PLUNKETT COONEY

Supreme Court Vacates Fifth Circuit Retaliation Decision in University of Texas Southwestern Medical Center v Nassar, M.D.

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The U.S. Supreme Court has vacated and remanded a Fifth Circuit court finding of retaliation in the case of University of *Texas Southwestern Medical Center v. Nassar, M.D.* Plunkett Cooney appellate attorneys Mary Massaron and Hilary A. Ballentine, on behalf of DRI – The Voice of the Defense Bar, had filed an amicus brief on merits with the Supreme Court, in support of the petitioner.

The case began after Naiel Nassar, M.D., former Associate Medical Director of the HIV-AIDS Clinic at Parkland Hospital (with which the University of Texas Southwestern Medical School was affiliated), requested that he be employed by the hospital instead of the medical school. Nassar believed he was treated adversely by his immediate supervisor, Dr. Beth Levine, because of his national origin and, therefore, sought the transfer to the hospital so that he would have a different supervisor. Nassar, believing he had secured employment by the hospital, wrote a letter accusing Levine of discrimination and resigning from the medical school. However, because the required authorizations had not been obtained, Nassar could not yet begin in his new position. Before the hospital took further action, Nassar accepted another job in California.

In 2008, Nassar filed a complaint against the University of Texas Southwestern Medical Center in the Northern District of Texas, claiming that the medical school had constructively discharged and retaliated against him in violation of Title VII of the Civil Rights Act, 42 U.S.C. sec. 2000, *et seq.* Importantly, the retaliation provision requires a plaintiff to prove that an adverse employment decision was taken against an employee "because" he opposed any practice made an unlawful employment

practice by Title VII or "because" he made a charge, testified, assisted, or participated in an investigation, hearing, or proceeding under Title VII. Therefore, when the case proceeded to trial, the medical school asked the district court to instruct the jury that it could find the medical school liable for retaliation only if Nassar established "but-for" causation. However, the district court instructed the jury that Nassar only had to prove that retaliation was "a motivating factor" in the claimed adverse employment action. The jury ultimately rendered a verdict in favor of Nassar on both the retaliation and constructive discharge claims.

The Fifth Circuit affirmed the retaliation verdict, holding that plaintiffs suing for workplace retaliation under Title VII need only prove that retaliation was one of any number of factors in the challenged employment decision. *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448 (5th Cir. 2012).

The core question is whether the "because" language of Title VII's retaliation provision requires a plaintiff to satisfy traditional "but-for" causation in order to prevail. The U.S. Supreme Court has held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a)(1), which uses the same language as is at issue here, imposes a "but-for" causation standard on plaintiffs who bring age discrimination claims. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009). The DRI brief argues that the same result should issue under Title VII's retaliation provision.

In this case, the court held that the plaintiff needed to satisfy the traditional "but-for" causation to prevail rather than the lesser standard that retaliation was only one of a number of factors in the employment decision.

The DRI brief emphasizes that the Fifth Circuit's precedent-setting error threatens to create grave difficulties for employers forced to defend employment decisions with such a low standard regarding the cause of a termination or adverse employment action. Such difficulties, and the attendant risk, will force employers to settle even meritless claims when the standard is lowered to allow liability for "a motivating factor" rather than a clear standard normally applied by but-for causation.

"The Supreme Court came down on the side of legal cohesiveness and consistency in this case, fully realizing that a lessening of the standard intended by Congress could give rise to a tide of 'frivolous claims, siphoning resources from efforts by employers, agencies and the courts…,'" said DRI President, Massaron, who serves as Plunkett Cooney's Appellate Law Practice Group Leader.

For more than 50 years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel and defending the integrity of the civil judiciary. A thought leader, DRI provides world-class legal education, deep expertise for policymakers, legal resources, and networking opportunities to facilitate career and law firm growth. For more information, log onto www.dri.org.

Plunkett Cooney, which is celebrating its centennial anniversary this year, employs over 150 attorneys in nine Michigan cities, Columbus, Ohio and Indianapolis, Indiana. The firm, which provides a range of transactional and litigation services, has achieved the highest rating (AV) awarded by Martindale-Hubbell and is listed among the U.S. News – Best Lawyers "Best Law Firms" in 2013.

DRI brief authors Massaron and Ballentine, who are in the firm's Bloomfield Hills, Michigan office, are available for interview or for expert comment through DRI's Communications Office. For more information, contact Tim Kolly at (312) 698-6220 or tkolly@dri.org.

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