

# **AALS Section on Employment Discrimination and Section on Labor Relations and Employment Law 2013 Newsletter**

## **Introduction**

The AALS Section on Employment Discrimination and the AALS Section on Labor Relations and Employment Law once again worked together to produce this year's annual AALS Newsletter. This newsletter begins with a list of relevant AALS presentations. It continues with a list of new hires, promotions, moves, administrative appointments, visits, honors and awards, followed by a list of publications from the members of both sections. The newsletter concludes with a roundup of recent Supreme Court decisions in the area of employment law, prepared by members of the section.

-- Compiled by Jason Bent and Brad Areheart

## **AALS Section Presentations**

*50th Anniversary of the Civil Rights Act of 1964: Examining its Future (Part I)*

Friday, January 3, 2014

8:30 am – 10:15 am

Section on Civil Rights, Co-Sponsored by Sections on Employment Discrimination and Minority Groups

**Moderator:** Jessica Dixon Weaver, Southern Methodist University, Dedman School of Law

**Speakers from Call for Papers:** Kareem U. Crayton, University of North Carolina School of Law; Juan F. Perea, University of Florida Fredric G. Levin College of Law ; Leticia Saucedo, University of California at Davis School of Law; Ruqaiijah A. Yearby, Case Western Reserve University School of Law.

**Speakers:** Sherrilyn Ifill, University of Maryland Francis King Carey School of Law.

The year 2014 marks the 50th anniversary of the passage of the Civil Rights Act of 1964. According to its preamble, the 1964 Civil Rights Act was enacted, among other things, “to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the

United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, [and] to establish a Commission on Equal Employment Opportunity.” And, of course, after its amendment on the floor, it provided for private actions to prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.

This program celebrates the 50<sup>th</sup> anniversary of the Civil Rights Act of 1964. Co-sponsored by the Minority Rights Section, this program explores the future of civil rights litigation. Specifically, it examines the gaps in the Civil Rights Act and considers the path that lawyers and advocates should take in future civil rights claims. Papers to be published in the *SMU Law Review*.

***Making Visible the Invisible: Reimagining Labor***

Friday, January 3, 2014  
10:30 am – 12:15 pm

Section on Labor Relations and Employment Law

**Moderator:** Peggie Smith, Washington University in St. Louis School of Law

**Speaker from Call for Papers:** Samuel R. Bagenstos, The University of Michigan Law School

**Speakers:** Mr. Julian Dibbell, The University of Chicago, The Law School; Melissa Hart, University of Colorado School of Law; Dr. Prabha Kotiswaran, Kings College, London School of Law; Noah D. Zatz, University of California, Los Angeles School of Law

Work is central to our lives. Yet exactly what does it mean “to work” from a legal perspective? This panel will consider this question as it relates to various forms of invisible work performed both by individuals who labor without pay as well as those who, while paid, perform activities that are heavily marginalized as labor. While women’s unpaid domestic activities in the home remain the paradigmatic form of invisible labor, in today’s shifting economy, the concept also applies to home care work, interns, gold farming, sex work, prison labor and a host of other activities that remain largely out of public view and fail to resonate as “work” in the public imagination. The panelists will focus on how the law defines work, how those definitions influence our explicit and implicit understandings of work, the policy implications of those definitions and how the law can craft more inclusive definitions.

**Labor Relations and Employment Law Boxed Luncheon**

Friday, January 3, 2014  
12:15 pm – 1:30 pm

***50th Anniversary of the Civil Rights Act of 1964: Examining Its Past and Contemporary Effects (Part II)***

Friday, January 3, 2014

3:30 pm – 5:15 pm

Section on Minority Groups, Co-Sponsored by Sections on Employment Discrimination and Civil Rights

**Moderator:** Ediberto Roman, Florida International University College of Law

**Speakers from Call for Papers:** Taunya Lovell Banks, University of Maryland Francis King Carey School of Law; Ming Hsu Chen, University of Colorado School of Law; Anthony Paul Farley, Albany Law School; Danielle Holley-Walker, University of South Carolina School of Law; Olatunde C. Johnson, Columbia University School of Law

