

CLIENT ALERT

U.S. Supreme Court Adopts Dual Causation Standards Under Title VII Heightening Plaintiffs' Burdens in Retaliation Cases

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On June 24, 2013, a 5-4 majority of the United States Supreme Court ruled that the "but-for" causation standard applies to retaliation claims brought under Title VII, rather than the lesser "motivating factor" standard applicable in Title VII discrimination claims based on race, color, religion, sex, and national origin, which the Court described as "status-based discrimination." As a result, an employer has an affirmative defense to a retaliation claim that will allow it to escape liability by showing that it would have taken the same action in the absence of a retaliatory motive. The majority in *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484 (June 24, 2013), concluded that the plain language and structure of Title VII, as amended in 1991, compelled that result. Four justices disagreed, relying on their view of the plain language of Title VII in support of the conclusion that retaliation claims, like status-based discrimination claims, should be resolved on a "mixed motive" basis using the "motivating factor" causation standard. The dissent predicted that Congress will overrule the majority's decision.

The plaintiff in *Nassar* was a physician of Middle Eastern descent who was on the faculty of the University of Texas Southwestern Medical Center. Based on that faculty status, he was also eligible for a staff position at an affiliated hospital. The plaintiff claimed in his lawsuit that (a) racially and religiously motivated harassment resulted in his constructive discharge from the University, and (b) the University caused the hospital to withdraw a job offer for a staff physician position in retaliation for his complaints of harassment. At trial the jury awarded the plaintiff compensatory and non-compensatory damages in excess of \$3,400,000, which amount the court reduced to \$700,000. On appeal, the Fifth Circuit Court of Appeals applied a "mixed motive" standard in affirming that part of the verdict relating to the retaliation claim, *i.e.* requiring "only a showing that retaliation was a motivating factor for the adverse employment action, rather than its 'but-for' cause." See Slip Opinion at 5. This ruling was the subject of the Supreme Court's analysis.

The Supreme Court majority based its reversal of the Court of Appeal's decision primarily on the language and structure of Title VII and, particularly, its 1991 amendments. The Supreme Court had applied the "but-for" causation standard to a status-based discrimination claim in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Two years later, however, Congress partially abrogated the *Price Waterhouse* decision in the Civil Rights Act of 1991 through an amendment to Title VII, Section 2000e-2(m). That amendment provides that "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." (emphasis added). As a result, an employer could no longer escape liability in status-based discrimination claims by showing that it would have taken the same actions had there been no discriminatory motive.

In its opinion in *Nassar*, the majority focused on the fact that Section 2000e-2(m) refers expressly to "race, color, religion, sex, or national origin," but not to retaliation. The majority contrasted the "motivating factor" language of Section 2000e-2(m) with that of the anti-retaliation provision, Section 2000e-3(a), which provides, instead, that it is an unlawful employment practice to discriminate "because" the employee had opposed discrimination or "because" the employee had participated in a charge or claim of discrimination. The use of "because" was significant to the majority, which relied on Congress' use of the word in the

Age Discrimination in Employment Act (ADEA). The Supreme Court held in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 169 (2009), that this language in the ADEA constituted a "but-for" causation standard. See Slip Opinion at 11-12 ("Given the lack of any meaningful textual difference between the text in this statute [Title VII] and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the 'but-for' cause of the challenged employment action"). In addition, the majority (a) relied on the overall "design and structure" of Title VII as a whole, (b) expressed its desire to protect "the fair and responsible allocation of resources in the judicial and litigation systems" from the increasing number of retaliation claims being filed under Title VII, and (c) rejected the EEOC's longstanding guidance supporting the "motivating factor" causation standard. See Slip Opinion at 13, 18, 20.

The dissenting opinion rejected the majority's views entirely. The dissent highlighted the fact that, by its 1991 amendments, Congress intended to "restore and strengthen . . . laws that ban discrimination in employment" following the *Price Waterhouse* decision. See Dissenting opinion at 10. According to the dissent, there would be no reason to impose a "but-for" standard given this intent. The dissent, like the majority, focused on the language of Section 2000e-2(m). Unlike the majority, however, the dissent relied on the language of that provision referring to "any employment practice," interpreting that phrase to protect broadly against retaliation, as well as other types of discrimination.

The majority's ruling that the "but-for" causation standard applies to Title VII retaliation claims will make it more difficult for employees to prevail on Title VII retaliation claims -- the "mixed motive" standard rejected by the majority is a far easier standard for employees to satisfy. This dual standard in status-based discrimination cases and retaliation cases will also complicate litigation that includes both types of claims, and will present a challenge to juries in analyzing a plaintiff's burdens under separate and distinct instructions.

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