

## Areas of Practice

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## **JUDICIAL**

### **Federal**

#### **U.S. Supreme Court Rules Defense of Marriage Act Unconstitutional, Effectively Nullifies California's Proposition 8**

In two landmark decisions, the U.S. Supreme Court ruled that the federal Defense of Marriage Act ("DOMA") is unconstitutional, and effectively nullified California's hotly debated Proposition 8 ("Prop 8").

In *United States v. Windsor*, the Court held that DOMA, a federal law enacted in 1996 that defined "marriage" and "spouse" as excluding same-sex partners, is an unconstitutional deprivation of liberty and equal protection for gay couples. Edith Windsor filed suit after she was required to pay \$363,053 in estate taxes after her partner, Thea Spyer, passed away and the federal government refused to recognize her right to the federal estate tax exemption for surviving spouses. In its 5-4 decision, the Court condemned DOMA as a law whose "avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." The Court characterized DOMA as contriving "to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State." Essentially, the Court declared that same-sex couples who are legally married pursuant to state law deserve equal rights to the benefits under federal law that are provided to all other married couples. The Court's ruling does not, however, require states to "legalize" same-sex marriage.

In *Hollingsworth v. Perry*, the Court ruled that the petitioners—a group of individuals who oppose same-sex marriage and had asked the Court to determine whether the Equal Protection Clause prohibits California from defining marriage as the union of a man and woman—did not have standing to bring their lawsuit. The effect of the Court's ruling is to leave in place the lower court's decision, which found California's Proposition 8 to be unconstitutional and therefore unenforceable. The Court explained that federal courts have authority under the

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Constitution to issue decisions only where there is an actual “case or controversy.” For there to be such a case or controversy, it is not enough for the party invoking the power of the court to merely have a “keen interest in the issue.” Rather, the party must have suffered a concrete and particularized injury. Because the petitioners had not suffered any such injury, but rather had a “generalized grievance” and were merely seeking to vindicate the constitutional validity of a generally applicable California law (Prop 8), they did not have the requisite standing to sue.

From an employment standpoint, the *Windsor* and *Hollingsworth* rulings mean that California employers must treat same-sex and opposite-sex spouses equally with respect to the administration of federal and California benefits, including but not limited to COBRA, ERISA benefit plans, HIPAA, and flexible spending accounts. Some particular implications for employers include the following:

- If a California employee is married to a same-sex partner, the employee will be entitled to take California Family Rights Act or Family Medical Leave Act to care for his or her spouse with a qualifying serious health condition;
- Same-sex spouses are entitled to equal leave under federal and California military caregiver laws;
- Same-sex spouses may be eligible for continuation of health insurance benefits (COBRA);
- Marriage to a same-sex spouse may trigger a special enrollment opportunity under HIPAA;
- Same-sex spouses will be treated equally with respect to 401(k) plans and other benefits; and,
- Evidentiary spousal privileges may apply to same-sex couples.

Employers should review their benefits policies and practices, particularly with respect to the definition of “spouse,” and update them where necessary. It is unclear what employers’ legal obligations are to same-sex couples who relocate from states in which they were legally married to a state that does not recognize their marriage. This may be difficult for employers to navigate if they have operations in multiple states, and further guidance from the courts is anticipated.

### U.S. Supreme Court Clarifies Causation Standard for Title VII Retaliation Claims

The U.S. Supreme Court ruled in *University of Texas Southwestern Medical Center v. Nassar*, that claims for retaliation under Title VII require a showing of “but for” causation rather than the broader “motivating factor” standard used for discrimination claims. The 5-4 decision thus gives greater protections to employers in defending Title VII retaliation claims by forcing employees to establish that the challenged employment decision would not have occurred in the absence of the employer’s retaliatory motive.

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The plaintiff, Dr. Naiel Nassar (“Nassar”), was a physician at the University of Texas Southwestern Medical Center (“UT”). Nassar alleged that he resigned from his position after experiencing discrimination and harassment based on his religion and ethnicity. In his resignation letter, he detailed the alleged discrimination and harassment and identified his supervisor as the perpetrator. While Nassar accepted a new position with Parkland Memorial Hospital (“the Hospital”), which was affiliated with UT, he alleged that his former supervisor subsequently compelled the Hospital to rescind its employment offer based on preexisting agreements between UT and the Hospital.

Nassar filed suit in federal court, asserting both discrimination and retaliation claims under Title VII. The jury found in favor of Nassar on both counts, and UT appealed. While the Fifth Circuit reversed the judgment with respect to the discrimination claim, it affirmed on the retaliation claim, applying the same “motivating factor” standard to both counts.

The central question for the Supreme Court was whether the “because” language of Title VII’s retaliation provision requires a plaintiff to satisfy traditional “but for” causation in order to prevail. In ruling in favor of UT, the U.S. Supreme Court held that the Fifth Circuit misconstrued the requisite causation standard for retaliation claims, noting the distinction between employees’ protected traits (addressed in discrimination claims) and their protected conduct (addressed in retaliation claims). Although “but for” causation was required with respect to both claims in the original text of Title VII, Congress amended the statute in 1991 to prohibit any employment action in which *discrimination* was a “motivating factor.” Congress did not similarly amend Title VII with regard to claims for retaliation. Thus, according to the Supreme Court, Nassar’s burden was to show that in the absence of UT’s retaliation (*i.e.*, “but for” the retaliation), he would have been hired by the Hospital. Because Nassar was unable to meet this burden, he could not establish his claim for retaliation under Title VII.