***Title VII at Fifty: Looking Forward and Looking Back***

Saturday, January 4, 2014

2:00 pm – 3:45 pm

Section on Employment Discrimination, Co-Sponsored by Sections on Minority Groups and Civil Rights

**Moderator:** Deborah A Widiss, Indiana University Maurer School of Law

**Speaker from Call for Papers:** Joseph R. Fishkin, The University of Texas School of Law

**Speakers:** Alfred W. Blumrosen, Rutgers School of Law – Newark; Ms. Chai Feldblum, U.S. Equal Employment Opportunity Commission; Trina Jones, Duke University School of Law; William L. Robinson, University of the District of Columbia, David A. Clarke School of Law; Mr. Steven Rosenblum, EE01, Inc.

2014 marks the 50<sup>th</sup> anniversary of the passage of Title VII of the Civil Rights Act of 1964. Title VII was the first major federal employment discrimination law—and it continues to be the most important one. By prohibiting discrimination on the basis of race, color, religion, sex, and national origin, Title VII transformed American workplaces. It required employers to remove most formal barriers to equal employment opportunity and it has dramatically reduced explicit acts of discrimination. It remains to be seen, however, how effective Title VII will be in addressing ongoing challenges such as implicit bias or structural barriers that impede access, as well as the extent to which it can address issues such as discrimination on the basis of caregiving responsibilities, gender identity, or prior criminal convictions. The Section's program brings together key leaders who helped shaped Title VII's early implementation, a current EEOC commissioner, and scholars to use this milestone year as an opportunity for looking both forward and backward at Title VII's impact and its potential.

## **Other AALS Programs of Interest**

### **Women in Legal Education – Speed Mentoring Program**

Friday, January 3, 10:30 am – 12:15 pm

### **Scholarship**

Friday, January 3, 1:30 pm – 3:15 pm

*Legal Scholarship Beyond the Law Review: Books, Briefs, Letters, and Other Avenues of Influence*

### **Aging and the Law**

Friday, January 3, 3:30 pm – 5:15 pm

*From the Affordable Care Act to Aging in Place: What You Need to Know As You Grow Older*

### **Education Law, Co-Sponsored by Section on Disability Law**

Saturday, January 4, 8:30 am – 10:15 am

*Law and the Education of Children with Disabilities*

### **Employee Benefits and Executive Compensation**

Saturday, January 4, 8:30 am – 10:15 am

*How to Invest for Retirement and Live Happily Ever After*

### **Law and Sports**

Saturday, January 4, 2:00 pm – 3:45 pm

*O'Bannon v. NCAA: Is There An Unprecedented Change to Intercollegiate Sports Just Over the Horizon?*

### **New Law Professors**

Saturday, January 4, 4:00 pm – 5:45 pm

*Developing as a Legal Scholar: Thoughts for New Law Professors*

### **Disability Law**

Saturday, January 4, 4:00 pm – 5:45 pm

*The Persistent Societal Habits of Bullying, Harassing and Excluding: Exploring the Current Legal and Public Policy Issues at the Forefront of Efforts Combating Such Discrimination*

### **Sexual Orientation & Gender Identity Issues**

Sunday, January 5, 2:00 pm – 5:00 pm

*Courting Justices: LGBT Law Advances in the Twenty-First Century*

### **Women in Legal Education**

Sunday, January 5, 2:00 pm – 3:45 pm

*New Voices in Gender Studies*

# **Faculty Employment Updates**

## **New Hires**

Leora Eisenstadt (Freedman Fellow at Temple University School of Law) to the Dept. of Legal Studies at Temple University's Fox School of Business.

Annie Lai (Yale Law School Cover Fellow) to UC-Irvine School of Law.

Claire Mumme to University of Windsor (Canada).

Michael Oswalt (SEIU) to Northern Illinois University College of Law.

Tammy R. Pettinato (from VAP at University of Louisville School of Law) to University of North Dakota School of Law.

Victoria Schwartz (Bigelow Fellow at University of Chicago) to Pepperdine University School of Law.

Danielle D. Weatherby to the University of Arkansas School of Law.

## **Tenure and Promotion**

Kevin Barry (Quinnipiac University School of Law) was granted tenure and promoted to Full Professor.

