

# Calling On Congress: Take a Page from Parliament’s Playbook and Fix Employment Discrimination Law

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## I. INTRODUCTION

The Supreme Court rendered two decisions addressing issues of federal employment discrimination law on June 24, 2013: *University of Texas Southwestern Medical Center v. Nassar*<sup>1</sup> and *Vance v. Ball State University*.<sup>2</sup> The opinions have many similarities: Both deal with analytical frameworks developed to prove and evaluate intentional discrimination claims; both were decided in a way that favors defendant employers over plaintiff employees; both were decided 5-4 with the same majorities and dissenters; both majority opinions stated that the decision was likely to result in fewer trials of discrimination claims; both majority opinions rejected the position of the Equal

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1. 133 S. Ct. 2517, 2534 (2013).  
2. *Id.* at 2454.

Employment Opportunity Commission (“EEOC”); and both dissents were authored by Justice Ginsburg and read from the bench.<sup>3</sup> Furthermore, the two cases prompted Justice Ginsburg to conclude the dissenting opinions with a call to Congress to overturn the decisions, as she had done in 2007 in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>4</sup> Apparently this strategy worked in *Ledbetter*, as President Obama signed the Ledbetter Fair Pay Act of 2009, overturning the legal principle articulated in that case. According to commentator Jeffrey Toobin, in *Vance* and *Nassar* Justice Ginsburg “ran her *Ledbetter* play again,” but he predicted it is less likely to succeed this time.<sup>5</sup>

I, too, urge Congress to amend the employment discrimination laws, but not by running “the *Ledbetter* play” again. Congress should stop patching the employment discrimination laws by enacting statutes to change the law announced in specific cases. Such a nickel-and-dime approach to reform of the law is precisely what led to the sharply divided decision in *Nassar*. Instead, Congress should take a page from the playbook of the United Kingdom’s Parliament and undertake a comprehensive reform of employment discrimination laws, as Parliament did in the Equality Act of 2010.

Part I of this Essay discusses the *Vance* and *Nassar* decisions, highlighting Justice Ginsburg’s dissents calling on Congress to overturn the Court’s holdings. As Part I discusses, commentators, too, for more than a decade have been calling on Congress to “fix” the employment discrimination law that the Court has developed.

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3. Rob Silverblatt, *Justice Ginsburg's Record-Breaking Day: Ginsburg Dissents From the Bench in Hotly Contested Cases*, U.S. NEWS & WORLD REPORT (June 25, 2013), <http://www.usnews.com/news/articles/2013/06/25/justice-ginsburgs-record-breaking-day>.

4. 550 U.S. 618 (2007), *abrogated by statute*, Pub. L. No. 111-2, 123 Stat. 5. In *Ledbetter*, the Court gave a grudging and strict interpretation of when a timely charge of discrimination alleging discriminatory pay practices must be filed with the Equal Employment Opportunity Commission. The Court held that the discrete act of a discriminatory pay practice triggers the running of the 180 (or 300) day charge-filing period; a charge must be filed within 180 days of each discrete discriminatory act. The Ledbetter Fair Pay Act overturned the decision by establishing three different events that constitute an unlawful employment practice and commence the running of the charge-filing period, thus more carefully tailoring the limitations period to the various acts of discrimination in compensation. The three events are as follows: 1) when a discriminatory compensation decision or practice is adopted; 2) when an individual becomes subject to a discriminatory compensation decision or practice; or 3) when an individual is affected by such a decision or practice, including each time the individual is paid resulting from the decision or practice. Title VII, 42 U.S.C. § 2000e-5(e)(3)(A) (2013); 29 U.S.C. § 626(d)(3) (Age Discrimination in Employment Act) (2013); 42 U.S.C. § 12117(a), incorporating 42 U.S.C. 2000e-5; (Americans With Disabilities Act); 29 U.S.C. § 791 & 794 (Rehabilitation Act of 1973) (2013).

5. Jeffrey Toobin, *Will Ginsburg's Ledbetter Play Work Twice?*, THE NEW YORKER (June 25, 2013), <http://www.newyorker.com/online/blogs/comment/2013/06/ruth-bader-ginsburg-ledbetter-play.html>.

