

Supreme Court Holds Retaliation Under Title VII Requires "But-For" Proof

On June 24, 2013, the Supreme Court held in *University of Texas Southwestern Medical Center v. Nassar* that a plaintiff alleging unlawful retaliation under Title VII of the 1964 Civil Rights Act must prove that the plaintiff's protected conduct was the "but-for" cause of the employer's adverse action. This decision reversed the lower standard articulated by the Court of Appeals for the Fifth Circuit that required a plaintiff only to show that retaliation was a "motivating factor" for the adverse employment action, as is the case for discrimination claims.

The plaintiff worked at the University of Texas Southwestern (UTSW) as a faculty member and physician at the hospital. After complaining about racial and religious abuse from a superior, the plaintiff sought to resign his faculty position yet remain employed as a physician at the hospital. The hospital offered the plaintiff a position pursuant to this request, but the supervisor to whom the plaintiff originally had complained protested the offer, citing the hospital's affiliation policy requiring that all staff members must also be UTSW faculty. The plaintiff claimed that this protest was retaliation for his claims against the superior. The Court acknowledged that while retaliation may have been a factor in the withdrawal of the offer, the affiliation requirement meant that the offer would have soon been withdrawn regardless of any retaliatory motives. Thus, the mixed motives of the hospital were not enough to sustain the plaintiff's case.

As a result of the Supreme Court's ruling, plaintiffs will have more difficulty proving unlawful retaliation, which will reduce the overall number of retaliation claims brought as well as the number that reach a jury. Now, an employer can prevail in a retaliation claim if it shows that it would have taken the adverse action regardless of any motive to retaliate.

Supreme Court to Review Validity of Obama NLRB Recess Appointments in Noel Canning

Also on June 24, 2013, the Supreme Court granted *certiorari* to review *Noel Canning v. National Labor Relations Board* concerning President Obama's recess appointment of three members to the National Labor Relations Board (NLRB) in January 2012. The Court of Appeals for the District of Columbia found two of these appointments to be unconstitutional because the president did not make

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them during an official intersession recess. Because the appointments were invalid, the NLRB lacked a quorum to decide an unfair labor case against Noel Canning. The Supreme Court will review the D.C. Circuit's holding along with the question of whether a president can exercise the power to make recess appointments during a time when the Senate convenes every three days in pro forma sessions.

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