Deborah Thompson Eisenberg (University of Maryland Francis King Carey School of Law) was promoted to Associate Professor of Law.

Jessica Fink (California Western School of Law) was granted tenure.

Matthew W. Green (Cleveland-Marshall College of Law) was granted tenure.

Ariana Levinson (University of Louisville School of Law) has been promoted to Associate Professor.

Marcia L. McCormick (St. Louis University School of Law) was promoted to Full Professor and was appointed as Co-Director of the Wefel Center for Employment Law at Saint Louis University.

Paul M. Secunda (Marquette University Law School) was promoted to Full Professor.

Craig Senn (Loyola University-New Orleans College of Law) was granted tenure.

Kerri Stone (Florida International University College of Law) was granted tenure.

### **Administrative Appointments**

Rick Bales (Northern Kentucky University) appointed Dean at Ohio Northern University College of Law.

Steve Befort (University of Minnesota Law School) named Associate Dean for Planning and Research.

Harris Freeman (Western New England University School of Law) appointed to serve as one of three members of the Commonwealth Employment Relations Board in Massachusetts.

Seth Harris (formerly NYLS) appointed Acting U.S. Secretary of Labor.

Jeffrey Michael Hirsch (University of North Carolina School of Law) was appointed Associate Dean of Academic Affairs.

Sharona Hoffman (Case Western Reserve University School of Law) has received a chair and was named the Edgar A. Hahn Professor of Jurisprudence.

Israel Horowitz (PBGC Chief Counsel and Adjunct Professor at Georgetown Law) named to serve on the Labor and Pensions Advisory Committee to the American Bankruptcy Institute's Chapter 11 Reform Commission.

Richard Moberly (University of Nebraska College of Law) appointed to the Department of Labor's Whistleblower Protection Advisory Committee.

Paul M. Secunda (Marquette University Law School) appointed to the Department of Labor's ERISA Advisory Council.

Emily Spieler (Northeastern University School of Law) to Chair of the Department of Labor's Whistleblower Protection Advisory Committee.

Michelle A. Travis (University of San Francisco School of Law) appointed to Associate Dean for Faculty Scholarship.

### **Visiting Appointments**

Miriam Cherry (St. Louis University School of Law) is a Visiting Professor at the University of Missouri-Columbia.

Nancy Leong (University of Denver Sturm College of Law) is a Visiting Professor at UCLA School of Law (Fall 2013).

Angela Onwuachi-Willig (University of Iowa College of Law) is a Visiting Professor at Yale Law School (Spring 2014).

Noah Zatz (UCLA School of Law) to Yale Law School (2013-2014).

### **Lateral Moves**

Jeremi Duru (Temple University School of Law) to American University Washington College of Law.

Brendan Maher (Oklahoma City University School of Law) to University of Connecticut School of Law.

### **Honors and Awards**

Jennifer Drobac (Indiana University-Indianapolis School of Law) appointed to American Law Institute (ALI).

Melissa Hart (University of Colorado-Boulder Law) appointed to American Law Institute (ALI).

Angela Onwuachi-Willig (University of Iowa College of Law) was elected as Fellow of the Iowa Bar Foundation, April 2013.

Charlie Sullivan (Seton Hall University School of Law) named Recipient of the Second Annual Paul Steven Miller Award for Scholarly Contributions to Labor and Employment Law.

Michael Waterstone (Loyola-LA Law School) appointed to American Law Institute (ALI).

## **Publications**

### **Books**

- ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE-RIDING* (Yale University Press 2013).
- GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866* (Oxford University Press 2012).
- ANGELA ONWUACHI-WILLIG, *ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY* (Yale University Press 2013).

### **Articles, Essays, and Book Chapters**

- Charlotte Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779 (2013).
- Bradley Areheart, *Accommodating Every Body*, 81 U. CHICAGO L. REV. (forthcoming 2013) (co-authored with Michael Stein, Anita Silvers, & Leslie Francis).

