

Title VII Retaliation Claims Become Harder to Prove

July 2013

The U.S. Supreme Court has made it harder for employees to win retaliation claims under Title VII. Retaliation is defined as taking an adverse employment action against someone because they opposed a discriminatory act (“opposition”), or filed a complaint or assisted in a legal proceeding related to a discriminatory act (“participation”). Now, instead of having to prove an employee’s opposition or participation was a “motivating factor” in the employer’s decision, an employee must prove that “but for” their opposition or participation, the adverse action would not have occurred. [University of Tex. Southwestern Med. Ctr. v. Nassar](#).

In this case, the plaintiff was a physician who worked both as a professor for the University of Texas, and as a staff doctor at Parkland Memorial Hospital. The two institutions had an agreement that students studying at the University would receive clinical training at the Hospital, and in return the Hospital would first fill any staff doctor vacancies with University faculty members.

Dr. Nassar was of Middle Eastern descent, and specialized in internal medicine and infectious diseases. His faculty supervisor was Dr. Beth Levine. Dr. Nassar accused Dr. Levine of discrimination based on religion and ethnicity. In particular, he alleged she undeservedly scrutinized his billing practices and productivity, and made insensitive remarks regarding Middle Eastern people. After complaints to Dr. Levine’s superior, Dr. Fitz, failed to resolve matters to Dr. Nassar’s satisfaction, he quit, but attempted to continue working at the Hospital. After quitting, he wrote a letter to various members of the University community. He claimed his

departure stemmed from Dr. Levine's harassment, and her religious, racial and cultural bias against Arabs and Muslims. After reading the letter and learning that Dr. Nassar intended to work for the Hospital while no longer on the faculty, Dr. Fitz interceded and the Hospital ended Dr. Nassar's employment.

Dr. Nassar then filed two claims. One was for religious and ethnicity discrimination by Dr. Levine that led to his constructive discharge. The second was for retaliation by Dr. Fitz that led to the loss of his job at the Hospital.

The trial court found for the doctor on both claims. The Fifth Circuit Court of Appeals reversed on the discrimination claim, but affirmed the retaliation award. In doing so the Appellate Court found Dr. Nassar had shown that Dr. Fitz's intervention with the Hospital was inspired, at least in part, because Dr. Nassar opposed Dr. Levine's alleged discriminatory conduct. In essence, Dr. Nassar's opposition was a "motivating factor" in Dr. Fitz's intervention with the Hospital.

The Supreme Court, however, held that the Appellate Court used the wrong standard. Instead, it should have used the "but for" standard. In effect, the Court framed the question as whether Dr. Fitz would have taken the same course of action absent Dr. Nassar's opposition to Dr. Levine's conduct.

Under this test, if part of Dr. Fitz's intervention was triggered by his concern that the Hospital was breaching its contract with the University by hiring Dr. Nassar, then Dr. Nassar could not prove retaliation under the Act, even if Dr. Fitz was also motivated by Dr. Nassar's complaints regarding Dr. Levine. The Court remanded the case to the Fifth Circuit to make this determination.

In reaching its conclusion, the Court exhaustively discussed the legislative and judicial history of Title VII, and the standards used in determining violations. Without getting into excruciating detail, 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 discriminatory act, or complained of, or sought legal remedies for unlawful workplace discrimination.

In status based cases, employees can prove discrimination in one of two ways; through direct or circumstantial evidence. Where an employee provides direct evidence that unlawful discrimination was a “motivating factor” in making an adverse employment decision, he wins. However, the employer is then given an opportunity to prove it had a “mixed motive” in making its decision that included both the proven unlawful motive, and other lawful reasons. In effect, if the employer can prove that “but for” [i.e., even absent] the discriminatory motive it would have taken the same action, the employee is not entitled to reinstatement or any monetary relief, and may only obtain a declaratory judgment, equitable relief, attorney’s fees, and costs. Under Connecticut law, however, once an employer proves it would have taken the same action absent the discriminatory motive, the employer is relieved of all liability. Levy v. CHRO, 236 Conn. 96 at fn. 19 (1996).

Where an employee can only provide circumstantial evidence of discrimination another process is used, which is known as the McDonnell Douglas burden shifting analysis. First, the plaintiff must state a prima facie case of discrimination by showing he is a member of a protected class, he suffered an adverse employment action, and the circumstances surrounding the employer’s decision supports an inference of discrimination. Once the plaintiff states a

prima facie case, the burden of production, not persuasion, shifts to the defendant to articulate a non-discriminatory reason for its decision. If successful, the plaintiff must then prove that the employer's offered reason was pretextual, and that intentional discrimination was a motivating factor in the employer's decision. In some cases, just proving the employer's offered reason was untruthful may be enough to infer a discriminatory motive. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

When it comes to Title VII retaliation claims the "but for" standard now applies, not the lower "motivating factor" standard. An employee must prove that absent his opposition or participation, he would not have been subjected to the alleged retaliatory action.

The higher "but for" standard already applies to both discrimination and retaliation claims under the ADEA. See Gross v. FBL Financial Services, Inc. The Court also suggested it applies to ADA discrimination and retaliation cases. See Nassar at 32-33.

An open question is whether the higher "but for" standard applies to discrimination and retaliation claims brought in Connecticut under the Connecticut Fair Employment Practices Act. Although the CHRO has historically applied the lower "motivating factor" standard, Connecticut courts have repeatedly stated that Connecticut law must be interpreted with an eye toward federal rulings. Levy v. CHRO, 236 Conn.96 (1996). To add more confusion, other judicial rulings have interpreted Connecticut law as being more favorable than its federal counterpart. See ex., Desrosiers v. Diageo N. Am. Inc., 2010 Conn. Super. LEXIS 2267 at 18 (Sept. 9, 2010).

Only time will tell how this all shakes out, but some clarity is beginning to emerge, at least at the federal level.

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