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Too Little, Too Late: The Supreme Court Adopts But-For Causation for Title VII Retaliation Claims

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On June 24, 2013, in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ (2013), the U.S. Supreme Court broke its long string of pronouncing expansive standards in the context of Title VII retaliation claims by requiring strict "but-for" causation and rejecting the more liberal "motivating factor" standard used for Title VII discrimination claims. Going forward, a plaintiff will be required to prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." While this more exacting causation standard may enable employers to defeat more retaliation claims at summary judgment, *Nassar* does not eliminate—or even reduce—employers' need to guard against retaliation claims through sound policies, prompt investigations and supervisory training.

Nassar's Retaliation Claim

Dr. Naiel Nassar, a former professor at the University of Texas Southwestern Medical Center, sued the University for Title VII discrimination and retaliation after he was denied a position at the University's medical clinic. With respect to his retaliation claim, Nassar alleged the University did not hire him because, in his prior employment with the University, he made complaints of discrimination.

Before the District Court and the Fifth Circuit Court of Appeals, Nassar and the University squared off on the causation standard for retaliation under Title VII: the University maintained that Nassar needed to prove he would have been hired "but-for" his prior discrimination complaints, while Nassar argued he needed only to establish that those complaints were a "motivating factor" in the University's decision. The opposing positions mirrored a nationwide split on the Title VII retaliation causation standard. The split originated from the U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*, which held that "but-for" causation applied to ADEA retaliation claims. Consistent with its heightened interest in retaliation claims, the Court granted certiorari to resolve the split the *Gross* decision inspired.

The Supreme Court's Analysis

Retaliation claims have skyrocketed in recent years, which may explain why the Court has taken such an interest in them. In 2012, 38% of all charges filed with the EEOC included a claim of retaliation. At oral argument in *Nassar*, Justice Kennedy acknowledged this growing trend and

warned that the Court should be very careful about the causation standard, especially where a failing employee claims retaliation as a "defensive mechanism" when termination appears imminent.

With this concern as a backdrop, the Court approached the causation question by looking to the 1991 amendment to Title VII that established the "motivating factor" standard for discrimination claims. The amendment provides that Title VII is violated "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." According to the Court in *Nassar*, excluding "retaliation" from the 1991 amendment evinces Congress's intent to require plaintiffs to prove "but-for" causation for retaliation claims.

In adopting the "but-for" causation standard, the Court rejected arguments by *Nassar* and the government (which joined in the oral argument) that retaliation is synonymous with discrimination and, therefore, Congress did not need to separately mention retaliation in its 1991 amendment. The Court acknowledged it has previously applied such reasoning in the context of broadly-worded anti-discrimination statutes, but found the reasoning to be "inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII." The Court also rejected arguments that the "motivating factor" standard should be adopted because it is consistent with the EEOC's interpretation, as expressed in the agency's Compliance Manual and other published guidance. Writing for a 5-4 majority, Justice Kennedy opined that the EEOC's interpretation did not specifically address or reconcile the omission of retaliation from the 1991 amendment and relied on circular reasoning. Therefore, the EEOC's position was not sufficiently persuasive to warrant deference from the Court.

While the dissent voiced strong objection to applying two different standards to claims of discrimination and retaliation under the same act, the majority maintained the distinction is not only mandated by the text of the statute, but also critical to the "fair and responsible allocation of resources in the judicial and litigation systems." Echoing concerns raised at oral argument, the Court again noted the upsurge in retaliation claims and worried that an employee facing demotion or termination "might be tempted to make an unfounded charge of . . . discrimination" to stage a retaliation claim to prevent the "undesired change in employment circumstance." According to the Court, a lower causation standard would make it difficult for employers to combat these frivolous claims at the summary judgment stage and, consequently, would divert judicial, administrative and employer resources from legitimate efforts to combat discrimination and harassment.

SCOTUS and Retaliation, Going Forward

Nassar is not the last we will hear from the Court on retaliation. Only one month after oral argument in *Nassar*, the Court granted *certiorari* in *Lawson v. FMR, LLC*, a whistleblower case, which addresses the scope of retaliation claims under the Sarbanes-Oxley Act (SOX). Next term, the Court will determine whether Section 806 of SOX, which applies to publicly-traded companies, extends to privately-held companies that contract with public companies. Thus, *Lawson* is the Court's next opportunity to either expand or further restrict the scope of retaliation claims. Although the *Nassar* decision represents the latter, it may not indicate how the Court will proceed in *Lawson*.

What Practical Steps Should Employers Take?

Although the Court in *Nassar* adopted the more exacting "but for" causation standard for Title VII retaliation claims, the application of this standard is unlikely to lead to a noticeable decrease in such claims. When the Court imposed the "but-for" causation standard for ADEA retaliations under *Gross*, there was a nominal 1% decrease in age charges filed with the EEOC; at best, a similar decrease can be expected post-*Nassar*. As such, employers must remain vigilant in responding to complaints of discrimination and take prophylactic measures to protect against retaliation claims.

To guard against such claims, employers should consider taking the following steps:

- Develop and implement strong anti-retaliation policies.
- Educate and train all managers and supervisors about unlawful retaliation and the company's policies against it.
- Provide multiple avenues for reporting discrimination claims, at least one of which is outside of the employee's chain of command.
- Promptly investigate all complaints of discrimination, using an outside investigator where appropriate.

- Validate the legitimate business reasons for disciplining or terminating an employee who engaged in protected activity prior to taking any adverse employment action.
- Ensure that the complaint, investigation, and conclusion(s) of an investigation are properly documented.

Implementing these steps effectively will maximize an employer's ability to utilize the reasoning and holding in *Nassar* to combat frivolous retaliation claims at the summary judgment stage.

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