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Avoiding Heightened Causation Standard for Retaliation Claims

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In 2013, the U.S. Supreme Court in the case of *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 978 (2013), clarified the standard of causation a plaintiff must satisfy in order to prevail on a claim of retaliation under Title VII of the Civil Rights Act of 1964 and 1991, as amended. In *Nassar*, Naiel Nassar alleged that his constructive discharge from employment, and the University of Texas Southwestern Medical Center's subsequent failure to rehire, were in retaliation for his complaints of race and religious discrimination. The jury found in Nassar's favor under a mixed-motive theory of liability and awarded him in excess of \$400,000 in back pay, plus over \$3 million in compensatory damages. The U.S. Court of Appeals for the Fifth Circuit affirmed the verdict and concluded that retaliation claims brought under Title VII require only a showing that retaliation was a motivating factor, rather than the but-for cause, of the adverse job action.

The U.S. Supreme Court reversed, holding that a plaintiff asserting a claim of retaliatory termination under Title VII must prove that his protected activity (i.e., opposing workplace discrimination or participating in a U.S. Equal Employment Opportunity Commission investigation) was the but-for cause for the termination of his employment. In so ruling, the court relied primarily upon the detailed statutory structure set forth in Title VII. *Nassar* came on the heels of the U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), which held that plaintiffs suing for age discrimination in the workplace must prove "but-for" causation under the Age Discrimination in Employment Act.

The *Nassar* holding elevated the standard of causation in retaliation cases and distinguished the analysis of those claims from other discrimination claims (race, color, sex, national origin and religion) under Title VII. Previously, courts analyzed all of these claims, including claims of retaliation, under the same less-stringent standard, merely requiring a plaintiff to prove that his or her protected activity was a motivating factor in the employment action. Presently, *Nassar* requires an employee to show that an employer's desire to retaliate was the sole basis, or the but-for cause, of the challenged employment action.

Although the Supreme Court's ruling in *Nassar* dealt a blow to employees who suffer from retaliatory conduct in the workplace in violation of Title VII, the court specifically limited its holding to retaliation claims arising under that statute alone. The court stated, "If Title VII had

likewise been phrased in broad and general terms, respondent's argument might have more force. But that is not how Title VII was written, which makes it incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation. Unlike Title IX, Section 1981, Section 1982 and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme. This statute enumerates specific unlawful employment practices [referring to Title VII]." Accordingly, employees who are victims of retaliation in violation of the aforesaid broadly worded statutes are not restrained by the *Nassar* holding and its heightened standard of causation.

Recently, in *Miller v. Kutztown University*, 2013 U.S. Dist. LEXIS 173878 (E.D. Pa. Dec. 11, 2013), a case of first impression, U.S. District Judge Lawrence F. Stengel for the Eastern District of Pennsylvania denied defendant Kutztown University's motion to dismiss and specifically held that the *Nassar* but-for retaliation standard does not apply to claims of retaliation brought under Title IX of the Education Amendments of 1972. In *Miller*, plaintiff Rhonda Miller, a university student, alleged that after she reported sexual harassment by a university professor, the university retaliated against her, ultimately resulting in her forced withdrawal from her academic program. Kutztown filed a motion to dismiss, arguing that Miller's Title IX retaliation claim failed to satisfy the heightened standard of causation articulated by the Supreme Court in *Nassar*. In *Miller*, the court recognized that "while it is true that the legal analysis in Title VII and Title IX is often similar, the [Supreme] Court made it clear in *Nassar* that its holding regarding but-for causation applied to Title VII, not Title IX ... because Title IX is a 'broadly phrased antidiscrimination statute' while 'Title VII is a detailed statutory scheme.'" Thus, *Miller* clarified *Nassar's* limited applicability beyond the confines of Title VII.

Additionally, in *Meyers v. California University of Pennsylvania*, 2014 U.S. Dist. LEXIS 104435 (E.D. Pa., July 31, 2014), and *Doe v. Rutherford County*, 2014 U.S. Dist. LEXIS 114477 (M.D. Tenn., Aug. 18, 2014), federal district courts acknowledged the distinction made in *Nassar* between Title VII and Title IX standards of causation for retaliation claims. While these courts did not specifically rule on this issue, significantly, they both recognized the need to analyze the express wording of the statute. Specifically, in *Doe*, the Tennessee federal district court articulated, "the language in each statute matters" and "that it was error to paint them all with the same brush without conducting statute-specific analyses." That court further noted that "the lesson in *Nassar* was that the causation standard for claims under particular federal antidiscrimination and anti-retaliation statutes must be statute-specific."

Similarly, in the case of *Clay v. United Parcel Service*, 2013 U.S. Dist. LEXIS 152659 at *23 (D. Kan. Oct. 24, 2013), another case of first impression, the U.S. District Court for the District of Kansas held that claims of retaliation arising under Section 1981 are not bound by the heightened causation standard set forth in *Nassar*. Specifically, the court held that "although Section 1981 claims generally apply the same prima facie tests as do Title VII ... the *Nassar* majority in reaching its causation ruling found Section 1981's retaliation provision significantly different from Title VII's retaliation provision." The *Clay* court recognized that Section 1981 is a "broadly worded" and "undifferentiated" antidiscrimination statute, unlike Title VII's detailed statutory scheme, and accordingly refused to extend *Nassar's* reach to retaliation claims asserted under Section 1981.

Following the *Nassar* ruling, many employers are using the court's new but-for standard as a basis for the filing of dispositive motions on a broad range of retaliation claims. While *Nassar*

certainly heightened the causation standard for plaintiffs asserting claims of retaliation under Title VII, it should not be construed as the standard applicable to claims of retaliation across the board. The Supreme Court made clear in its opinion that, due to the detailed statutory scheme articulated by Congress in drafting Title VII, other broadly worded statutes are not to be confined to the *Nassar* but-for standard.

Tips for Employment Law Practitioners

With respect to claims in which employees are retaliated against for opposing discrimination, legal counsel should opt to file suit under Section 1981 or Title IX and avoid the more stringent standards of causation of Title VII. From a practical standpoint, attorneys should evaluate opportunities to avoid Title VII and the new heightened standards of causation when bringing claims on behalf of clients who are victims of retaliation.

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