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By **Anthony J. Oncidi***

Employee Must Prove That Illegal Retaliation Was The "But For" Cause Of Adverse Job Action Under Title VII

University of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. ___, 2013 WL 3155234 (2013)

The United States Supreme Court ruled that a plaintiff asserting retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") must prove that illegal retaliation was the "but for" cause of the employer's adverse action. In a five-to-four decision, the Court rejected the lower court's decision applying a less burdensome standard, which required merely that a plaintiff show retaliation was one "motivating factor," among others, resulting in the adverse job action. Dr. Naiel Nassar, a physician of Middle Eastern descent, complained that one of his superiors, Dr. Beth Levine, discriminated against him based on his religion and ethnic heritage. Nassar, who worked as a staff physician and assistant professor at the University of Texas Southwestern Medical Center ("UTSW"), attempted to resolve the issue by arranging to work at the hospital without being a UTSW faculty member under Levine's supervision. After Nassar resigned from UTSW, citing Levine's discrimination and harassment as his primary motivation for the transfer, the hospital withdrew its offer of employment at the request of Levine's supervisor. Nassar filed suit against UTSW, alleging constructive discharge and retaliation under Title VII. The issue on appeal was whether Nassar had to prove that the alleged retaliation was the "but for" cause of the termination or merely one of several "motivating factors" in the decision. In holding that a plaintiff alleging a Title VII retaliation claim must prove that the retaliation was the "but for" cause of the employer's adverse employment decision, the Supreme Court clarified that the less burdensome "motivating factor" test applies only to status-based discrimination under Title VII (discrimination on the basis of race, color, religion, sex, national origin, etc.) and not retaliation claims such as the one Nassar asserted in this case.

*Anthony J. Oncidi is a Partner in and the Chair of Proskauer's Labor and Employment Law Department in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his email address is aoncidi@proskauer.com.

Supreme Court Narrows Definition Of "Supervisor" Under Title VII

Vance v. Ball State Univ., 570 U.S. ___, 2013 WL 3155228 (2013)

The United States Supreme Court held that an employee is a "supervisor" for purposes of vicarious employer liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against an employee. Following alleged harassment by a superior, Maetta Vance, a Ball State University ("BSU") dining services employee, filed suit alleging hostile work environment in violation of Title VII. Vance asserted vicarious liability on the part of BSU based on the actions of another BSU employee named Saundra Davis. BSU moved for summary judgment, arguing that because Davis was not Vance's supervisor, it could not be held vicariously liable for her actions. The issue on appeal was whether a "supervisor" must have the power to take tangible employment actions or whether a "supervisor" need only direct the day-to-day activities of an employee – as Vance alleged Davis did. Affirming the decision of the Court of Appeals for the Seventh Circuit, the Supreme Court held that a "supervisor" is an individual who has authority to take tangible employment actions, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits."

This decision is significant because an employer can be held strictly liable for its supervisors' harassment of employees if the harassment culminates in a tangible employment action. If no tangible employment action results, however, an employer can escape liability by establishing that (1) the employer exercised reasonable care to prevent and correct any harassment and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer. In cases in which the harasser is not a supervisor, an employer may still be held liable but only if it was negligent in controlling working conditions – i.e., that it knew or should have known the illegal activity was occurring in the workplace. In rejecting a broader definition of supervisor, the Court limited the circumstances under which an employer can be found vicariously liable for an employee's harassment of another employee.

Employee's Sexual Harassment Claim Was Properly Rejected, But There Was Substantial Evidence Of Retaliation

McCoy v. Pacific Mar. Ass'n, 216 Cal. App. 4th 283 (2013)

Catherine Y. McCoy was working as a marine clerk at the ports when she and other employees filed a federal lawsuit alleging discrimination against PMA (a nonprofit organization that serves as a bargaining agent for its membership, which includes terminal operator Yusen Terminals, Inc.). After the lawsuit was settled, McCoy was provided "standard nightside vessel planner training." McCoy claimed that during the training, the vessel planners refused to acknowledge her presence and that she was given a less desirable room, which increased her isolation from the rest of the vessel planning staff. McCoy presented additional evidence that she suffered from other forms of retaliation and sexual harassment during the training. Although the jury awarded McCoy $1.2 million in economic and emotional distress damages, the trial court granted defense motions for judgment notwithstanding the verdict ("JNOV") on the grounds that: (1) PMA was not McCoy's employer and (2) there was not substantial evidence of sexual harassment or retaliation. The Court of Appeal affirmed dismissal of the sexual harassment and intentional infliction of emotional distress claims on the grounds that

