Lawyers React To High Court Ruling On Retaliation Suits

Law360, New York (June 24, 2013, 8:41 PM ET) -- The U.S. Supreme Court ruled Monday that workers pursuing Title VII retaliation claims must show that their employer would not have taken action against them if the employee had not complained of unlawful discrimination. Here, attorneys tell Law360 why the 5-4 ruling is significant.

Randy Avram, Kilpatrick Townsend & Stockton LLP

"While the difference between a 'motivating factor' and a 'but-for cause' is likely to be lost on most juries, the Supreme Court has effectively raised the summary judgment hurdle for Title VII retaliation plaintiffs. This effect appears to have been a desired one for the five-Justice majority, who noted that a higher causation standard would facilitate tossing 'dubious claims' at the summary judgment stage. Today's decision should both discourage frivolous claims and lower settlement demands in retaliation cases, especially where plaintiffs have no evidence beyond a mere temporal relation to connect an adverse employment action to some earlier protected activity."

Karen Buesing, Akerman Senterfitt LLP

"The Supreme Court's decision in Nassar should eliminate a familiar play in the employee playbook: asserting a claim of discrimination in anticipation of being fired or disciplined, then claiming the discipline was in retaliation for complaining of discrimination. Employees must now establish that their protected activity was a 'but-for' cause of the employer's adverse action. The Court's refusal to give deference to EEOC guidance which allowed an employee to establish a claim by showing that engaging in protected activity was 'a' motivating factor, rather than 'the' motivating factor, may further erode the deference courts give to EEOC guidance in the future."

Thomas Bundy III, Sutherland Asbill & Brennan LLP

"The Court threw a life preserver to employers today, pulling them from the murky waters of the 'motivating factor' test, and now requiring plaintiffs to prove retaliation was a 'but for' cause of the adverse employment action about which plaintiffs complain initially. This decision, in effect, loosens the handcuffs retaliation claims place on employers, allowing them to consider business decisions with a tad less concern about another claim being levied against them."

Apalla Chopra, O'Melveny & Myers LLP
"This is a good employer-favorable decision. The Supreme Court concluded that to prove a retaliation claim under Title VII, a plaintiff must demonstrate that his/her protected activity was 'the' cause of any alleged retaliation — not simply 'a' cause. In so doing, the Supreme Court rejected the 'mixed-motive' causation standard applicable to cases of status discrimination under Title VII (e.g., race or gender discrimination), and instead applied a more narrow 'but for' causation standard applicable to Title VII retaliation cases. As a result of this decision and into the future, I would expect plaintiffs to make fewer, but perhaps stronger, retaliation claims."

Joshua M. Davis, Goulston & Storrs PC
"The Supreme Court's Nassar decision makes it easier for employers to defeat claims of retaliation. By requiring that employees demonstrate that their protected activity was the 'but for' cause of the alleged retaliatory conduct, the Court defined the limits of Title VII protection in a way that should slow the pace of retaliation claims. In addition, the decision should allow lawyers to give their employer clients clearer guidance about how to avoid claims of retaliation."

Noreen DeWire Grimmick and Joshua Feinstein, Hodgson Russ LLP
"This decision is favorable for employers and is expected to reduce the number of retaliation claims that go to verdict and increase the number of claims that will be dismissed by summary judgment motion. In order to succeed in a retaliation claim under Title VII, plaintiffs will now have to prove that the employer's desire to retaliate was the 'but for' cause of the challenged employment action alleged in the suit. Justice Kennedy, writing for the majority, indicated that the Court adopted the same 'structural analysis' of the anti-retaliation provisions applicable to Title VII as the Court previously applied to ADEA anti-retaliation provisions in the 2009 decision of Gross v FBL Financial Services Inc."

