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# Testing The Supreme Court (Again) On Retaliation Claims

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Gavel

Today, (Wed., April 24th), the Supreme Court hears oral argument in a closely watched employment retaliation case from the Fifth Circuit: *University of Texas Southwestern Medical Center v. Nassar* (U.S. No. 12-484). The ruling in this case, whatever the outcome, is likely to significantly impact employers and their ability to defend themselves against the ever-increasing number of retaliation claims. Here is a quick overview of the issues at hand.

The central question in the *Nassar* case is what is the appropriate standard of proof for Title VII retaliation claims (and other similarly worded statutes): Must an employee prove that the employer would not have taken an adverse employment action *but for* the employee's protected activity? Or must she or he prove only that his or her "protected activity" was a *motivating factor*? This is commonly referred to as the mixed-motive standard.

The Supreme Court embraced the "but-for" standard in a 5-4 decision in *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), a case interpreting another employment statute - the Age Discrimination in Employment Act (ADEA). The similarity in the statutory language of the ADEA and the language of Title VII's retaliation provision is important. In *Gross*, the Court latched on to the plain language of the ADEA:

> The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." (emphasis added).

Like the language of the ADEA, Title VII's retaliation provision makes it unlawful:

> for an employer to discriminate . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing. . . (emphasis added).

In other words, the Court ruled the plain text of the ADEA requires plaintiffs to prove *but-for* causation. Following that logic, the plain text of Title VII requires retaliation plaintiffs to also prove *but-for* causation.

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The mixed-motive standard, a lesser standard codified in the 1991 Amendment to Title VII, only requires the plaintiff - employee to prove that someone's race, color, religion, sex, or national origin was a *motivating* factor in the adverse employment decision. (By the way, this is the same amendment that granted plaintiffs the ability to recover compensatory and punitive damages, recover attorneys' fees, and changed modern - day employment law as we know it.)

But, the 1991 Amendment does not expressly apply to or refer to retaliation claims. This is where courts have differed. The First, Sixth and Seventh Circuit Courts of Appeal conclude that Title VII retaliation claims must be considered under the "but-for" standard. The Fifth and Eleventh Circuit apply the mixed-motive analysis to retaliation claims.

The Supreme Court, in preparation for today's argument, has received multiple amici briefs from supporters of both the UT-Southwestern and Dr. Nassar. Underlying this legal debate is Dr. Nassar's original claim that he was not hired because of his race and religion. The United States (EEOC), the Washington Lawyers Committee for Civil Rights and Urban Affairs, and the Employment Justice Center are among many that have weighed in on this case in support of the mixed motive standard—some even arguing that Court's ruling in *Gross* was wrong. They argue that the 1991 Amendment, with its lower mixed-motive standard does, in fact, extend to retaliation claims, because retaliation is a form of discrimination.

On the other side, the U.S. Chamber of Commerce, the Equal Employment Advisory Council, the American Council on Education, and defense lawyers are watching the Court with great interest on this case. The implications are significant: retaliation is the most frequent charge brought against employers. But, proving that someone's protected activity was a motivating factor (as opposed to *the* factor) is much easier for a plaintiff; defending such an action is much more complicated and expensive for employers.

Interestingly, the *Gross* majority (Roberts, Alito, Kennedy, Thomas, Scalia) is still intact on the Court. But, some observers note that Justices Kennedy and Alito were among a majority who, in 2008, found that the protections of the ADEA implicitly encompassed retaliation – even though it was not expressly included in the statute.

The oral argument in this case begins at about 11 a.m. ET this morning. We will be listening.

**Additional Resources** :

SCOTUSBlog: *University of Texas Southwestern Medican Center v. Nassar*