there was insufficient evidence of severity or pervasiveness – McCoy testified about hearing "five to nine" vague sexual comments from a non-supervisor about women's bodies over the course of four months. The Court further affirmed the JNOV in favor of PMA on the ground that PMA's member companies, not PMA itself, are the employers of employees at the ports such as McCoy. However, the Court reversed the JNOV with respect to the retaliation claim, finding "there was substantial evidence supporting the jury's conclusion that respondents unlawfully retaliated against [McCoy] for engaging in protected activity and that the retaliation resulted in a material alteration of the terms, conditions, or privileges of [her] employment." Finally, the Court upheld the trial court's granting of a new trial on the grounds of irregularity in the proceedings, surprise and excessive damages.

SEIU Has Right To Private Contact Information Of Non-Represented County Employees

County of Los Angeles v. Los Angeles County Employee Relations Comm'n, 56 Cal. 4th 905 (2013)

During the course of collective bargaining, the Service Employees International Union ("SEIU") asked the county for the personal contact information (names, home addresses and home telephone numbers) of county employees who are in the bargaining unit but who are not members of the union. When the county refused to disclose that information based on the employees' right to privacy, the union filed an unfair employee-relations practice charge with the Los Angeles County Employee Relations Commission. The Commission agreed with the union and ordered the county to release the information. The trial court upheld the Commission's decision but on different grounds, and the court of appeal considered the non-members' state constitutional right to privacy, reversed the trial court's order and remanded with directions to the trial court to enter a new order directing the county and union to meet and confer on a proposed notice to non-member county employees that included an opportunity for them to object to disclosure. In this opinion, the California Supreme Court reversed the court of appeal's decision, holding that SEIU's interest in communicating with all county employees (including those who are not represented by the union) significantly outweighs non-members' interest in preserving the privacy of their contact information – however, the Supreme Court reversed the court of appeal's order attempting to impose specific notice and opt-out procedures as part of the disclosure process.

Later CCP Sec. 998 Settlement Offer Does Not Extinguish Earlier Offer

Martinez v. Browncо Constr. Co., 56 Cal. 4th 1014 (2013)

In this personal injury case, Raymond and Gloria Martinez sued Browncо Construction Co. for damages arising out of an electrical explosion that severely injured Mr. Martinez. In August 2007, pursuant to Cal. Code Civ. Proc. § 998, Mr. Martinez offered to compromise his negligence claim for $4.75 million, and Mrs. Martinez offered to compromise her loss of consortium claim for $250,000. Browncо ignored the Martinezes' offer of compromise. Just before trial in February 2010, Mr. Martinez and Mrs. Martinez served reduced compromise offers of $1.5 million and $100,000 respectively; Browncо again ignored the offers. At trial, Mr. Martinez obtained a judgment in the amount of

$1,646,674, and Mrs. Martinez obtained a $250,000 judgment. The Martinezes filed a memorandum of costs seeking a total of $561,257, including $188,536.88 in expert fees incurred after the first offer but before the second offer. Brownco opposed the request for expert fees on the ground that the second offer extinguished the first and that costs incurred before the second offer was made could not be recovered under section 998. The Supreme Court disagreed and determined that "[w]here, as here, a plaintiff serves two statutory offers to compromise, and the defendant fails to obtain a judgment more favorable than either offer, recoverability of expert fees incurred from the date of the first offer is consistent with section 998's language and best promotes the statutory purpose to encourage the settlement of lawsuits before trial."

