SUPREME COURT *NASSAR* RULING: THE BUT-FOR STANDARD IN RETALIATION CASES

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I. INTRODUCTION

This article briefly reviews the U.S. Supreme Court decision of *University of Texas Southwestern Medical Ctr v Nassar*, 570 US ___ (2013).

Title VII of the Civil Rights Act of 1964, 42 USC 2000e, proscribes race, color, religion, sex, or national origin discrimination by covered employers. A mixed-motives jury instruction basically means that, if there is evidence of several reasons for the adverse employment action, of which one reason is illegal, the burden of persuasion shifts to the employer to show that it would have taken the adverse employment action even without the presence of "a" proscribed motivating reason. McNamara and Southerland, *Federal Employment Jury Instructions*, §§ 3.272 - 3.273, pp 3-53 to 3-55 (James Publishing).

In *Nassar*, the issue was whether a jury should be given a mixed-motives causation instruction or a but-for causation instruction in a Title VII employment case alleging retaliation.

II. FACTUAL BACKGROUND

The University of Texas Southwestern Medical Center (University) is affiliated with Parkland Memorial Hospital (Hospital). The affiliation agreement requires the Hospital to offer empty staff physician posts to the University's faculty members.

Dr. Nassar is a medical doctor of Middle Eastern descent. He was a University faculty member and a Hospital staff physician. Dr. Beth Levine was Dr. Nassar's superior. Dr. Nassar alleged that Dr. Levine was biased against him because of his religion and ethnic origin. Dr. Nassar complained about Dr. Levine's alleged harassment to Dr. Gregory Fitz, Dr. Levine's supervisor. Dr. Nassar wanted to continue working at the Hospital without also being on the University's faculty. During discussions with the Hospital, Dr. Nassar concluded that this might be possible. He then resigned his University position. In addition, he sent a letter to Dr. Fitz and others, in which he stated that the reason for his resignation was the harassment from Dr. Levine which was allegedly motivated by Dr Nassar's religion, race, and culture. Dr. Fitz was not happy with Dr. Nassar's accusations.

The Hospital offered Dr. Nassar a job as a staff physician. Dr. Fitz protested to the Hospital about that offer. Dr. Fitz maintained that the offer was inconsistent with the affiliation agreement's requirement that staff physicians also be members of the University faculty. The Hospital then withdrew its offer. This meant that Dr Nassar ended up with neither a University faculty position nor a Hospital physician position.

Dr Nassar believed that he was constructively discharged because of his race and religion and that the University denied him a job in retaliation for his prior resignation letter alleging discrimination.

III. UNITED STATES DISTRICT COURT

Dr. Nassar filed his Title VII suit in the United States District Court for the Northern District of Texas. He alleged two violations of Title VII. The first claim was a race and religion "status" discrimination claim under 42 USC 2000e–2(a). His second

claim was that the employer's actions were in retaliation for his complaining about discrimination, in violation of 42 USC 2000e–3(a). The jury found for Dr. Nasser on both claims.

IV. COURT OF APPEALS FOR THE FIFTH CIRCUIT

On appeal, the Fifth Circuit Court of Appeals affirmed in part and vacated in part. 674 F3d 448 (5th Cir 2012). The Fifth Circuit concluded that Dr. Nasser had submitted insufficient evidence in support of his race and religion discrimination claims. However, the Fifth Circuit affirmed the retaliation finding. The Fifth Circuit held that Title VII retaliation claims, like discrimination status claims, require only a showing that retaliation was a motivating factor for the adverse employment action, rather than a but-for cause for the adverse employment action.

Four judges dissented from the Fifth Circuit's decision not to rehear the case *en banc*. These four judges indicated that the Circuit's application of the motivating factor standard to retaliation cases was an incorrect interpretation of Title VII. 688 F3d 211 (5th Cir 2012).

V. THREE TO TWO CIRCUIT SPLIT ON "BUT-FOR" ISSUE

At least three Circuit Courts had applied the but-for causation standard to retaliation cases. *Palmquist v Shinseki*, 689 F3d 66 (1st Cir 2012) (Rehabilitation Act retaliation case); *Lewis v Humboldt Acquisition Corp*, 681 F3d 312 (6th Cir 2012) (*en banc*) (Americans with Disabilities Act case); and *Barton v Zimmer, Inc*, 662 F3d 448 (7th Cir 2011) (Age Discrimination in Employment Act retaliation case).

