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Labor & Employment Law: Debating the Motive Standard for Retaliation Cases

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Editor's note: This is the eleventh NH Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here they discuss the upcoming decision of the US Supreme Court in University of Texas Southwestern Medical Center v. Nassar, whose oral arguments are scheduled for April 24 and which will decide whether the retaliation provision of Title VII requires an employee to prove but-for causation (the employer would not have taken the contested action but for an improper motive) or if a mixed-motive analysis applies (whether the employee should prevail, if he or she is able to establish merely that an improper motive was one of several reasons for the contested action).

Nancy: Hey, Deb, how many beers will it take for me to read the upcoming Supreme Court decision in University of Texas Southwestern Medical Center v. Nassar as it "clarifies" the meaning of the phrases "because of" and "mixed motive" for Title VII retaliation cases?

Debra: Wow, that's a mouthful. I'll play your silly game: How many beers?

Nancy: None. I don't drink beer. Too many calories. But if I (still) did, I'd guess about five to 10.

Debra: Why? What about Nassar could drive you to drink?

Nancy: I speak respectfully. I am a simple person. What could drive me to want to revisit my distaste for "brewski" will be my hair-pulling frustration over the Supremes' variant definitions of the same darn phrase in Title VII jurisprudence.

Debra: And what phrase would that be?

Nancy: "Because of."

Debra: Please explain.

Nancy: The US Supreme Court has already flipped once on the "clear meaning" of "because of" in Title VII jurisprudence. Back in the day, we got *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989), in which the majority opinion declared that "because of" absolutely, positively, no way could mean "solely," as it rejected a "but for" standard of proof. That was when the Supremes acknowledged the existence of mixed-motive claims in Title VII cases. It was so clear! So clear! As the court said in a footnote, "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'"

Debra: Yes. And because Justice O'Connor's concurring opinion included a statement that without "direct evidence of discrimination" no mixed-motive case could be brought, a lot of jurisprudence was spawned about what constituted direct evidence.

Nancy: That created the silly wormhole discussions of "stray remarks," which sparked federal Judge (Ret.) Nancy Gernter's famous rebuff: "Stray remarks are windows to the soul."

Debra: Right, and then Congress passed the Civil Rights Act of 1991, which codified mixed-motive in Title VII discrimination cases, so post-1991, if there was any evidence of discrimination affecting the decision, the employee could win and be awarded all Title VII remedies, unless the employer showed it would have taken the same action anyway, in which case, the employee still could be awarded attorney's fees, but little more.

Nancy: When Congress codified mixed-motive into Title VII, it managed to do so only for discrimination cases, but Congress forgot to include a reference to Title VII's retaliation provision, so the question in Nassar is whether or not the mixed-motive law of Price Waterhouse continues to rule in Title VII cases asserting retaliation.

Debra: There could be vestiges of "direct evidence" and "stray remarks" haunting us for some time. The Supreme Court interpreted the Civil Rights Act of 1991 in the 2003 case *Caesar's Palace (Desert Palace, Inc. d/b/a Caesar's Palace Hotel & Casino v. Costa)*, and held that under the statutory amendments of the act,

no direct evidence was necessary for a mixed-motive instruction.

Nancy: And that left it for the future to determine whether direct evidence was necessary in the employment case categories, which were not amended by the Civil Rights Act of 1991 (like the Title VII retaliation provisions and the discrimination provisions of the Age Discrimination in Employment Act).

Debra: Well, remember, we got the answer for age discrimination cases in *Gross v. FBL Financial Services, Inc.* 557 U.S. 167 (2009), a surprising decision that held there is no mixed-motive cause of action under the ADEA - even though neither party asked the court to decide that.

Nancy: True. The phrase "because of," which exists in Title VII and was defined in *Price Waterhouse,* also exists in the ADEA. But in *Gross v. FBL Financial Services,* the Supreme Court ruled that there could be no mixed-motive cases brought under the ADEA, and that even if discrimination were shown to be a "motivating factor," an age discrimination plaintiff now has to prove (by a preponderance of the evidence) that age is the "but-for" (sole) cause of the employer's action.

After the FBL case, to establish a disparate-treatment claim under the plain language of the ADEA, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. Arghhh!

Debra: So a little incongruity from the US Supreme Court on an employment law case is sending you on a potential brewski binge? The decision could be detrimental to employers. If the Court enforces the mixed-motive approach, employers defending Title VII claims will find it more difficult to defend against such claims, as it is easier for employees to establish that mixed motives led to an adverse employment action than it is to show that an illegal bias was the reason for an employment decision. It may also be difficult for employers to prove that an employment decision based on numerous reasons did not include illegal discriminatory or retaliatory motives.

Nancy: I don't agree, Deb. At trial, mixed motive could be beneficial to employers, giving them two bites of the apple: (1) did the employer discriminate? and, (2) if the employer discriminated, would it have fired the employee anyway? My advice to employees is to argue mixed motive at the summary judgment stage; then drop it at trial and just go forward with discrimination, so if the answer is yes to (1) did the employer discriminate? All you have to do is look below for the damage amounts on the jury verdict form.

Debra: So what are you getting all worked up about in *Nassar*?

Nancy: It's the principle. I don't think it is fair for a 5-4 vote of the Supreme Court to, without any rational explanation, change the meaning of the exact same words "because of" in two employment discrimination laws.

Debra: Fair? Since when is that relevant in the law?

Nancy: I have always believed that courts should be fair and just.

Debra: What's that story you told me about from your first year of law school at Franklin Pierce Law Center (now UNH Law School)? You remember, the thing Dean Simpson, fresh from retirement at Suffolk Law School (was it age discrimination that sent him to Franks?), told you in your torts class?

Nancy: Sigh. Forty years ago, the late, great Dean Donald Simpson (a professor at Franks) told me that if I wanted to learn about fairness and justice, I should go to divinity school, but if I wanted to learn the law, I should stay put.

Debra: So, 40 years later, are you pleased with your choice?

Nancy: Most of the time. But my husband did graduate from divinity school, and the rules of the road that he studies and teaches don't change when the make-up of the Supreme Court changes.

Debra: Change is always good.

Nancy Richards-Stower, licensed in New Hampshire and Massachusetts, with an office in Merrimack, represents only employees and happens to be married to a minister.

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Nancy Richards-Stower practices plaintiff's employment law in Merrimack. Former chair of the N.H. Commission for Human Rights, she was inducted into The College of Labor and Employment Lawyers in 2003.

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