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Verdict

July 9, 2013

Joanna L. Grossman and Deborah L. Brake

Revenge: The Supreme Court Narrows Protection Against Workplace Retaliation in University of Texas Southwestern Medical Center v. Nassar



All eyes were on the Supreme Court as it closed out its term with landmark decisions that struck down the Defense of Marriage Act, gutted the Voting Rights Act, and narrowly preserved the ability of colleges and universities to use affirmative action in admissions. But during that same final week, the Court issued two rulings in employment discrimination cases. In both, a divided 5-4 court made it more difficult for employees who experience discrimination to find redress in court.

In the first, *Vance v. Ball State University* (<http://supreme.justia.com/cases/federal/us/570/11-556>), which I discussed in a [prior column](http://verdict.justia.com/2013/06/25/the-power-to-harass) (<http://verdict.justia.com/2013/06/25/the-power-to-harass>), the Court narrowed the definition of “supervisor” in harassment cases, which reduces the number of cases in which employers can be held vicariously liable for unlawful harassment.

In the second, *University of Texas Southwestern Medical Center v. Nassar* (<http://supreme.justia.com/cases/federal/us/570/12-484/>), the same 5-4 majority took a restrictive view of causation in workplace retaliation cases, which will undermine protection for workers who complain about discrimination. As Justice Ginsburg observed in her dissents in both cases, the majority opinions are insensitive to the realities of working life, and preoccupied with making it easy for employers to win discrimination cases at the summary judgment stage.

In this column, we will discuss the ruling in *Nassar* and the ways in which it misconceives the nature of retaliation, the law designed to protect against it, and the power of the Court when interpreting federal statutes.

The Facts in *University of Texas Southwestern Medical Center v. Nassar*

From 1995 to 2006, Naiel Nassar worked as a medical doctor for the University of Texas Southwestern Medical Center (UTSWC). Of Middle Eastern descent, Dr. Nassar is an infectious disease specialist, who focuses on the treatment of HIV/AIDS. During his time at UTSWC, Nassar served both as a faculty member at the University and as a physician in the hospital. He also served as the associate medical director of one of the hospital’s clinics.

In 2004, a new director of the clinic, Beth Levine, was hired. Before accepting the position, Levine interviewed

the people whom she would be supervising. Although she met with other subordinates for 15 to 20 minutes, she met with Nassar for an hour-and-a-half. Once she was hired, she questioned Phillip Keiser, Nassar's immediate superior and her subordinate, about Nassar's productivity and work ethic. According to Keiser, Levine "never seemed to [be] satisf[i]ed" with his assurances that Nassar worked harder than others, rather than less hard. Nassar complained several times to Levine's supervisor, Dr. Gregory Fitz, about this unwarranted scrutiny, which included unfair questions about his billing practices. The following year, Levine objected to the hiring of another Middle Eastern doctor and observed that "Middle Easterners are lazy." When the physician was hired over her objection, she complained that the hospital had "hired another one."

To avoid the hostility, Nassar sought to get out from under Levine's supervision. He was in talks with the hospital about dropping his faculty position, but retaining his job as a physician. Although he was offered a staff physician at the hospital initially, the offer was withdrawn. In 2006, he resigned from UTSWC, citing "the continuing harassment and discrimination . . . by . . . Beth Levine" as the "primary reason" for his resignation. Dr. Fitz, according to Keiser, was shocked by the letter and said that because Levine had been "publicly humiliated," she should be "publicly exonerated." It was Fitz's opposition that led the hospital to withdraw its offer to Nassar.

Nassar filed a charge with the Equal Employment Opportunity Commission (a necessary step on the way to a Title VII lawsuit), alleging that Levine had discriminated against him on the basis of his race, religion, and ethnicity and constructively discharged him (i.e., it made the conditions so intolerable that he had no choice but to quit). His charge also alleged that Fitz retaliated against him because he complained about Levine's discrimination against him. The jury found in his favor on all counts and awarded him substantial back pay and damages.

A Dispute Over the Meaning of Causation

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the finding of constructive discharge, but affirmed the finding of retaliation. One issue on appeal—and the issue that ultimately reached the Supreme Court—was whether the jury had been instructed correctly about the required proof of retaliation.

The jury had been instructed that Nassar "[did] not have to prove that retaliation was [UTSW's] only motive, but he [had to] prove that [UTSW] acted at least in part to retaliate." The university objected and argued on appeal that Nassar should have been forced to prove retaliation was the sole reason for the withdrawal of the staff physician job at the hospital. The Fifth Circuit rejected this claim on appeal, but the Supreme Court, in the ruling that was just issued, accepted the claim, and reversed the jury's verdict for Nassar.

