HYDERALLY & ASSOCIATES P.C.

US Supreme Court Year in Review: 2012-2013 Labor & Employment Law Cases

Ty Hyderally, Esq.

Morris/Essex Small Firm Networking Group
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Case List

- Lefemine v. Wideman, 133 S.Ct. 9 (Decided November 5, 2012)
- Nitro-Lift Technologies, LLC v. Howard, 133 S.Ct. 500 (Decided November 26, 2012)
- Kloeckner v. Solis, 133 S.Ct. 596 (Decided December 10, 2012)
- Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (Decided April 16, 2013)
- US Airways v. Mccutchen, 133 S.Ct. 1537 (Decided April 16, 2013)
- Hillman v. Maretta, 133 S.Ct. 1943 (Decided June 3, 2013)
- Univ. of Tex. Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (Decided June 24, 2013)
- Vance v. Ball State University, 133 S.Ct. 2434 (Decided June 24, 2013)
- Lawson v. FMR, LLC, 2014 U.S. LEXIS 1783 (Decided Mar. 4, 2014)

LEFEMINE V. WIDEMAN

133 S.Ct. 9 (Decided November 5, 2012)

Facts:

- First Amendment case with implications for employment law.
- Petitioner Steven Lefemine:
  - pro-life protestor
  - participated in demonstration at busy intersection by carrying signs with graphic pictures of aborted fetuses.
- Police officers threatened to ticket protestors for breach of peace, forced Lefemine to end protest.

LEFEMINE V. WIDEMAN

133 S.Ct. 9 (Decided November 5, 2012)

Facts (continued):

- Police made similar threats about later planned protests.
- Lefemine
  - filed complaint under 42 U.S.C. §1983 alleging violations of First Amendment rights
  - sought nominal damages, declaratory judgment, permanent injunction, and attorney's fees.

LEFEMINE V. WIDEMAN

133 S.Ct. 9 (Decided November 5, 2012)

District Court (732 F. Supp. 2d 614 (S.C. 2010)):

- Determined that police infringed on Lefemine's rights.
- Permanently enjoined Defendants' content-based restrictions on Lefemine's graphic signs under similar circumstances.
- Denied request for nominal damages and recognized a qualified immunity for the defendants because illegality of conduct was not clearly established at that time.
- Denied request for attorney's fees under 42 U.S.C. §1988.

LEFEMINE V. WIDEMAN

133 S.Ct. 9 (Decided November 5, 2012)

Fourth Circuit (672 F.3d 292 (4th Cir. 2013)):

- Affirmed District Court decision.
- Denied request for attorney's fees under 42 U.S.C. §1988.
- Held: Plaintiff who secures permanent injunction but no monetary damages is not a "prevailing party" under 42 U.S.C. §1988 and thus is not entitled to attorney's fees.

LEFEMINE V. WIDEMAN

133 S.Ct. 9 (Decided November 5, 2012)

US Supreme Court (Per Curiam):

- Vacated Fourth Circuit decision and remanded.
- The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. §1988, allows prevailing party in certain civil rights actions to recover "a reasonable attorney's fee."
- A plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

LEFEMINE V. WIDEMAN

133 S.Ct. 9 (Decided November 5, 2012)

US Supreme Court (continued):

- Injunction or declaratory judgment usually satisfies test for when plaintiff “prevails.”
- Because Lefemine is “prevailing party,” he “should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.” (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)).
- Remanded to evaluate if special circumstances impact award of attorney’s fees.

NITRO-LIFT TECHNOLOGIES, LLC V. HOWARD

133 S.Ct. 500 (Decided November 26, 2012)

Facts:

- Nitro-Lift Technologies entered confidentiality and non-competition agreement with former employees Eddie Lee Howard and Shane Schneider.
- Agreement contained arbitration clause.
- Later, employees worked for Nitro-Lift competitor.
- Nitro-Lift served employees with demand for arbitration to assert breach of contract claims as to non-competition agreement.

NITRO-LIFT TECHNOLOGIES, LLC V. HOWARD

133 S.Ct. 500 (Decided November 26, 2012)

Facts (continued):

- Employees filed suit in Oklahoma state court, asked Court to declare non-competition agreements null and void, and enjoin their enforcement.
- Okla. Stat. Tit. 15 §219A limits enforceability of noncompetition agreements.

