

# Proving A Retaliation Claim At Trial Under The “But For” Standard

June 24, 2013 • Legal Updates & Insights

In a landmark 5-4 decision in *University of Texas Southwest Medical Center v. Nassar*, the U.S. Supreme Court held that a plaintiff alleging unlawful retaliation for protected opposition to suspected discrimination under Title VII of the Civil Rights Act of 1964 must prove retaliation was the “but for,” i.e., the decisive, cause of his or her termination or other adverse action. 133 S.Ct. 2517 (2013).

The Plaintiff, Naiel Nassar, a staff physician and professor of Middle Eastern descent, claimed that his supervisor (Levine) was biased against him based on his religion and ethnic heritage. Nassar complained to Levine’s supervisor (Fitz) and arranged to keep working only at the hospital as a staff physician, and no longer working at the University as a faculty member with Levine. In his University faculty resignation letter, Nassar wrote that he was leaving due to Levine’s harassment. In response to the letter’s harassment allegations, Fitz objected to the hospital’s employment offer to Nassar, which was withdrawn. Nassar brought a lawsuit claiming that Levine’s harassment resulted in his constructive discharge from the University and that the efforts by Fitz to prevent the hospital from hiring him were in retaliation for his protected complaints about harassment by Levine.

The Plaintiff argued before the Court that he just needed to prove that retaliation was a “motivating factor,” for the withdrawal of his job offer, whereas the Defendant employer claimed that retaliation for Nassar’s reporting of the harassment must be the “but for” cause for revoking the offer. The “but for” standard would appear to present a higher hurdle for employees to clear at trial when trying to prove retaliation.

Writing for the majority, Justice Anthony Kennedy, citing tort law principles, said that the “but for” causation standard is the default standard for liability under Title VII. The Civil Rights Act of 1991, which amended Title VII, addressed “mixed motive” claims for discrimination based on race, sex, and other protected characteristics, but not specifically for retaliation claims, which are analyzed separately. The Court continued by submitting that the ‘motivating factor’ standard was not “an organic part of Title VII,” particularly as the original text of the law says that a defendant’s unlawful conduct must have been taken “because of” a prohibited factor (such as retaliation).

The Court found that Nassar’s argument that the “motivating factor” standard should apply rather than the “but for” standard is an inconsistent reading of the 1991 Civil Rights Act Amendment, which addresses only discriminatory actions based upon race, color, religion, sex and national origin. Justice Kennedy concluded that Congress therefore clearly intended to confine the “motivating factor” provision to only those specific unlawful discriminatory employment practices, and deliberately had not addressed retaliation. The Court also submitted that there is a policy argument to be made for the “but for” test, as retaliation claims are “being made with ever-increasing frequency,” and that lowering Title VII’s causation standard could contribute to the filing of frivolous claims.

Justice Ruth Bader Ginsburg argued in her powerful dissent that the majority ruling misinterpreted the

text of Title VII, and suggested that discrimination and retaliation have always “traveled together” and therefore the Court should reject splitting the causation standards for discrimination and retaliation claims. Justice Ginsberg submitted that the law’s prohibition of retaliation is so “tightly bonded” to the prohibition of discrimination that they cannot be disassociated from each other. Justice Ginsburg questioned whether the majority’s decision was in fact driven by an appetite to reduce the number of retaliation claims brought against employers under Title VII.

She continued to write that Congress, through the 1991 amendments to the 1964 Civil Rights Act, aimed to strengthen anti-discrimination laws and therefore would not have intended to deliberately exclude retaliation from the new “motivating factors” standard. Retaliation is one of the most common claims brought against employers and it is easy to see why even an employer who is not guilty of discrimination would be motivated to act to remove an employee who has complained of discrimination. Therefore, in order to protect employees’ rights to seek redress for retaliation, one would have to agree with Justice Ginsburg’s view that discrimination and retaliation claims likely were intended to be subject to the same standard of proof, as they were under Title VII in its original form, and that establishing different standards of proof will unnecessarily confuse jurors.

However, an opinion issued very recently by the Supreme Court in *Burrage v. United States* (Case No. 12-7515, January 27, 2014) illustrates why the distinction between the “but for” and “motivating factor” standards may not make a difference in jury verdicts at trial, as the Court has acknowledged that events can have more than one “but for” cause. In *Burrage*, Justice Antonin Scalia wrote that a “but for” standard applied to a criminal law holding a dealer of illegal drugs responsible for the death of a person that “results from” use of drugs sold by the dealer. Citing *Nassar* and related cases, the Court held that the “but for” causation liability standard applied to Title VII’s “because of” language also should be applied to the drug law’s “results from” language.

Justice Scalia writes in several places in the opinion, however, that several different and separate factors could each be found by a jury to be an “independently sufficient cause” for the damage suffered by a victim of unlawful conduct (such as an employee fired by an employer for reporting harassment). Therefore, *Burrage* shows that *Nassar* does not require that an employee show that retaliation was the only “but for” reason for an employer’s adverse action, but only that the retaliatory motive would have been enough on its own for the employer to act. For the same reason, application of the “but for” standard to Title VII retaliation claims likely will not make courts any more likely to grant summary judgment and dismiss claims prior to trial.

Employees also should be aware that under the local New York City Human Rights Law (which applies to most individuals who work in New York City), an employee’s retaliation claims are not subject to the “but for” standard at all. Instead, a plaintiff need only show that the protected activity was a “motivating factor” for the employer’s retaliatory action. See *Russo v. New York Presbyterian Hosp.*, 09 Civ. 5334(MKB), 2013 WL 5346427 at \*19 (E.D.N.Y. Sept. 23, 2013).

If you believe you have been a victim of unlawful retaliation, do not hesitate to assess your rights and contact us – you deserve a pleasant and fair work environment.



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