The dispute arises from a complicated series of developments in discrimination law that occurred two decades ago, about how to proceed in cases when there is direct evidence of an illegitimate motive for an employment decision, but there is also evidence of at least one legitimate motive. The crux of *Nassar* revolves around whether the so-called "mixed-motive" proof structure is available for retaliation claims, or only for underlying claims of discrimination.

***Price-Waterhouse* and the Concept of Mixed-Motive Discrimination**

Discrimination under Title VII is typically proven by evidence that an adverse employment action was undertaken because of a protected characteristic, like race or sex. When there is no direct evidence of discrimination, plaintiffs can make use of the pretext model established by the Supreme Court in 1973 in *McDonnell Douglas Corp. v. Green* (<http://supreme.justia.com/cases/federal/us/411/792/case.html>) to smoke out evidence of discrimination.

The concept of an alternative proof structure was introduced by the Court in its 1989 ruling in *Price Waterhouse v. Hopkins* (<http://supreme.justia.com/cases/federal/us/490/228/>), in which a majority of the Justices agreed that a plaintiff could prove discrimination by showing that it was a substantial motivating factor in an adverse employment decision. But the Court's ruling also allowed that an employer could avoid liability if it could prove that, despite taking the protected characteristic (like race or sex) into account, it still would have made the same

decision anyway. This mixed-motive approach was a better fit for cases in which there was evidence of both legitimate and illegitimate motives for an employer's action.

In 1991, Congress passed a civil rights bill to override several Supreme Court rulings that had interpreted discrimination laws narrowly, or otherwise circumscribed protection for employees. One of the specific components of that bill was to codify, in an amended form that made it easier for plaintiffs to prevail, the *Price Waterhouse* motivating-factor proof structure. In its statutory form, the plaintiff's burden is to prove that discrimination was "a motivating factor" for the adverse decision. That alone results in a finding of employer liability. However, upon proof by the employer that it would have made the same decision even apart from the discrimination, the employer can escape money damages, but may still be on the hook for attorneys' fees and injunctive relief.

The Majority's Opinion in *Nassar*

The question presented in *Nassar* was whether a plaintiff claiming retaliation can prevail upon proof that retaliation was "a motivating factor," or must prove, under the traditional proof structure, that it was the reason for the action. The more specific issue is whether the Congressional override of *Price Waterhouse* in 1991 applies only to what the majority terms "status-based discrimination" or also applies to retaliation, as well.

Title VII defines as an unlawful employment practice as discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin." (Section 2000e-2(a)) In a separate provision, it provides that it is also an unlawful employment practice for an employer to discriminate "because" an employee has opposed or participated in an investigation of unlawful employment practices. (Section 2000e-3(a)). The codified version of the mixed-motive proof structure is contained in subsection 2000e-2(m).

In an unpersuasive and at times oddly reasoned opinion, the majority held that mixed-motive theory is not applicable to retaliation claims. It based its conclusion largely on the assertion that without more detailed instruction, the phrase "because of" in a statute implies but-for causation—i.e., a situation in which the consequence would not have occurred but for the antecedent. (The Court majority's claim that this is "textbook tort law" is questioned persuasively by Justice Ginsburg in dissent, and discussed below here.) Thus, all claims not subject to a specific direction to deviate from this understanding require proof of but-for causation. When Congress codified mixed-motive discrimination, according to the majority, it changed the standard for causation in status discrimination cases, but not for cases of retaliation.

The majority's opinion also relies in large part on the fact that the mixed-motive provision falls in subsection 2, while the retaliation provision falls in subsection 3. It makes nothing of the fact that other provisions clearly applicable to retaliation are also found in section 2, nor does it make anything of the statutory language that changes the proof structure for proof of all "unlawful employment practices."

Precedent, Schmeccedent

In rejecting the mixed-motive framework for retaliation claims, the Court majority had to sidestep numerous recent precedents finding retaliation claims to be implicitly encompassed in statutory bans on discrimination.

In three cases decided since 2005, the Court has found the two types of bans inextricably linked. In all three, the Court's reasoning relied primarily on an acknowledgment of the necessity of extending statutory protections to retaliation in order to effectuate the statute's purpose of preventing and remedying discrimination. And yet, the Court in *Nassar* refuses to allow the motivating-factor method of proof in retaliation claims because that part of the statute does not specifically mention it—a silence that did not stop the Court in the prior three cases from reading discrimination bans to encompass retaliation claims.

In *Nassar*, the Court now explains away these three cases as involving general and less specific bans on discrimination, in contrast to the more detailed provision on causation in section 2000e-2(m). However, it is not clear why Congress' inclusion of more detailed language on causation should make any difference here. The fact that Congress, in this provision, took pains to specify a more plaintiff-friendly approach to causation suggests its

sensitivity to ensuring that the statute adequately remedies discrimination—a purpose that is wholly compatible with including protection from retaliation.

