

## "But for" causation must be used in Title VII retaliation cases, U.S. Supreme Court says

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Title VII retaliation claims must be proven according to traditional "but for" causation principles, and not the less strict "motivating factor" standard applicable to other claims under the Statute, the U.S. Supreme Court ruled in *University of Texas Southwestern Medical Center v. Nassar*, decided June 24, 2013.

In *Nassar*, Plaintiff, Dr. Naiel Nassar, claimed that his Middle Eastern heritage became an issue when Dr. Beth Levine became chief of his department at the University of Texas Southwestern Medical Center. In July 2006, Dr. Nassar resigned from his teaching job at the University, claiming that Dr. Levine criticized Middle Easterners as "lazy" and subjected him to unfair scrutiny.

After his resignation, the hospital affiliated with the University offered Nassar a job as a staff physician. Shortly thereafter, Nassar sent an email to Levine's supervisor, Dr. Fitz, and others at the University stating that his departure stemmed from Levine's harassment and her bias against Arabs and Muslims. Dr. Fitz, upset about Nassar's email and wanting public exoneration for Levine, objected to the hospital's job offer to Nassar, claiming that the hospital's affiliation agreement barred it from offering a non-university member like Nassar a staff physician position. The hospital subsequently withdrew its job offer.

Nassar filed a lawsuit against the University claiming that Fitz's efforts to prevent the hospital from hiring him were in retaliation for his complaints about Levine's harassment. Nassar was awarded damages by a jury at trial. A three-judge panel of the Court of Appeals of the Fifth Circuit affirmed the lower court's ruling, finding that retaliation was a motivating factor for Dr. Fitz's actions.

On appeal, however, the Supreme Court held that the case merits resolution under a strict "but for" causation standard of Title VII, not the lesser "motivating factor" standard found in §2000e-2m. Thus, the Supreme Court found that Nassar should have presented proof that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Accordingly, the Court vacated and remanded the judgment of the appeals court for further proceedings consistent with its opinion.

**What does the decision mean for employers?** 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 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.