

# U.S. SUPREME COURT REINS IN RETALIATION CLAIMS UNDER TITLE VII

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**Practices & Industries**

Labor & Employment

Good news for employers! Fewer retaliation claims brought under Title VII will likely go to a jury in the future based on the holding of the U.S. Supreme Court in the case *University of Texas Southwestern Medical Center v. Nassar* No. 12-484 570 US \_\_ 2013 US LEXIS 4704. Title VII protects employees from discrimination based on their personal characteristics: race, color, religion, sex, and national origin. Justice Kennedy referred to this part of the statute as the “status based discrimination provision.”

A separate provision of Title VII, which Justice Kennedy referred to as the “anti-retaliation provision,” prohibits an employer from discriminating against an employee who has opposed discriminatory conduct under Title VII, or because an employee made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing brought under Title VII. It was the detailed analysis of this anti-retaliation provision by the court that formed the basis of its holding.

In the *Nassar* decision, which was issued on June 24, 2013, Justice Kennedy, writing for the majority, determined that in order to succeed in a claim of retaliation under Title VII, an employee must prove that the challenged adverse employment action that is the subject of the suit would not have occurred “but for” the desire by the employer to retaliate against the employee. This decision resolves a split in the various circuit courts across the nation as to whether a “mixed motive” retaliation case under Title VII – one in which proof of factors other than a desire to retaliate motivated the challenged employer conduct – is sufficient proof for a plaintiff to bring a Title VII retaliation case to a jury. The Supreme Court now holds that when challenging adverse employment action grounded on a Title VII retaliation claim, the plaintiff must prove the employer conduct would not have occurred “but for” the employer’s desire to retaliate – otherwise the retaliation claim cannot go to the jury and will be subject to dismissal.

In New York, the Second Circuit Court of Appeals previously applied a “mixed motive” analysis to Title VII retaliation claims that allowed more of these cases to go to a jury. While the Supreme Court’s decision now requires plaintiffs to prove that employer conduct was motivated solely by a desire to retaliate, employers still need to guard against discriminatory conduct in the work place. Employers should implement compliance programs, train managers at every level to avoid

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discriminatory and retaliatory conduct, maintain streamlined procedures for employees to follow if complaints arise, and conduct diligent investigations in response to complaints.