But while the Court at least plausibly distinguishes its retaliation precedents, it runs roughshod over its 1989 decision in *Price Waterhouse v. Hopkins*, a case in which six Justices endorsed the very approach to causation that the Court now finds incompatible with retaliation claims under Title VII. In *Price Waterhouse*, the plaintiff, Ann Hopkins, proved that sex stereotypes entered into the decision to deny her partnership in the accounting firm. But she could not disprove the employer’s asserted reason for its action—poor interpersonal skills.

The plurality decision, written by Justice Brennan for himself and three others, permitted the plaintiff to proceed with the case based on her proof that discrimination was a “motivating factor” in the firm’s decision, followed by an opportunity for the firm to avoid liability if it met the burden of proving that the same decision would have been made absent any discriminatory motive, based on poor personal skills alone. Justices White and O’Connor, each writing separately, agreed with this basic framework. The six Justices made up a majority of Justices in the decision who understood that the terms “because of sex” in the statute did not necessarily mean that the plaintiff had to prove but-for causation in order to make out the claim.

Notably, Justice Kennedy dissented in *Price Waterhouse*, insisting (unsuccessfully in that case) that the statutory language “because of” in Title VII always means, and only means, but-for causation. In *Nassar*, Justice Kennedy has seized the opportunity to effectively (if surreptitiously) overrule *Price Waterhouse*, now that the more conservative makeup of the Court has given him the votes to do so.

The only precedent the Court abides in *Nassar* is its more recent decision under a different statute, the Age Discrimination in Employment Act, in *Gross v. FBL Financial Services, Inc.* (<http://supreme.justia.com/cases/federal/us/557/08-441/>) (discussed [here](http://writ.news.findlaw.com/grossman/20090625.html) (<http://writ.news.findlaw.com/grossman/20090625.html>)). In that case, the Court—controversially—rejected a mixed-motive approach to causation for proving age discrimination, requiring proof of but-for causation. In that case, however, the Court took pains in its opinion to reassure Court watchers that it was not addressing the level of causation required under Title VII. In *Nassar*, the Court now reads *Gross* as directly bearing on causation under Title VII, finding it and not *Price Waterhouse* (a decision that actually *was* about Title VII) to be the definitive word on what “because of” means under Title VII.

A Stingy Approach to Congressional Overrides

Perhaps the most troubling part of the Court’s reasoning is how it subverts the 1991 Civil Rights Act amending Title VII by taking a stingy approach to a Congressional override. In passing the 1991 Act, Congress responded to several Supreme Court decisions that it viewed as insufficiently protective of civil rights, including *Price Waterhouse*.

While Congress agreed with the six Justices in *Price Waterhouse* that a plaintiff need not prove but-for causation in order to bring a discrimination claim under Title VII, it believed that the *Price Waterhouse* rule was actually overly-friendly to *employers* by letting them off the hook from liability if they proved that they would have made the same decision anyway, based only on the legitimate motive. Rather than escape liability, Congress believed, the employer’s proof should limit only the remedies available to employees. Without this more generous framework for employees, Congress believed, employers would not be forced to keep discriminatory motives and actions in check. So Congress not only endorsed the mixed-motive framework adopted by the six Justices in *Price Waterhouse* in the 1991 Act, it believed that the decision *did not go far enough* to protect employees.

The Court’s reading of this legislative background is, frankly, bizarre and ahistorical. The Court now says that the 1991 Act rejected *Price Waterhouse* in totality, and reads section 2000e-2(m) in the narrowest way possible, as only setting down rules for status-based discrimination under Title VII. For other claims, the Court now reasons, the slate is wiped clean, as if the *Price Waterhouse* decision had never happened, and Congress had never acted to strengthen it.

In rather obscure but ultimately revealing language, the Court, at one point, says that the 1991 Act's motivating-factor provision is "not an organic part" of Title VII. That is an odd way to approach the interpretation of an amendment to a statute. The Court uses section 2000e-2(m)'s latecomer status to denigrate Congress' approach to causation, and to replace it with the Court's own preferred policy choices.

This approach to interpreting a statutory override is nothing short of a "diss" to the Congress that enacted it. The 1991 Act was passed to rebuke the Court for not interpreting statutory law to be sufficiently protective of employees. Instead of staying true to that intent, the current Court now takes the 1991 Act and reads it to set more pro-employer rules for retaliation claims—a claim that was not even at issue in the *Price Waterhouse* case, and therefore was not expressly addressed by Congress in the override in the 1991 Act. By taking this kind of stingy approach to Congressional overrides, the Court puts an impossibly high burden on Congress to foresee and address every possible extension and adaptation of the judicial rules that it sees to override and/or modify. This raw power grab distorts the balance of power between the Court and Congress.