Congress has responded to several Supreme Court decisions, overturning or adjusting the law announced in them, most notably in the Civil Rights Act of 1991. However, as Part II discusses, the incremental approach of Congress's responding to one or more Supreme Court decisions every few years is not adequate to repair and modernize the employment discrimination laws of this Nation. Part II briefly describes the comprehensive approach of Parliament and recommends that Congress legislate accordingly.

## II. VANCE AND NASSAR

### A. Vance

The issue in *Vance* was, “Who is a supervisor?” Is it anyone who has authority to direct other employees’ daily work activities, or is it only those who have ultimate authority, such as hiring, firing, demoting, promoting, and so on? This question matters because employers can be held liable under Title VII of the Civil Rights Act of 1964<sup>6</sup> for sexual harassment perpetrated by their employees. When the harasser is a non-supervisor, the employer is liable if negligent—if it knew or should have known of the harassment and failed to take prompt and effective remedial action.<sup>7</sup> However, it was generally believed that employers should be held liable more readily for harassment perpetrated by supervisors, and in 1998 the Supreme Court effectuated that result by announcing a standard for imposing liability for supervisor harassment that was more plaintiff friendly than the foregoing negligence standard in *Burlington Industries, Inc. v. Ellerth*<sup>8</sup> and *Faragher v. Boca Raton*.<sup>9</sup> Under the supervisor standard, an employer is strictly liable if the harassment results in a “tangible employment action,” such as firing or demoting, but if no tangible employment action results, the employer may try to prove a two-part affirmative defense to avoid liability.<sup>10</sup> In the aftermath of *Faragher* and *Ellerth*, plaintiffs argued that their harassers were supervisors in order to benefit from the more favorable analysis. The circuits split on what authority a supervisor must have.

The *Vance* Court held that a supervisor must have authority to take tangible employment actions against the victim.<sup>11</sup> Although the

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6. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

7. See, e.g., *Vance*, 133 S. Ct. at 2441.

8. 524 U.S. 742, 761 (1998).

9. 524 U.S. 775, 807 (1998).

10. *Ellerth*, 524 U.S. at 761; *Farragher*, 524 U.S. at 807.

11. *Vance*, 133 S. Ct. at 2443.

Court did not think that *Faragher* and *Ellerth* resolved the issue before it, it did decide that the answer was implicit in the framework created in those cases. Because the pivotal question in the framework is whether a tangible employment action was taken, the Court held that “the strong implication” is that supervisors have the authority to take tangible employment actions.<sup>12</sup> In so holding, the Court rejected as ambiguous and unhelpful the EEOC’s interpretation of “supervisor” in its Guidance.<sup>13</sup>

Justice Ginsburg’s dissent advocated adopting the definition in the EEOC Guidance. She argued that the majority’s definition was inconsistent with the assumptions about “supervisor” in prior decisions,<sup>14</sup> and that it ignored “workplace realities.”<sup>15</sup> The dissent contended that the majority’s decision to define “supervisor” narrowly would “diminish[] the force of *Faragher* and *Ellerth*, ignore[] the conditions under which members of the work force labor, and disserve[] the objectives of Title VII to prevent discrimination from infecting the Nation’s workplaces.”<sup>16</sup>

The majority and dissent disagreed about the ramifications of the *Vance* decision. The majority argued that the decision would not diminish protection against sexual harassment because the negligence standard for non-supervisor harassment provides sufficient protection.<sup>17</sup> In contrast, the dissent predicted that plaintiffs who cannot avail themselves of the supervisor analysis will face “a hazardous endeavor.”<sup>18</sup>

### B. Nassar

The issue in *Nassar* was whether the “motivating factor” causation standard and the associated mixed-motives analytical framework apply to retaliation claims under Title VII, as they do to discrimination claims under the Statute. Some background is helpful in understanding how this issue arose. For many years, two proof frameworks have been used to prove and evaluate individual disparate-treatment claims. The first is the pretext framework developed by the Supreme Court in *McDonnell Douglas Corp. v.*

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12. *Id.* at 2448.

13. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999).

14. *Vance*, 133 S. Ct. at 2462 (Ginsburg, J., dissenting).

15. *Id.*

16. *Id.* at 2455.

17. *Id.* at 2451–52.

18. *Id.* at 2464 (Ginsburg, J., dissenting).

