Bostock v. Clayton County: Civil Rights Jenga


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This is the 19th N.H. Bar News *article co-written by employment lawyers Debra Weiss Ford (employer advocate) and Nancy Richards-Stower (employee advocate). Here they discuss the 2020 Supreme Court decision* Bostock v. Clayton County, *590 U.S., 140 S. Ct. 1731 (2020).*

Nancy: Title VII of the Civil Rights Act makes it illegal for "*an employer ... to discriminate against any individual ..., **because of** ... race, color, religion, sex, or national origin.*" Deb, how many hours have you spent litigating what "because of" means?

Deb: Hours? Decades! It gets tricky when there are "mixed motives" for the employment action, making the difference between "direct evidence" and "circumstantial evidence" important.

Nancy: Determining what constituted "direct evidence" became a cottage industry in mixed-motive cases because once the employee showed discrimination was a motive, *the burden shifted to the employer* to prove it acted for a non-discriminatory reason.

Deb: Yes, thanks to Justice Sandra Day O'Connor's concurrence in *Price Waterhouse*, holding that before an employee got a mixed-motive instruction, she must have offered "direct evidence of discrimination".

Nancy: A supervisor yelling "*I hate women; you're fired!*" is direct evidence of gender discrimination.

Deb: Even I can't disagree with that. Then, the burden shifts to the employer to show that the real reason, the "because of" reason, was not discrimination, e.g., the employee missed her sales quota. If the jury believed she was fired "because of" poor sales, the employee lost, despite, contemporaneous gender bias.

Nancy: Congress overruled *Price Waterhouse* with the Civil Rights Act of 1991, so when an employee missed her sales quota and was fired, if her gender played any part, Title VII was violated:

> *"...an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."* 42 U.S.C. 2000e-2(m).

Deb: Yes, but, Section 2000e-5(g)2(B), severely limited her remedies when the employer proved she was fired "*because of*" poor sales:

> *"On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-*
> *(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and*
> ***(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment..."***

Nancy: Getting attorney fees is better than the big zero of *Price Waterhouse*. Also, the 1991 Act knocked out the direct evidence requirement for mixed-motive cases. Unfortunately, the authors of the 1991 Act flunked "drafting 101," forgetting to include retaliation claims (*University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338 (2013)), so those don't benefit from the "motivating factor" language.

Deb: *Nassar* held that the language of Title VII's retaliation provisions was similar to the language of the Age Discrimination in Employment Act (ADEA), so Title VII retaliation claims required proof "*that the desire to retaliate was **the** but-for cause of the challenged employment action.*" (emphasis added).

Nancy: "The" meaning to some, sole cause.

Deb: Then came the drug case, *Burrage v. U.S.*, 571 U.S. 204 (2014) which, misquoted *Nassar* in a most significant way:

> *"...we held that § 2000e-3(a) "require[s] proof that the desire to retaliate was **[a]** but-for cause of the challenged employment action." Nassar, supra, at 352..."*

Nancy: Changing Nassar's "the" to "a" was a huge deal. Employees could now argue they were not required to prove "sole cause" in non-mixed-motive discrimination cases, nor retaliation cases, under Title VII.

Deb: Admit it: employees were challenged to explain how a misquote in a Supreme Court drug case "amended" the holding of an employment case.

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A requires employers to provide reasonable accommodations to an employee who has a disability, provided it is not an undue hardship.

New Hampshire case law has not directly addressed employer disability discrimination in the medical marijuana context, although commentators note that the New Hampshire Supreme Court's recent opinion in *Appeal of Andrew Panaggio* indicates its readiness to protect medical marijuana use. The Court held in that case that, where an employee's doctor prescribed cannabis for a work-related injury, the employer or its insurer could not deny reimbursement based on the federal illegality of cannabis.

Cannabis and the Workplace – A New Hampshire Employer's Guide

While the issue of accommodation remains cloudy and complicated, several considerations will help employers adhere to legal requirements, avoid litigation, and safeguard workplace safety and productivity.

When an employee requests an accommodation for medical marijuana use, a statutorily protected disability may be underlying. Under federal and state disability laws when a disabled employee requests a reasonable accommodation employers must engage in an "interactive process" with the employee. That process considers the essential functions of the position and whether accommodation is indeed reasonable. While the analysis can be involved, in short, an accommodation is reasonable unless it would represent an undue hardship to the employer or a direct threat of harm to the employee or others. In the case of cannabis use the question should be whether the use of medical marijuana use would impair work performance or impose a serious safety risk. However, the Americans with Disabilities Act still provides that the use of an illegal drug cannot be a reasonable accommodation. Marijuana is still considered a schedule 1 narcotic under federal law. But what about medical marijuana use off site and off work hours?

Employers may still prohibit marijuana use at work, deny on-site marijuana use as a reasonable accommodation, and discipline employees for being under the influence of cannabis at work. That said, off duty use of cannabis, especially in positions that are not considered safety sensitive, may be something that employers may soon no longer control or use to justify adverse employment decisions.

Given Appeal of *Panaggio*, it is hard to predict whether New Hampshire courts would recognize a claim for wrongful termination or retaliation for off-site marijuana use, where an employee is not actually impaired while working.

Employers subject to laws that require a drug-free workplace (such as for safety-sensitive or federally regulated positions) are still able to refuse to hire or take adverse action against an employee for marijuana use but smoke signals from Washington suggest that change, in the form of changes to federal drug laws with regard to marijuana, may be in the wind. In the meantime, as we emerge from the pandemic, return to the new normal in the workplace and start to address

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Nancy: It took energy! That's why Bostock is fabulous for employees. Best known for holding that Title VII's prohibition of sex discrimination includes sexual orientation and sexual identity, Bostock swatted away confusion on how to prove regular (non-mixed-motive) discrimination and retaliation cases under Title VII. I call it "Civil Rights Jenga": one can pull out different sticks to topple the pile; each is a separate "but for" cause. Justice Gorsuch wrote:

> *" In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.*
> ***This can be a sweeping standard. Often, events have multiple but-for causes**. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means **a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision.** So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. Or it could have written "primarily because of" to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. But none of this is the law we have."* (citations omitted) (Emphasis added)

Deb: So, do you interpret this to mean that summary judgment will not be granted for employers when there is any evidence of discrimination, regardless of solid evidence of a non-discriminatory reason for the action?

Nancy: Correct. Justice Gorsuch wrote, "*Often events have multiple but-for causes.*" Employees need not prove that discrimination was the primary, sole, main or even the most important trigger for the action. Mixed-motive pleading and McDonnell Douglas burden shifting may disappear. The employee can escape summary judgment and can receive full damages at trial *without having to offer any evidence disproving the employer's nondiscriminatory reason/s*, because both the discriminatory and non-discriminatory reasons can be true, "but for" motivations.

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