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Supreme Court Adopts "But For" Causation Standard for Title VII Retaliation Claims

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On June 24, 2013, the Supreme Court ruled that a plaintiff in a Title VII retaliation case must prove that the retaliation was the "but for" cause of the employer's adverse action. *University of Texas S.W. Med. Ctr. v. Nassar*, No. 12-484 (June 24, 2013). In so ruling, the Court rejected by a vote of 5 to 4 a decision of the U.S. Court of Appeals for the Fifth Circuit applying the less burdensome standard requiring that a plaintiff only show that retaliation was one "motivating factor," among others, that resulted in the adverse action.

This decision is welcome news for employers. Retaliation claims are very much on the rise – in fact they are now the most common type of claim filed against employers. Last year, 38% of all complaints filed with the EEOC included some claim of retaliation: that number is up from 22% just 15 years ago. Read our earlier blog post on this topic: 2012 EEOC Year in Review – Retaliation Charges Continue to Rise.

Background

Respondent Nassar, a physician of Middle Eastern descent who worked as both an assistant professor at the University of Texas Southwestern Medical Center ("UTSW") and as a staff physician at the UTSW-affiliated hospital, alleged that his superior, Dr. Levine, made slurs about his ethnicity and discouraged him from seeking promotion. Nassar complained to Levine's supervisor on numerous occasions about the harassment. Despite obtaining a promotion, Nassar still believed that Levine was biased against him and arranged to work at the hospital without being a UTSW faculty member under Levine's supervision. Nassar resigned, citing Levine's continued harassment and discrimination as the primary reasons for his resignation. In response, Levine's supervisor protested the hospital's hiring of Nassar, and the hospital withdrew Nassar's offer of employment.

Nassar filed suit in the Northern District of Texas, claiming that UTSW constructively discharged and retaliated against him in violation of Title VII. A jury found in Nassar's favor on both claims. The jury was instructed that Nassar must show that discriminatory intent was "a motivating factor" for the alleged retaliation. On appeal, UTSW urged the district court to apply a "but for" standard to the retaliation claim (i.e., but for illegal retaliation, Nassar would not have been harmed).

The Fifth Circuit vacated the district court's judgment regarding constructive discharge, but affirmed the court's judgment of retaliation on the theory that Nassar offered sufficient proof by showing that Levine's supervisor was motivated, at least in part, to retaliate against Nassar for his complaints against Levine. UTSW filed a petition for writ of certiorari seeking to clarify the standard for such a claim, and this decision followed.

The Court's Holding

The Court found that the "motivating factor" test applied only to status-based discrimination (discrimination on the basis of race, color, religion, sex, national origin, promotion etc.), not retaliation claims. In reaching this conclusion, the Court relied on its earlier decision in *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009), which held that the Age Discrimination in Employment Act requires proof that age is "the but for cause" of an adverse employment decision. Applying a parallel analysis to the facts at hand, the Court concluded that both the plain language of the statute and Congress' deliberate omission of retaliation claims from the section of Title VII that codifies the motivating factor standard, weigh against applying the motivating factor test to retaliation claims. Indeed, given that other sections of Title VII expressly refer to all unlawful employment actions, the Court determined that Congress would have drafted the statute differently had it desired to apply the motivating-factor standard to all Title VII claims, including retaliation claims.

The Court further noted that public policy supports implementation of the "but-for" standard given the ever-increasing frequency with which retaliation claims are being made. Lessening the causation standard, the Court reasoned, could contribute to the filing of frivolous claims and waste judicial resources. Although Nassar and the Government argued that the less burdensome causation standard is consistent with longstanding agency views contained in the Equal Employment Opportunity Commission guidance manual, the Court found that the manual was not entitled to deference. Accordingly, the Court vacated the Fifth Circuit's decision and remanded the case for further proceedings.

Implications

Under the *Nassar* decision, different causation standards now apply to retaliation claims and status-based discrimination claims. To survive summary judgment and to prevail at trial, an employee will now have to prove that illegal retaliation by the employer actually caused the harm that is alleged. The alternative and more lenient standard would have permitted an employee to prove liability even if the allegedly illegal conduct were just a motivating factor (not the actual reason) for the adverse employment action.

When trying retaliation claims, employers should make certain that they include the new standard adopted by the Supreme Court in their jury instructions. Many of the model and template jury instructions will include the prior standard. In addition, counsel may need to educate the judge regarding the new standard and how it should be presented to the jury. It will also be critically important employers to advocate for the "but for" standard in jury instructions in lawsuits brought under state, county or city retaliation actions. This decision may also spark legislative efforts to amend various statutes, including discrimination statutes and whistleblower statutes, so employers should stay alert for additional updates on this topic.

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