- Kevin Barry, *Exactly What Congress Intended?*, 17 Chicago-Kent Emp. Rts. & Emp. Pol'y J. 5 (2013).
- Stephen F. Befort, The Constitutional Dimension of Unilateral Change in Public-Sector Collective Bargaining, 27 ABA J. Lab. & Emp. L 165 (2013).
- Jason R. Bent, *An Incentive-Based Approach to Regulating Workplace Chemicals*, 73 Ohio State L.J. 1389 (2012).
- Susan Bisom-Rapp, *Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States*, 44 LOY. U. CHI. L.J. 717 (with Malcolm Sargeant) (2013).
- Susan Bisom-Rapp, *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*, 30 HOFSTRA LAB. & EMP. L.J. 1 (with Michael J. Zimmer) (2012) (published in Italian as *La Guerra di Confine Nordamericana: il Ruolo della Ricerca Canadese e Americana nel Dibattito sulla Riforma del Diritto del Lavoro Statunitense*, in REGOLE, POLITICHE E METODO: L'EREDITÀ DI MARCO BIAGI NELLE RELAZIONI DI LAVORO DI OGGI 82 (F. Basenghi, L.E. Golzio (a cura di), con la collaborazione di A. Russo, O. Rymkevich, I. Senatori, C. Serra, eds., Giappichelli, 2013).
- Susan Bisom-Rapp, *Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom and the United States*, 15 EMP. RTS. & EMP. POL'Y J. 43 (with Andrew Frazer & Malcolm Sargeant) (2011) (reprinted in AGE AND EQUALITY LAW 209 (Michael Selmi, ed., Ashgate 2013)).
- Henry L. Chambers, Jr., *The Cost of Non-Compensable Workplace Harm*, 8 FIU L. REV. 317 (2013) (symposium).
- Brian S. Clarke, *The Gross Confusion Deep in the Heart of Univ. of Texas S.W. Med. Ctr. v. Nassar*, 4 CAL. L. REV. CIRCUIT 75 (2013).
- Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723 (2013).
- Caroline Mala Corbin, *The Contraception Mandate*, 107 Nw. U. L. Rev. 1469 (2013), (reprinted in WOMEN AND THE LAW (T. Thomas, ed., Thompson Reuters 2013)).
- Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1209 (2013).
- Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815 (2012-13).



- Amber Fricke & Angela Onwuachi-Willig, *Do Female “Firsts” Still Matter?: Why They Do for Women of Color*, 2012 MICH. ST. L. REV. 1529 (2012) (invited symposium essay).
- Charlotte Garden, *Union Made: Labor’s Litigation for Social Change*, 88 TULANE L. REV. (forthcoming 2013).
- Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. (forthcoming 2013).
- Tristin K. Green, *“It’s Not You, It’s Me”*: Assessing an Emerging Relationship Between Law and Social Science, 46 CONN. L. REV. 287 (2013).
- Rebecca K. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition*, 98 MINN. L. REV. HEADNOTES 73 (2013) (reviewing SONIA SOTOMAYOR, MY BELOVED WORLD (2013)).
- Rebecca K. Lee, *Fisher v. University of Texas at Austin: Promoting Full Judicial Review and Process in Applying Strict Scrutiny*, 4 HOUS. L. REV. HLRe 33 (2013).
- Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).
- Nancy Leong & Charlotte Garden, *“So Closely Intertwined”*: Labor Interests and Racial Solidarity, 81 GEO. WASH. L. REV. 1135 (2013).
- Orly Lobel, *Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems*, Symposium on Whistleblowing and the Regulation of Workplace Reporting, 54 S. TEX. L.J. 37 (2013).
- Orly Lobel & On Amir, *Driving Performance: A Growth Theory of Non-Compete Law*, 16 STAN. TECH. L. REV. 833 (2013).
- Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 101 (Fall 2013).
- Angela Onwuachi-Willig, *Next Generation of Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484 (2013) (co-authored with Professor Anthony Alfieri, University of Miami School of Law).
- Angela Onwuachi-Willig, *What Would Be the Story of Alice and Leonard Rhinelanders Today?*, 46 U.C. DAVIS. L. REV. 939 (2013).

