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Employment Law

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U.S. Supreme Court Clarifies that Title VII Retaliation Claims Are Subject to "But-For" Rather than "Motivating-Factor" Standard

In *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the United States Supreme Court clarified the standard of causation required to prevail on a retaliation claim brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq*. The Court held that Title VII retaliation claims require proof that the desire to retaliate was the "but-for" cause of the challenged employment action. In reaching this conclusion, the Court rejected arguments that it should apply the "motivating-factor" standard set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and codified in Title VII.

In *Nassar*, the plaintiff Dr. Naiel Nassar was a physician of Middle Eastern descent on faculty with the University of Texas Medical Center. Dr. Nassar also held staff privileges at Parkland Memorial Hospital. He complained that he suffered harassment, including undeserved scrutiny of his billing practices and productivity. He alleged that this harassment stemmed from "religious, racial and cultural bias against Arabs and Muslims." *Nassar*, 133 S. Ct. at 2524. Dr. Nassar resigned his position with the university, though it appeared as if he would be able to retain his position with Parkland Hospital. The university protested to the hospital, asserting that the offer of employment to Dr. Nassar was inconsistent with the affiliation agreement between the university and the hospital. The hospital subsequently withdrew its offer of employment to Dr. Nassar. *Id.*

Dr. Nassar brought two claims against the university, both under Title VII. First, he alleged constructive discharge in violation of 42 U.S.C.§ 2000e-2(a), which prohibits an employer from discriminating against an employee "because of such individual's race, color, religion, sex, and national origin." Dr. Nassar also claimed employer retaliation in violation of Section 2000e-3(a), which prohibits employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge." *Id*. After a jury found for Dr. Nassar on both claims, the U.S. Court of Appeals, Fifth Circuit upheld the retaliation award. The Fifth Circuit upheld the retaliation award on the theory that the claim required only a showing that the retaliation was a motivating factor for the adverse employment action, rather than its but-for cause. *Id*.

The Supreme Court handed down a divided five-to-four opinion. Justice Anthony Kennedy delivered the opinion, in which Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito joined; Justice Ruth Bader Ginsburg filed a dissenting opinion, in which Justices Stephen Breyer, Sonia Sotamayor, and Elena Kagan joined. Justice Kennedy began by noting that causation in fact—that is, proof that the defendant's conduct did in fact cause a plaintiff's injury—is a standard requirement of any tort claim. This standard is included in federal statutory claims of workplace discrimination. *Id*. at 2525 (citing *Hazen Paper*

Co. v. Biggens, 507 U.S. 604, 610 (1993)). In the usual course, this standard requires the plaintiff to show that the harm would not have occurred in the absence of the defendant's conduct. Because this is the background against which Congress legislated in enacting Title VII, these requirements "are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Nassar*, 133 S. Ct. at 2525.

The *Nassar* majority discussed two categories of employer conduct prohibited by Title VII. The Court referred to the first category as "status-based discrimination." This category is discrimination against an employee based upon the personal characteristics of race, color, religion, sex, and national origin. *Id*. The second category of proscribed employer action is not based upon an employee's personal characteristics, but rather upon employee conduct. *Id*. The prohibition against discrimination based upon an employee's opposition to employment discrimination, or an employee's submission of, or support for, a complaint that alleges discrimination, are set out in a subsequent section of Title VII. *Id*.

Motivating Factor: The Causation Standard in Title VII Status-Based Claims

With respect to status-based discrimination, Title VII provides that it is unlawful for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." *Id*. at 2526 (citing *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 258-59 (1989), *superseded by statute on other grounds by* § 107 of the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m)). In its 1989 *Price Waterhouse* opinion, the Court clarified what it meant for an action to be taken "because of" one of these personal characteristics. *Price-Waterhouse*, 490 U.S. at 240-42. In that opinion, six justices agreed that if a plaintiff could show that one of the prohibited traits was a "motivating" or a "substantial" factor in the employer's adverse employment action, the plaintiff had met his burden of proof. *Id*. at 241. At that point, the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same action in the absence of all discriminatory motivation. *Id*. at 245-46.

Two years after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which to a degree codified the *Price Waterhouse* burden-shifting and causation framework. With respect to causation, Congress codified the *Price Waterhouse* standard by adding a new subsection to Section 2000e-2, Title VII's principal ban on status-based discrimination. 42 U.S.C. § 2000e-2. That section provides:

> [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.

Id. § 2000e-2(m) (emphasis added).

But-For: The Causation Standard in ADEA Age Discrimination Claims

In 2009, the Supreme Court addressed the causation standard found in a similar statute, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* See *Nassar*, 133 S. Ct. at 2527 (referencing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), and citing § 623(a)(1) of the ADEA). The ADEA provides that it is unlawful for an employer to discriminate against an employee "because of such individual's age." *Id.* at 2527. In *Gross v. FBL Financial Services*, the Court was called upon to determine what standard of causation applied to ADEA claims alleging discrimination "because of" an individual's age.