NITRO-LIFT TECHNOLOGIES, LLC V. HOWARD

133 S.Ct. 500 (Decided November 26, 2012)

District Court of Johnston County, OK:

- Dismissed complaint.
- Held contracts contained valid arbitration clause.
- Held arbitrator, not court, should settle dispute.

NITRO-LIFT TECHNOLOGIES, LLC V. HOWARD

133 S.Ct. 500 (Decided November 26, 2012)

OK Supreme Court (2011 OK 98 (2011)):

- Reversed and remanded.
- Held non-competition agreement void and unenforceable, violates public policy as expressed by Okla. Stat., Tit. 15 §219A.
- Reasoned existence of arbitration agreement in employment contract does not prohibit judicial review of underlying agreement.

NITRO-LIFT TECHNOLOGIES, LLC V. HOWARD

133 S.Ct. 500 (Decided November 26, 2012)

US Supreme Court (Per Curium):

- Vacated OK Supreme Court decision and remanded.
- Under Federal Arbitration Act, 9 U.S.C.S. § 1 et. seq., attacks on validity of contract, as distinct from attacks on validity of arbitration clause itself, should be resolved by arbitrator in first instance, not by court. (citing *Preston v. Ferrer*, 552 U.S. 346, 349 (2008)).

KLOECKNER V. SOLIS
133 S.Ct. 596 (December 10, 2012)

Background:

- Under the Service Reform Act of 1978, discharged or demoted federal employee may appeal to Merit Systems Protection Board.
- If employee alleges discrimination prohibited by federal statute, it is "mixed case."
- A mixed case may be filed with the agency and appealed either to MSPB or by suing in district court. Or employee may bypass agency and file mixed case directly with MSPB.
- Employee is entitled to judicial review of MSPB decision.
- Generally, Federal Circuit has jurisdiction over appeals of MSPB decisions, BUT mixed cases are subject to review in same way as under applicable federal discrimination statute.

KLOECKNER V. SOLIS

133 S.Ct. 596 (December 10, 2012)

Facts:

- Carolyn Kloeckner, employee of Dept of Labor, alleged sex and age discrimination.
- Kloeckner requested EEOC hearing, and DOL fired her while EEOC case was pending.
- Kloeckner originally brought her mixed case to MSPB, but later amended EEOC case to include retaliatory termination claim, and withdrew MSPB case.
- Later, EEOC judge dismissed the case to sanction Kloeckner for bad faith conduct in discovery.
- Kloeckner attempted to refile MSPB case, but months after deadline imposed by judge in the original MSPB dismissal -- rejected as untimely.
- Kloeckner sued DOL in federal district court.

KLOECKNER V. SOLIS
133 S.Ct. 596 (December 10, 2012)

District Court (2010 WL 582590 (E.D. Mo. Feb. 18, 2010)):

- Kloeckner's federal lawsuit should be characterized as appeal of untimely MSPB filing.
- In appeal of MSPB filing, jurisdiction is limited to Federal Circuit.
- Dismissed.

KLOECKNER V. SOLIS
133 S.Ct. 596 (December 10, 2012)

Eighth Circuit (639 F.3d 834 (8th Cir. 2011)):

- Affirmed.
- Because the MSPB claims were dismissed as untimely rather than any decision being issued on the merits concerning discrimination, the reviewing court should not characterize this as a mixed case.
- Thus, the Federal Circuit is the appropriate jurisdiction for the appeal of the MSPB's non-mixed decision.

KLOECKNER V. SOLIS

133 S.Ct. 596 (December 10, 2012)

US Supreme Court (Kagan):

- Reversed and remanded.
- The Court rejected the Government's "bifurcated scheme" which would send procedural rulings to the Federal Circuit while allowing rulings on the merits or with mixed procedural and meritorious bases to remain in other federal courts.
- Holding: A federal employee who claims an agency action appealable to the MSPB violates a federal antidiscrimination statute should file her claims in district court, rather than in the Federal Circuit, regardless of whether the MSPB decided her case on procedural grounds or on the merits.

