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## The New HBA Ambassadors



# U.S. Supreme Court Sets High Standard for Proving Workplace Retaliation Claims

By JILL YAZIJI

In *University of Texas Southwestern Medical Center v. Nasser*, 570 U.S. \_\_\_\_ (2013), the United States Supreme Court handed down a strict, “but-for,” causation standard required for proving a retaliatory discharge claim against an employer. Once a faculty member of the University of Texas Southwestern Medical Center (UTSW) and a physician at the affiliated Parkland Hospital, Nasser had worked for many years before Dr. Levine came on board. Nasser alleged that Levine discriminated against him on the basis of his religion (Muslim) and ethnicity (Arab). He left his position at UTSW two years later, but not before complaining that religious, culture and ethnic-based discrimination by Levine led him to resign. Nasser, however, managed to continue his employment with Parkland Hospital despite an agreement by the Hospital requiring its physicians to be also affiliated with UTSW. Levine’s supervisor, who objected to Nasser’s public accusations against Levine, opposed Nasser’s continued employment with the Hospital despite the affiliation agreement and the Hospital responded by withdrawing Nasser’s ap-

pointment. Nasser filed his lawsuit alleging constructive and retaliatory discharge claims against UTSW. Nasser prevailed at trial, which resulted in over \$400,000 of back pay award and over \$3 million in compensatory damages.


In a 5-4 decision, the U.S. Supreme Court reversed Nasser’s retaliatory discharge award, holding that he failed to prove that he would not have been discharged but for his complaints about workplace discrimination. The Court’s majority distinguished between the causation standard required in so-called “status-based” claims (based on race, color, religion, sex, or national origin,) and the standard required for Title VII retaliation claims by employees who expose or complain about workplace discrimination. A plaintiff complaining of status-based discrimination could prevail if she shows that one of the five traits was a “motivating” or “substantial” factor, among others, in the adverse employment decision. This principle, also known as the “lessened causation standard,” announced by the Court in *Price Waterhouse v. Hopkins*, was codified by Congress in the 1991 amendments. This less stringent causation principle, however, does not apply to retaliation claims made by employees who complain/object to workplace discrimination. Retaliation claims, the Court held, are subject to the “but-for” causation test, which is the same standard used in ADEA claims.

Informing the majority’s decision were both the textual interpretation of the retaliation provision, §2000e-3(a), (which is substantially similar to §623(a) of the ADEA that the Court interpreted in *Gross v. FBL Financial Services, Inc.* as requiring the “but-for” causation standard;) and Congress’s structural choice in Title VII itself, in which the “antiretaliation provision appears in a different section from Title VII’s ban on status-based discrimination.”

In addition to effecting congressional intent, scrutiny of the causation standard

in such cases is crucial in stemming the “ever increasing frequency” with which those claims are being made, argued the Court’s majority.

Writing for the dissent, Justice Ginsburg decried the majority’s decision that “drives a wedge between the twin safeguards in so-called ‘mixed-motive cases,’” stating that the Court is driven by a “zeal to reduce the number of retaliation claims” without sensitivity to the realities of workplace.

In light of *University of Texas Southwestern Medical Center v. Nasser*, Title VII retaliation claims have become more difficult to proceed as summary judgment will await any claimant who cannot proffer evidence that the adverse employment decision would not have been taken “but for” the protected Title VII complaint. 

*Jill Yaziji is the principal of Yaziji Law Firm, a civil litigation firm, and an Associate Editor at The Houston Lawyer.*

# U.S. Supreme Court Limits States’ Rights of Recovery Under Medicaid Statute

By PRESTON D. HUTSON

**O**n March 28, 2013, the U.S. Supreme Court issued its opinion in *Wos v. E.M.A.*, \_\_ U.S. \_\_; 133 S.Ct. 1391 (2013) clarifying the rights of individual states to recover settlement