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"BUT-FOR" THE SUPREME COURT – IT WOULD HAVE BEEN EASIER TO PROVE RETALIATION

It has been a busy week for the Supreme Court as it reaches the end of its current term. On Monday, two significant decisions were handed down that directly affect employment law. The first was the Court's clarification of the meaning of "supervisor" for purposes of Title VII discrimination. The second decision deals with the amount of proof it takes to prove that an employer retaliated against an employee. Both decisions lean toward favoring employers in litigation. This is significant because the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

THE KEY QUESTION: WHAT MOTIVATES THE EMPLOYER?

Since 1991, the law has provided that an unlawful employment practice is proven when the complaining party demonstrates that race, color, religion, sex or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice. But the law also provides - in a different section - that it is an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* he has opposed any practice or made an unlawful employment practice, or *because* he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing. It is because of these two sections that spell out differet standards of proof for proving status-based discrimination (the first type) and conduct-based discrimination, i.e., retaliation (the second type) that the Court was called upon to decide which standard controlled each type of discrimination.

PHYSICIAN SUES FOR DISCRIMINATION AND RETALIATION

A physician of Middle Eastern descent, who was both a university faculty member and a hospital staff physician, claimed that one of his supervisors at the university was biased against him on account of his religion and ethnic heritage. He complained to his supervisor's boss. But after the physician arranged to continue working at the hospital without also being on the university's faculty, he resigned his teaching post and sent a letter to the supervisor's boss and others stating that he was leaving because of his supervisor's harassment. The boss, upset at the fact of the supervisor's public humiliation and wanting public exoneration for the supervisor, objected to the hospital's job offer to the physician, which was then withdrawn. The physician filed suit, alleging two discrete Title VII violations – one for religious and ethnic discrimination by his supervisor and a second for retaliation by the supervisor's boss for causing the withdrawal of the job offer. Ultimately, on appeal, the physician won his retaliation claim because the Fifth Circuit held that the evidence showed that the supervisor's boss was motivated – *at least in part* – by the physician's complaints about the discrimination of the physician's supervisor.

THE SUPREME COURT SAYS IT TAKES MORE TO PROVE RETALIATION

There is really no question that an employee who alleges status-based discrimination based on *personal characteristics* under Title VII (i. e., race, color, religion, sex and national origin) need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the discriminatory act. So-called "*but-for*" causation is not the test. "But-for" causation means that the employer's wrongful act would not have occurred *but for* the employer's unlawful motive. It's instead enough to show that the motive to discriminate was just one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. On the other hand, retaliation claims are not based on personal characteristics but on certain wrongful *conduct*. The Court found significant and controlling that the two categories of wrongful retaliatory employer conduct - because of the employee's opposition to employment discrimination and the employee's submission of, or support for, a complaint that alleges employment discrimination - are covered by a separate section of Title VII. Because Congress is presumed to know what it is doing when it fashions statutes using the language that it does indicates that different standards of proof were indeed intended when the statute was drafted. According to the Court, the approach physician and the Government suggest - that conduct need only be *a factor* in the retaliation - is inappropriate in the context of a statute as precise, complex and exhaustive as Title VII. The Court in this case is bound to interpret the language of the statute as written and not what may be desirable.

SOME GOOD NEWS FOR EMPLOYERS

This case is another welcome clarification of a troublesome standard that has perplexed attorneys and litigants since 1991 when the law was changed to make it clear that a case of status-based discrimination can be proved if a discriminatory motive was merely a factor in the

employer's decision. Some courts have applied that lessened standard in retaliation cases. But after this decision, the higher "but-for" standard will be applied going forward in cases asserting unlawful retaliation.

Reference: *University of Texas Southwestern Medical Center v. Nassar (U. S. S. Ct. No. 12-484, June 24, 2013)*

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