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False Claims Act

Just 'Because': A Higher Burden for Proving Retaliation Claims Under the False Claims Act

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In *University of Texas Southwestern Medical Center v. Nassar*[1] decided last year, the Supreme Court resolved a seemingly narrow question: Are Title VII retaliation claims governed by the ''motivating factor'' causation standard that governs Title VII discrimination claims, or instead by the traditional ''but-for'' causation standard that governs common-law torts? In a 5-4 decision, the Supreme Court awarded a big win to employers by holding that Title VII retaliation claims are subject to the more rigorous ''but-for'' causation standard.[2] But, at the same time, the *Nassar* Court resolved a far more basic question—the meaning of the word ''*because*''—that transcends Title VII and will have a profound effect on the interpretation of countless other federal statutes, including the anti-retaliation provision of the False Claims Act (''FCA'').[3]

[1] 133 S. Ct. 2517 (2013).
[2] *Id*. at 2528.

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I. Retaliation Under The FCA. The FCA's anti-retaliation provision imposes liability on employers who threaten, harass, or discharge employees ''because of lawful acts done by the [employee] in furtherance of an action under this section.''[4] While it is clear that a causal link must exist between the FCA whistleblowing activity and the adverse employment action—the latter must occur ''*because of*'' the former—the FCA statute does not define the extent of that causal relationship. Must the whistleblowing activity be the ''but-for'' cause of the adverse employment action? Or is some lesser causal relationship sufficient? The statute is silent on that issue, so it was left for the courts to decide.

Stepping into the void, virtually every court to interpret Section 3730(h)—including the First, Third, Sixth, Seventh, Eighth, and D.C. Circuits—has held that but-for causation is *not* an element of an FCA retaliation claim.[5] Rather, courts have consistently applied the

[3] 31 U.S.C. § 3730(h) (''Section 3730(h)'').
[4] *Id*.
[5] *See Maturi v. McLaughlin Research Corp*., 413 F.3d 166, 172 (1st Cir. 2005); *Fanslow v. Chicago Mfg. Ctr., Inc*., 384 F.3d 469, 485-86 (7th Cir. 2004); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3d Cir. 2001); *McKenzie v. Bell-*

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lesser ''motivating factor'' standard that governs Title VII discrimination claims, and have held that FCA plaintiffs (like Title VII plaintiffs) may pursue so-called ''mixed-motive'' claims. A plaintiff could therefore get to a jury by showing merely that ''the protected activity and the negative employment action [were] not completely unrelated.''[6] And defendant-employers could be held liable for retaliation under the FCA even if the plaintiff's whistleblowing activity was only one factor (among other legitimate factors) in the adverse employment decision.

II. The Nassar Decision. But all of that has arguably changed with the Supreme Court's decision in *Nassar*. Dr. Naiel Nassar, a physician of Middle Eastern descent, sued his former employer (a university hospital) when he was denied permanent employment after making complaints that his supervisor was engaged in religious and racial harassment. Nassar brought claims for discrimination and retaliation under Title VII. The hospital countered that it had legitimate reasons for denying Nassar a permanent position, wholly apart from any alleged retaliation, and therefore that retaliation was not the ''but-for'' cause of its actions. But the district court held (and the Fifth Circuit agreed) that Nassar was not obliged to make such a but-for showing, because Title VII retaliation claims—like Title VII *discrimination* claims—require only that retaliation be a ''motivating factor'' in the adverse employment decision.[7]

The Supreme Court disagreed. In a 5-4 decision authored by Justice Kennedy, and joined by the Court's conservative bloc, the Court held that Title VII retaliation claims must be proved under the but-for causation standard, not the lesser ''motivating factor'' standard found in Title VII's separate discrimination provision.[8] The Court reasoned that, ''absent an indication to the contrary in the statute itself,'' Congress's use of the word ''because'' is presumed to incorporate common-law principles of causation—including the hornbook principle that ''an action is not regarded as a cause of an event if the particular event would have occurred without it.''[9] Since Title VII forbids only those actions taken ''*because* [the employee] has opposed . . . an unlawful employment practice,'' the Court explained, ''Title VII retaliation claims must be proved according to traditional principles of but-for causation.''[10]

III. Implications for FCA Retaliation Claims. Like Title VII and the ADEA, the FCA's retaliation provision requires that a plaintiff suffer an adverse employment action ''*because of*'' his whistleblowing activities.[11] After *Nassar*, then, it appears that FCA retaliation plaintiffs must prove their case under the more rigorous but-for causation standard—not the ''motivating factor'' standard that courts have been using for decades.