Gross, 557 U.S. at 176. The Court concluded that to prevail on an ADEA claim, a plaintiff must prove that "age was the 'but-for' cause of the employer's adverse decision." *Id*.

In *Gross*, the Court advanced two principal reasons for not applying the *Price Waterhouse* standard when interpreting the causation element under the ADEA. First, the Court noted that there were textual differences between Title VII and the ADEA that required different interpretations. Second, the Court noted that Congress had made several carefully-tailored structural changes to Title VII that were not made to the ADEA. *Id*. at 178-79. Notably, these changes included a modification to the causation element found at 42 U.S.C. § 2000e-2(m). The *Gross* Court's reasoning figured heavily in the majority's *Nassar* opinion. See *Nassar*, 133 S. Ct. at 2526-29.

But-For: The Causation Standard in Title VII Retaliation Claims

Title VII's anti-retaliation provision is set forth in a separate provision from those addressing status-based discrimination. The anti-retaliation provision states, in relevant part, that "[i]t shall be . . . unlawful . . . for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a), quoted in *Nassar*, 133 S. Ct. at 2528.

Both Nassar and the United States—through their *amicus* brief—argued that the motivating-factor test of Section 2000e-2(m) should apply to Title VII retaliation claims, just as it does for Title VII status-based claims. *Nassar*, 133 S. Ct. at 2528. The Court rejected this argument, noting that such an approach is "inappropriate in the context of a statute as precise, complex, and exhaustive at Title VII." *Id*. at 2530. The majority noted that, had Congress desired to make the motivating factor standard applicable to all Title VII claims, it could have done so when it passed the 1991 Act. *Id*. at 2529.

Further, in the absence of a statutory clarification, the Court's analysis in *Gross* provided a framework for understanding the standard in retaliation claims. "Given the lack of any meaningful textual difference between the text in this statute 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." *Id*. (citing *Gross*, 557 U.S. at 176). In summary, the majority concluded that if Congress had intended a lower causation standard to apply to Title VII retaliation claims, just as with status-based claims, then Congress could have made the modifications found at 42 U.S.C. § 2000e-2(m) applicable to the entire Title VII framework. *Id.* at 2530-31. Absent any statutory evidence that Congress intended such a sweeping change, the Court was left to apply a plain-meaning analysis to the word "because," and to conclude that it means "but-for" causation. *Id*. at 2534.

Significantly, the *Nassar* majority also noted that proper interpretation and implementation of Title VII's anti-retaliation provisions and its causation standard "have central importance to the fair and responsible allocation of resources in the judicial and litigation system." *Id*. at 2531. The majority observed:

> This [allocation of resources] is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the [EEOC] has nearly doubled in the past 15 years . . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

Nassar, 133 S. Ct. at 2531. The Court noted that "lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, [*sic*] administrative agencies, and courts to combat workplace harassment." *Id*. at 2531-32.

The Dissent

In a lengthy discussion, the *Nassar* dissent pointed to a line of Supreme Court case law. The dissent argued that these cases hold that a ban on discrimination encompasses any retaliation for that discrimination. *Nassar*, 133 S. Ct. at 2534-35 (Ginsburg, J., dissenting). Therefore, they reasoned, the causation standard should be the same whether the Title VII claim is for status-based discrimination or retaliation for opposing status-based discrimination. *Id*. The dissent also took issue with the majority's statutory construction analysis: the phrase "employment practices," they argue, "undeniably includes retaliation." *Id*. at 2541. The dissent argued that Section 2000e-2 does not deal exclusively with status-based claims; rather, that section deals with a variety of matters, some of them unquestionably covering retaliation. *Id*. at 2543.

Conclusion

Both risk managers and litigators should familiarize themselves with the *Nassar* opinion. Although the opinion is undoubtedly employer-friendly, it also draws the firing line for disputes over the burden of proof in retaliation claims. Now, those disputes will be presented more frequently to the court, whether by summary judgment or directed verdict. It remains critical for employers and risk managers to document meticulously employee performance and any issues surrounding an employee's involvement in a claim of workplace discrimination. Adequate record-keeping systems are also important to sidestep issues of foundation, and—particularly in Illinois—potential claims of spoliation.

Similarly, it is important for the litigator to be familiar with and conversant in a client's documentation from the outset, and to be able to present that evidence in a cogent and admissible way. At the trial stage, where cases involve both status-based and retaliation claims (such as the case in *Nassar*), it will be very important for the successful advocate to take the time to explain the differing burdens to the jury, and explain their application.

About the Author

James L. Craney is a partner in the Madison County office of *Lewis Brisbois Bisgaard & Smith LLP*, where his practice focuses upon general liability litigation. During his career, Mr. Craney has defended numerous employment discrimination, wrongful termination, and civil rights violation suits, both in federal and state court. He earned his B.S. from the University of Illinois in Champaign-Urbana, and his M.S. from Southern Illinois in Carbondale. He earned his J.D. from St. Louis University, where he also obtained the program's Health Law Certificate. Mr. Craney is a member of the IDC Employment Law Committee, and is a regular speaker before bar association and industry groups.

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