This case is a welcome development for employers, as employees will now be faced with a more strenuous burden of proof when bringing retaliation claims under Title VII.

### U.S. Supreme Court Clarifies Meaning of “Supervisor” Under Title VII

In *Vance v. Ball State University*, the U.S. Supreme Court offered clarity on who may be considered a “supervisor” under Title VII. According to the Court, the title of “supervisor” is only applicable to those employees responsible for “tangible employment actions” in connection with a plaintiff.

Maetta Vance (“Vance”), an African American woman, worked in Ball State University’s (“Ball State”) catering department. Throughout her employment, Vance lodged numerous complaints in which she alleged racial discrimination and retaliation by Saundra Davis (“Davis”), a Caucasian woman. Like Vance, Davis was employed in Ball State’s catering department. Davis was a catering specialist while Vance was a full-time catering assistant. Vance claimed that Davis harassed and discriminated against Vance on the basis of her race. While the precise scope of Davis’ role with Ball State was disputed, the parties

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agreed that Davis lacked the power to hire, fire, demote, promote, transfer, or discipline Vance.

Vance ultimately filed suit in federal court, alleging a racially hostile work environment in violation of Title VII. She specifically alleged that Davis was her supervisor and that, based on Davis' supervisory role, Ball State was vicariously liable for Davis' actions.

The trial court granted summary judgment in favor of Ball State. While Vance argued that Davis' authority to control Vance's daily activities and evaluate her performance made her a supervisor, the trial court disagreed. It held that since Davis lacked the ability to "hire, fire, demote, promote, transfer, or discipline" Vance, she was not Vance's supervisor. As such, Ball State could not be held vicariously liable for Davis' actions. The Seventh Circuit Court of Appeals affirmed the trial court's ruling.

In affirming the Seventh Circuit's decision, the Supreme Court held that in order to be categorized as a "supervisor," an individual must possess the ability to take "tangible employment action" against the alleged victim. More specifically, an alleged supervisor must have the ability to bring about a "significant change in employment status, such as hiring, firing, failing to promote, reassigning with significantly different responsibilities, or causing a significant change in benefits." Because Vance failed to demonstrate that Davis met this standard, Ball State could not be vicariously liable for the alleged misconduct.

While this is certainly a positive ruling, employers must remain cognizant of the potential liability to which they are exposed by supervisory employees. Courts generally disregard position titles and instead analyze the specific duties of potentially supervisory employees in determining employers' liability for misconduct by those individuals. Moreover, under California's Fair Employment and Housing Act, Courts construe "supervisor" much more broadly.

## **California**

### California Court of Appeal (Again) Weighs in on Arbitration Agreements

In *Leos v. Darden Restaurants, Inc.*, a California Court of Appeal held that an employer's arbitration agreement could be enforced according to its terms because it was not substantively unconscionable.

Alexis Leos and Jennifer Stucker (collectively, "Plaintiffs") were formerly employed by Darden Restaurants, Inc. ("Darden"). Upon being hired by Darden, Plaintiffs signed a Dispute Resolution Process ("DRP") Acknowledgment, whereby they acknowledged that they had received and reviewed the DRP booklet. The DRP booklet provided as follows: "I agree as a condition of my employment to submit any disputes I may have to the company's DRP and to abide by the provisions outlined in the DRP." The booklet further specified that its terms applied to discrimination and harassment claims, and that Darden was equally bound by the terms.

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When Plaintiffs filed a lawsuit alleging claims for sexual harassment and retaliation, Darden filed a motion to compel arbitration. Plaintiffs opposed the motion on the ground that the arbitration provision was unconscionable based on the fact that they had no choice but to accept, and were unable to negotiate, its terms. Following the trial court's denial of the motion on the ground that the arbitration provision was unconscionable, Darden appealed.

In reversing the trial court's ruling, the Court of Appeal reasoned that procedural and substantive unconscionability must both be present for a court to decline enforcing a purportedly unconscionable contract. While the arbitration provision was procedurally unconscionable because Plaintiffs were required to acquiesce to it as a condition of their employment and did not have an opportunity to negotiate its terms, the agreement was not substantively unconscionable. Accordingly, it was enforceable.

Of particular note, the appellate court rejected Plaintiffs' argument that the clause indicating that the agreement "may be updated from time to time as required by law" rendered it unenforceable. As the court explained, Darden's reservation of rights to modify the arbitration provision "as required by law" was neither overly harsh nor so one-sided as to shock the conscience. Moreover, a modification required by law cannot be ruled unlawful.

The appellate court also disagreed with Plaintiffs' contention that provisions that required arbitration to commence within ninety days of selection of an arbitrator, limited arbitration to two days, and placed limits on discovery, were unconscionable in light of the fact that the arbitrator had discretion to modify these terms upon a showing of good cause. Likewise, the provision that permitted employees to arrange for a court reporter at their own expense did not, according to the court, run afoul of an employer's duty to pay for "all costs unique to arbitration" because employees would have to pay for a court reporter in a civil action.

*This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Hazel Ocampo, Heather Stone or Ryan Nell at (858) 755-8500; or Andrew L. Smith, Jennifer Weidinger or Tristan Mullis at (310) 649-5772.*

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