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SUPREME COURT SETS HEIGHTENED STANDARD FOR PROVING RETALIATION CLAIMS

In a Nutshell

On June 24, 2013, the United States Supreme Court heightened the burden of proof for retaliation claims under Title VII by holding that employees have to prove that the employer's desire to retaliate was the "but-for" cause of the employer's adverse employment action. In *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*,[1] the Court found that the "motivating factor" standard commonly applied to Title VII status-based discrimination claims is not the proper standard for Title VII retaliation claims. Instead, the Court held, plaintiffs must prove Title VII retaliation claims through the higher but-for causation standard commonly derived from traditional tort principles. The Court highlighted the dramatic increase in retaliation claims over the years and predicted that the new but-for standard will help foreclose frivolous retaliation claims. The Court was sharply divided on the issue, as demonstrated by its 5-4 vote. Justice Kennedy delivered the opinion of the Court, with Chief Justice Roberts and Justices Scalia, Thomas, and Alito joining in the opinion. Justice Ginsburg filed a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

The Road to *Nassar*

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, color, religion, sex, or national origin. Title VII also includes an anti-retaliation provision that makes it unlawful for employers to take an adverse employment action against an employee for having opposed, complained of, or sought remedies for unlawful workplace discrimination.

In 1989 the Supreme Court, in *Price Waterhouse v. Hopkins*,[2] held that a plaintiff could prevail on a status-based Title VII discrimination claim if he or she could show that race, color, religion, sex, or national origin was a "motivating" or "substantial" factor in the employer's adverse action. Under *Price Waterhouse*, if a plaintiff met that burden, the burden of persuasion then shifted to the employer, which could still prevail if it proved that it would have taken the same employment action absent any desire to discriminate.

Two years later, Congress passed the Civil Rights Act of 1991, which, in part, codified the *Price Waterhouse* "motivating factor" causation standard by adding a new provision to the Title VII language:

> [A]n 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.*[3]

While the 1991 Act partly codified the *Price Waterhouse* standard, it also partly rejected the *Price Waterhouse* framework by eliminating an employer's ability to defeat Title VII status-based claims by proving that it would have taken the same employment action absent a discriminatory animus. Indeed, the 1991 Act adopted new language allowing the court to grant an employee declaratory relief, injunctive relief, and limited attorneys' fees and costs even if an employer could establish, pursuant to *Price Waterhouse*, that the same employment action would have been taken regardless of an impermissible motive. Courts throughout the nation subsequently applied this standard to Title VII retaliation claims, with some recent circuit divides.

In 2009, the Supreme Court visited the issue of causation in *Gross* v. *FBL Financial Services, Inc.*[4] *Gross*, however, dealt with the Age Discrimination in Employment Act of 1967 ("ADEA"), not Title VII. In *Gross*, the Court held that the "because of . . . age" language found in the ADEA created a "but-for" standard for age discrimination claims. In other words, the Court held that an ADEA plaintiff was required to prove that age was the "but-for" cause of the employer's adverse action and declined to adopt the *Price Waterhouse* motivating factor standard. The *Gross* decision paved the way for the *Nassar* ruling.

The *Nassar* Facts

Nassar, a physician of Middle Eastern descent, sued the University of Texas Southwestern Medical Center claiming constructive discharge based on alleged harassment by his supervisor, Dr. Levine, due to his race and religion. Nassar alleged that Levine unfairly scrutinized his billing practices and productivity because of her bias against his religion and ethnic heritage, and that she made comments that "Middle Easterners are lazy." Nassar also claimed that Levine's supervisor, Dr. Fitz, retaliated against him after he sent a letter to Fitz and others stating he was resigning because of Levine's harassment, which he claimed stemmed from "religious, racial and cultural bias against Arabs and Muslims."[5] Prior to submitting the letter, Nassar had received a job offer from a University affiliate hospital. Fitz, angry that Nassar publicly humiliated Levine and wanting public exoneration for her, objected to the job offer, arguing that the affiliation agreement between the University and hospital required Nassar to be a University faculty member. The affiliate hospital subsequently withdrew its job offer to Nassar.

