

PUBLICATION

Are Title VII Retaliation Claims Dead Post-Nassar?

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This June, the U.S. Supreme Court announced the causation standard for Title VII retaliation claims in the landmark case of *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013), saying:

Title VII retaliation claims must be proved according to traditional principles of but-for causation.... This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

With a heightened "but-for" causation standard, many assumed that retaliation claims were dead in the water. Six months later, however, the answer is not so clear. It really depends upon the underlying facts and in which Circuit Court of Appeals district you happen to land.

For example, the Third Circuit in *Velma v. Univ. of Pennsylvania* affirmed summary judgment in favor of the employer, entered by the District Court of the Eastern District of Pennsylvania, holding that a former university employee could not satisfy the required causal connection between the protected activity and her subsequent termination because she had negative performance evaluations predating any protected activity. Similarly, the Sixth Circuit in *Nicholson v. City of Clarksville, Tennessee* affirmed summary judgment in favor of the employer, entered by the District Court of the Middle District of Tennessee, holding that the employee could not satisfy the "but-for" causation standard on his denial of promotion retaliation claim because he failed to demonstrate that the employer's legitimate reasons (lack of requisite skills and resistance to supervisor direction) were pretext. Additionally, the Fifth Circuit in *Coleman v. Jason Pharmaceuticals*, affirmed summary judgment, entered by the District Court for the Northern District of Texas, in favor of the employer, holding that the former employee failed to submit any evidence of a retaliatory motive.

The Fifth Circuit in *Finnie v. Lee County, Mississippi* affirmed judgment as a matter of law in favor of the employer, entered by the District Court of the Northern District of Mississippi. In *Finnie*, the former employee worked as a correctional officer for almost four years. During that tenure, she became an adherent of the Pentecostal Church and requested a religious accommodation to wear a skirt in lieu of the required uniform pants, which she had previously worn. After a series of discussions, the sheriff informed the employee that she would have to wear pants or resign. She then took accrued vacation leave, contacted an attorney and filed a charge with the Equal Employment Opportunity Commission. Approaching the end of her accrued leave, the employee had a meeting with the sheriff, during which the following exchange allegedly took place:

Sheriff: *Well, you have completely failed to follow one of the policies that we have set forth here. You don't work here anymore.*

Employee: *How have I failed to meet the policies?*

Sheriff: *You are not following the policy on my dress code. It is your choice that you chose not to follow it. So I have tried to work with you every way I could, to give you an opportunity to follow that policy and come back [to] work and you, for whatever reason, have chose [sic] not to do that.*

Employee: *Whatever reason? Because it's my religion?*

Sheriff: *And you have filed an EEOC grievance against us. You've got it in the court process and we'll let it run its course.*

The district court had apparently reasoned that, even though the sheriff mentioned the EEOC charge at the meeting, it was "insufficient to allow a reasonable juror to conclude that the charge was a motivating factor because [the sheriff] had definitively and conclusively determined ... before the EEOC charge was filed, that [the employee] could only remain employed if she agreed to wear pants." Agreeing, the Fifth Circuit affirmed. These cases would lead one to believe that retaliation cases are dead.

But the Sixth Circuit, in *Bishop v. Ohio Dept. of Rehab. and Corrections*, reversed and remanded the summary judgment in favor of the employer entered by the District Court for the Southern District of Ohio, holding that female employees of the Ohio Department of Rehabilitation and Corrections had presented enough evidence to create a genuine issue of material fact to allow the matter to proceed to trial. Specifically, the Sixth Circuit found that the employees presented fact issues as to whether their supervising lieutenant acted with a retaliatory animus when she gave them negative performance reviews and whether there was a causal connection between the lieutenant's negative reviews and the warden's termination decision in the absence of evidence that the warden conducted an independent investigation. Similarly, the Eighth Circuit in *Bennett v. Riceland Foods, Inc.* affirmed a jury verdict in the amount of \$300,000 after a trial conducted in the District Court for the Eastern District of Arkansas. The Eighth Circuit found that the two employees supported their case with evidence that the director who proposed eliminating their jobs was "mad" and "bothered" that the two would not withdraw their complaints and that their jobs were eliminated six weeks after a finding that their grievances had merit. The key evidence was perhaps the testimony of a superintendent that the elimination of their positions was unnecessary from a business perspective and would not have happened "but for" protected activity.

So, what are the lessons learned post-*Nassar*? While it may be too soon to tell, employers should not assume that retaliation cases have gone the way of the dodo bird. Former employees continue to survive summary judgment and have even been successful at trial on retaliation claims post-*Nassar*. As such, it remains imperative that employers do not retaliate against employees who engage in protected activity. Moreover, employers should train managers and supervisors as to what constitutes retaliation.

Equally important is to be careful before, during and after the termination process. Before a termination decision is made, the employer should be able to articulate a legitimate non-retaliatory reason to support the termination, and the employer should consult with legal counsel if a potential retaliation claim could stem from the termination. The employer should conduct a separate investigation to support the termination and not rely solely on the recommendation of a possibly biased supervisor. Once the decision has been made, informing the employee of the termination should be handled carefully. Ideally, the person notifying the employee of the termination is not the same person against whom the employee lodged a complaint. There should be a witness at the termination meeting; this witness should be carefully selected, preferably a trusted member of management, and not the office gossip. After the termination meeting, both the person conducting the termination meeting and the witness should draft a summary of the termination meeting, and both summaries should be added to the terminated employee's personnel file.