

When is Retaliation Considered Retaliation?

07.26.2013

PRACTICE AREAS

Employment and Labor

In addition to addressing harassment and discrimination, Title VII also prohibits retaliation against employees for reporting or opposing unlawful harassment or discrimination. Until recently, it was unclear whether the legal standard for proving claims of retaliation would be the same or different than the standard for establishing harassment or discrimination.

This question was resolved in *University of Texas Southwestern Medical Center v. Nassar* when the U.S. Supreme Court clarified that the "motivating factor" analysis provided by the statute does not apply to retaliation claims. (Title VII provides that an unlawful employment practice is established "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." 42 USC 2000e-2(m)). Instead, the Supreme Court concluded that employees must prove Title VII retaliation claims under the more strict "but-for" standard. Under the "but-for" test, the employee must prove that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. In making this ruling, the Supreme Court found that because the 1991 amendments to Title VII which adopted the motivating-factor test only amended the language in Title VII relating to discrimination claims (and not the language relating to retaliation), the amendments did not alter the requirement of the "but-for" test in retaliation claims.

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The Supreme Court's decision provides significant protections for employers against frivolous retaliation claims. We regularly advise clients to diligently document the reasons for all tangible employment decisions and such a practice makes even more sense in light of the Supreme Court's decision. If an employer can establish that there was a "lawful" reason for taking the questioned action against the employee, the employee will find it difficult, if not impossible, to prove that the action in question would not have occurred absent the alleged wrongful retaliatory action or actions of the employer.