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Circuit Split Regarding Theory of Causation Expected to be Settled by Supreme Court

By Suzanne M. Glisch

This year the Supreme Court is set to decide a case that may have a significant impact on how employers approach defending claims under multiple federal employment laws. The issue is one that may appear technical but nonetheless is significant for employers: the proper application of a recent Supreme Court decision and what an employee-plaintiff must prove in order to prevail on a claim of retaliation under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and under similarly worded employment statutes. Some circuits require a plaintiff to prove "but-for" causation. Others only require proof that the employer had a "mixed motive." Fortunately, the issue may be settled this year when the Supreme Court of the United States decides *University of Texas Southwestern Medical Center v. Nassar*.

By way of background, *Nassar* comes to the Supreme Court from the United States Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas), where the appellate court upheld the district court's finding that Naiel Nassar had been retaliated against. The district court's conclusion came after it instructed the jury on a mixed-motive theory of causation rather than a but-for theory of causation. A but-for theory requires that the plaintiff demonstrate that the employer would not have taken the adverse employment action **but for** an improper motive. By contrast, the less onerous mixed-motive theory requires only that the plaintiff establish that an improper motive was one of multiple reasons for the adverse employment action.

These two theories are at issue here mainly because of two Supreme Court decisions and one act of Congress. The mixed-motive causation

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standard comes from the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). However, following the *Price Waterhouse* decision, Congress passed the Civil Rights Act of 1991, which partially abrogated the *Price Waterhouse* decision and nuanced the theory of causation for Title VII discrimination cases. Notably, although the Civil Rights Act of 1991 changed parts of Title VII, it left untouched the language in Title VII's retaliation provision. Then, in 2009, the Supreme Court held in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 168 (2009), that because the language of the Age Discrimination in Employment Act ("ADEA") prohibits discrimination "because of" an individual's age - language that happens to mirror the Title VII retaliation provision - plaintiffs asserting ADEA claims must prove but-for causation. The Supreme Court based its decision in *Gross* in part on the fact that Congress changed parts of Title VII through the Civil Rights Act of 1991 but declined to make similar changes to the ADEA.

The result of all this has been a circuit split on the application of *Gross* and the proper standard of causation in cases under federal employment statutes:

First, Sixth, and Seventh Circuits

The First, Sixth, and Seventh circuits follow the holding in *Gross* and believe the Court's decision in that case to require that, unless a federal employment statute expressly requires otherwise, an employee-plaintiff must prove but-for causation. Because, like in the ADEA, the retaliation provision of Title VII does not include any express language permitting mixed-motive claims, as opposed to Title VII's discrimination provision, which does reference a mixed-motive theory, but-for causation is the proper standard to use. Further, these circuit courts have even applied this logic to other employment statutes that mirror the ADEA's "because of" language, such as the Rehabilitation Act.

Fifth and Eleventh Circuits

The Fifth and Eleventh circuits, on the contrary, have limited the *Gross* holding only to cases involving claims under the ADEA, even going so far as to hold that other employment discrimination statutes that use similar or even identical language to the ADEA (such as Title VII's retaliation provision) require a plaintiff to prove only that the improper motive was one of multiple reasons for the alleged discriminatory action - the mixed-motive theory. These circuit courts, then, follow the holding of *Price Waterhouse* (expanded by the Civil Rights Act of 1991) rather than follow *Gross*.

Based on where the Fifth Circuit falls in this split, the district court in *Nassar* instructed the jury on a mixed-motive theory of causation. The jury subsequently found that the defendant University of Texas Southwestern Medical Center ("UTSW") had engaged in retaliation. UTSW appealed to the Supreme Court, arguing that the use of the mixed-motive theory (as opposed to the but-for theory) in Title VII retaliation cases was improper in light of the language of Title VII and Supreme Court's decision in *Gross*.

The facts of *Nassar* help shed light for employers on the important distinction between the two theories of causation. During his employment with UTSW, Nassar allegedly felt that his supervisor was discriminating against and harassing him because of his Middle Eastern background. Nassar therefore inquired about working for a UTSW affiliate, Parkland Hospital ("Parkland"). UTSW claimed that an affiliation agreement it had with Parkland required any physician seeking employment with Parkland to be employed by UTSW rather than by Parkland directly. Based on this, UTSW declined to approve Nassar's request to work for Parkland.

Unbeknownst to UTSW, however, a Parkland employee continued to work behind the scenes to hire Nassar. After receiving an offer letter from Parkland, Nassar resigned from UTSW in a letter in which he also accused his supervisor of harassing and discriminating against him. Thereafter, UTSW put a stop to Parkland's impending employment of Nassar, who then sued UTSW claiming that it violated Title VII by retaliating against him for his protected activity. Despite UTSW's opposition to the district court's mixed-motive instruction to the jury on Nassar's retaliation claim, as well as the court's own observation during trial that UTSW had "put forth a strong defense" regarding the fact it had "some legitimate reason" for preventing Nassar's employment at Parkland - namely, the affiliation agreement - the district court nonetheless instructed the jury using the mixed-motive theory of causation. The jury found for Nassar. The Fifth Circuit subsequently upheld the district court's decision to use the mixed-motive instruction.

Due to the fact that the outcome could have been different had the jury been instructed to analyze the facts under the but-for theory (*i.e.*, asking whether Nassar's internal complaint of harassment was *the* reason for opposing Nassar's transfer to Parkland), UTSW petitioned the Supreme Court for a writ of certiorari on the issue of mixed-motive versus but-for causation under Title VII's retaliation provision and under other, similarly worded federal employment statutes. The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America have filed a brief in support of UTSW's position.

The Supreme Court's decision on this issue could have a significant, practical impact on employers, employees, and employment litigation generally. If the Supreme Court agrees with UTSW and expands its holding in *Gross* to apply to Title VII retaliation cases - and any other federal employment statute that uses language similar to the ADEA or Title VII's retaliation provision - then employers may face an easier time defending themselves against discrimination and retaliation claims. The case is scheduled for oral argument on April 24, 2013.

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