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### *Labor and Employment Alert: University of Texas Southwestern Medical Center v. Nassar: Court Requires High Standard In Title VII Retaliation Cases*

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The United States Supreme Court recently handed down an important decision regarding the proof required for plaintiffs asserting retaliation claims under Title VII. In *University of Texas Southwestern Medical Center v. Nassar*, the Court held that Title VII retaliation plaintiffs must prove that their protected activity was a "but-for" cause of the adverse employment action suffered by the employee, rather than simply a "motivating factor." In other words, a plaintiff bringing a Title VII retaliation claim must demonstrate that he or she would not have suffered an adverse employment action but for his or her protected activity.

In *Nassar*, plaintiff Naiel Nassar was an assistant professor at the University of Texas Southwestern Medical Center and a staff physician at Parkland Hospital. Nassar, of Middle Eastern background, accused his supervisor of harassment based on his religion and ethnicity. Following his complaint, and due to his continued belief that his supervisor harbored bias against him, Nassar negotiated with the hospital to continue working there while severing his employment with the university (a move that would have resulted in a change of supervisors). Initially, the hospital agreed, so Nassar resigned from the university and cited harassment by Dr. Levine as his reason for leaving. University officials then objected to Nassar being employed solely with the hospital because such action was inconsistent with an existing affiliation agreement between the hospital and the university. As a result, the hospital withdrew its offer to allow Nassar to be employed solely as a staff physician. Nassar sued based on (1) race and religious discrimination, and (2) retaliation. The jury found in favor of Nassar. The Fifth Circuit affirmed finding that Nassar had demonstrated that retaliation was a "motivating factor" of the university's actions, which had caused Nassar to lose his employment offer with the hospital.

The Supreme Court reversed the Fifth Circuit's decision and held that Title VII retaliation claims must be proven using a "but for" standard of causation rather than the less burdensome "motivating factor" standard. Relying on the plain language of Title VII, the Court found it

important that 42 U.S.C. § 2000e-2(m) specifically states that unlawful employment practices based on race, color, religion, sex and national origin could be proved based on the "motivating factor" standard, but that the plain language of the statute did not include retaliation. Further, the Court focused on the language of Title VII's anti-retaliation provision, which "makes it unlawful for an employer to take adverse employment action 'because of' certain criteria." In a 2009 case involving similar "because of" language, *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), the Court had held that a plaintiff suing under the Age Discrimination in Employment Act must prove that age was the but-for cause of the adverse employment action. According to the Court, the "because of" language in the retaliation statute mandated the same result in *Nassar*.

Notably, the *Nassar* ruling speaks only to the standard of proof required in Title VII retaliation cases. The "motivating factor" standard is still applicable to Title VII claims based on race, color, religion, sex and national origin.

The Court's decision is a victory for employers. The "but for" standard of proof is considerably more difficult for plaintiffs to achieve and will serve to aid employers in defending Title VII retaliation claims.

For additional information regarding this or any employment-related issue, please contact your Vorys attorney or a member of the Vorys labor and employment group by calling 614.464.6400.