GENESIS HEALTHCARE CORP. V. SYMCZYK
133 S.Ct. 1523 (April 16, 2013)

Facts:

- Respondent Laura Symczyk was employed by Petitioners as a registered nurse.
- Symczyk filed a class action lawsuit alleging that Genesis violated the FLSA by automatically deducting 30 minutes of time worked per shift for meal breaks, even when the employees did compensable work during that time.
- When Petitioners answered the complaint, they filed an offer of judgment (OOJ) under FRCP 68.
- The OOJ included $7,500 for alleged unpaid wages plus reasonable attorneys' fees, costs, and expenses at the court's discretion.
- Symczyk failed to respond, and pursuant to a term in the OOJ, after 10 days, Petitioners considered the silence a rejection of the OOJ.

GENESIS HEALTHCARE CORP. V. SYMCZYK
133 S.Ct. 1523 (April 16, 2013)

Facts (continued):

- Petitioners filed a motion to dismiss, arguing that they offered Symczyk complete relief on her individual claims, so she no longer possessed a personal stake in the outcome of the suit and the action was moot.
- Symczyk did not deny that the OOJ completely satisfied her claims.
- Symczyk objected to Petitioner's tactic as an inappropriate attempt to "pick off" the named plaintiff before the collective-action process could unfold.

GENESIS HEALTHCARE CORP. V. SYMCZYK
133 S.Ct. 1523 (April 16, 2013)

District Court (2010 WL 2038676 (E.D. Pa. May 19, 2010)):

- Dismissed for lack of subject matter jurisdiction.
- The district court accepted the reasoning that following the rejection of the OOJ which would have fully satisfied Plaintiff's claims, the lawsuit was moot.

GENESIS HEALTHCARE CORP. V. SYMCZYK
133 S.Ct. 1523 (April 16, 2013)

Third Circuit (656 F.3d 189 (3d Cir. 2011)):

- Reversed and remanded.
- Despite agreeing that no other plaintiffs opted into the suit, that the OOJ fully satisfied Symczyk's individual claim, and that traditionally, such an OOJ would moot Symczyk's claim, held that the claim here was not moot.
- Reasoned that to allow defendants to "pick off" named plaintiffs with strategic Rule 68 offers before certification would frustrate the goals of collective actions.
- Remanded in order to allow respondent to seek conditional certification of the district court.

GENESIS HEALTHCARE CORP. V. SYMCZYK
133 S.Ct. 1523 (April 16, 2013)

US Supreme Court (Thomas):

- Reversed.
- The Court held that the case was appropriately dismissed for lack of subject matter jurisdiction because Symczyk has no personal interest in representing putative, unnamed plaintiffs, or any other interest that would preserve her lawsuit against mootness.
- In *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980), Plaintiff's claim was not moot despite an OOJ because the attorneys' fees were in dispute following the OOJ for the full amount of damages.
- In this case, Petitioners' OOJ covered attorneys' fees too, thereby eliminating a final basis for maintaining Symczyk's claim.

GENESIS HEALTHCARE CORP. V. SYMCZYK
133 S.Ct. 1523 (April 16, 2013)

US Supreme Court (Dissenting Kagan, joined by 3 others):

- Cites *Chafin v. Chafin*, 133 S. Ct. 1017(2012), under which "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."
- Disagrees with the premise that Symczyk's claim is moot.
- Argues that "an unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. . . . Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted."

US AIRWAYS V. MCCUTCHEN
133 S.Ct. 1537 (April 16, 2013)

Facts:

- Respondent James McCutchen participated in a health benefits plan established by his employer US Airways under the Employee Retirement Income Security Act (ERISA).
- The plan required US Airways to pay any medical expenses resulting from a third party's actions and entitled US Airways to reimbursement upon recovery of money from the third party.
- McCutchen suffered serious injuries from a car accident caused by another driver losing control of her car and colliding with McCutchen.
- Under *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), an employer may bring a civil action to enforce such a reimbursement plan.

US AIRWAYS V. MCCUTCHEN
133 S.Ct. 1537 (April 16, 2013)

Facts (continued):

- McCutchen, who suffered estimated damages over $1 million, settled with the driver for $10,000 due to her limited insurance coverage and obtained the maximum of $100,000 from McCutchen's automobile insurer, reduced to approximately $66,866 after deducting attorneys' fees.
- US Airways, which had covered McCutchen's medical expenses arising from the accident, sought reimbursement of the $66,866.
- McCutchen argued 1) the reimbursement clause was meant only to prevent against over-recovery, which did not occur here; and 2) US Airways should contribute a portion of the $66,866 toward his attorney's fees.