The jury found for Nassar on both claims. On appeal, the Court of Appeals for the Fifth Circuit found that Nassar did not submit sufficient evidence to establish his constructive discharge count. The court therefore vacated that portion of the judgment. However, the Fifth Circuit affirmed the jury's retaliation finding and held that Nassar could prove retaliation through the motivating factor standard applied to Title VII status-based discrimination claims. The University subsequently petitioned the court for a rehearing en banc, which the court denied.[6] The University appealed to the Supreme Court.

The Supreme Court's Opinion

In distinguishing the burden plaintiffs must meet to establish a status-based discrimination claim versus a retaliation claim, the Court compared the relevant language of Title VII to that of the ADEA and found no "meaningful textual difference."[7] The Court therefore found that like *Gross*, "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[8] Under this standard, an employer is not liable for retaliation if it would have taken the same action for other, non-discriminatory reasons.

The Court rejected Nassar's primary argument that retaliation essentially is another form of unlawful employment practice under Title VII no different from race or national origin discrimination and, therefore, the same motivating factor causation standard should apply. In doing so, the Court closely examined Congress' intent by looking at the plain language and design and structure of the retaliation provision of Title VII and found that it did not support Nassar's argument. The Court also found that the case law Nassar cited did not support the proposition that "every reference to race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for 'retaliation.'"[9] Further, the Court highlighted the dramatic increase in retaliation claims over the last fifteen years and the importance of the but-for causation standard to the "fair and responsible allocation of resources in the judicial and litigation systems. . . . [L]essening the causation standard could also contribute to the filing of frivolous claims, siphoning resources from efforts by employers, agencies, and courts to combat workplace harassment."[10] Additionally, the Court discredited the relevant EEOC Compliance Manual, which had adopted the motivating factor standard for Title VII retaliation claims.

***Nassar's* Application to Other Statutes**

Although *Nassar* dealt with Title VII, we can expect the *Nassar* standard to be applied to other retaliation statutes framed and interpreted under Title VII. Particularly, plaintiffs bringing retaliation claims under the Florida Civil Rights Act ("FCRA") and the Florida Whistleblower's Act ("FWA") will likely have to satisfy the *Nassar* standard since Florida state and district courts have repeatedly held that FCRA and FWA claims are to be interpreted under Title VII standards. Just as the Florida Third District Court of Appeals adopted the *Gross* standard for age claims brought under the FCRA,[11] we can expect application of *Nassar* to FCRA and, likely, FWA retaliation claims. One can also expect employers to argue that *Nassar* applies to FLSA retaliation claims, given the common application of Title VII causation standards to FLSA retaliation claims.[12] Simply put, the impact of *Nassar* will likely be far reaching.

~ By Luis Santos, FordHarrison LLP

Endnotes

[1] 2013 U.S. LEXIS 4704 (U.S. June 24, 2013).
[2] 490 U.S. 228.
[3] 42 U.S.C.S. § 2000e-2(m)(emphasis added).
[4] 557 U.S. 167.
[5] *Nassar*, 2013 U.S. LEXIS 4704 at *12.
[6] *Nassar v. Univ. of Tex. Southwestern Med. Ctr.*, 688 F.3d 211 (5th Cir. Tex. 2012).
[7] *Nassar*, 2013 U.S. LEXIS 4704 at *24.
[8] *Id.*
[9] *Id.* at 29.
[10] *Id.* at *34.
[11] *Sunbeam TV Corp. v. Mitzel*, 83 So. 3d 865 (Fla. 3d DCA 2012).
[12] *See, e.g.*, *Poole v. City of Plantation*, 2010 U.S. Dist. LEXIS 44119 (S.D. Fla. May 5, 2010).