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Nassar A Year Later: Pennsylvania ADA Retaliation Case Considers Impact Of Supreme Court's Decision

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CurrentsLetterNReaders will recall a flurry of U.S. Supreme Court decisions as the Court's term ended in mid-2013. One of these decisions was University of Texas Southwestern Medical Center v. Nassar – this week's letter of the law is N for *Nassar*. In *Nassar*, the Court held that Title VII retaliation claims should be decided under a "but for" rather than "motivating factor" causation test. This is one of those decisions where almost anybody but an employment lawyer thinks, "That's nice – what's that *mean*?" Generally it does not mean much for employers in their day to day management of employees, but it should mean that employers will win a few more cases in court. As with an high court decision, the real impact is not known until lower courts have interpreted it for a few years. Last week's federal court decision in *Berkowitz v Oppenheimer Precision Products, Inc.* is one recent look at this still-new case. *Berkowitz* is not a Title VII case, but rather an ADA and FMLA case. The employee suffered from various health issues, and it seemed undisputed that he was disabled under the ADA. He was fired several days after returning from a medical leave and informing management that more leave might be needed. The stated reasons for termination was inappropriate workplace behavior, including verbal abuse of others. Berkowitz countered that his employer had tolerated such behavior years and terminated him only in close proximity to his use of leave and anticipation of further leave. The Eastern District of Pennsylvania denied the employer's motion for summary judgment and said the case should proceed to trial. *Berkowitz* highlights two points about what *Nassar* means to employers:

1. As noted above, *Nassar* is a Title VII and does not on its face apply to ADA claims. Often decisions under one employment law are extended to other laws, and the employer argued that the same is true here and cited court decisions in support of that. It seems likely that *Nassar* will ultimately be extended to retaliation claims under the ADA, but the court in *Berkowitz* in effect passed on this issue.

2. Instead, the court said that it would deny summary judgment on the retaliation claim under the more pro-employer *Nassar* "but for" standard anyway. This highlights that pro-employer procedural decisions do not change the general rule that cases involving employee health issues are usually more about the facts – the documentation of performance issues relied upon, being able to

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explain why might appear to be changes in the employer's approach as the employee claimed in *Berkowitz* (successfully, at least at this stage), and the interactions with the employee to demonstrate that the employer properly considered potential obligations under the ADA and FMLA.

Employers dealing with situations like the employer in *Berkowitz* might consider posts such as this one, or click on the Employee Health Issues topic and browse those cases.