

Nassar's Effect On the Causation Standard *Beyond Title VII Discrimination*

By Kari Erickson Levine

In one of the biggest employment cases of 2013, *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ (June 24, 2013), the Supreme Court held in a 5-4 decision that the mixed-motive theory under employment discrimination laws (which only requires a plaintiff to show that the employer had several motives for taking adverse action, including an unlawful motive) does not apply in Title VII retaliation claims. (See Alexis M. Dominguez, "Clearer Employer Liability Standards ...," *Employment Law Strategist*, September 2013, bit.ly/17boXPD.)

Title VII prohibits two forms of conduct. The first is "status-based discrimination," where an employer discriminates on the basis of race, color, religion, sex or national origin. The second is "retaliation," where an employer takes an adverse employment action against someone because that person opposed a discrimina-

tory act, complained of, or sought legal remedies for unlawful workplace discrimination. While *Nassar* changed the causation standard for Title VII retaliation claims when it rejected the mixed-motive standard that is permissible for these claims, it remains unclear what effect the ruling will have on the causation standard for claims brought under other federal anti-discrimination laws like the American's with Disabilities Act (ADA) or the Family Medical Leave Act (FMLA). Both of these contain similar causation language to that contained in Title VII.

BACKGROUND

Dr. Nassar was a physician who worked both as a professor for the University of Texas, and as a doctor on staff at Parkland Memorial Hospital. Dr. Nassar was of Middle Eastern descent. He accused his faculty supervisor of discrimination based on religion and ethnicity and filed two claims, one for religious and ethnicity discrimination, and the other for retaliation related to adverse employment actions. Dr. Nassar won both claims at the trial level. The U.S. Circuit Court of Appeals for the Fifth Circuit reversed on the discrimination claim, but affirmed the retaliation award finding that Dr. Nassar's opposition to discrimination was a "motivating factor" in the adverse employment action.

At issue in the Supreme Court was whether the "motivating factor" causation standard that applies to status-based

discrimination claims under Title VII also applied to Title VII claims of retaliation. The Supreme Court held that it did not. Justice Kennedy, writing for the majority, explained that the "motivating factor" causation standard applies only to status-based claims of discrimination under Title VII and that the correct causation standard for retaliation claims under Title VII is the "but-for" standard — meaning that the alleged retaliation would not have occurred absent an improper motive on the employer's part. *Id.*

In *Nassar*, the Court addressed the federal circuit split that has developed following its 2009 decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), in which the Court held that a plaintiff claiming age discrimination under the Age Discrimination in Employment Act (ADEA) must prove "but-for causation," a higher standard than the "motivating factor" burden in Title VII discrimination claims. But while *Nassar* changed the causation standard for Title VII retaliation claims when it rejected the mixed-motive standard that is permissible for discrimination claims, it remains unclear whether it affects the causation standard for other employment discrimination causes of action with similar causation language to that contained in Title VII, e.g., FMLA or ADA.

IMPLICATIONS

To fully understand the implication of the *Nassar* decision, a little background

Kari Erickson Levine is a partner in the Labor & Employment practice of Jones Day, resident in the San Francisco office. She focuses her practice on the representation of employers in all aspects of labor and employment law and litigation, including state and federal employment discrimination, wrongful discharge, FMLA, CFRA, ADA, and Title III ADA access. She can be reached at kelevine@jonesday.com or 415-875-5812.

goes a long way. In the Title VII sex discrimination case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court first recognized that to prove Title VII employment discrimination, a plaintiff need not show that the employer's intentional discrimination was "the" motivating factor, or that the discrimination would not have occurred "but for" the plaintiff's protected status. The Supreme Court held instead that a Title VII plaintiff need only show that sex stereotyping was "a motivating factor" in the decision-making process. However, the Court stressed that if the employer could show that the same decision would have been made in the absence of any discriminatory motive, the employer would be free of liability.

When it amended Title VII with the passage of the 1991 Civil Rights Act, Congress codified the "mixed motive analysis" and overturned portions of *Price Waterhouse*. Section 703(m), prohibiting discrimination based on race, sex, color, national origin and religion, was included and establishes that an employer is liable for discrimination if "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The enforcement section of Title VII was also amended to limit damages when a plaintiff wins a mixed motive case. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

But Congress failed to apply this codified version of the mixed-motive analysis beyond Section 703 of Title VII. What, then, was the standard to be applied to claims brought under Section 704 of Title VII, the retaliation section? And what standard applies to other federal anti-discrimination laws like the ADEA, FMLA or ADA?

That question was answered in the case of age discrimination claims in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), when the Supreme Court held that the plain language of the ADEA does not permit use of the mixed-motive theory. As a result, an ADEA plaintiff must

prove that "but for" his or her age, the employer would not have taken the adverse employment action.

POST-GROSS

Post-*Gross*, the federal appellate courts have grappled with the standard to be applied when considering claims other than those brought for race, sex, color, national origin or religious discrimination under Section 703 of Title VII. The courts are split, with some Circuits applying portions of *Price Waterhouse* that survived the 1991 Civil Rights Act and, therefore, using the mixed-motive standard (the appellate court in *Nassar* being one of them), and others holding that it is not available.

Some of the most difficult cases to assess are those where an employment decision was motivated by both a legitimate and discriminatory reason. In *Richardson v. Monitronics, International Inc.*, 434 F.3d 327 (5th Cir. 2005), the Fifth Circuit applied a mixed motive framework to analyze an FMLA claim. In this particular case, the court found that while discriminatory purpose was a motivating factor in the employer's termination decision, the employee's repeated violation of the company's attendance policy would have resulted in her termination regardless. *Id.* at 336.

The Sixth Circuit also applied a burden shifting framework in analyzing the FMLA claim in *Hunter v. Valley View Local Schools*, 579 F.3d 688 (6th Cir. 2009). The school district placed a custodian on involuntary leave after several periods of intermittent FMLA leave. After the custodian presented evidence that the school district retaliated against her for exercising her FMLA rights, the burden shifted to the school district to prove that it would have placed her on involuntary leave regardless of her FMLA leave. *Id.* at 692-93.

The school superintendent testified that there were mixed motives to placing the custodian on involuntary leave: her permanent medical restrictions and "excessive absenteeism" due to FMLA leave. The mixed motives indicated there were

issues of fact as to the school district's employment decision, and thus, the Sixth Circuit reversed the grant of summary judgment awarded to the school district.

MIXED MESSAGES IN THE COURTS

While *Nassar* changed the causation standard for Title VII retaliation claims when it rejected the mixed-motive standard that is permissible for Title VII discrimination claims, it remains unclear what effect it will have on the causation standard for other employment discrimination causes of action with similar causation language to that contained in Title VII. In October, an Oregon federal judge held in *Siring v. Oregon State Board of Higher Education*, No. 11-01407, 2013 U.S. Dist. Lexis 147996 (D. Oregon, Oct. 15, 2013), that the heightened standard for title VII retaliation claims under *Nassar* does not change the standard for ADA claims.

Although in *Siring* the court acknowledged that the language in the ADA appears similar to that in the retaliation provision of Section 704 of Title VII, the statutory text and legislative history of the ADA supported the court's belief that the ADA's discrimination provision is substantively more similar to the discrimination provision contained in Section 703 of Title VII. Given this finding, and recognizing the application of *Nassar* to the ADA to be an open question, the court declined to apply the more stringent *Nassar* standard and instead followed Ninth Circuit precedent holding that the causation standard for ADA discrimination claims is "motivating factor." This area will bear future attention as courts analyze the application of *Nassar* in other non-Title VII contexts, including claims raised for retaliation under the FMLA.