*Green*.<sup>19</sup> The second is the mixed-motives framework developed by the Court in *Price Waterhouse v. Hopkins*.<sup>20</sup> However, the *Price Waterhouse* framework was modified when, in the Civil Rights Act of 1991,<sup>21</sup> Congress incorporated the two parts of the mixed-motives analysis, “motivating factor” and the same-decision defense, into two new sections in Title VII.<sup>22</sup> Congress not only codified the mixed-motives analysis, but it also selected the causation standard from *Price Waterhouse*—motivating factor rather than substantial factor—and changed the effect of the same-decision defense, rendering it a limitation on monetary remedies rather than a defense to liability. “Motivating factor” is the threshold for the “mixed-motives” analysis, which generally is considered more favorable for plaintiffs than the pretext analysis. For two decades, the courts applied both the pretext and mixed-motives frameworks to disparate treatment cases under Title VII, the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”). In 2009, the Court surprisingly held in *Gross v. FBL Financial Services, Inc.*<sup>23</sup> that, because Congress did not amend the ADEA to include “motivating factor”—and “because of” means but-for causation—the mixed-motives framework does not apply to the ADEA. Left unanswered was the breadth of the holding: Did it imply that but-for causation is required for, and the mixed-motives analysis is inapplicable to, all employment discrimination provisions that have only the “because” statutory language? Enter *Nassar*.

The plaintiff in *Nassar* asserted a claim for retaliation under Title VII after he had asserted a discrimination claim. The Fifth

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19. 411 U.S. 792, 802–07 (1973). The *McDonnell Douglas* pretext analysis is a three-step analysis with a shifting burden of production. First, the plaintiff establishes a prima facie case, which basically requires the plaintiff to prove that he or she is in a protected class, there is a job available, and the plaintiff is basically qualified to perform the job, although the elements vary somewhat depending on what type of adverse employment action the employer took. If the plaintiff satisfies the burden at the first stage, at stage two the employer bears the burden of production to articulate a legitimate, nondiscriminatory reason for its employment decision. If the defendant satisfies the burden of production at the second stage, the burden of production shifts back to the plaintiff to prove that the employer’s proffered reason is a pretext for discrimination.

20. 490 U.S. 228, 249 (1989). In the *Price Waterhouse* mixed-motives analysis there were two stages with a shifting burden of persuasion. First, the plaintiff must prove that the protected characteristic was a motivating or substantial factor (the case produced no majority opinion on the standard of causation) in the adverse employment action. Then the burden of persuasion shifts to the defendant, who could still win the case and avoid liability by proving the same-decision defense—that it would have taken the same adverse action for nondiscriminatory reasons.

21. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

22. 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B).

23. 557 U.S. 167 (2009).

Circuit had applied the mixed-motives analysis to his retaliation claim, rejecting the argument that *Gross* controlled. The Supreme Court reversed, holding that Congress did not amend the Title VII retaliation provision to include “motivating factor.” Therefore, as the Court held regarding the ADEA in *Gross*, a plaintiff asserting a retaliation claim must prove that a retaliatory motive is the but-for cause of the adverse employment action.

The *Nassar* majority examined the history of Title VII law from its 1964 passage, to *Price Waterhouse*, to the Civil Rights Act of 1991, to *Gross*. Turning to the structure of Title VII, the Court concluded that because there is no meaningful textual difference between the Title VII retaliation provision and the antidiscrimination provision in the ADEA, the conclusion, as in *Gross*, is that Title VII retaliation claims require proof of but-for causation.<sup>24</sup> The Court stated that the higher standard of causation is important to “the fair and responsible allocation of resources in the judicial and litigation systems.”<sup>25</sup> Explaining further, the Court cited the dramatic increase in retaliation claims filed from 1997 to 2012—more than double. The Court explained how an employee, fearing termination for a job-related reason, could set up a retaliation claim by making a meritless claim of discrimination before the adverse action, only to claim retaliation for making the claim when the adverse action is taken. In the face of such frivolous claims, employers would have difficulty obtaining summary judgment under the motivating factor standard.<sup>26</sup> The majority opinion also addressed two other points raised by the dissent. First, the Court rejected the argument that it should defer to the EEOC’s interpretation, expressed in a guidance manual. The Court found that the EEOC’s explanations supporting its position lacked the persuasive force necessary for *Skidmore*<sup>27</sup> deference. Second, the Court rejected the argument that even if the “motivating factor” standard in Title VII did not control the result, the Court’s decision in *Price Waterhouse* should. The majority did not think that *Price Waterhouse* survived the enactment of the Civil Rights Act of 1991. In sum, the Court found its holding to be supported by the “text, structure, and history of Title VII.”<sup>28</sup>

Again, Justice Ginsburg dissented, focusing on the majority’s elimination of the “symbiotic relationship” between discrimination and

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24. *Nassar*, 133 S. Ct. at 2531.

