



ILLINOIS STATE BAR ASSOCIATION

# LABOR & EMPLOYMENT LAW

*The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law*

## U.S. Supreme Court requires “but for” causation standard in Title VII retaliation claims

By Jon D. Hoag, SmithAmundsen LLC, St. Charles, Illinois

In 1995, Naiel Nassar (“Nassar”) was hired to work as a member of the University of Texas Southern Medical Center’s (“University”) faculty and as a staff physician at Parkland Memorial Hospital (“Hospital”). The University had an affiliation agreement with the Hospital by which the Hospital permitted the University’s students to obtain clinical experience. In addition, the affiliation agreement required the Hospital to offer empty staff physician posts to University faculty members.

Nassar specialized in internal medicine and infectious diseases. In 2004, the University hired Dr. Beth Levine (“Levine”) as its Chief of Infectious Disease Medicine. Levine became Nassar’s ultimate superior. Notwithstanding that Nassar obtained a promotion in 2006 with help from Levine, Nassar believed that Levine was biased against him based on his religion and ethnic heritage (Nassar is of Middle Eastern descent). On multiple occasions Nassar met with Levine’s supervisor, Dr. Gregory Fitz (“Fitz”), to complain about Levine’s harassment. Nassar alleged that Levine unjustifiably scrutinized his billing practices and made derogatory comments such as that “Middle Easterners are lazy.”

In response to this alleged harassment, Nassar engaged in direct negotiations with the Hospital to remain employed with the Hospital without being on the University’s faculty. The Hospital agreed to this arrangement, so Nassar submitted a letter of resignation to the University. In the letter, Nassar stated that he was resigning because of harassment by Levine, which stemmed from religious, racial and cultural bias against Arabs and Muslims. Fitz was alarmed by Nassar’s

public humiliation of Levine (the letter was sent to multiple people including Fitz) and Fitz stated that Levine needed to be publicly exonerated. When Fitz learned that the Hospital agreed to keep Nassar employed as a staff physician, Fitz objected and asserted the Hospital’s offer was inconsistent with the affiliation agreement. The Hospital withdrew its employment offer to Nassar.

In response to the Hospital’s withdrawal of its employment offer, Nassar filed an administrative charge of discrimination. Nassar asserted two separate claims under Title VII. His first claim was that Levine’s racially and religiously motivated harassment resulted in his constructive discharge from the University. Nassar’s second claim was that Fitz’s efforts to prevent the Hospital from hiring him were in retaliation for complaining about Levine’s harassment, in violation of § 2000e-3(a). After exhausting his administrative remedies, Nassar pursued his claims in federal court. A jury found in favor of Nassar. On appeal, the Fifth Circuit found there was insufficient evidence to support Nassar’s constructive discharge claim, but affirmed the retaliation finding. Importantly, the Fifth Circuit affirmed the retaliation finding on the theory that retaliation claims, like claims of status-based discrimination, require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its “but-for” cause.

The U.S. Supreme Court granted *certiorari* to determine the proper standard for causation for Title VII retaliation claims. In a 5-4 decision, the Court concluded that Title VII retaliation claims require a “but-for” causation standard. The Court focused its analysis on

the Civil Rights Act of 1991, which amended Title VII to lessen the causation standard for “status-based” discrimination; allowing an individual to establish a violation by showing race, color, religion, sex, or national origin was a “motivating factor” for the employment practice. The Court stressed that Title VII’s antiretaliation provision (i.e. § 2000e-3(a)) appears in a separate section from Title VII’s ban on status-based discrimination, and Congress did not amend § 2000e-3(a) to apply the “motivating factor” standard. The Court noted that Title VII is a detailed statutory scheme and if Congress wanted the motivating-factor standard to apply to all Title VII claims, it would have expressly set forth this standard in clear textual terms.

In addition, the Court relied on its relatively recent holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) where the Court determined that the ADEA required proof that age was the but-for cause of the prohibited conduct. In *Gross*, the Court had to decipher the standard for proving discrimination was “because of” age in violation of the ADEA. The Court concluded that “because of” age meant that age was the reason the employer decided to act and was the “but-for” cause of the employer’s decision. *Gross*, 557 U.S. at 176. Likewise, Title VII’s antiretaliation provision makes it unlawful for an employer to take adverse employment action against an employee “because of” certain criteria. The Court noted that there are no meaningful textual differences between Title VII’s antiretaliation provision and the text at issue in *Gross*, and thus, an employee must establish that the desire to retaliate was the “but-for” cause of the challenged employment action.

The majority further supported its conclusion by pointing out that retaliation claims have been increasing and have nearly doubled over the past 15 years. The majority stated that giving Congressional intent to the causation standard for retaliation claims was important because lessening the causation standard could contribute to the filing of frivolous claims. For example, if an employee knew that he or she was about to be fired for poor performance, demoted, or transferred, he or she might be tempted to make an unfounded charge of discrimination and then claim retaliation when the employer takes adverse action. The majority expressed concern that employers would face increased cost and difficulty in prevailing against such

claims if a lessened causation standard were applied to retaliation claims. In addition, a further increase in retaliation claims would siphon resources from employers, administrative agencies and the courts which would affect efforts to combat workplace harassment.

The Court's ruling that employees must establish retaliation is the "but-for" cause and not simply a "motivating factor" of the adverse action is a victory for employers. That being said, the Court was sharply divided and the dissent issued biting criticism of the majority's analysis. The dissent stressed that status-based and retaliation claims under Title VII have always "traveled together" and the majority erred by splitting the causation standards between these types of claims un-

der Title VII. The dissent concluded by calling on Congress to once again amend Title VII through a Civil Rights Restoration Act and make it clear that the same causation standard applies to all Title VII claims. On July 30, 2013, Congress responded and The Protecting Older Workers Against Discrimination Act was reintroduced in the House and Senate. The legislation sets out to reverse the holdings in *Gross* and *Nassar*. Prior attempts to reverse the holding in *Gross* did not advance, but only time will tell if the recent *Nassar* decision will give this type of legislative effort further momentum.

*University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013). ■

THIS ARTICLE ORIGINALLY APPEARED IN  
THE ILLINOIS STATE BAR ASSOCIATION'S  
*LABOR & EMPLOYMENT LAW* NEWSLETTER, VOL. 51 #3, SEPTEMBER 2013.  
IT IS REPRINTED HERE BY, AND UNDER THE AUTHORITY OF, THE ISBA.  
UNAUTHORIZED USE OR REPRODUCTION OF THIS REPRINT OR  
THE ISBA TRADEMARK IS PROHIBITED.