

## Priority Rests With Injured Party, Not Insurance Carrier

### Supreme Court Holds that But-For Standard Applies to Retaliation Claims

On June 24, 2013, in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. \_\_\_\_ (2013), the United States Supreme Court held that Title VII retaliation claims must be proved according to the traditional principles of but-for causation, and not the lessened causation test set forth in Title VII with respect to status-based discrimination claims. This means that plaintiffs in Title VII retaliation cases must prove that an employer would not have taken adverse employment action against him or her had it not been but-for an improper motive. In contrast, plaintiffs bringing status-based discrimination claims (i.e. claims based on sex, race, color, national origin, or religion) are only required to prove that discrimination was "a motivating factor" for an adverse employment action. This principle was set forth in the holding of an earlier Supreme Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which was later codified in part and abrogated in part by Congress. *University of Texas* at p. 2.

The Respondent/Plaintiff, Dr. Naiel Nassar, a former faculty member of the Petitioner/Defendant, University of Texas Southwestern Medical Center (UTSW), is a physician of Middle Eastern descent. He alleged that he was subjected to racially and religiously motivated harassment at UTSW resulting in his constructive discharge, in violation of Title VII. He further alleged that he was denied future employment in retaliation for having complained about the alleged harassment in his resignation letter, also in violation of Title VII. The jury found for Dr. Nassar on both claims, and awarded him over \$400,000 in back pay, plus more than \$3 million in compensatory damages. The United States District Court for the Northern District of Texas later reduced the award of compensatory damages to \$300,000. *Id.* at p. 4. On appeal, the Fifth Circuit vacated the constructive discharge claim based on insufficient evidence and affirmed the retaliation claim applying the mixed-motive standard. *Id.* at p. 5. The issue before the Supreme Court in *Nassar* was whether the lesser mixed-motive causation standard used in status-based claims applied to retaliation claims brought under Title VII. The high court vacated the judgment of the Fifth Circuit and remanded the case for further proceedings consistent with its opinion, which concluded that the mixed-motive causation standard does not apply, and that Title VII retaliation plaintiffs must prove but-for causation. *Id.* at p. 23.

The Supreme Court noted that Title VII's anti-retaliation provision is found in a different section of the statute than that which prohibits status-based discrimination. *Id.* at p. 11. Implementing the analysis used by the Court in the landmark case of *Gross v. FNBL Financial Services, Inc.*, 557 U.S. 167, which interpreted the Age Discrimination in Employment Act, the Court looked at the language of the anti-retaliation provision, which similarly prohibited adverse employment action against an employee "because of" defined criteria. The Court concluded that this language calls for proof that the desire to retaliate was the but-for cause of the employment action at issue. *Id.* at p. 12.

In its opinion, the Supreme Court also noted that claims of retaliation are being filed with the Equal Employment Opportunity Commission (EEOC) with "ever-increasing frequency" and that lessening the causation standard for retaliation claims "could also contribute to the filing of frivolous claims." *Id.* at p. 18.

### Commentary

Title VII retaliation claims must now be proved according to traditional principles of but-for causation. As enunciated by the Supreme Court, this requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.