US AIRWAYS V. MCCUTCHEN
133 S.Ct. 1537 (April 16, 2013)

District Court (2010 WL 3420951 (W.D. Pa. Aug. 30, 2010)):

- Granted Plaintiff US Airways' motion for summary judgment.
- Plaintiff is entitled to the $66,866.
- Applied the Third Circuit precedent from *Bill Gray Enters. v. Gourley*, 248 F.3d 206 (3d Cir. 2001), which rejected the argument that the common law make whole doctrine should be used in ERISA plan interpretation.
- The language of the plan permitting reimbursement "for amounts paid for claims out of any monies recovered" requires 100% reimbursement, and no allocation toward attorney's fees.

US AIRWAYS V. MCCUTCHEN
133 S.Ct. 1537 (April 16, 2013)

Third Circuit (663 F.3d 671 (3d Cir. 2011)):

- Vacated and remanded.
- Applied the equitable principle of unjust enrichment.
- Determined that the reimbursement for US Airways was not the "appropriate equitable relief" to which US Airways is entitled under ERISA § 502(a)(3), 29 U.S.C.S. § 1132(a)(3).
- Reasoned that in adopting the "appropriate equitable relief" language, Congress intended to invoke principles which sometimes would not be deferential to absolute freedom of contract.
- Remanded to determine an amount for reimbursement which would be "appropriate equitable relief."

US AIRWAYS V. MCCUTCHEN
133 S.Ct. 1537 (April 16, 2013)

US Supreme Court (Kagan):

- Vacated and remanded.
- Issued a two-part decision, with one part favoring US Airways and the other favoring McCutchen.
- First, in an action brought under § 502(a)(3) based on an equitable lien agreement, the terms of the ERISA plan govern, and doctrines such as unjust enrichment or the double-recovery or common-fund rules cannot override those terms. This allows US Airways' reimbursement.
- Second, under the common-fund doctrine, a party who recovers a common fund for the benefit of persons other than himself is due a reasonable attorney's fee from the fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).
- The terms of the plan do not address the cost of recovery, so it is properly read to retain the common-fund doctrine Thus, McCutchen may deduct from the $66,866 reimbursement owed to US Airways attorney's fees to be determined on remand.

US AIRWAYS V. MCCUTCHEN
133 S.Ct. 1537 (April 16, 2013)

US Supreme Court (Dissenting Scalia, joined by 3 others):

- Agreed with the majority's conclusion that equity cannot override the plain terms of a contract.
- Disagreed with the majority's conclusions that the terms of the contract as they pertain to attorney's fees are not "plain" and that the common fund doctrine applies.
- Asserted that the Court should not address the attorney's fee issue because it was not an issue properly before the Court.
- Citing statements from both parties and the Solicitor General, argued that all parties understood that the provision at issue before the Court regarding reimbursement for any amounts recovered from third-parties provides reimbursement without any contribution to attorney's fees and expenses.

HILLMAN V. MARETTA

133 S.Ct. 1943 (June 3, 2013)

Facts:

- The Federal Employees' Group Life Insurance Act of 1954 (FEGLIA) established an insurance program for federal employees and allows them to name a beneficiary.
- A Virginia statute, Va. Code. Ann. § 20-111.1(A) ("Section A") revokes a beneficiary designation in any contract providing a death benefit to a former spouse upon the entry of divorce.
- FEGLIA provides an "order of precedence" beyond the named beneficiary.
- If Section A is preempted by federal law, VA has another statute, Va. Code Ann. § 20-111(D) ("Section D"), which gives a cause of action to the party who would have received proceeds under Section A against the former spouse who received the proceeds due to a preemptory federal law.

HILLMAN V. MARETTA

133 S.Ct. 1943 (June 3, 2013)

Facts (continued):

- Warren Hillman named then-spouse respondent Judy Maretta his beneficiary.
- They divorced, and Hillman married petitioner Jacqueline Hillman.
- After Warren's death, Maretta filed a claim as his beneficiary and collected the proceeds.
- Under Section D, Jacqueline Hillman sued Maretta to recover the proceeds.
- Maretta filed a plea in bar/demurrer, asserting that FEGLIA preempted Section D.

