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LEGAL ALERT

Supreme Court Limits Mixed-Motive Standard

On June 24, 2013, in a 5-4 decision, the U.S. Supreme Court clarified that an employee alleging unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964 must prove that a retaliatory motive was the “but-for” cause of an adverse employment action. In other words, the employee must show that the employer would not have taken the adverse employment action but for an improper motive. The decision, which will make it more difficult for employees to prevail on retaliation claims, is a significant victory for employers. *University of Texas Southwestern Medical Center v. Nassar*.



Legal Background

Title VII prohibits discrimination in employment “because of an individual’s race, color, religion, sex, or national origin.” It also prohibits retaliation “because” an individual opposed a practice made unlawful under Title VII or participated in an investigation into alleged unlawful conduct.

In 1989, in *Price Waterhouse v. Hopkins*, a plurality of the Supreme Court concluded that, if an employee shows that an impermissible consideration, e.g., national origin, played a role in an employer’s adverse employment action, the burden of persuasion shifts to the employer to prove that it would have made the same decision in the absence of the impermissible consideration. If the employer meets that burden, it is relieved of liability.

Subsequently, in 1991, Congress partially codified and partially abrogated *Price Waterhouse*. Consistent with the Supreme Court’s decision, Congress amended Title VII to state that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”

But it also amended Title VII to state that, even if an employer demonstrates that it would have taken the same action in the absence of an impermissible motivating factor, the plaintiff still can recover certain equitable relief, including attorneys’ fees and costs, but cannot recover money damages or be reinstated.

After the 1991 amendments, lower courts struggled to apply the *Price Waterhouse* mixed-motive standard to non-Title VII discrimination claims. The Supreme Court resolved that issue in 2009, simply ruling that the mixed-motive standard of causation does not apply to age discrimination claims under the Age Discrimination in Employment Act. *Gross v. FBL Financial Services*.

Lower courts also struggled with whether the mixed-motive standard, as codified by the 1991 amendments, applies to *all* claims under Title VII, including retaliation claims, or just discrimination claims. That issue came to a head in *Nassar*.

Factual Background

Dr. Naiel Nassar, who is of Middle Eastern descent, was an Assistant Professor of Internal Medicine and Infectious Diseases at the University of Texas Southwestern Medical Center from November 2001 until September 2006. As a faculty member, he worked full time as the Associate Medical Director of the Amelia Court HIV-AIDS Clinic at Parkland Hospital, with which the medical center was affiliated.

In 2004, the medical center hired Dr. Beth Levine as the Chief of the Infectious Diseases Division of the school. Dr. Levine supervised the Clinic’s Medical Director, who supervised Dr. Nassar.

According to Nassar, Levine treated him differently than his colleagues from the start. He felt that she unfairly scrutinized his productivity and billing practices and attempted to delay his promotion, among other things. He also objected to certain comments Levine made about individuals of Middle Eastern descent.

In early 2006, Nassar approached the medical center and the hospital with a plan to become an employee of the hospital, at least in part because of a desire to no longer work for Levine. Dr. Gregory Fitz, the Chair of Internal Medicine at the medical center, opposed the plan, citing an affiliation agreement between the center and the hospital requiring all physicians working at the hospital be faculty members of the center. Unknown to the center, Nassar continued to discuss his plan with the hospital. Ultimately, the hospital told Nassar that if he resigned his faculty position with the medical center, the hospital would hire him.

In July 2006, Nassar submitted his resignation to the medical center. In it, he wrote that he was resigning because of the “harassment and discrimination” by Levine. Upon receipt of Nassar’s resignation letter,

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Dr. Fitz and Dr. Samuel Ross, the hospital's Chief Medical Officer, met to discuss Nassar's complaints. Shortly thereafter, the hospital revoked its offer to Nassar.

In 2008, Nassar filed suit against the medical center, claiming that the center had constructively discharged and retaliated against him. With respect to his retaliation claim, he argued that Dr. Fitz had blocked the hospital from hiring him because of his complaints about Dr. Levine. The hospital asserted that Fitz's actions were consistent with the affiliation agreement, and that Fitz would have taken the same action regardless of Nassar's complaints.

During trial, the medical center asked the district court to instruct the jury that it could find the center liable for retaliation only if a retaliatory motive was the "but-for" cause of the center's action. The district court rejected the center's request and instructed the jury that Nassar had to prove only that retaliation was a motivating factor for Fitz's actions. Nassar prevailed on his retaliation claim, and the medical center appealed.

On appeal, the U.S. Court of Appeals for the 5th Circuit upheld the jury's verdict on Nassar's retaliation claim and in so doing, concluded that the district court had properly instructed the jury. The medical center then requested the U.S. Supreme Court to consider whether the district court had properly instructed the jury.

The Issue Before The Court

The issue before the Supreme Court was whether Title VII requires a plaintiff alleging retaliation under Title VII to prove that a retaliatory motive was the "but-for" cause of an adverse employment action, or simply that the impermissible motive was "a motivating factor." In other words, is an employee who alleges retaliation required to prove that the employer would not have taken an adverse employment action but for a

retaliatory motive, or merely that a retaliatory motive was one of multiple reasons, including legitimate business reasons, for the employer's actions?

The Court's Ruling

Relying on the text and structure of Title VII, as well as its earlier decision in *Gross*, the Supreme Court held that an employee alleging retaliation under Title VII must prove that an impermissible motive was the "but-for" cause of the employer's actions. Stated otherwise, an employee must prove that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."

The Court rejected Nassar's argument that the "motivating factor" standard of proof applies to all claims under Title VII, and concluded that it applies only to "status-based discrimination" claims, i.e., claims based on race, color, religion, sex, and national origin.

Significance For Employers

The Court's ruling is a victory for employers. The decision will make it more difficult for employees to prevail on Title VII retaliation claims. An employee alleging retaliation now must prove that an impermissible, retaliatory motive was *the* reason, not simply *a* reason, for the employer's actions. The burden of proof never shifts to the employer. The Court acknowledged that the "but-for" standard will make it easier for employer to dismiss "dubious" claims at the summary judgment stage.

The Court's ruling also seems to sound the death knell for *Price Waterhouse*. The Court stated that "there is no reason to think the different balance articulated by *Price Waterhouse* somehow survived" the 1991 amendments.

If you would like more specific advice about how this decision could affect your operations, contact your regular Fisher & Phillips attorney, or visit our website at www.laborlawyers.com.

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