The Sky is Definitely Not Falling on Plaintiffs in Retaliation Cases

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Introduction[1]

Some analysts contend that the legal landscape for retaliation claims has abruptly and decisively changed in favor of employers. In support of that position, employer advocates typically rely on a recent Supreme Court case, *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013). The Supreme Court ruled in *Nassar* that, in order to prevail, a plaintiff must show retaliation was the "but for" cause of an employer's adverse action.

The notion that *Nassar* has somehow eviscerated the viability of retaliation claims turns on the assumption that "but for" causation differs significantly from the traditional concept of causation. Supreme Court precedent following *Nassar* indicates, however, that causation analysis regarding retaliation claims has not materially changed.

I. Justice Antonin Scalia Saves the Day for Retaliation Claims!

In a case emanating from the Eighth Circuit, *Burrage v. United States*, 134 S.Ct. 881 (2014), the Supreme Court directly addressed the meaning of "but for" causation. Although a criminal case, *Burrage* used *Nassar* as the starting point to analyze the issue.[2] The Supreme Court then quoted legal authority describing "but for" causation as "the ***minimum* concept of cause**."[3]

The Supreme Court's unanimous opinion in *Burrage*—which Justice Antonin Scalia authored—ultimately framed the analysis of "but for" causation through a number of metaphorical examples. *Id.* Notably, one of Justice Scalia's metaphors actually reiterated the precise point made by employee advocates following *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167 (2009), wherein the Supreme Court adopted "but for" causation under the Age Discrimination in Employment Act:

> [The predicate act is the "but for" cause if] the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, ***it was the straw that broke the camel's back.***[4]

In so doing, Justice Scalia confirmed that the evidentiary standard governing retaliation claims is not onerous and, in fact, continues to be the lowest threshold for establishing a causal connection even after *Nassar*.[5]

II. The Practical Impact of *Nassar* on Causation Analysis in Retaliation Cases Should Not Be Significant Under Federal Law

As reflected by post-*Gross* precedent, the "new" causation standard described in *Nassar* should not be more difficult to satisfy than the "old" causation standard. More to the point, post-*Nassar* precedent confirms that the demise of retaliation claims predicted by some employer advocates has not come to pass. By way of example, the Eighth Circuit has held that a jury may infer causation simply from the evidence that the employer's rationale for adverse action was pretext for retaliation.[6]

That the robust enforcement of anti-retaliation protections should continue after *Nassar* comports with the Supreme Court's policy preference for the out-of-court resolution of disputes. In that regard, as exemplified by several recent pro-arbitration decisions, the Supreme Court has essentially outsourced the dispute resolution function of the courts in an expanding array of cases.

The ongoing broad application of anti-retaliation protections advances the Supreme Court's outsourcing agenda in at least two respects. First, according to the Supreme Court's evident perspective, employees will be less likely to litigate if they think their discrimination, harassment, and other workplace-related complaints will be addressed appropriately by employers rather than trigger reprisals by employers. Second, from the Supreme Court's vantage point, employers will be more likely to address workplace-related concerns and, therefore, avert litigation when employees feel free to come forward with their complaints to employers.

In short, although litigation in the lower courts may create marginal doctrinal permutations as to causation, the general plaintiff-friendly approach should continue much as before. After *Nassar*, then, employees are still successfully relying on the long line of cases whereby the Supreme Court has interpreted

and enforced anti-retaliation protections liberally:

- *Kasten v. Saint-Gobain Perform. Plastics Corp.*, 131 S.Ct. 1325, 1329 (2011) (holding that the anti-retaliation provision of the Fair Labor Standards Act protects employees who only make an oral complaint, rejecting the trend under state law that increasingly requires formal and/or written reports to compel protection);
- *Thompson v. North Amer. Stainless, LP*, 131 S.Ct. 863, 868 (2011) (in a unanimous opinion announced by Justice Antonin Scalia, concluding that adverse action against a third party can support a retaliation claim);
- *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846, 849 (2009) (ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential violation);
- *Gomez-Perez v. Potter*, 553 U.S. 474, 478-79 (2008) (in an opinion authored by Justice Samuel Alito, basically reading an anti-retaliation provision into the Age Discrimination in Employment Act);
- *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that Section 1981 protects individuals who have complained about potential violations concerning a third party); and
- *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (ruling that what constitutes adverse action in support of a retaliation claim is anything which "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'").

III. The Legal Developments in Retaliation Cases Under State Law Have Been Positive as Well

Retaliation claims also continue to receive favorable treatment under Minnesota law. For example, the Minnesota Supreme Court recently ruled that plaintiffs have the right to a jury trial in workers compensation retaliation cases and, moreover, that employers in those cases cannot use the *Faragher/Ellerth* affirmative defense that has defeated so many harassment claims over the years.[7]

Conclusion

It warrants highlighting that the pro-employee precedent in retaliation cases stands in stark contrast to the approach in discrimination and harassment cases. That seeming paradox has confounded legal scholars and practitioners alike for years.

The Supreme Court's seemingly contradictory approach regarding retaliation versus other employment claims appears to flow from two main sources: (1) the Supreme Court's policy preference for out-of-court dispute resolution discussed above and (2) the intuitive and visceral appeal of retaliation claims. Accordingly, the differing approach to retaliation claims in comparison to discrimination and harassment claims should persist at least as long as the existing Supreme Court composition continues.

[1]An earlier version of this article appeared in the special employment law section of *Minnesota Lawyer*, which was published on June 23, 2013.

[2]134 S.Ct. at 887-88.

[3]*Id.* at 888 (emphasis added).

[4]*Id.* (emphasis added).

[5]*Id.*

[6]*Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013).

[7]*See generally Schmitz v. U.S. Steel Corp.*, 852 N.W.2d 669 (Minn. 2014).