In the only published decision yet to speak to the issue, the United States District Court for the District of Columbia departed sharply from circuit precedent—the D.C. Circuit, like every other circuit to reach the issue, had previously endorsed the ''motivating factor'' standard under the FCA—and held that *Nassar*'s rationale necessarily extends to FCA retaliation claims:

> Notwithstanding the circuit's statements to the contrary in this case, because the False Claims Act's retaliation provision includes the same key language as the Title VII retaliation provision recently interpreted by the Supreme Court in *Nassar*, and the ADEA discrimination provision interpreted in *Gross*, the Court must apply the same heightened causation standard here. To succeed on her claim, a plaintiff must show that retaliation for protected activities was a 'but-for' cause of the adverse action.[12]

Assuming other courts fall in line with *Schweizer*—and, given the clarity and breadth of *Nassar*'s holding, we expect they will—then *Nassar* has effectively sounded the death knell for mixed-motive retaliation claims under the FCA.[13] In practice, this will make it more difficult for FCA plaintiffs with dubious retaliation claims to survive summary judgment, because it will be incumbent upon those plaintiffs to affirmatively prove that their whistleblowing activity was the but-for cause of their employer's adverse decision—not simply one ''motivating factor.'' Consequently, many cases that otherwise might have gone to trial—for the employer to try and *disprove* such a causal link—will instead be dismissed as a matter of law. Although *Nassar*'s implications are still being played out in the courts, for now, at least, defendant-employers appear to have a new arrow in their quivers to win early dismissal of FCA retaliation claims.

South Telecomm., Inc., 219 F.3d 508, 514 n.4 & 518 (6th Cir. 2000); *Norbeck v. Basin Elec. Power Coop*., 215 F.3d 848, 850-51 (8th Cir. 2000); *United States ex rel. Yesudian v. Howard Univ*., 153 F.3d 731, 736 (D.C. Cir. 1998). *But see Zahodnick v. Int'l Bus. Machines Corp*., 135 F.3d 911, 914 (4th Cir. 1997) (stating, without elaboration, that Section 3730(h) requires a plaintiff to prove that the adverse employment action was ''a result of'' his protected conduct).

[6] *United States ex rel. George v. Boston Sci. Corp*., 864 F. Supp. 2d 597, 609 (S.D. Tex. 2012) (citations omitted).

[7] *Nassar v. Univ. of Texas Sw. Med. Ctr*., 674 F.3d 448, 454 & n.16 (5th Cir. 2012), *rev'd* 133 S. Ct. 2517 (2013).

[8] *Nassar*, 133 S. Ct. at 2534.

[9] *Id*. at 2525.

[10] *Id*. at 2528, 2533 (quoting 42 U.S.C. § 2000e-3(a)) (emphasis added). The Court also relied on its prior decision in *Gross v. FBL Financial Services, Inc*., where it held that retaliation claims under the Age Discrimination in Employment Act (ADEA) required proof that ''age was the 'but-for' cause of the employer's adverse decision.'' 557 U.S. 167, 177 (2009). ''Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*,'' the *Nassar* Court explained, ''the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.'' *Nassar*, 133 S. Ct. at 2528.

[11] 31 U.S.C. § 3730(h)(1) (emphasis added).

[12] *United States ex rel. Schweizer v. Océ N. Am., Inc*., 956 F. Supp. 2d 1, 13-14 (D.D.C. 2013).

[13] In *United States ex rel. White v. Gentiva Health Serv's, Inc*., which arose on a motion to dismiss, the district court assumed (without deciding) that *Nassar*'s holding extends to FCA retaliation claims. No. 3:10-CV-394-PLR-CCS, 2014 WL 2893223, at *17 (E.D. Tenn. June 25, 2014). Because the plaintiff had adequately alleged that her whistleblowing activity was the but-for cause of her termination, the court explained that the plaintiff's retaliation claim survived even under the more stringent causation rule announced in *Nassar*. *Id*.

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