25. *Id.* at 2532.

26. *Id.*

27. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

28. *Nassar*, 133 S. Ct. at 2534.

retaliation.<sup>29</sup> The dissent argued that the majority, by holding that retaliation was outside the scope of the motivating factor provision in Title VII,<sup>30</sup> was attributing to Congress an intent at odds with Congress's clear purpose to strengthen Title VII in the Civil Rights Act of 1991.<sup>31</sup> The dissent mocked the fact that the majority analogized the antidiscrimination provisions of Title VII and the ADEA in *Nassar* but distinguished them in *Gross*: "What sense can one make of this other than 'heads the employer wins, tails the employee loses'?"<sup>32</sup>

*C. Nassar and Vance Dissents: Calling on Congress to Fix It*

Justice Ginsburg's dissenting opinions in both *Vance* and *Nassar* call upon Congress to intervene, as it has in the past, to repair the damage wrought by the Court's decisions. In *Nassar*, the dissent proclaimed that *Nassar* and *Vance* "should prompt yet another Civil Rights Restoration Act."<sup>33</sup> The invitation to Congress was reminiscent of Justice Ginsburg's closing in her *Ledbetter* dissent: "Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."<sup>34</sup>

There also has been a growing crescendo among scholars in the past decade or so that federal employment discrimination law is broken and Congress needs to fix it. And Congress has responded to Supreme Court opinions several times. The most far-reaching response by Congress was the Civil Rights Act of 1991, in which Congress amended Title VII and the Americans with Disabilities Act, abrogating ten Supreme Court decisions.<sup>35</sup> In fairness, the 1991 Act did more than simply overturn cases, but it did not do enough. As mentioned, the *Ledbetter* dissent's call to Congress was answered with the Ledbetter Fair Pay Act of 2009.<sup>36</sup> The Americans with Disabilities Act Amendments Act of 2008<sup>37</sup> abrogated the law announced in two Supreme Court decisions.

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29. *Id.* at 2537 (Ginsburg, J., dissenting).

30. 42 U.S.C. § 2000e-2(m).

31. *Nassar*, 133 S. Ct. at 2539 (Ginsburg, J., dissenting).

32. *Id.* at 2545.

33. *Id.* at 2547.

34. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting).

35. H.R. REP. NO. 102-40, pt. 2, at 1 (1991).

36. Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

37. Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. § 12101).

The most curious failure of Congress to respond is the non-passage of the Protecting Older Workers Against Discrimination Act (“POWADA”),<sup>38</sup> which would have changed the law announced in *Gross*.<sup>39</sup> Given the considerable negative reaction to the Court’s holding that age-discrimination plaintiffs have to prove but-for causation,<sup>40</sup> it is surprising that both political parties did not push passage of POWADA.

Now Justice Ginsburg has twice called on Congress again to respond to Supreme Court decisions that reduce protections under the employment discrimination laws. If Congress were very sensitive to the Court’s opinions, it might respond. *Nassar* seems effectively to ensconce the but-for causation standard for most discrimination and all retaliation claims. Beyond *Nassar*’s far-reaching impact on discrimination law, the Court’s discussion of the large volume of retaliation claims, the ease with which plaintiffs can assert meritless claims, and the need to dismiss such claims at summary judgment,<sup>41</sup> is a rather bald assertion that the Court intends to reduce the number of retaliation claims that are asserted and that go to trial. The Court articulated a similar intention, though not as bluntly stated, in *Vance*. The Court said that the supervisor definition would permit resolution of many cases as a matter of law, and plaintiffs would know before filing what they must prove.<sup>42</sup> Nonetheless, as Jeffrey Toobin points out, the political realities are different in 2013 than they were when Congress passed the Ledbetter Act.<sup>43</sup>

### III. CALLING ON CONGRESS TO FIX IT: LEGISLATE LIKE PARLIAMENT

Although I am sympathetic to the dissent’s calls for Congress to fix the “wayward” opinions of the Court, particularly *Nassar*, I do not think that Congress should continue its approach of simply fixing what it considers errant decisions. Congress should take a holistic view of our very complex body of employment discrimination law and undertake a thorough reform of it. Forget “the *Ledbetter* play”! Take a page out of the playbook of the United Kingdom’s Parliament: Develop

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38. S. 1756, 111th Cong., (1st Sess. 2009); H.R. 3721, 111th Cong., (1st Sess. 2009).

