

University of Texas Southwestern Medical Center v. Nassar *U.S. Supreme Court Adopts Elevated Causation* *Standard for Title VII Retaliation Claims*

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This week, a divided Supreme Court held that a plaintiff advancing a retaliation claim under Title VII of the Civil Rights Act of 1964 must establish that his or her protected activity was a “but-for” cause of the employer’s alleged adverse action, and not merely that the retaliatory motive was one “motivating factor” in the decision. *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, No. 12-484, 570 U.S. ____ (2013) (June 24, 2013). The opinion, written by Justice Kennedy, reverses a Fifth Circuit ruling that held that the less demanding “motivating factor” test applies to retaliation claims under Title VII 42 U.S.C. §2000e-3(a) just as it does to status-based discrimination claims under §2000e-2(a). The decision will make it more difficult in marginal cases for plaintiffs to prevail or to evade summary judgment.

The majority noted that Title VII, as amended in 1991, prohibits two fundamentally different categories of “unlawful employment practices.” The first category is found in §2000e-2(a), and prohibits employment discrimination on the basis of certain “personal characteristics” — race, color, religion, sex, or national origin. The second category is found in §2000e-3(a), and it prohibits adverse actions based on certain forms of *conduct* — employer retaliation based on actions taken by an employee to oppose, complain about, or seek remedies for unlawful workplace discrimination. An employee alleging discrimination based on personal characteristics (which the Court called “status-based” discrimination) need not show a “but-for” causal link between the injury and the act — that is, that the adverse action would not have happened had the plaintiff not been within the protected class — but rather need only show that a discriminatory motive was *among* the reasons the employer took the contested action.

The question presented in this case was whether the less taxing “one factor among others” test applicable to status-based discrimination also applies to claims of unlawful employer retaliation. In holding that it did not, the Court focused on principles of statutory construction and congressional intent, and it determined that Congress intended to limit application of the “motivating factor” test to status-based discrimination, and that the default “but-for” causation rule applies to Title VII retaliation claims.

Background

Naiel Nassar, a medical doctor of Middle Eastern descent, was employed by the University of Texas Southwestern Medical Center. Due to an affiliation agreement between the Hospital and the University that required the Hospital to offer open positions to University staff, Nassar was employed as both a member of the University’s faculty and as a staff physician at the Hospital.

Nassar alleged that his University supervisor (Levine) was biased against him on account of his religion and ethnic heritage. He met with Levine's supervisor (Fitz) on multiple occasions during his employment to complain about the alleged harassment. Eventually, Nassar resigned from his University faculty position with the intention of remaining on staff at the Hospital. At the time of his resignation, Nassar submitted a letter to several University staff members, accusing Levine of harassment. Following receipt of the letter, Fitz protested Nassar's continued employment with the Hospital, alleging that such an arrangement violated the University's affiliation agreement. The Hospital then withdrew its offer. Nassar brought claims alleging both status-based discrimination and retaliation.

But-For Causation Required in Retaliation Cases

Justice Kennedy began the opinion of the Court by noting that as with common law tort claims, a default "but-for" causation standard is presumed to apply to Title VII cases unless otherwise indicated by Congress. Likening this ruling to the holding of *Gross v. FBL Fin. Serv. Inc.*, 557 U.S. 167 (2009), which dealt with causation under the Age Discrimination in Employment Act (ADEA), the Court found that both textual and structural aspects of Title VII support the conclusion that the "motivating factor" standard does not satisfy the causation requirement for retaliation claims.

First, the Court noted that Title VII's anti-retaliation and status-based bias provisions are found in different parts of the statute. While Congress added language to the section prohibiting status-based discrimination in the Civil Rights Act of 1991 that expressly adopted the "motivating factor" language, Congress did not add parallel language to the section proscribing retaliation. In contrast, where Congress did intend for status-based discrimination and retaliation to be considered together as "unlawful employment practices," it had said so specifically.

Respondent argued that the Court had previously implied a remedy for retaliation from other certain federal statutes prohibiting discrimination. Because the Court had previously been willing to imply a right to be free from retaliation when a statute had expressly proscribed only discrimination, Respondent argued, a proscription against retaliation should be implied into §2000e-2(a)'s prohibition of status-based discrimination, which Congress decided to make expressly subject to the reduced causation standard.

The Court rejected this argument for three reasons. First, it held that doing so would be inconsistent with the statute's plain language, which clearly marks out different standards for status-based discrimination and retaliation. Second, "implying" a standard Congress did not embrace would do violence to the statute's design and structure, which placed status-based discrimination and retaliation in two separate sections. "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." Moreover, the Court noted, "a different portion of the 1991 Act contains an express reference to all unlawful employment actions [including retaliation], thereby reinforcing the conclusion that Congress acted deliberately when it omitted retaliation claims from" the provision lessening the burden in status-based discrimination cases.

Finally, while the Court acknowledged that in instances where Congress had enacted general and terse antidiscrimination provisions, it had been willing to imply a remedy for retaliation, it found those cases irrelevant here. Where Congress drafts a detailed and exhaustive statute like Title VII, the language and structure of the enactment must be honored, and the Court should not simply assume that Congress inadvertently failed to address a "missing" subject. "Text may not be divorced from context," the Court said. "In light of Congress' special care in drawing so precise a statutory scheme, it would be improper to indulge respondent's suggestion that Congress meant to incorporate the default rules that apply only when Congress writes a broad and undifferentiated statute."

The Court also noted the danger of implying a less muscular standard in the retaliation context. An employee facing certain discipline or other adverse action would have every incentive to allege discrimination and, “when the [adverse] employment action comes, the employee could allege that it is retaliation,” which “could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage.” Such a result “would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.”

In dissent, Justice Ginsburg expressed concerns regarding the future state of discrimination claims. Citing the legislative history of the 1991 amendments, she argued that the Court’s interpretation of the causation standard was out of line with the intent of Congress. From a practical perspective, she expressed concerns about the difficulty trial courts would have in administering cases that implicate two different Title VII causation standards.

Practical Implications

In the wake of *Nassar*, employers may act with somewhat greater confidence when taking carefully considered adverse employment actions in situations that seem likely to spawn future retaliation claims. Though employers should continue to consider the likelihood of retaliation claims, and should make certain that every reasonable step is taken to justify the action should the need later arise, the Court’s holding indicates that attacks on such well-considered actions will be less likely to succeed. This holding is limited, however, to claims under Title VII, and employers would be wise to consider more plaintiff-friendly proof burdens that may exist under state law.

Similarly, *Nassar* will make it more difficult for plaintiffs in close cases to avoid summary judgment, and thus will make close cases less attractive to plaintiff’s counsel. As the Court noted, a less robust causation standard would provide powerful incentive to employees facing likely adverse actions — discipline, pay cuts, layoffs, demotions or terminations — to allege discrimination, laying the predicate for a subsequent retaliation claim. A plaintiff must now demonstrate that any alleged adverse employment action would not have occurred but for the complaint itself.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Washington, D.C. lawyer:

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