Court Should Have Certified Class Action For Missed Meal And Rest Breaks And Unpaid Overtime

Faulkinbury v. Boyd & Assoc., Inc., 216 Cal. App. 4th 220 (2013)

Plaintiffs sought to represent and certify a class of 4,000 current and former employees of Boyd & Associates, which provides security guard services throughout Southern California. Plaintiffs alleged that Boyd denied the putative class members off-duty meal periods and rest breaks and that it had failed to include certain reimbursements and an annual bonus payment in calculating the employees' hourly rate of overtime pay. The trial court denied certification as to all three subclasses, and the Court of Appeal affirmed as to the claims for meal and rest periods on the ground that the evidence submitted by Boyd showed the ability of each of its security guards to take breaks depended on individual issues. However, the Court reversed the denial of class certification as to the overtime subclass, reasoning that the trial court abused its discretion to the extent it decided common issues did not predominate. The Supreme Court granted review, but after the Supreme Court's opinion in *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), the case was transferred back to the Court of Appeal, which in this opinion reconsidered its earlier opinion in light of *Brinker* and held that the trial court erred by denying class certification of all three subclasses – determining that common issues of fact predominate over individual issues. *See also Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013) (class action should have been certified because common issues predominate over individual issues, and common injury resulted from wage statement errors); *Leyva v. Medline Indus., Inc.*, 716 F.3d 510 (9th Cir. 2013).

Security Guards Must Be Compensated For Nighttime Hours Spent At Jobsites

Mendiola v. CPS Sec. Solutions, Inc., 2013 WL 3356998 (Cal. Ct. App. 2013)

CPS provides security guards for building construction sites throughout California. A number of the guards are designated "trailer guards" because they are expected to spend the night at their assigned jobsites in CPS-provided residential type trailers in order to be available to investigate alarms and other suspicious circumstances and to prevent vandalism and theft. In this class action lawsuit, the guards challenged CPS's pay practices, which included payment of eight hours for patrol and eight hours for on call status during the week and 16 hours for patrol and eight hours for on call status during weekends. The trial court granted a preliminary injunction requiring CPS to compensate the guards for all on-call time spent in the trailers. The Court of Appeal reversed the

preliminary injunction to the extent it requires CPS to compensate the guards for the entirety of their 24-hour weekend shifts. On weekends, the guards must be compensated for 16 hours, and eight hours may be excluded for sleep time, provided the guards are afforded a comfortable place to sleep, the time is not interrupted, the guards are compensated for any period of interruption, and on any day that they do not receive at least five consecutive hours of uninterrupted sleep time, they are compensated for the entire eight hours.

Employer Can Remove Case To Federal Court Under CAFA When It Discovers The Case Is Removable

Roth v. CHA Hollywood Med. Ctr., 2013 WL 3214941 (9th Cir. 2013)

The employer defendant in this case removed the action from state to federal court after it discovered through its own investigation that the case was removable under the Class Action Fairness Act ("CAFA"). Plaintiff filed a motion to remand the action to state court because defendants had not received from *plaintiff* a pleading or document that showed the case was removable to federal court. The district court granted the motion to remand, but the Court of Appeals for the Ninth Circuit reversed, holding that "a defendant who has not lost the right to remove because of a failure to timely file a notice of removal under § 1446(b)(1) or (b)(3) may remove to federal court when it discovers, based on its own investigation, that a case is removable."

Safeway Assistant Manager Was Misclassified As Exempt From Overtime Pay

Heyen v. Safeway Inc., 216 Cal. App. 4th 795 (2013)

After she was terminated, Linda Heyen, a former assistant manager for Safeway, brought this action to recover unpaid overtime pay, asserting that Safeway should have classified her as a non-exempt employee because she regularly spent more than 50 percent of her work hours engaged in nonexempt tasks such as bagging groceries and stocking shelves. An advisory jury agreed with Heyen and awarded her overtime pay in the amount of $26,184.60. In this appeal, Safeway contended that the trial court failed to properly account for hours Heyen spent simultaneously performing exempt and nonexempt tasks (i.e., "actively managing the store while concurrently performing some checking and bagging of customer grocery purchases"). The Court of Appeal affirmed the judgment in favor of Heyen, holding that the "multi-tasking" standard proposed by Safeway is inconsistent with California law. *See also Negri v. Koning & Assoc.*, 216 Cal. App. 4th 392 (2013) (insurance claims adjuster was not exempt under the administrative exemption where employer stipulated that it "never paid [plaintiff] a guaranteed salary").

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Contacts

Harold M. Brody, Partner
310.284.5625 – hbrody@proskauer.com

Enzo Der Boghossian, Partner
310.284.4592 – ederboghossian@proskauer.com

Anthony J. Oncidi, Partner
310.284.5690 – aoncidi@proskauer.com

Kenneth Sulzer, Partner
310.284.5663 – ksulzer@proskauer.com

Mark Theodore, Partner
310.284.5640 – mtheodore@proskauer.com

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