In our legal system, statutory law has its legitimacy in the democratic accountability of the Congress that enacts it, and it is Congress that bears responsibility for the policy choices made in the statute. In *Nassar*, however, the Court takes a congressional amendment designed to make civil rights laws more plaintiff-friendly, and finds a way to tease out a rule that is more employer-friendly even than the state of the law that existed when Congress enacted the amendment. That is a judicial snub to Congress if ever there was one.

Is This a Tort Case or A Discrimination Case?

Rather than turn to canons of statutory interpretation, the Court's interpretation of "because of" is expressly rooted in tort law. Citing the Restatement and other tort law sources, the Court says that causation in fact under the common law of torts typically requires but-for causation, such that the harm would not have occurred absent the defendant's wrongdoing.

There are, however, two problems with the Court's analogy to tort law. First, there is no indication whatsoever from either the original statutory background to Title VII, or the legislative history of the 1991 Act that Congress intended to embrace tort law concepts. To the contrary, the 1991 Act's embrace of a motivating-factor standard seems to suggest, if anything, that tort law's but-for causation standard held no sway over Congress.

Second, even if tort law was the appropriate place to look, the Court grossly oversimplifies tort law and its approach to causation. But-for causation often gives way to more nuanced approaches when it can be shown that more than one actor or cause contributed to the harm. Tort's law's but-for causation standard was developed for single-actor, single-cause harms brought about by physical actions. It is far afield from intentional wrongs such as discrimination, where the whole concept of causation relates not to physical actions, but rather to a particular mindset and the subjective reasons for an action. Whether a stray golf ball is the but-for cause of a brain injury is a very different causation problem than whether a retaliatory motive or a legitimate one is the but-for cause of a demotion. This is not the kind of causation inquiry that tort law typically grapples with.

The Court's turn to tort law as a guiding principle is at odds with a statutory setting in which there is no evidence that Congress intended to incorporate tort law principles into the statute. Thus, the Court's reasoning in *Nassar* leaves it vulnerable to charges that the Court is so steeped in the common-law method that it forgot it was deciding a case in the very different realm of statutory interpretation.

The Practical Effect: Employees Suffer, Employers Win

By insisting on but-for causation for retaliation claims, the Court has imposed on employees a much tougher standard of proof than is required of employees when it comes to discrimination claims. That state of affairs not only leaves employees woefully unprotected from retaliation, it creates added practical problems, as well. Unfortunately, retaliation is an all-too common aftermath of an employee's complaining about discrimination, and many employees who bring discrimination lawsuits include claims for retaliation as well. Judges and juries

deciding these cases will now have to apply different standards of causation to the retaliation claim than they apply to the claim for discrimination. The result will surely confuse many juries and more than a few trial court judges, who will now have to finely parse the extent to which a retaliatory motive, as opposed to a discriminatory motive, brought about a particular employment action.

In separating the standards of proof for discrimination and retaliation claims, the Court has made retaliation a disfavored stepchild of the statute. Despite recognition in prior cases that protection from retaliation is integral to statutory protection from discrimination, the Court now treats retaliation as if it were a lesser kind of employer wrongdoing, revealing that the Court is more concerned about protecting employers from lawsuits than it is about fully protecting employees from retaliation.

The Court's real concern with protecting employers from frivolous claims emerges near the end of the opinion. It cites the rapid uptick in retaliation charges with the EEOC, and notes that they outpace all types other than race discrimination. But the Court is unconcerned with the possibility that the increase reflects a growing problem, rather than a rise in frivolous complaints. Studies of retaliation suggest that it is a grossly common response to complaints of discrimination. Nevertheless, on an empty record, the Court makes the policy choice, which should have properly been left to Congress, about the balance among competing concerns.

Kicking the Ball Back to Congress? Justice Ginsburg's Call to Action (Again)

Writing for the four dissenters, Justice Ginsburg pulled out all the rhetorical stops in taking the Court to task for ignoring the 1991 Act and supplanting it with the Court's own pro-employer policies. She flags the practical problems that the decision raises for litigants; the untimely end of *Price Waterhouse*; and the 1991 Act's endorsement of that decision, and the Court's seemingly forgotten earlier affirmations of the importance of the retaliation claim. Most eloquently, Justice Ginsburg calls on Congress to restore the retaliation claim to equal status and comparable proof requirements as those that apply to its statutory sibling, the discrimination claim, in order to ensure that the statute lives up to Congress' goal of ensuring adequate protection to employees.

Whether the current Congress has the political will to take up Justice Ginsburg's challenge is another matter. It strikes us, frankly, as unlikely, in light of other challenges facing Congress and the present political environment. But that is precisely the problem with the Court's stingy approach to interpreting Congressional overrides: It requires, in effect, a supermajority that endures over time in order to correct or modify the judicial interpretations of a statute. That is not the balance between Congress and the Courts that the Founders envisioned.



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