

## REFERENCE GUIDE

# Supreme Court Decisions on Job Discrimination: What it Means For Museums

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The U.S. Supreme Court recently issued two decisions that effectively make it harder for a worker to prove that he or she was subject to job discrimination. In one case, the Supreme Court narrowed the definition of who is a “supervisor” in cases involving racial and sexual discrimination which limits the potential exposure of employers to be strictly liable for harassment in the workplace. In another, the Supreme Court tightened the standard that workers must meet in order to prove that they have suffered illegal retaliation for complaining about employment discrimination. This reference guide explains how these decisions apply to museums.



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# Definition of Supervisor

## Title VII Background

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to, among other things, create or perpetuate a discriminatory work environment based on an employee's race, color, religion, sex, or national origin.

## Vance v. Ball State

In Vance v. Ball State University, Maetta Vance, an African-American woman working as a catering assistant for Ball State University, claimed that she had been subject to a racially hostile work environment in violation of Title VII, that Sandra Davis (a white woman) was her supervisor, and that the university was liable for Ms. Davis' creation of the racially hostile work environment. Both sides agreed that Ms. Davis did not have the power to hire, fire, demote, transfer or discipline Ms. Vance. However, the university claimed that Ms. Davis was Ms. Vance's co-worker and not her supervisor.

## Supreme Court Narrows Definition of Supervisor

The Supreme Court, in Vance, rejected the Equal Employment Opportunity Commission's (and several Court of Appeals') definition of a "supervisor" to be an employee who exercises significant direction over another's daily work. Instead, the majority agreed with the Seventh Circuit Court of Appeals and ruled that the term "supervisor" was limited to an employee who has the power to take "tangible employment actions"—i.e., hiring, firing, failing to promote, reassigning with significantly different responsibilities, or making a decision that would cause a significant change in benefits. The Supreme Court found that the authority to take such action was the "defining characteristic" of a supervisor.

## Importance of Co-Worker/Supervisor Distinction

The co-worker/supervisor distinction, based on prior Supreme Court decisions, is crucial to understanding an employer's potential liability and a plaintiff's burden of proof. For example, if a co-worker harasses a fellow employee, an employer will be directly liable for that co-worker's behavior only if it was negligent in not discovering or stopping the offensive conduct. However, if the harassing employee is a "supervisor" and not a co-worker, an employer may be found strictly liable for the hostile work environment if the supervisor takes some adverse employment action (such as firing, failing to promote, reassigning, or making a decision that results in a significant change to an employee's benefits). If the "supervisor" does not take such action, and the employer can prove that it took reasonable care to prevent the harassment and the employee did not take advantage of these corrective opportunities, then it will not be held strictly liable for the supervisor's conduct.



## What Does this Mean in Practice?

The Supreme Court effectively raised the bar on a plaintiff's burden of proof—to hold an employer strictly liable for a co-worker's alleged harassment she will have to prove that the co-worker was a supervisor under the Court's narrow definition; if she cannot do so, she will then have the tougher burden of proving that the employer was negligent in not stopping or discovering the co-worker's behavior.

So, let's say that assistant curator at Museum X claims that she has been discriminated against because she is Asian-American and a woman. Specifically, she claims that the chief curator of her department made offensive remarks about Asians and women in general and accordingly treated her differently than other assistant curators. The chief curator directed and managed the assistant curator in her work but had no authority to fire her or reassign her. Based upon Vance, the chief curator is not a "supervisor" and will not be held strictly liable for the chief curator's actions. Museum X will make a motion for summary judgment and argue that it took all reasonable care to prevent the discrimination and the assistant curator did not take advantage of the corrective opportunities.

I would caution, however, that discrimination cases are very fact-specific and courts will conduct fact-specific inquiries and look behind any "supervisor" titles and examine the duties and responsibilities of the alleged supervisor to make their determination.

## Retaliation as a Primary Factor in Negative Employment Action

### Title VII Background

By way of background, Title VII's key provision holds that an unlawful employment practice is established when a plaintiff proves that race, color, religion, sex or national origin was a motivating factor (but not necessarily the only one) for the employment practice at issue.

### University of Texas v. Nassar

In University of Texas Southwestern Medical Center v. Nassar, a doctor of Middle Eastern descent brought a Title VII action against the university claiming that racially- and religiously-motivated harassment resulted in his being constructively discharged from his job and that the refusal to re-hire him in a better position was in retaliation for complaining about the original alleged harassment. The Fifth Circuit Court of Appeals found that retaliation claims only required a plaintiff to show that retaliation was a motivating factor for the adverse employment action and not its "but-for" cause, i.e., in the absence of the retaliation, the employment action (demotion, firing, etc.) would not have occurred. It also found that there



was evidence to support that the alleged refusal to re-hire Dr. Nassar was motivated, in part, to retaliate against him for his initial harassment complaints.

### **“But For” Standard for Retaliation Claims**

The Supreme Court, however, tightened the standard for Title VII retaliation claims by vacating the Fifth Circuit’s decision and holding that these claims must be proved according to a “but-for” causation standard. In other words, a plaintiff must now prove that the unlawful retaliation would not have occurred but for the employer’s alleged wrongful actions.

### **What Does This Mean in Practice?**

What does this mean in practice? As an example, let’s say a gift shop cashier at Zoo Y claims that he was demoted because he complained that he was being discriminated against because he is African-American. However, Zoo Y has documentation showing that he was demoted because he was continually late to work and would leave early. Prior to the Supreme Court’s decision, all he would have to do to prove his retaliation case would be to show that retaliation played some motivating role in the decision to demote him. Now, he has the tougher task of proving that the retaliation was the sole determinative factor in the decision. Based on these facts, he would have a tougher time in trying to prove his retaliation claim because Zoo Y could point to his poor time records as a motivator in his demotion.

In short, AAM members should (on both the employer and on the employee side) consult with counsel to discuss their specific concerns and situations. Employers, I might add, should ensure that they have effective employment handbooks/practices in place to help protect them should these situations arise.

