NC STATE UNIVERSITY

Howling Counsel

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Attorneys:
Eileen Goldgeier
Vice Chancellor & General Counsel
Mike Poterala
Deputy General Counsel
Judy Curry
Associate General Counsel
Laura Ratchford
Associate General Counsel
Sarah Ann Lannom
Associate General Counsel
Shawn Troxler
Assistant General Counsel
Brenton McConkey
Assistant General Counsel

Professional Staff:
Deborah Harvey, Business Officer
Clifton Williams, Records Officer
Yolanda Smith, Paralegal
Irma Rose, Administrative Support
Brad Trahan, Law Clerk

Office of General Counsel
NC State University
304 Holladay Hall
Raleigh, NC 27607
919-515-3071 (Phone)
919-515-3060 (Fax)

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Contact Info

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Legal Spotlight

U.S. Supreme Court Defines "Supervisor"

In Vance v. Ball State University, the court addressed the issue of who is a "supervisor" for purposes of Title VII. In Vance, the petitioner, an African American woman, sued her employer, Ball State University, alleging that a fellow employee, Saundra Davis, created a racially hostile work environment in violation of Title VII. The Court upheld summary judgment for Ball State University – holding that Davis was not Vance's supervisor because she could not take tangible employment actions against Vance.

The same 5-4 majority from Nassar (see below) held that an employee is a supervisor under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. The court explained that "tangible employment actions" consisted of "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."

The court relied on general principles of agency law and common law notions adopted in its past cases – specifically, Burlington Industries v. Ellerth and Faragher v. Boca Raton. The court dismissed the definition used by the Equal Employment Opportunity Commission as a "vague standard" that would "frustrate judges and confound jurors."

What this Means at NC State: Only persons who have the authority to make an employment decision with respect to the hiring, firing, promotion, demotion, etc. of an employee will subject the university to vicarious liability for harassment under Title VII. Units should consider reviewing which persons have such authority and be clear in that regard.

At NC State, supervisors are required to complete **Discrimination and Harassment Prevention and Response Training**. To arrange for training, contact the **Office for Institutional Equity and Diversity (OIED)**.

OIED is currently offering a summer session of the Equal Employment Opportunity Institute (EEOI) on August 5 and 6, 2013. Please ensure that managers and supervisors (both EPA and SPA) receive this required training by **registering** with OIED.

Office of Civil Rights (OCR) Guidance Regarding Pregnant Students

On June 25, 2013, the U.S. Department of Education's Office of Civil Rights (OCR) issued a "**Dear Colleague**" letter regarding the challenges faced by pregnant high school and college students. The letter reminded educational institutions that under Title IX, it is illegal to exclude pregnant students (or students who have been pregnant) from participating in any part of an educational program, including extracurricular activities. The OCR has developed a **pamphlet**, "Supporting the Academic Success of Pregnant and Parenting Students," that provides more information and strategies for educators to meet the needs of students who are pregnant or have children. Should you have questions regarding a pregnant student's participation in programs or activities at NC State, please contact the **Office for Institutional Equity and Diversity (OIED)** or the **Office of General Counsel (OGC)** for assistance.

Question of the Month

"If I participate in one of the 'Moral Monday' or 'Thankful Tuesday' protests and am arrested, can I be fired?"

Being an active citizen means being engaged in the political process. As state employees, we do not lose our rights to be involved in supporting or opposing candidates or issues as private citizens. However, state law prohibits employees from using work time and university resources (e.g. computers, e-mail, letterhead, copy/fax machines, telephones, and vehicles) to support or oppose political candidates and issues.

Being arrested in and of itself may not be a basis for disciplinary action. NC State does have the right to take disciplinary action against employees for *misconduct*, (faculty or EPA employees) or *unacceptable personal conduct* (for SPA employees). Whether disciplinary action is pursued when an employee is arrested is always based on the specific circumstances of the situation and the university's administrative investigation of the underlying facts. A nexus between the conduct forming the basis for the arrest and the person's duties as an employee is required for any disciplinary action to be instituted. Being arrested for attending a protest event would likely not lead to disciplinary action, unless extenuating circumstances exist.

If you supervise an employee who has been arrested and have a question regarding disciplinary action, please contact Employee Relations or the Office of General Counsel.

U.S. Supreme Court Rules for Employers in Title VII Cases

Recently, the Supreme Court ruled 5-4 that a plaintiff making a retaliation claim against an employer must establish that his or her activity was a "but-for" cause of the adverse action by the employer.

In University of Texas SW Medical Center v. Nassar, a University employee, Nassar, resigned from his position at a University teaching hospital because of alleged harassment by his supervisor a University employee. Nassar later applied to work solely for the hospital and was denied the job. Nassar brought an action against the University for discrimination and retaliation, alleging his failure to be hired for the hospital job was in retaliation for his resignation after complaining about discrimination by his supervisor.

The issue before the court was what standard of proof the court should apply when analyzing retaliation claims under Title VII. In 1991 Congress reduced the traditional "but-for" standard of proof to a lessened "motivating factor" standard of proof in cases of status-based discrimination. Nassar urged the court to extend the "motivating factor" standard to cases of retaliation (only requiring plaintiff to prove that retaliation was a motivating factor in the decision not to hire, rather than having to prove that he would have received the position except for the retaliatory intent). The court did not extend lessened standard of proof to retaliation claims and vacated and remanded the case for further proceedings to determine if Nassar is able to prove his case under the "but-for" causation standard.

Employees must prove that retaliation was the reason for an adverse action.

The court relied on the fact that the 1991 changes made by Congress were expressly extended only to status-based discrimination cases and Congress failed to extend such a standard to retaliation claims. The court also noted that the statute makes status-based discrimination and retaliation claims separate provisions and Title VII treats and discusses them differently. The court emphasized that lessening the standard of proof would lead to the filing of frivolous lawsuits and would only prove to add to the already "ever-increasing frequency" in which employees are filing retaliation lawsuits.

What this Means at NC State: Individuals who claim that they have been the victim of an adverse employment action (i.e. dismissal, denial of promotion, etc.) due to retaliation for engaging in a protected activity under Title VII (e.g. filing a charge of discrimination with the EEOC) must prove that the adverse action was taken because of the protected activity.

Questions about this subject may be addressed to Associate General Counsel Sarah Lannom at 919-515-2333.

When a Non-Disclosure Agreement is Not Enough

Although non-disclosure agreements (NDA's) are often treated as boilerplate agreements, a ruling by the Federal Circuit this month highlights the importance of careful drafting.

The Federal Circuit ruled that an NDA preempts trade secret law and a trade secret ceases to be protected the moment it is disclosed if the NDA required confidential information to be marked as such and the information was disclosed to the recipient under the NDA without such marking. Convolve, Inc. v Compaq Computer Corporation (Fed. Cir. July 1, 2013). This decision has important implications for both NC State and the companies with which we do business. Parties intending to disclose may propose an NDA that does not require marking and requires all non-public information to be kept confidential. This is in the best interest of the owner of the information because trade secret law can apply indefinitely. But for the recipient, particularly a recipient with many employees, marking is perhaps the only way to manage the confidentiality of the disclosure.

Since the unauthorized disclosure of trade secret information can result in significant monetary damages to the discloser, and since an NDA will preempt trade secret protection, it is more important than ever that we pay close attention to the drafting of our NDA's—both incoming and outgoing.

Questions about this subject may be addressed to Associate General Counsel Judy Curry at 919-515-2696.