39. 557 U.S. 167 (2009).

40. See William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 709 & n.127 (2010).

41. *Nassar*, 133 S. Ct. at 2531.

42. *Vance*, 133 S. Ct. at 2450.

43. Toobin, *supra* note 5.

and enact an ambitious reform law similar to the Equality Act of 2010.<sup>44</sup>

*A. The Inadequacy of the Ledbetter Play*

The problem with Congress's approach to fixing particular decisions is well illustrated by the opinions in *Nassar*. The majority interpreted Congress's amendment of specific sections of Title VII via the Civil Rights Act of 1991 to be a clear indication that those amendments were not intended to apply to any other sections of Title VII<sup>45</sup>—precisely as the Court had reasoned in *Gross* regarding the ADEA. The dissent, on the other hand, reasoned that the narrow interpretation by the majority was at odds with the purpose of the 1991 Act—to expand protections against employment discrimination.<sup>46</sup> Why did Congress amend only Title VII by inserting the mixed-motives analysis? Perhaps, as the dissent suggested, because it was reacting to *Price Waterhouse*, a Title VII sex-discrimination case. The 1991 Act was Congress's most ambitious reform of the discrimination laws to date, yet it demonstrates that the episodic approach to fixing discrimination law has proven problematic and inadequate.

The incremental approach of patching the laws not only creates the uncertainty evidenced in *Nassar* and *Gross*, it also means that Congress is not expressing views regarding many emerging theories, concepts, and principles developed in case law. (For example, what does Congress think about gender stereotyping as a theory of discrimination?) Nor has Congress indicated whether concepts developed in later-enacted laws should apply to earlier laws. Should the theory of “regarded as” or perceptive discrimination—expressly provided for in the ADA—apply to Title VII and the ADEA?

*B. Take a Page from Parliament's Playbook*

Our employment discrimination law is asymmetrical, differing from one statute to another, and confused. If you don't believe me, try to teach the course! The United Kingdom found itself in a similar position. With a three-decade-old body of law, featuring nine antidiscrimination laws described as “outdated, fragmented, inconsistent, inadequate, inaccessible, and at times

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44. Equality Act, 2010, c. 15, § 149 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2010/15/section/149..>

45. *Nassar*, 133 S. Ct. at 2532.

46. *Id.* at 2540 (Ginsburg, J., dissenting).

incomprehensible,”<sup>47</sup> a research team, supported by an advisory board and panel of experts, undertook a year-long study that culminated in 2000 with a detailed report recommending a single equality act.<sup>48</sup> That report was followed by a Discrimination Law Review reaching the same recommendation in 2007.<sup>49</sup> Those efforts came to fruition in 2010 with one comprehensive law replacing the others. The particulars of the law are not as important here as is the approach—comprehensive.

#### IV. CONCLUSION

When it enacted early discrimination laws, the U.K. studied and followed the model of the U.S. and Canada.<sup>50</sup> As the oldest of our discrimination laws reaches its fiftieth anniversary in 2014, it is time for Congress to look to the U.K.’s example. As much as one may disagree with any single decision of the U.S. Supreme Court, running the *Ledbetter* play is no longer the answer. In the words of Justice Ginsburg, “The ball is in Congress’s court.”

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47. Bob Hepple, *The New Single Equality Act in Britain*, 5 THE EQUAL RIGHTS REV. 11, 13 (2010), available at <http://www.equalrightstrust.org/ertdocumentbank/bob%20hepple.pdf>.

48. BOB HEPPLE ET AL., EQUALITY: A NEW FRAMEWORK 1 (2000).

49. Hepple, *supra* note 47, at 14.

50. *Id.* at 12.