- Angela Onwuachi-Willig, *A Room with Many Views: A Response to Essays on According to Our Hearts: Rhinelander v. Rhinelander and the Multiracial Family*, 16 J. GENDER RACE & JUST. 793 (2013).
- Angela Onwuachi-Willig, *On Derrick Bell as Pioneer and Teacher: Teaching Us How to Have the Nerve*, 36 SEATTLE UNIV. L. REV. xlii (2013) (invited tribute to Professor Derrick Bell).
- Nicole B. Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GEORGIA L. REV. 527 (2013).
- Nicole B. Porter, *Women, Unions, Negotiation*, 13 NEV. L.J. (forthcoming 2013).
- Nicole B. Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 FIU L. REV. 447 (2013) (symposium).
- Nicole B. Porter, Symposium: *Teaching Labor and Employment Law, A Proposal to Improve the Workplace Law Curriculum from a Corporate Compliance Perspective*, 57 ST. LOUIS U. L. J. (forthcoming 2013).
- Suja A. Thomas, *Employer Costs and Conflicts Under the Affordable Care Act*, 99 CORNELL L. REV. ONLINE 56 (Oct. 2013) (co-authored with Peter Molk).
- Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law: (See, e.g., The Lack of Judicial Restraint in Wal-Mart, Twombly, and Ricci)*, 48 WAKE FOREST L. REV. (forthcoming 2013).
- Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMPLOYEE RIGHTS & EMPLOYMENT POLICY JOURNAL 35 (2013).
- Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disability Act*, 46 U.C. DAVIS L. REV. 961 (2013) (to be reprinted in WOMEN AND THE LAW: 2013 EDITION (Tracy A. Thomas, ed., forthcoming 2013)).

## Announcements

**The Ninth Annual Colloquium on Current Scholarship in Labor and Employment Law** will be held at the University of Colorado Law School in Fall, 2014.

The Stanford Law Review will host a symposium entitled, **The Civil Rights Act of 1964**, on January 24-25, 2014. For more information:

<http://www.stanfordlawreview.org/symposium/civil-rights-2014>.

The UNLV Boyd School of Law will host the **Conference on Psychology and Lawyering: Coalescing the Field**, on February 21-22, 2014. For more information:

<http://www.law.unlv.edu/PsychologyLawyering2014>.

Hunter College and the National Center for the Study of Collective Bargaining in Higher Education and the Professions announce the **41<sup>st</sup> Annual National Conference**, to be held at the CUNY Graduate Center, New York, April 6-8, 2014. For more information:

<http://www.hunter.cuny.edu/ncscbhep/>.

**The Louis Jackson Memorial National Law Student Writing Competition in Employment and Labor Law** is again being sponsored by Jackson Lewis at Chicago-Kent College of Law's Institute for Law and the Workplace. Entries are due January 21, 2014. For more information:

<http://www.kentlaw.iit.edu/institutes-centers/institute-for-law-and-the-workplace/louis-jackson-writing-competition>.

## Supreme Court Round Up

### Decided Cases

*University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). Employee retaliation claims filed under Title VII of the Civil Rights Act of 1964 must be proved according to traditional principles of but-for causation, not the lessened causation test stated in the 42 U.S.C. § 2000e-2(m). **See Analysis Below.**

*Vance v. Ball State University*, 133 S.Ct. 2434 (2013). An employee is a “supervisor” for purposes of vicarious liability under Title VII of the Civil Rights Act only if he is empowered by the employer to take tangible employment actions against the victim. **See Analysis Below.**

*American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). The Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

*Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). Class action brought by respondents was improperly certified under Federal Rule of Civil Procedure 23(b)(3). Third Circuit erred by

refusing to decide whether the class's proposed damages model could show damages on a class wide basis.

***Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).** Because the lower court did not hold the university to the burden of strict scrutiny articulated in *Grutter v. Bollinger* and *Regents of the University of California v. Bakke*, when considering the use of race as a factor in admissions, the lower court's decision affirming the district court's grant of summary judgment in favor of the university was incorrect.

***Genesis HealthCare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013).** Because respondent had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction.

***Kloeckner v. Solis*, 133 S.Ct. 596 (2012).** A federal employee who claims that an agency action appealable to the Merit Systems Protection Board violates an antidiscrimination statute listed in 5 U.S.C. § 7702(a)(1) should seek judicial review in district court, not the Federal Circuit, regardless whether the Board decided her case on procedural grounds or on the merits.