David M. Eisenberg, Baker Sterchi Cowden & Rice LLC
"This 5-4 ruling on 'mixed-motive' retaliation claims, holding that Title VII retaliation claims (like federal age discrimination claims) require 'but for' causation, was long-awaited and not unexpected. However, practitioners need to be aware that some state courts, interpreting their state human rights laws, apply less stringent standards to state law retaliation claims. See, e.g., the Missouri Supreme Court decision in Hill v. Ford Motor Co., 277 S.W.3d 659, 664-65 (2009) (applying 'contributing factor' standard). In such states, plaintiffs' counsel will

generally pursue a state law remedy, rather than the federal counterpart, to take advantage of the more lenient burden of proof."

Michael W. Fox, Ogletree Deakins Nash Smoak & Stewart PC
"In Nassar, the Court holds that retaliation under Title VII will use a 'but for' not 'motivating factor' standard — about which Justice Kennedy, in language that is music to a defendant's ears, bluntly says: 'This, of course, is a lessened causation standard.' Looking beyond this victory, does today's decision (coupled with Gross) establish a default standard for all federal employment law statutes? Maybe. Going forward in reviewing other statutes, unless Congress specifically used 'motivating factor' or other similar language, 'but for' is the likely test."

Dionne Hayden, Miller Canfield Paddock & Stone PLC
"The Nassar opinion provides employers with an important tool for identifying and disposing of untenable retaliation claims. The application of the stricter 'but for' causation principle will allow employers to focus the courts' attention on whether retaliation truly motivated the employment action. As noted by Justice Kennedy in the majority opinion, employees are filing retaliation claims 'with ever-increasing frequency,' with the number of retaliation claims filed with the EEOC now outnumbering those based on every other status-based discrimination type except race. With the ever-growing number of retaliation claims, Nassar provides an essential mechanism for weeding out dubious claims."

Michael D. Homans, Flaster/Greenberg PC
"Obviously, the Nassar decision will be helpful to employers by making it harder for employees to prove unlawful retaliation, especially when a mix of potential motives, lawful and unlawful, are involved. As with the Supreme Court's 2009 decision in Gross v. FBL Financial Services, Inc. that federal age discrimination claims require proof of 'but for' causation, we can expect conservative courts to take the position that an employer cannot be motivated both by discrimination and retaliation. Rather, the employee will have to choose which claim to pursue at trial — retaliation or something else, but not both. This will be a significant shift in employment discrimination trials, as plaintiffs like Nassar who allege that they were discriminated against, and then retaliated against for complaining about the discrimination, will have to choose at trial which theory to pursue as the motive for an adverse action."

Gregory Keating, Littler Mendelson PC

“The U.S. Supreme Court has finally put the brakes on the runaway train of retaliation claims facing employers, imposing a higher standard on plaintiffs to establish causation. This signals that the Court may be poised in its next term to further limit the expansive reach of retaliation claims fueled by an aggressive Administrative Review Board in a series of recent rulings. While this is a positive outcome for employers, it is critical that they remain vigilant and implement concrete steps to protect against retaliation claims due to increased government enforcement and new laws from state and federal legislatures expanding retaliation rights and remedies.”

Darin Mackender, Fisher & Phillips LLP
“The decision is a significant victory for employers. As the Supreme Court noted, retaliation claims are being filed with increasing frequency. The Court’s adoption of a but-for causation standard will make it easier for employers to dispose of questionable claims. More generally, at a time when the reach of Title VII and other discrimination laws seems to be ever-expanding, the Supreme Court delivered a message, albeit far from unanimous, that limits exist. Employers should be mindful, however, of the dissent’s parting prediction that the decision ‘should prompt yet another Civil Rights Restoration Act.’”

Scott McIntyre, BakerHostetler
“In Nassar, the Court declined to lessen the standard of proof for Title VII retaliation, recognizing that poorly performing employees may assert baseless retaliation claims as a smokescreen to protect themselves from discipline. The Court cited the explosion of retaliation claims and systemic costs of defending baseless claims. In another positive sign for employers, the Court held that the EEOC Guidelines that called for the lesser motivating factor standard were a product of circular reasoning and not worthy of deference. Coupled with the Courts's similar rejection of the EEOC Guidelines today in Vance, this provides positive momentum to employers who disagree with the EEOC Guidelines in other areas such as background checks.”

