



Supreme Court Tightens Standard In Retaliation Cases

Insights

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As the U.S. Supreme Court ended its most recent term with a number of cases that will have broad societal implications, one employment law case decided by the Court seems to have taken somewhat of a back seat, despite the significant effect it will have on retaliation claims arising out of workplace discrimination complaints.

In *University of Texas Southwestern Medical Center v. Nassar*, the Court held that an employee asserting a Title VII claim of unlawful retaliation must prove that a retaliatory motive was the “but for” cause of any adverse employment action. This decision will make it significantly more difficult for employees to establish retaliatory motive, although by no means does it signal a death knell for retaliation claims in general.

Putting It In Context

Over the past 15 years, the number of EEOC charges alleging retaliation has doubled. In 1997 there were 16,394 Title VII retaliation charges filed with the EEOC. In 2012 there were 31,208 Title VII retaliation charges filed, outpacing all other charges filed save for race discrimination.

There are several reasons why the increase in retaliation charges has occurred. First, the total number of charges for all forms of discrimination filed between 1997 and 2012 has increased by almost 25%. With more charges filed, the number of retaliation charges was bound to rise as well. Second, since 2009, the Labor Department has hired additional investigators and has signaled a more aggressive approach to Title VII enforcement. This arguably encourages more people to come forward and file charges.

Third, the Supreme Court’s 2006 decision in *Burlington Northern v. White* clarified, and in many areas of the country expanded, the scope of what constituted an adverse employment action giving rise to a valid claim of retaliation. With a broader definition of what constitutes retaliation, more people have been able to bring retaliation claims. Fourth – and perhaps most significantly – many courts have applied a “mixed-motive standard” that has enabled employees to prevail in retaliation claims.

Confusion Over Mixed-Motives

In 1991, Congress amended Title VII to state that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the

practice.” This mixed-motive standard requires only that an employee establish that his or her protected status was *a* reason for the employment practice, but not necessarily the *sole* reason.

But Congress also amended Title VII to prohibit an employee’s recovery of monetary damages and reinstatement if an employer demonstrates that it would have taken the same action regardless of any impermissible motivating factor for the unlawful employment action.

These amendments created confusion as to whether the new mixed-motive standard applied to all Title VII claims, including retaliation, or whether it applied only to discrimination claims. The *Nassar* case brought this confusion before the Supreme Court for clarification.

The Background

Dr. Naiel Nassar, who is of Middle Eastern descent, held a faculty position at the University of Texas Southwestern Medical Center. He also held a staff position at Dallas Parkland Hospital, with which the university was affiliated.

Nassar complained that his supervisor at the university treated him differently than his colleagues, including unfairly scrutinizing his billing practices and attempting to delay his promotion. He also claimed that his supervisor made derogatory comments about individuals of Middle Eastern descent.

At least in part to no longer work for his supervisor, Nassar requested that he be allowed to resign his faculty position with the university and continue working as an employee of the hospital. Nassar’s department chair at the university, who also supervised the alleged harasser, objected to the request, citing an affiliation agreement requiring that all physicians working at the hospital be faculty members at the university. Without the university’s knowledge, Nassar continued to discuss his plan with the hospital. The hospital offered Nassar a position if he resigned his faculty position with the university.

As a result, Nassar submitted a resignation letter to the university in which he claimed that he was giving up his faculty position because of the “harassment and discrimination” by his supervisor. Nassar’s department chair at the university and the hospital’s Chief Medical Officer met and discussed the complaints outlined in Nassar’s resignation letter. The hospital thereafter revoked its offer to Nassar.

Nassar then filed suit against the university, claiming constructive discharge and retaliation. With respect to his retaliation claim, Nassar alleged that his department chair blocked the hospital from hiring him because of his complaints against his supervisor. The university argued that the department chair’s actions were consistent with the affiliation agreement, and that the same actions would have been taken in the absence of Nassar’s complaints.

The trial court applied a mixed-motive standard, instructing the jury that Nassar only needed to prove that retaliation was a motivating factor for the university’s actions. At trial, Nassar prevailed

on his retaliation claim. On appeal, the U.S. Court of Appeals for the 5th Circuit agreed that the trial court had correctly applied a mixed-motive standard and had properly instructed the jury.

The Supreme Court's Ruling

The Supreme Court rejected the mixed-motive standard applied by the trial court. In so doing, the Court limited the mixed-motive analysis solely to “status-based discrimination” claims. That is, claims alleging discrimination based on race, color, religion, sex, and national origin.

As for retaliation claims, the high Court held that an employee must establish that a retaliatory motive was the “but for” cause of the adverse employment action. In other words, an employee must prove that the adverse employment action would not have occurred in the absence of discriminatory intent.

In reaching this holding, the Court attributed the rise in retaliation claims over the past 15 years to the application of the mixed-motive standard. To illustrate, the Court noted that poor performers at a worksite who knew they were likely to face termination, transfer, demotion, or other adverse employment action could attempt to forestall the otherwise lawful yet undesired change in employment circumstances by simply asserting an unfounded charge of status-based discrimination. Then, if the employer proceeded with the adverse employment action, the employee could claim it was retaliation for the filing of the charge.

The Significance Of *Nassar*

Without question, the Court's ruling in *Nassar* is a significant victory for employers. It is now more difficult for employees to prevail on Title VII retaliation claims, since they must prove that a retaliatory motive was *the* reason, not simply *a* reason, for an adverse employment action. With this “but for” standard, the burden of proof will not shift to the employer on the retaliation claim. Procedurally, the “but-for” standard will enable employers to more readily seek and obtain dismissal of retaliation claims through summary judgment.

From a practical standpoint, the most significant benefit of the *Nassar* decision to employers is this: employers that are preparing a well-documented and justifiable plan of action, such as termination based on performance issues, may feel more secure in proceeding as planned even though the employee has engaged in a protected activity such as the filing of a status-based charge of discrimination. That is, employers need no longer feel obligated to place an otherwise lawful termination, demotion, transfer, or other similar action on indefinite hold.

Despite the foregoing, any dire prediction of open season on employees who file discrimination charges is vastly overblown. The applicable legal standard has been clarified, but the cause of action remains. Employees will still prevail in meritorious retaliation claims. Employers must remain mindful of their obligation to avoid adverse employment actions that lack sufficient justification. As such, employers must still document performance issues; prepare honest, objective, and constructive performance evaluations; and consider how issues with similarly-situated employees were addressed prior to taking any adverse employment action.

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