At least two Circuit Courts had applied the mixed-motive standard. *Smith v Xerox Corp*, 602 F3d 320 (5th Cir 2010) (Title VII retaliation case); and *Saridakis v S Broward*

Hosp Dist, 468 F Appx 926 (11th Cir) (Title VII retaliation case), *cert denied*, 184 L Ed 2d (2012).

The Supreme Court granted certiorari in the *Nassar* case. 568 US ___ (2013).

VI. U. S. SUPREME COURT FIVE VOTE MAJORITY DECISION

Justice Kennedy wrote the majority decision, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The majority held that a mixed-motives jury instruction is not proper in a Title VII retaliation case.

According to the majority, Congress amended Title VII in 1991 to allow discrimination claims in which a proscribed consideration was "a motivating factor" for the adverse employment action. In 1991, Congress added the words "an unlawful employment practice is established 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" to Title VII. 42 USC 2000e-2(m)

An employee who alleges Title VII "status-based" race, color, religion, sex, or national origin discrimination does not have to show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. But-for causation is not the test. It is sufficient to show that the motive to discriminate was one of the employer's motives, even if the employer also had other lawful motives that were causative in the employer's decision. *Price Waterhouse* v. *Hopkins*, 490 US 228 (1989); and 43 USC 2000e–2(m), 2000e–5(g)(2)(B).

According to the majority decision, unlike Title VII claims concerning protected class status discrimination, Title VII's wording concerning retaliation does not provide

that a plaintiff may establish discrimination by showing that retaliation was simply a motivating factor. Congress did not add such a provision to the Title VII retaliation provision when it amended Title VII in 1991 to add §§2000e-2(m). This was even though Congress at the same time amended Title VII in several ways.

The decision held that a plaintiff in a Title VII retaliation case must prove, by a preponderance of the evidence, that retaliation was the but-for cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of retaliation, even when a plaintiff has produced evidence that retaliation was one of the motivating factors for the adverse employment action.

Although the Supreme Court had not previously considered the question of the showing required to establish liability for a Title VII retaliation claim, it had previously considered the issue of causation in a case involving the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 623. *Gross* v *FBL Financial Services, Inc*, 557 US 167 (2009). In *Gross*, the Court held that the ADEA required proof that age was the but-for cause of the prohibited conduct.

The *Nassar* majority decision concluded that the text, structure, and history of Title VII demonstrate that a plaintiff making a Title VII retaliation claim must prove that his or her protected activity was a but-for cause of the alleged adverse action by the employer.

VII. U. S. SUPREME COURT FOUR VOTE DISSENT

Justice Ginsburg dissented, with Justices Breyer, Sotomayor, and Kagan joining.

Justice Ginsburg stated that in providing for a higher burden of proof for retaliation claims, the majority failed to appreciate that retaliation for complaining about discrimination is tightly bonded to the original protected class status discrimination itself and cannot be disassociated from it. According to Justice Ginsburg, the Court had previously indicated that retaliation in response to a complaint about proscribed discrimination is discrimination on the basis of the characteristic Congress sought to immunize against adverse employment action. *Jackson* v. *Birmingham Bd of Ed,* 544 US 167 (2005).

In *Sullivan* v *Little Hunting Park, Inc*, 396 US 229 (1969), the Court determined that 42 USC 1982, which provides that "[a]ll citizens of the United States shall have the same right … as is enjoyed by white citizens … to inherit, purchase, lease, sell, hold, and convey real and personal property," protected a white person who suffered retaliation after complaining of discrimination against his black tenant. *Jackson* expanded on that holding in the context of sex discrimination. "Retaliation against a person because [he] has complained of sex discrimination," the Court found, "is another form of intentional sex discrimination." 544 US at 173.

Furthermore, according to Justice Ginsburg, the Court had previously recognized that retaliation is an intentional act. Retaliation is a form of 'discrimination' because the complainant is being subject to differential treatment. In addition, retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint which is an allegation of sex discrimination. 544 US at 173-174.

The dissent concludes that the majority decision which holds that 42 USC 2000e–2(m) excludes retaliation claims is at odds with decisions recognizing that retaliation is

inherently bound up with status-based discrimination, reaches outside of Title VII to arrive at an interpretation of "because" that ignores the realities of life at work; is not guided by precedent, or by the intentions of legislators who amended Title VII in 1991; and appears motivated by a desire to reduce the number of retaliation claims.

VIII. CONCLUSION

In *Nassar*, the U. S. Supreme Court ruled in a five to four decision that the but-for causation standard is applicable to claims of unlawful employer retaliation under 42 USC 2000e–3(a).

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About the Author

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