

Supreme Court Delivers Victory To Employers, But Dissent Calls Upon Congress To Act

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The Supreme Court recently delivered a victory for employers by holding that plaintiffs who sue their employers for alleged retaliation under Title VII must prove their claims according to the “but for” causation standard applicable to most tort claims, rather than the standard for Title VII discrimination claims, which is easier for plaintiffs to meet.

Legal Background

A plaintiff who brings a claim for so-called “status based discrimination” under Title VII has to show only that his or her protected status (e.g., race, sex, religion) was a “motivating factor” in the employer’s decision to take action against the plaintiff. In other words, if a plaintiff can show that her sex was one of several factors the employer took into account in firing her, she has proved enough for her claim to go to a jury. This “motivating factor” standard for status based discrimination claims is lower than the “but for” standard that traditionally applies to tort claims. For example, a plaintiff bringing a negligence claim has to show that the defendant was the cause of his harm by proving that in the absence of the defendant’s negligent act (lawyers say “but for” the defendant’s negligent act) the plaintiff would not have suffered the harm.

While there is no question that the easier-to-meet “motivating factor” standard applies to status-based discrimination claims under Title VII, courts have not necessarily agreed on the standard applicable to retaliation claims – i.e., when an employee claims that he was fired because he complained about discrimination. Some courts subscribed to the approach taken by the EEOC, which was that retaliation claims were also subject to the easier-to-meet “motivating factor” standard, while others applied the traditional “but for” causation standard applicable to most tort claims. The Supreme Court cleared up the confusion in *In University of Texas Southwestern Medical Center v. Nassar*, No. 12–484 (June 24, 2013), where a 5-4 majority ruled that the traditional “but for” causation standard applies to claims for retaliation under Title VII.

Factual Background

The plaintiff, Dr. Nassar, worked at a teaching hospital as both an instructor employed by the affiliated medical school and as a treating doctor at the hospital. Dr. Nassar claimed that his indirect supervisor, Dr. Levine, directly discriminated against him because he was of Middle Eastern descent by subjecting him and his billing practices to closer scrutiny than was applied to the other doctors Dr. Levine supervised and by making derogatory comments about people of Middle Eastern descent. Dr. Nassar complained to Dr. Levine’s supervisor, Dr. Fitz. Dr. Nassar did not feel that his complaints were addressed, and sought to leave the school while remaining employed at the hospital. After working out such an arrangement with the hospital, Dr. Nassar resigned from the university. In connection with his resignation, Dr. Nassar sent a letter to Dr. Fitz and others again raising the alleged discrimination by Dr. Levine.

Dr. Fitz was upset by what he considered to be Dr. Levine’s “public humiliation” and called for her to be “publicly exonerated.” He also challenged the hospital’s decision to retain Dr. Nassar, based in part with the school’s agreement with the hospital that staff doctors would also be members of the medical school faculty. The hospital ultimately decided not to continue Dr. Nassar’s employment.

Dr. Nassar sued under Title VII, alleging direct discrimination by Dr. Levine based upon his national origin, and retaliation by Dr. Fitz for Dr. Nassar's complaints about Dr. Levine's discrimination. The jury found for Dr. Nassar on both claims, but the Circuit Court vacated the decision on the direct discrimination claim, finding there was insufficient evidence of discrimination. The Circuit upheld the jury's finding on the retaliation claim on the basis that to prevail on a retaliation claim under Title VII a plaintiff only needed to show that retaliation for complaining about discrimination was a "motivating factor" for the employer's adverse employment action, not its "but for" cause.

Legal Analysis and Implications

The Supreme Court reversed the Circuit Court's holding that the lower "motivating factor" standard applied to retaliation claims. The Court reasoned that Congress had purposefully set forth the "motivating factor" standard in a section of Title VII pertaining only to status-based discrimination claims. The Court reasoned that the fact that retaliation claims were not encompassed within that section meant that Congress had not intended to disturb the traditional tort-law standard of "but-for" causation for retaliation claims.

The upshot of the decision is that a plaintiff making a retaliation claim must show not only that retaliation was a "motivating factor" for the employer's taking an adverse employment action, but was the "but for" reason for the challenged decision. In other words, the plaintiff must show that, absent a motive to retaliate, the employer would not have taken the action.

For Dr. Nassar, this means that if the medical school can show that, even if Dr. Nassar had not complained about Dr. Levine, the school would have challenged the hospital's decision to continue Dr. Nassar's employment based on the school's agreement with the hospital, the medical school is not liable for retaliation under Title VII.

One of the surprising things about the decision was the extent to which the conservative majority who authored the opinion openly addressed the practical implications of the decision, noting the steep rise in the number of retaliation claims faced by employers and the ease with which such a cause of action can be fabricated by a plaintiff. The Court even went so far as to offer a hypothetical example of an employee who sees a termination coming due to poor performance and so complains about harassment just so he or she can file a claim when the inevitable adverse employment action occurs.

The strongly worded dissent authored by Justice Ginsburg (who was joined by Justices Breyer, Sotomayor, and Kagan) took the opposite approach, stating that a cause of action for retaliation was vitally important to the realization of Title VII's goals, because, in Justice Ginsburg's view, fear of retaliation is the main reason victims might not report discrimination. At the end of the dissent, Justice Ginsburg essentially called upon Congress to amend Title VII so that the "motivating factor" standard also applies to retaliation claims.