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A Supreme Court Update: Notes On Wednesday's Oral Argument About Title VII Retaliation Claims

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Supreme Court

Wednesday morning, the Supreme Court heard the final oral argument of its term – and the argument surrounds an employment retaliation case born in the State of Texas. *University of Texas Southwestern Medical Center v. Nassar* (U.S. No. 12-484).

The underlying case involves a doctor who complained of discrimination and was not hired, but candidly, that's not part of the discussion anymore. The real battle is over what employees should have to prove to win a case of retaliation.

The crux of the debate focuses on two standards: a "but-for"/"this-was-the-reason-I-was-fired-standard" or a lesser, mixed-motive standard, requiring only that the employee prove that an illegal motive was a "motivating factor" in the decision. In Title VII cases, the statute's 1991 Amendment specifically said that a mixed-motive standard applies to a discrimination case based on race, color, religion, sex or national origin. But, should it also apply to claims of *retaliation*?

Much of Wednesday's argument – which was limited to one hour and involved three separate attorneys and multiple justices – focused on how the law was written and amended. Justice Elena Kagan jumped into the fray early, asking the attorney for UT-Southwestern: "Is there any other discrimination statute in which one can say that there's a different standard for proving retaliation than there is for proving substantive discrimination?"

Later, Justice Scalia, perhaps telegraphing his eventual decision, emphasized that the text of the statute treats *discrimination* differently than *retaliation*: "I don't have to psychoanalyze Congress and say did they really mean it, blah, blah, blah. It's there in the statute. They didn't take it out. The statute still makes a clear distinction between the two."

Watching from the sidelines, one appreciates that each Justice and each lawyer is trying to make the right decision and do the right thing. I was struck by the careful position of the United States Attorney, who appeared on behalf of the Department of Justice in support of the former doctor-employee (and, interestingly, once worked as an Assistant to Justice Kagan).

The Department of Justice attorney confidently asserted that – even under the lesser, mixed-motive standard, "truly frivolous" retaliation claims would be weeded out at summary judgment. And yet, I can't help but think that many of us spend a great deal of our time and your money fighting frivolous and

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expensive claims. Further, many of these claims – under a lesser, mixed motive standard – won't be "weeded out." With a lower legal hurdle to clear, plaintiffs asserting retaliation will have an easier time at the negotiating table.

The attorney representing UT-Southwestern drove this point home: "Now, what you're then looking at is an expensive and unpredictable trial, most defendants will be forced to settle even meritless claims. And the EEOC's own statistics show that, one, retaliation claims have become all the rage. They are the – the leading type of claims being raised these days. And, two, the EEOC's reasonable cause determination show that only 5 percent of them have even reasonable cause to support them, which is not an especially high standard."

Stay tuned. The Court is expected to issue a decision sometime late summer.

For a transcript of the argument, go to the Supreme Court's website at www.supremecourt.gov. The audio recording of the argument will be available later this week.