

# Supreme Court Applies Tougher “But For” Standard to Title VII Retaliation Claims

Drinker Biddle®

Article By

[William R. Horwitz](#)

[Drinker Biddle & Reath LLP](#)

[Labor Sphere](#)

- [Civil Rights](#)
- [Civil Procedure](#)
- [Health Law & Managed Care](#)
- [Labor & Employment](#)
- [Litigation / Trial Practice](#)
- [Administrative & Regulatory](#)
  
- [All Federal](#)

Tuesday, July 2, 2013

In [University of Texas Southwestern Medical Center v. Nassar](#), decided June 24, 2013, the United States Supreme Court held that a plaintiff can no longer establish a retaliation claim under [Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.](#) (“Title VII”), merely by demonstrating that retaliation was a “motivating factor” in the employer’s decision to fire, demote or otherwise take adverse action. Instead, plaintiffs must demonstrate that retaliation was the “but for” reason for the employer’s adverse action. In other words, plaintiffs must show that the adverse employment action would not have happened absent the employer’s unlawful retaliatory motive. This holding makes it more difficult for plaintiffs to prevail on Title VII retaliation claims.

Defendant University of Texas Southwestern Medical Center (the “University”) and Parkland Memorial Hospital (the “Hospital”) entered into an “affiliation agreement” requiring all Hospital staff physicians to be employed by the University. Plaintiff Naiel Nassar, a medical doctor, worked as a faculty member for the University and a staff physician for the Hospital. Dr. Beth Levine was a supervisor. During his employment, Nassar complained to Levine’s supervisor, Dr. Gregory Fitz, that Levine discriminated against Nassar on the basis of his ethnic heritage and religion.

Nassar ultimately resigned from the University and, in a letter to Fitz and others, accused Levine of harassing him because he was Arab and Muslim. Although the Hospital had offered to continue employing him as a staff physician, it withdrew the offer when Fitz – unhappy about Nassar’s accusations against Levine – objected that employing a physician who was not employed by the University was inconsistent with the affiliation agreement.

Nassar filed a lawsuit in federal court in Texas asserting Title VII claims for race and religious discrimination, and retaliation. After Nassar received a jury verdict in his favor on both counts, the University appealed. With regard to the retaliation claim, the U.S. Court of Appeals for the Fifth Circuit affirmed. In reaching its decision, the Fifth Circuit held that Nassar had established that retaliation was a “motivating factor” in Fitz’s objection to the Hospital hiring Nassar.

In a 5-4 decision, the Supreme Court reversed, rejecting the “motivating factor” standard. According to the Court, “proof that the defendant’s conduct did in fact cause the plaintiff’s injury ... is a standard requirement of any tort claim.” Referring to this concept as a “default” rule, the Court explained that the rule applies “absent an indication to the contrary” in a statute.

Against this backdrop, the Court observed that Title VII prohibits employers from discriminating on the basis of two different categories: (1) “personal characteristics,” which are race, color, religion, sex and national origin; and (2) “protected employee conduct,” which is opposing or complaining about workplace discrimination. Title VII addresses these two different categories in two separate statutory sections, 42 U.S.C. § 2000e-2 (personal characteristics) and 42 U.S.C. § 2000e-3(a) (protected employee conduct).

According to the Court, in the personal characteristics section of Title VII, Congress clearly indicated that the motivating factor standard applies. Indeed, the statute includes the phrase “motivating factor” and states that discrimination is prohibited “even though other factors also motivated the practice.” Thus, the Court explained, Congress plainly indicated its intent that the motivating factor analysis applies to claims under this section.

In contrast, in the protected employee conduct section of Title VII, Congress did not use this language. Instead, the section prohibits an employer from retaliating “because of” protected employee activity – language that the Court, when analyzing other statutes, has interpreted as meaning that the “but for” standard applies.

In reaching its decision, the Court declined to give deference to the guidance manual published by the Equal Employment Opportunity Commission, which reflected the agency’s view that the “lessened causation standard” applies to Title VII retaliation claims. According to the Court, the EEOC’s reasoning “lack[ed] ... persuasive force” and was “circular.”

The Court concluded that a plaintiff asserting a claim for retaliation under Title VII must present “proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” The Court vacated the Fifth Circuit’s judgment and remanded the case for further proceedings.

For employers, the Nassar decision is good news. As the Court noted, “claims of retaliation are being made with ever-increasing frequency” and applying the “motivating factor” standard advocated by Nassar could have “contribute[d] to the filing of frivolous claims.” However, this decision only applies to retaliation claims under Title VII. The decision does not alter the standard of proof for retaliation claims under other statutes – particularly state statutes – and employers should continue to exercise caution when taking action against an employer who has engaged in protected activity.

©2019 Drinker Biddle & Reath LLP. All Rights Reserved

**Source URL:** <https://www.natlawreview.com/article/supreme-court-applies-tougher-standard-to-title-vii-retaliation-claims>