.S. Supreme Court determined in *Vance v. Ball State University* that, for purposes of Title VII vicarious liability, the definition of “supervisor” is limited to an employee who is empowered to take tangible employment actions against the victim of harassment. Tangible employment actions include: hiring, firing, demoting, promoting, reassigning and making decisions causing significant changes in an employee’s economic benefits. Tangible employment actions do not include simply scheduling, assigning or directing the work of others.

**What is the Significance of the Decision?**

According to Supreme Court precedent, an employer is strictly liable for the actions of a supervisor when the supervisor’s harassment results in a tangible employment action. If a supervisor’s harassing conduct does not result in a tangible employment action, then an employer is still liable for the harassment by a supervisor unless the employer proves: 1) the employer exercised reasonable care to prevent and correct the harassing
conduct; and 2) the harassed employee unreasonably failed to take advantage of corrective or preventative measures provided by the employer. In contrast, if a co-worker is the alleged harasser, a plaintiff must prove that the employer knew or should have known of the harassment and failed to take reasonable steps to address the harassment. Therefore, whether the alleged harasser is a supervisor or non-supervisor will have a significant impact on the manner in which a harassment case is litigated as well as the outcome.

**University of Texas Southwestern Medical Center v. Nassar**

In *University of Texas Southwestern Medical Center v. Nassar*, the U.S. Supreme Court clarified the standard of causation required for plaintiffs asserting retaliation claims under Title VII. The plaintiff, a medical doctor, alleged that the University retaliated against him for complaining of harassment. The district court instructed the jury that under Title VII, a plaintiff only needs to prove that retaliation was a motivating factor for the adverse employment action, not the traditional tort principles of but-for causation. The Fifth Circuit Court of Appeals affirmed.

The U.S. Supreme Court reversed. According to the Court, when interpreting Title VII, it is presumed that Congress intended to incorporate the traditional but-for standard of causation absent an indication to the contrary in the statutory language itself. With regard to Title VII, the Court pointed out that the motivating factor causation framework refers only to status-based discrimination (discrimination based upon a protected class: race; sex; religion, etc.) and not retaliation. Additionally, the Court noted that the status-based discrimination provision is in a completely different section of the statute than the provision banning retaliation. Therefore, the Court held that based upon statutory structure and the plain language of Title VII, the motivating factor causation standard applies only to claims alleging status-based discrimination and not retaliation claims. According to the Court, a less onerous standard of causation for retaliation would contribute to the filing of frivolous claims.

**What is the Significance of the Decision?**

Retaliation claims continue to be on the rise. In general, retaliation lawsuits are more difficult to defend. Although *Nassar* does not have a direct impact on day-to-day decisions of human resource professionals, they should take some solace in knowing that when faced with a retaliation lawsuit, the standard is now clarified and the plaintiff must establish that retaliation was the cause of the adverse employment action.

**Employer Action Steps**

The Supreme Court’s rulings provide some valuable insights that employers can put into action.

1. Review benefit and leave practices to determine whether there is any necessary extension of the practices to employees with same-sex spouses (not yet in Ohio, but be cautious!).
2. Review and revise job descriptions. Determine which employees have the authority to take tangible employment actions, document those decisions in written job descriptions and communicate that fact to the employee.
3. Document legitimate, non-retaliatory reasons for taking an adverse employment action after any employee engages in protected activity.

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