KING & SPALDING

Client Alert

Labor & Employment and Appellate Practice Groups

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Supreme Court Victory for Employers Facing Title VII Retaliation Claims

On June 24, 2013, the Supreme Court held in *University of Texas Southwestern Medical Center v. Nassar*, that the burden of proof for plaintiffs arguing retaliation in violation of Title VII is "but-for" causation, rather than the lessened "motivating factor" causation standard.[1]

A former University of Texas Southwestern Medical Center employee, respondent Dr. Naiel Nassar, alleged that his immediate supervisor discriminated against him due to his religion and his race, and that the Medical School retaliated against him when he complained about the discrimination. Following a jury trial where Dr. Nassar succeeded on both his discrimination and retaliation claims, the Medical School hired King & Spalding to pursue post-trial district court proceedings and appeal the verdict to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit overturned the jury's verdict on Dr. Nassar's status-based discrimination, but affirmed the jury's verdict with respect to the retaliation claim, holding that under the motivating factor causation standard, there was sufficient evidence that retaliatory animus played a factor in Dr. Nassar's termination.

In January, King & Spalding successfully petitioned the Supreme Court for a writ of certiorari to review the Fifth Circuit's holding. King & Spalding argued that under the Court's recent ruling in *Gross v. FBL Financial Services, Inc.* holding that the similarly worded Age Discrimination in Employment Act requires proof that the prohibited criterion (*i.e.* age) was the but-for cause of the prohibited conduct a plaintiff must prove discriminatory animus was the but-for cause of an employer's retaliatory conduct, rather than merely a motivating factor.[2]

The Supreme Court agreed. In a decision authored by Justice Kennedy, the Court reaffirmed its holding in *Gross*, announcing that Title VII retaliation claims must be proven according to traditional principles of but-for causation and not the lessened causation standard used in Title VII discrimination claims. The Court vacated the judgment of the Fifth Circuit and remanded the case for further proceedings.

Implications

In its opinion, the Court pointed out that retaliation claims are being made with ever-increasing frequency and expressed concern that lessening the

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causation standard could contribute to the filing of frivolous claims, which would siphon resources from efforts by employers, administrative agencies, and courts to combat employment discrimination and harassment. A but-for standard of causation means that employers will be better able to defeat such frivolous claims earlier in the life of a case, saving the employer time and resources, and acting as a deterrent to those who might pursue such claims.

Ultimately, the Court's decision in this case means that in the future, plaintiffs pursuing claims under other federal statutes, such as the Americans with Disabilities Act and the Family and Medical Leave Act, that prohibit discrimination or retaliation "because" of or "on the basis" of a protected status or protected conduct will also be subject to the more rigorous "but for" burden of proof unless the law in question includes a statutorily mandated lesser burden.

Finally, the Court declined to afford deference to the EEOC's compliance manual and other written guidance indicating that retaliation claims should be subject to the lessened causation standard, finding that the reasons given by the EEOC's materials for the EEOC's interpretation were inconsistent with the statute and circular. The weight of deference afforded agency interpretations depends upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. It is clear the courts will not afford an agency's interpretation deference where, as here, it fails to address the specific provisions of a statutory scheme or provide anything more than a general pronouncement of what the law should be.

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1 *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ , Slip Op. 12-484 (Jun. 24, 2013).

2 *Gross v. FBL Financial Services, Inc.*, 557 U.S. 168 (2009).