***Levin v. U.S.*, 133 S.Ct. 1224 (2013).** The Gonzalez Act, 10 U.S.C. § 1089(e), which provides that the intentional tort exception to the Federal Tort Claims Act does not apply to "any cause of action arising out of a negligent or wrongful act or omission in the performance of medical . . . functions," permits a suit against the United States alleging medical battery by a Navy doctor acting within the scope of his employment.

***Millbrook v. U.S.*, 133 S.Ct. 1441.** The law enforcement proviso to the Federal Tort Claims Act applies to all the activities of law enforcement officers within the scope of their employment, not just to their investigative or law enforcement activities.

***U.S. Airways v. McCutchen*, 133 S.Ct. 1537 (2013).** The law enforcement proviso to the Federal Tort Claims Act applies to all the activities of law enforcement officers within the scope of their employment, not just to their investigative or law enforcement activities.

***Madigan v. Levin*, No. 12-872 (2013),** Writ of certiorari dismissed as improvidently granted. Underlying Issue: Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

***Unite Here Local 355 v. Mulhall* (2013).** Writ of certiorari dismissed as improvidently granted. Underlying Issue: Whether an employer and union may violate Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business.

## **Pending Cases**

***Heimeshoff v. Hartford Life & Accident Ins. Co.* (No. 12-729).** When should a statute of limitations accrue for judicial review of a disability adverse benefit determination under the Employee Retirement Income Security Act?

***Schuette v. Coalition to Defend Affirmative Action* (No. 12-682).** Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

***Sandifer v. U.S. Steel Corp.* (No. 12-417).** What constitutes “changing clothes” within the meaning of Section 203(o) of the Fair Labor Standards Act?

***Lawson v. FMR LLC* (No. 12-3).** Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.

***NLRB v. Noel Canning* (No. 12-1281).** (1) Whether the President’s recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) whether the President’s recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and (3) whether the President’s recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

***U.S. v. Quality Stores* (No. 12-1408).** Whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act, 26 U.S.C. 3101 et seq.

***Sebelius v. Hobby Lobby Stores* (No. 13-354).** Whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq., which provides that the government “shall not substantially burden a person’s exercise of religion” unless that burden is the least restrictive means to further a compelling governmental interest, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners.

***Conestoga Wood Specialties Corp. v. Sebelius* (No. 13-356).** Whether the religious owners of a family business, or their closely held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage mandate of the Affordable Care Act.

**Source:** SCOTUS Blog

## Analysis of Recent Cases

### *University of Texas Southwestern Medical Center v. Nassar,* 133 S. Ct. 2517 (2013)

A 5-4 SCOTUS holding that employee retaliation claims under Title VII of the Civil Rights Act of 1964 must be proved with but-for causation not the lessened causation test stated in the 42 U.S.C. § 2000e-2(m).

Dr. Naiel Nassar, former faculty member at University of Texas, brought suit against the University of Texas Southwestern Medical Center claiming employment discrimination under Title VII and retaliation for the initial claims of discrimination. While employed by the University, the respondent worked both as a member of the faculty and as a staff physician at the affiliated teaching hospital. According to Dr. Nassar, one of his supervisors at the University, Dr. Levine was biased against him because of his race and religion. The respondent complained to Dr. Levine's supervisor, Dr. Fitz, and eventually resigned from his teaching position though he had arranged to maintain his position as a staff physician at the hospital. In a letter, the respondent cited Dr. Levine's harassment as the reason for his resignation, and Dr. Fitz, in what the respondent alleges was a retaliatory act to the complaints against Dr. Levine, objected to Dr. Nassar's position at the hospital. The offer was then withdrawn. The Fifth Circuit vacated the jury's finding that Dr. Nassar was constructively discharged, but affirmed his claims regarding retaliation because evidence showed that retaliation was a motivating factor.

The legal question presented was whether employment retaliation is subject to the causation standard used by the Fifth Circuit, **a motivating factor test**, or whether the respondent is required to show that the retaliation was a **"but-for"** cause of the adverse employment action.

