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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Mixed-Motive Case To Shape Bias Suit Landscape

By **Abigail Rubenstein**

Law360, New York (January 22, 2013, 9:51 PM ET) -- The U.S. Supreme Court's decision to consider the standard workers must meet to prove discrimination under employment laws that do not specifically authorize mixed-motive claims will have a defining impact on employer exposure to retaliation suits, attorneys say.

The high court on Friday agreed to take up the University of Texas Southwestern Medical Center's appeal of a Fifth Circuit win for former faculty member Dr. Naiel Nassar, who claimed retaliation under Title VII after allegedly being harassed by a supervisor. Lawyers say the case could result in a decision with sweeping ramifications for the litigation outlook for employers facing retaliation allegations.

The case gives the justices the chance to resolve a circuit split over whether Title VII's retaliation provision and similarly worded statutes require an employee to prove but-for causation, meaning the plaintiff would have to show that an employer would not have taken an adverse employment action but for an improper motive. In the alternative, plaintiffs would be required to show proof only that the employer had a mixed motive, in which an improper motive was one of multiple reasons for the employment action.

Because the mixed-motive standard is a lower bar for plaintiffs to clear, lawyers told Law360 that, depending on how expansive the justices opt to be in their ultimate ruling, the case could help determine the stakes for employers hit with claims under a slew of employment laws, potentially including not just Title VII retaliation, but also the Americans With Disabilities Act, the Family and Medical Leave Act, and several whistleblower statutes.

"This case will not have much effect on the day-to-day decisions of employers, but it will really affect how lawsuits are handled and the outcome of lawsuits," said Michael W. Fox of Ogletree Deakins Nash Smoak & Stewart PC. "It will impact how the overall system of employment litigation is going to work, and whether it will be slanted more for or against the employer's position."

If the high court finds in favor of the medical school, it could give the justices an opportunity to build on the victory they handed employers in their 2009 decision in *Gross v. FBL Financial Inc.*, attorneys say.

In *Gross*, the court determined that the Age Discrimination in Employment Act required proof that age was the "but-for cause" of an adverse employment action, so an employer is not liable if it would have taken the same action for other, nondiscriminatory reasons.

The medical school's case gives the court a chance to explain whether the logic of *Gross*

should be extended to other federal employment statutes that do not specifically authorize mixed-motive claims, or whether courts should instead apply its 1989 decision in *Price Waterhouse v. Hopkins*, holding that the discrimination provision of Title VII requires a plaintiff to prove only that discrimination was a motivating factor for an adverse employment action.

"The case will clarify whether the holding in *Gross* is limited only to the ADEA or whether it is intended to apply to all federal statutes with language different than Title VII," said Lynn Kappelman of Seyfarth Shaw LLP. "I think the very fact that the circuit courts are all over the map is a good indication that clarity is long overdue."

Lawyers pointed out that all five justices who composed the majority in the *Gross* case are still on the court and are unlikely to have changed their minds on the underlying logic of the case in the last few years.

"This court seems to be particularly inclined to follow up with cases, at least in the employment law area, when they don't think the appellate courts have gotten it right," Fox said. "If you look at the class action arbitration waiver cases, they made their decision and then some courts were not going along with it, so they decided to take follow-up cases to make sure they got the point."

"It seems to me that this one really does run square into the holding of *Gross*, and they may be following up to say, 'We mean it,'" he said.

However, attorneys also cautioned those on the management side from prematurely claiming victory in the case, as the justices have demonstrated a particular sympathy for retaliation plaintiffs in the past.

"Starting with the premise that they took [certiorari] in a case that limited the application of *Gross*, you could say that they were not happy with the Fifth Circuit's decision," Larry Lorber of Proskauer Rose LLP said. "On the other hand, you could say they had to take it because of the circuit split and that this court has expanded retaliation claims, and they just don't like retaliation."

A ruling for the plaintiff here that allows mixed-motive claims under more laws would make it harder for employers to win summary judgment because of the fact-intensive nature of a mixed-motive analysis, and this will also make it tougher for them to negotiate settlements, attorneys say.

"There will be many more trials if the mixed-motive standard is applied to other federal statutes, and employers won't be able to settle these cases because plaintiffs will have a much more likely opportunity to go to trial and won't be worried about summary judgment from the courts," Kappelman said.

And even a narrow holding limited to Title VII retaliation claims could have a big impact, since claims for retaliation are becoming a more significant component of litigation, lawyers told Law360.

"The underlying case here actually just further confirms the fact that there are more and more cases where the plaintiff has been unable to prove the underlying causes of action, such as discrimination or, here, constructive discharge, but has been able to establish claims for retaliation," Donald Schroeder of Mintz Levin Cohn Ferris Glovsky & Popeo PC said. "This is an ongoing phenomenon in employment cases."

In the lawsuit against the Medical Center, Nassar, who is of Middle Eastern descent, alleged that he was forced to resign from his faculty position because of racially motivated harassment by a superior. He also claimed that the school retaliated against him by

preventing him from obtaining a position after his resignation at the affiliate hospital at which he had been working while a faculty member.

A jury agreed, prompting the Medical Center to take the case to the Fifth Circuit. The appeals court found insufficient evidence for the constructive discharge claim but upheld the jury's verdict on retaliation, saying it was based on credibility determinations it had no reason to disrupt.

In its petition to the high court, the Medical Center asserted that it was the mixed-motive approach that allowed the jury to reach its conclusion that retaliation had occurred.

"On one hand, this is eye-glazingly technical, but retaliation claims have become almost a side issue that is swallowing the whole," Lorber said. "For [employment] litigation, this is a big-ticket item."

UTSW Medical Center is represented by Daryl L. Joseffer, Michael W. Johnston and Merritt E. MacAlister of King & Spalding LLP and by Texas' attorney general.

Nassar is represented by Brian P. Lauten of Sawicki & Lauten LLP.

The case is University of Texas Southwestern Medical Center v. Nassar, case number 12-484, in the U.S. Supreme Court.

--Editing by Elizabeth Bowen.

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