HILLMAN V. MARETTA

133 S.Ct. 1943 (June 3, 2013)

District Court (80 Va. Cir. 439 (Va. 2010)):

- Ruled that FEGLIA does not preempt Section D.
- Determined that there is no 1) express preemption; 2) conflict preemption; or 3) field preemption.
- First, there is no direct inconsistency between FEGLIA and Section D because the payment is made to the named beneficiary. Only later is the action against the former spouse initiated, pursuant to the state interest in domestic relations.
- Second, Section D's equitable cause of action for the spouse at the time of death does not obstruct Congress's stated objectives for FEGLIA.
- Third, Congress did not intend exclusive federal regulation of the field at issue here.

HILLMAN V. MARETTA

133 S.Ct. 1943 (June 3, 2013)

VA Supreme Court (283 Va. 34 (Va. 2012)):

- Reversed.
- Concluded that FEGLIA preempts Section D.
- Noted that a majority of state courts have ruled that FEGLIA does not preempt a state-law constructive trust on FEGLI proceeds for someone other than the named beneficiary, but rejected the interpretation followed in those decisions as incorrect.

HILLMAN V. MARETTA

133 S.Ct. 1943 (June 3, 2013)

US Supreme Court (Sotomayor):

- Affirmed.
- The Supremacy Clause gives Congress the power to expressly pre-empt state law.
- State law is pre-empted "to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trading Council*, 530 US. 363 (2000).
- Concluded that Congress clearly intended for insurance proceeds to be paid directly to the named beneficiary of the federal employee, and that any state law interfering with this objective is pre-empted.

UNIV. OF TEX. SOUTHWESTERN MEDICAL CENTER V. NASSAR

133 S.Ct. 2517 (June 24, 2013)

Facts:

- Respondent Naiel Nassar is a medical doctor of Middle Eastern descent.
- Nassar was employed by Petitioner University of Texas Southwestern Medical Center as a physician and by the University as an assistant professor.
- Nassar's supervisor and University employee, Dr. Beth Levine, allegedly discriminated against Nassar based on his religion and ethnic heritage.
- After enduring the discrimination for an extended period, Nassar pursued an arrangement to continue working at the Hospital without being on the University's faculty.

UNIV. OF TEX. SOUTHWESTERN MEDICAL CENTER V. NASSAR

133 S.Ct. 2517 (June 24, 2013)

Facts (continued):

- After Nassar complained about the discrimination in a letter to Dr. Gregory Fitz, a University chairperson, Fitz protested the proposed arrangement for Nassar's continued employment with the Hospital, and the Hospital withdrew its offer to Nassar.
- Nassar exhausted his administrative remedies.
- Nassar filed a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.* alleging two violations: 1) status-based discrimination under §2000e-2(a); and 2) retaliation for complaining about the harassment under §2000e-3(a).
- Nassar alleged that the discrimination which lead to him leaving the University and pursuing work only with the Hospital amounted to a constructive discharge.

UNIV. OF TEX. SOUTHWESTERN MEDICAL CENTER V. NASSAR

133 S.Ct. 2517 (June 24, 2013)

District Court (2010 WL 4627852 (N.D. Tex. Nov. 3, 2010)):

- Nassar won on both counts at trial, and a jury awarded him $438,167.66 in back pay and benefits and $3,187,500.00 for compensatory damages.
- The court reduced the jury award for compensatory damages to $300,000 under Title VII's compensatory damages cap.
- Plaintiff applied to the court for an award of front pay, but the court denied Plaintiff's motion based in large part on the substantial figure already awarded by the jury.
- The court did award Plaintiff $489,927.50 in attorney's fees plus court costs.

UNIV. OF TEX. SOUTHWESTERN MEDICAL CENTER V. NASSAR

133 S.Ct. 2517 (June 24, 2013)

Fifth Circuit (674 F.3d 448 (5th Cir. 2012)):

- Vacated in part (re constructive discharge) and affirmed in part (re retaliation).
- To establish a constructive discharge claim, a plaintiff must show working conditions so intolerable that a reasonable person under the same circumstances would feel compelled to resign. (citing *State Police v. Suders*, 542 U.S. 129, 141 (2004).
- Found insufficient proof to show that Nassar's working conditions were so intolerable as to satisfy the *Suders* standard.
- Saw no basis to upset the jury's verdict regarding the retaliation claim.