In the majority opinion delivered by Justice Kennedy on June 24, 2013, the court found that under Title VII, a plaintiff claiming adverse employment action due to retaliation must show that the employee's protected action was a but-for cause of the retaliatory or adverse action by the employer. The court arrived at this conclusion by separating out status-based discrimination, covered under 42 USC §2000e-2(a), from retaliation for complaints regarding the aforementioned discrimination under §2000e-3(a). The court found that the motivating factor test associated with Title VII applies only to status-based discrimination claims, not retaliation claims. This conclusion relied on both textual analysis of the statute and the structure Congress used originally in Title VII and in the later amendments.

Justice Ginsburg filed a dissenting opinion in which Justice Breyer, Justice Sotomayor, and Justice Kagan joined. In the dissent, Justice Ginsburg finds that the distinction between these claims, and the different tests, are inconsistent with the text and structure of Title VII, as well as inconsistent with case precedent. Justice Ginsburg finds that retaliation for complaining about discrimination and the prohibited discrimination itself are tightly bound and linked in such a way

that both acts are discrimination which Congress intended to address and protect employees from when writing and amending this statute. The dissent also emphasizes that the court should defer to the EEOC's Compliance Manual, which applies the motivating factor test to retaliatory actions. The dissent believes that the majority holding allows retaliation to go unpunished because it was not the sole cause of an adverse employment action, undermining Congress's intent in creating and bolstering Title VII.

-- Orly Lobel, University Professor and Professor of Law, University of San Diego

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***Vance v. Ball State University,***  
**133 S.Ct. 2434 (2013)**

*What Is A "Supervisor" For Purposes Of Imposing Vicarious Liability On An Employer For Hostile Work Environment Harassment?*

In *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court held that an employer is vicariously liable for discriminatory harassment where the harassing employee is a "supervisor." This twin holding was rooted in § 219(d)(2) of the Restatement (Second) of Agency, which recognizes vicarious tort liability for a "master" in cases where its servant was "aided in accomplishing the tort by the existence of the agency relation." *Faragher*, 524 U.S. at 802–803; *Ellerth*, 524 U.S. at 760–763.

In adapting this "aided-by-the-agency-relation" concept for application in the Title VII context, the *Faragher/Ellerth* Court separated supervisor harassment into two categories: (1) cases in which the supervisor took a tangible employment action against the plaintiff; and (2) cases in which the supervisor did not do so. In the first category of cases, the agency relation inherently aided the supervisor's conduct as it resulted in an official act of the employer and, as a result, the employer should be strictly liable. In the second category, however, the Court concluded that holding the employer strictly liable would be unjust and, accordingly, created an affirmative defense for the employer that, if proven, would allow the employer to avoid liability. Specifically, under the now familiar "*Faragher/Ellerth* defense" an employer can avoid liability for the hostile work environment harassment by a supervisor that did not include a tangible employment action against the plaintiff by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. 765.

Given that the Court's basis for imposing vicarious liability on the employer was the supervisor's "abuse of his supervisory authority," *Faragher*, 524 U.S. at 802, it matters whether or not a harasser is a "supervisor." The *Faragher/Ellerth* Court did not specifically define what a

“supervisor” was for vicarious liability purposes. Instead the Court made fairly broad statements about “supervisory authority” and the ability of a person with supervisory authority to “discriminate in the terms and conditions of subordinates’ employment.” The Court noted that the “power to supervise... may [include the power] ... to hire and fire, and to set work schedules and pay rates” but did not indicate that a supervisor must have those or any other specific duties or authority regarding the plaintiff. Additionally, in *Faragher*, the plaintiff complained about the actions of two supervisors, Bill Terry and David Silverman, only one of whom (Terry) had the authority to take tangible employment actions against her. *See Faragher*, 524 U.S. at 781. The Court nonetheless treated both Terry and Silverman as supervisors and held the defendant employer vicariously liable for the actions of both. *Id.* at 808-10.

In the wake of *Faragher* and *Ellerth*, the lower courts disagreed about the meaning of “supervisor.” Some courts – including the First, Seventh, and Eighth Circuits – held that a “supervisor” must have the power to take a tangible employment action (i.e., hire, fire, demote, promote, transfer, or discipline) against the victim. Others – including the Second and Fourth Circuits, as well as the EEOC – concluded that status as a “supervisor” is tied more broadly to the ability to exercise significant direction over another’s daily work and, also, whether the harassment was more broadly “aided by the agency relationship” within the meaning of *Faragher*.

