

Labor & Employment Law

SCOTUS: Drug Deal Case from Iowa Invokes Federal Employment Law

By: Nancy Richards-Stower and Debra Weiss Ford

Editor's note: This is the 13th Bar News debate between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here they discuss the impact of the US Supreme Court's decision in Burrage v. United States (Jan. 27, 2014) on the issue of causation under the federal Age Discrimination in Employment Act and in retaliation cases under Title VII of the Civil Rights Act of 1964, as amended.

Nancy: Deb, *Burrage v. United States* arose after a heroin addict died in an Iowa town called Nevada. No wonder I'm confused!

Debra: Nevada's in the middle of Iowa, but the deal went down in Ames. The heroin epidemic rages everywhere.

Nancy: The facts: Drug dealer "Lil C" Burrage sold heroin to Joshua Banka who died the next morning after a multi-hour drug binge during which he ingested the heroin plus oxycodone, alprazolam and clonazepam.

Debra: The Controlled Substances Act increases the minimum sentence for distribution of heroin to 20 years "if death or serious bodily injury *results from* the use of such substance." (Emphasis added).

Nancy: Medical experts testified that Banka might have died even if he had not taken the heroin, so Burrage moved for acquittal, arguing that Banka's death could "result from" heroin use only if there was evidence that heroin was a "but-for" cause of death.

Debra: The trial court denied the motion and instructed the jury that the prosecutors needed to prove only that the heroin sold by Burrage and ingested by Banka was a "contributing cause" of Banka's death.

Nancy: The Eighth Circuit upheld Burrage's conviction, and the Supreme Court granted cert to decide the meaning of "results from." Did it mean "but for," "proximate cause," "sole cause," "contributing cause," "played a substantial part," "was a direct result of," was the "reasonably probable consequence of," or

something else?

Debra: The court decided that "results from" meant "but-for" causation, which must be proved to the jury before a court could issue the 20-year mandatory minimum sentence.

Nancy: I laughed, then became frightened, after reading the decision's footnote 2: "Although [the CSA's] language, read literally, suggests that courts may impose a fine or a prison term, it is undisputed here that the 'death results' provision mandates a prison sentence. *Courts of Appeals have concluded, in effect, that the "or" is a scrivener's error.*" (Emphasis added)

Debra: Scrivener's error? This seems inconsistent, as Justice Scalia emphasizes interpreting the statute as written, using the plain meaning of the words, yet in this footnote seems to do the opposite.

Nancy: The court began, "The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause" and since the CSA failed to define "results from," the court looked for its "ordinary meaning."

Debra: And found it in the New Shorter Oxford English Dictionary 2570 (1993): A thing "results" when it "[a]rise[s] as an effect, issue, or outcome from some action, process or design."

Nancy: Then the court turned to employment law, citing University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013): "'Results from' imposes, in other words, a requirement of actual causality. 'In the usual course,' this requires proof 'that the harm would not have occurred' in the absence of — that is, but for — the defendant's conduct."

Debra: Nassar held that Title VII's retaliation provisions require "but-for" proof of discrimination, not just "motivating factor" proof, because Title VII's 1991 amendments adding "motivating factor" omitted reference to retaliation.

Nancy: THAT was a scrivener's error!

Debra: Maybe, but the court also invoked the other “but-for” employment case, *Gross v. FBL Financial Services*, 557 U.S. 167 (2009): “... the Age Discrimination in Employment Act... makes it “unlawful for an employer... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” Relying on dictionary definitions of “[t]he words ‘because of’ – which resemble the definition of ‘results from’ recited above – we held that “[t]o establish a disparate-treatment claim under the plain language of [§623(a) (1)]... a plaintiff must prove that age was [a] ‘but for’ cause of the employer’s adverse decision.”

Nancy: See, Deb! The court says “age was a but-for cause,” not the but-for cause.” That should end the absurd commentary that *Nassar* and/or *Gross* require proof of discrimination by some “sole cause!”

Debra: Then why did Justice Ginsburg, concurring, write: “For reasons explained in my dissenting opinion in *University of Texas Southwestern Medical Center v. Nassar*... I do not read “because of” in the context of antidiscrimination laws to mean “solely because of.”

Nancy: For emphasis!

Deb: Let’s end with Justice Scalia’s baseball analogy explaining “but-for” causation in *Burrage*.

“Consider a baseball game in which the visiting team’s leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run... It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach’s decision to put the leadoff batter in the lineup, and the league’s decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a non-essential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.”

Nancy: Go Sox!





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