Pamela Moore, McCarter & English LLP
“Today was a good day for employers. In its prior two decisions on retaliation, Burlington Northern v. White and Thompson v. North American Stainless, LP, the Court made retaliation claims much more difficult to defend and, as a result, increased the number of claims for retaliation being filed against employers throughout the United States. Today’s ruling in the Nassar case evens the playing field and should give employers greater ability to more effectively defend claims that should not even get to a jury. Stay tuned for

Congressional action given the Justice Ginsberg's invitation for legislation."

Anthony Oncidi, Proskauer Rose LLP
"What the Nassar decision will do is restore some sanity to the process of trying these cases to a jury. An employee will have to prove that illegal retaliation by the employer actually caused the harm that is alleged. The alternative standard would have permitted an employee to prove liability even if the allegedly illegal conduct were just a motivating factor (not the actual reason) for the adverse employment action. Employers clearly should prevail in cases in which the employee cannot prove that but for the employer's desire to retaliate he or she would not have been harmed."

David J. Reis, Arnold & Porter LLP
"Nassar confirms that Congress had never intended for there to be 'mixed motive' liability for retaliation under Title VII and makes it easier for employers to defeat retaliation claims where there may be some credible evidence of retaliation in a given adverse employment action, but strong evidence of nonretaliatory reasons, too. Ever since the 1991 Civil Rights Act, an employer has been liable for discrimination under Title VII if the plaintiff merely proved that race, color, sex, religion or national origin was a motivating factor for the adverse employment action. The employer could then limit damages only by proving that it would have made the same employment decision for nondiscriminatory reasons."

Ira Rosenstein, Morgan Lewis & Blockius LLP
"Justice Kennedy walks a tightrope between classic statutory interpretation and the practical implications of his decision, ultimately determining that both support application of traditional 'but for' causation for retaliation claims as opposed to the unique 'motivating factor' causation standard applied to what he deems 'status' discrimination claims brought under Title VII and the Civil Rights Act of 1991."

Alan Rupe, Kutak Rock LLP
"The news on Nassar is nothing new. The Supreme Court reapplied its cogent reasoning from Gross, finding that if Congress had intended the 1991 Amendments' lower causation standard to apply to Title VII retaliation claims, as well as discrimination claims, it should have said so. The Court also ratified employers' concerns that the lower standard contributed to frivolous claims being filed and surviving summary judgment. In doing so, the Court showed little deference to the EEOC's interpretation, proving its continuing willingness to engage in its own heavy lifting with regard to statutory interpretation. That's a

welcome trend."

Douglas T. Schwarz, Bingham McCutchen LLP
"The Court's decision that a federal Title VII retaliation plaintiff must prove an adverse employment action would not have occurred 'but for' the plaintiff's protected activity is fresh air for employers. Statutory prohibition of retaliation is, of course, crucial to assuring compliance with the law, but a loosened standard of proof would have facilitated the maddening game of 'gotcha' many employees have learned to play. The Court's decision will permit defense counsel to help trial courts and agencies cull the many very weak retaliation cases from the few meritorious ones. The dissent's call for congressional action is ill-advised."

Charles Thompson, Seyfarth Shaw LLP
"We're pleased to see that Justice Kennedy and the court looked to the language of Title VII and correctly applied the 'but for' standard of causation to Retaliation Cases. We hope this will encourage the plaintiff's bar to think twice before throwing retaliation into every complaint they file. 'But for' is a crisp standard that can be summary adjudicated when appropriate and will be easier to comprehend for a jury than the motivating factor analysis used in other Title VII actions. This opinion gives clarity on the standard required needed to get from conduct to compensable injury in retaliation cases."

--Editing by Richard McVay.