UNIV. OF TEX. SOUTHWESTERN MEDICAL CENTER V. NASSAR

133 S.Ct. 2517 (June 24, 2013)

US Supreme Court (Kennedy):

- Vacated and remanded.
- Issue: Whether retaliation for complaining about the harassment under §2000e-3(a) is subject to the same causation standard as status-based discrimination under §2000e-2(a) ("motivating factor").
- Holding: §2000e-3(a) retaliation claims require a but-for causation standard, a higher standard than the "motivating factor" standard expressly applicable to §2000e-2(a).
- Thus, a retaliation claim under §2000e-3(a) of Title VII requires a showing that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

UNIV. OF TEX. SOUTHWESTERN MEDICAL CENTER V. NASSAR

133 S.Ct. 2517 (June 24, 2013)

US Supreme Court (Dissenting Ginsburg, joined by 3 others):

- By differentiating between discrimination and retaliation claims, the majority fails to heed the Court's own past decision, when it established that "retaliation in response to a complaint against [proscribed] discrimination *is* discrimination on the basis of the characteristic Congress sought to immunize against adverse employment action." *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167, 179 n. 3 (2005) (emphasis added).
- Thus, retaliation claims brought by employees who complain about the type of discrimination subject to the motivating factor standard should also be subject to the motivating factor standard.
- Tort law's but-for test is ill-suited to employment discrimination cases because the analysis involves a hypothetical inquiry into the mind of the employer.

VANCE V. BALL STATE UNIVERSITY

133 S.Ct. 2434 (June 24, 2013)

Facts:

- Maetta Vance, an African-American woman, worked for Ball State University as a catering assistant.
- Vance filed an EEOC claim alleging that her white co-worker Saundra Davis harassed and discriminated against Vance because of her race.
- In her complaint, Vance alleged that Davis was her supervisor and that BSU was vicariously liable for Davis's creation of a racially hostile work environment.
- The parties agreed that Davis did not have the power to fire, demote, promote, transfer, or discipline Vance.

VANCE V. BALL STATE UNIVERSITY

133 S.Ct. 2434 (June 24, 2013)

District Court (2008 WL 4247836 (S.D. Ind. Sept. 10, 2008)):

- Granted Defendants' motion for summary judgment in its entirety.
- Employers are essentially strictly liable if the employee's supervisor created the hostile work environment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *see also Faragher v. Boca Raton, 524 U.S. 775 (1998)*.
- Vance argued that Davis is part of management "because she doesn't clock in" and that periodically Davis had authority to direct the work of other employees.
- These facts, even if true, are insufficient to establish Davis's status as a supervisor.
- When the harasser is a co-employee, an employer can be held liable only if it has been negligent either in discovering or remedying the harassment.

VANCE V. BALL STATE UNIVERSITY

133 S.Ct. 2434 (June 24, 2013)

District Court (continued):

- When an employer becomes aware of the harassment problem, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004).
- Recognized two comments by Ms. Davis that may have been related to race. After Vance reported Davis, BSU issued Davis a warning.
- Characterized the comments as relatively innocuous, and found BSU's response to Vance's complaint to be appropriate.

VANCE V. BALL STATE UNIVERSITY

133 S.Ct. 2434 (June 24, 2013)

Seventh Circuit (646 F.3d 461 (7th Cir. 2011)):

- Affirmed.
- In the case of harassment by co-workers, Title VII does not require an employer's response to successfully prevent subsequent harassment, though it should be reasonably calculated to do so.
- Ruled that BSU conducted a prompt and reasonable investigation into the complaints and took reasonable corrective action by formally warning Davis verbally to refrain from making discriminatory statements and counseling both Vance and Davis about civility in the workplace.