The Court granted *certiorari* in *Vance* to resolve this circuit split and held “that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII [only] if he or she is empowered by the employer to take tangible employment actions against the victim” (i.e., to effect 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). *Vance*, 133 S. Ct. at 2439, 2443.

In reaching this decision, a majority of the Court concluded that *Ellerth* and *Faragher* contemplated a unitary category of supervisors, *i.e.*, those employees with the authority to make tangible employment decisions. Justice Alito, writing for the majority, stated (perhaps inaccurately) that “[t]here is no hint in either decision that the Court had in mind two categories of supervisors: first, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker’s labor to some ill-defined degree. On the contrary, the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation.” This approach, the Court reasoned, would be far easier to apply than the approach recommended by the EEOC Guidance, which “would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors.”

However, in defining “supervisor” in this way, the Court turned its back on the aided-by-the-agency-relation standard it purported to apply. As the Court recognized in *Faragher* and *Ellerth*,



“there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship” given that “[t]he agency relationship affords contact with an employee subjected to a supervisor’s sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior.” *Faragher*, 524 U.S. at 802-3. “When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose power . . . does not disappear ... when he chooses to harass....” *Id.* at 803.

One of the cases directly overruled by *Vance – Whitten v. Fred’s Inc.*, 601 F.3d 231 (4th Cir. 2010) – provides an apt illustration of sexual harassment by a supervisor who lacked the authority to hire or fire the plaintiff but was undeniably “aided by the agency relationship” in harassing her. There, the harasser told the plaintiff that if she wanted long weekends off from work, she needed to “be good to [him] and give [him] what [he] want[ed]” and that he would make her life a “living hell” if she ever took work matters “over [his] head.” *Whitten*, 601 F.3d at 236. Later that day, the harasser pressed his genitals against the plaintiff’s back twice as he passed by her. When the plaintiff protested, the harasser ordered her to stay late to clean the store, telling her that the store should be spotless and that he did not care if it took her all night. The next day, he told her she would have to work on Super Bowl Sunday as punishment for allegedly not setting the store alarm properly the night before. Although none of these acts by the harasser amounted to a tangible employment action, the Fourth Circuit held that the harasser was clearly aided by the agency relationship in sexually harassing the plaintiff. Under *Vance*, however, Ms. Whitten’s harasser would not be a “supervisor,” as he could not take a tangible employment action against her.

Various commentators have criticized (or will soon criticize) the Court’s narrow definition of “supervisor” on several bases including that it is no easier to apply than the EEOC’s definition and that it will likely cause significant problems in retaliation doctrine. Additionally, other commentators have pointed out that the Court’s definition of “supervisor” in *Vance* is wholly inconsistent with the Court’s recent use of the term “supervisor” in *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011), which approved so-called “cat’s paw” discrimination cases. The Court’s holding in *Staub* was explicitly premised on the fact that Mr. Staub’s “supervisors,” the only actors who possessed the requisite discriminatory animus, did *not* have the authority to take any adverse employment action against him.

Additionally, the majority in *Vance* rejected Ms. Vance’s argument that the Court should interpret the term “supervisor” as used in *Faragher* and *Ellerth* in accordance with its plain and ordinary meaning as reflected in dictionary definitions. Although the justices in the majority have been happy to use dictionary definitions (even entirely circular definitions) to interpret statutes (including in *Univ. of Tx. S.W. Med. Center v. Nassar*, which was decided the same day as *Vance*), they are apparently unwilling to do so when interpreting the Court’s own opinions.

Nevertheless, based on *Vance*, in order for a harasser to be a “supervisor” for purposes of imposing vicariously liability on an employer, the harasser must have had the authority to take tangible employment action against the victim. Without such authority, the harasser is merely a co-worker and the employer can be held liable for his discriminatory harassment only if it was negligent, meaning that it (1) knew or should have known about the harassment and (2) failed to take reasonable action to stop it.

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