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The Meaning of "But-For" Harassment: The Second Circuit Breaks Its Silence and it is not Good for Employers

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In 2013, the U.S. Supreme Court held that Title VII retaliation claims must be proven according to traditional principles of "but-for" causation. Since *Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013)*, employees must now provide proof that *but for* the employer's retaliatory animus, the employee would not have been terminated, demoted or suffered some other adverse employment action. *Nassar* was a monumental victory for employers facing these types of claims because this "but for" requirement is significantly more stringent than the standard that existed pre-*Nassar*, which only required employees to show that retaliatory animus was *a motivating factor* in the employer's decision to take adverse action. The U.S. Supreme Court established the "but-for" requirement to discourage employees from filing frivolous retaliation claims, specifically those predicated on an employee who knows that he or she is about to be fired or disciplined for poor performance and in a desperate attempt to thwart the disciplinary action, lodges a false complaint.

The Second Circuit Court of Appeals has been quiet in the wake of Nassar until it just recently overturned a New York District Court's dismissal of a plaintiff's retaliation claim on summary judgment. The decision in *Kwan v. The Andalex Group LLC, – F.3d – (2d Cir. 2013)* illustrates that while the U.S. Supreme Court's aims in Nassar were clear (creating a heightened proof requirement to filter out frivolous claims), theory and practice often diverge.

In *Kwan*, plaintiff worked as Vice President of Acquisitions for a real estate management firm for several years. She claimed that shortly after she complained to the company's Chief Operating Officer about being treated differently than her male counterparts with respect to compensation, she was terminated in retaliation for her complaint. On summary judgment, Kwan argued that the employer's reasons for her termination, bad attitude, poor performance, and change in business focus, were inconsistent and contradictory. The District Court disagreed and granted summary judgment.

On appeal, the Second Circuit reversed, holding that the company's multiple explanations for Kwan's termination, which were ever-changing and evolving, coupled with the close temporal proximity between her complaint and termination were sufficient to create an issue for trial as to whether Kwan's complaint of gender discrimination was a "but-for" cause of her termination. For the first time since *Nassar*, the Second Circuit explained that "but-for" causation "does not require proof that retaliation was the only cause." A

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plaintiff may prove that retaliation was a "but-for" cause of an adverse employment action by "demonstrating weaknesses, implausibilities, inconsistencies or contradictions in the employer's proffered legitimate, non-retaliatory reasons for its action." In other words, the Court noted, "but-for" causation requires the "weighing of disputed facts" and is therefore, "poorly suited to disposition by summary judgment." Rather, the question of whether an employee would have been terminated in the absence of his or her complaint is one for the jury.

So, what is the takeaway? *Nassar* gave employers hope that the "but-for" heightened proof requirement would result in more dismissals of retaliation claims at summary judgment, thereby allowing employers to vindicate themselves while avoiding the cost of trial. *Kwan* dampens that enthusiasm by stating that the "but-for" analysis will often fail at the summary judgment stage, effectively passing the buck to juries with the associated expense and risk of exposure. One saving grace is that the Court's instruction came in a footnote so what credence lower courts give to it remains to be seen. Nevertheless, in light of *Kwan*, employers should be wary about their chances of success at summary judgment when defending retaliation claims, no matter how meritless they may be.

So Nassar may not have been the panacea for employment retaliation claims that many employment defense lawyers thought it was.

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