VANCE V. BALL STATE UNIVERSITY

133 S.Ct. 2434 (June 24, 2013)

US Supreme Court (Alito):

- Affirmed.
- Issue: Who qualifies as a "supervisor" for the purpose of establishing vicarious liability in a Title VII harassment case?
- Holding: "[A]n employee is a supervisor for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."
- The Court created the *Ellerth/Faragher* framework for cases involving supervisors with hiring, firing, and other traditional powers of tangible employment action. That background informs the Court's definition of "supervisor" here.

VANCE V. BALL STATE UNIVERSITY

133 S.Ct. 2434 (June 24, 2013)

US Supreme Court (Dissenting Ginsburg, joined by 3 others):

- Cited the EEOC's broad definition of persons who qualify as a "supervisor": (1) an individual authorized "to undertake or recommend tangible employment decisions affecting the employee," including "hiring, firing, promoting, demoting, and reassigning the employee"; or (2) an individual authorized "to direct the employee's daily work activities." EEOC, *Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8 BNA FEP Manual 405:7651 (Feb. 2003).
- The majority's decision is problematic in that it eliminates from characterization as a supervisor employees who control the day-to-day schedules and assignments of others.
- Would have followed the EEOC's definition of "supervisor."

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- Facts
  - The Defendants in this case are three privately held companies involved in the business of mutual fund investment. They are collectively known as "Fidelity Investments".
  - All three companies act as investment advisors to the Fidelity family of mutual funds.
  - The funds themselves have no employees, but are overseen by a board of trustees.

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- Facts cont.
  - Lawson, the plaintiff/employee, was employed by Fidelity Investments (the privately owned company).
  - In 2007 she reported inaccuracies in a report that would give investment advice to the public.
  - She also reported the improper retention of 12b-1 fees to General Counsel.
  - Lawson reported several other discrepancies, all having to do with the errors in methodology.

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- Facts cont.
  - Zhang, the second plaintiff, was terminated for similar protected activity.
  - Both Lawson and Zhang brought suit against "Fidelity Investments".

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- District Court (Lawson v. FMR, LLC, 724 F. Supp. 2d 141 (D. Mass. 2010))
  - The court denied the motion to dismiss as to the SOX claim but granted the motions as to the state wrongful discharge claims.
  - The court found that the term "employee" under SOX was ambiguous and turned to other consideration for further guidance.
  - The court determined that the whistleblower protections in SOX extend to employees of any related entity of a public company.

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- The 1st Circuit (Lawson v. FMR, LLC, 670 F.3d 61 (1st. Cir. 2012))
  - Held that Sec. 1514A (whistleblower protection) does not extend protections to the employees of private corporations.
  - "While different readings may be given the term "employee" within the emphasized language of the text of § 1514A(a) itself as to whether the protected employee refers only to employees of the public companies, principles of statutory interpretation lead us to interpret § 1514A(a) in favor of such a limitation." *Lawson* , 670 F.3d at 68.
  - Reversed and Remanded.

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- Supreme Court (Justice Ginsburg)
  - Reversed the decision of the 1st Circuit and remanded to the District Court.
  - Issue: Whether §1514A extends whistleblower protection to employees of privately held contractors who perform work for public companies.
  - Holding: Yes. Employees had valid whistleblower claims because SOX shielded employees of privately held contractors and subcontractors—for example, investment advisors, law firms, and accounting enterprises—who performed work for a public company.

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- Supreme Court
  - The Court noted that, "affording whistleblower protection to mutual fund investment advisers is crucial to Sarbanes-Oxley's endeavor to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." *Lawson*, 2014 U.S. LEXIS at 40.
  - The Court stated that SOX directly regulates accountants and attorney by requiring them to report and investigate misconduct or risk being banned from future practice.

Lawson v. FMR, LLC

2014 U.S. LEXIS 1783 (Mar. 4, 2014)

- Supreme Court
  - The extensive regulations placed on lawyers and accountants under SOX indicates why Congress would have wanted to extend whistleblower coverage to them.
  - No provision of the Act other than §1514A affords them protection from retaliation by their employers for complying with the Act's reporting requirements.
  - We cannot countenance that Congress intended to leave these professionals vulnerable to discharge or other retaliatory action for complying with the law.
    Lawson, 2014 U.S. LEXIS 1783 at 37.

HYDERALLY & ASSOCIATES P.C.

US Supreme Court Year in Review: 2012-2013
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Ty Hyderally, Esq.

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