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FMLA retaliation claim can proceed

Judge sidesteps but-for causation question

By Eric T. Berkman

A recent U.S. District Court ruling suggests that the U.S. Supreme Court's controversial decision earlier this year in *University of Texas Southwestern Medical Center v. Nassar,* which saddled plaintiffs in Title VII retaliation cases with a very high bar for surviving summary judgment, will not necessarily extend to other types of retaliation claims.

The Supreme Court ruled in *Nassar* that an employee who alleges retaliation under Title VII must show that the employer would not have taken a negative employment action "but-for" the employee's prior complaint of discriminatory behavior under the statute.

However, in a ruling earlier this month U.S. District Court Judge Douglas P. Woodlock declined to rule that the but-for causation standard in *Nassar* applied to a retaliation claim under the federal Family and Medical Leave Act.

In that case, a letter carrier sued the U.S. Postal Service, arguing that he was disciplined and fired for exercising his right to take medical leave under the FMLA.

While Woodlock did not rule that the but-for standard does *not* apply to FMLA retaliation claims, he declined to rule that it did, finding instead that the plaintiff had made an adequate showing to survive summary judgment under either the but-for standard or the less burdensome standard of showing that the plaintiff's exercise of his FMLA rights was a "motivating factor" behind the employer's decision.

"*Nassar* was one of those decisions that comes down as a 'boom,' but the impact may not be what people originally thought," said plaintiff's counsel Lori A. Jodoin of Rodgers, Powers & Schwartz in Boston. "In this case, the defendants aggressively sought dismissal of the FMLA count based in large part on *Nassar* but the judge didn't fall for that and allowed the claim to proceed to trial. So despite *Nassar*, retaliation claims continue to be strong claims that should be taken seriously."

Christina Lewis
Hinckley Allen

Christina L. Lewis, a management-side employment lawyer in Boston who was not involved in the case, said a ruling like this leaves everyone up in the air.

"When *Nassar* came down, [there was a lot of anticipation] about whether the but-for causation standard would apply to all statutes where Congress didn't specifically codify the motivating factor standard," said the Hinckley Allen attorney, adding that because Congress did not codify the motivating factor standard in the FMLA, there was good reason to think the but-for standard would apply to such cases.

"Now we're forced to guess," Lewis said.

A spokesperson for U.S. Attorney Carmen M. Ortiz, whose office represented the defendant U.S. Postal Service, declined comment.

The 42-page decision is *Chase v. United States Postal Service, et al.*, Lawyers Weekly No. 02-619-13. The full text of the ruling can be found at masslawyersweekly.com.

Retaliatory discharge?

Plaintiff Robert Chase started working as a mail carrier for the U.S Postal Service in 1997 and transferred to the post office in Brookline in the early 2000s. The plaintiff apparently received positive performance evaluations throughout his career until tension allegedly arose between him and his supervisor, defendant Michael King, over work-related injuries.

According to the plaintiff, issues with King, who managed the Brookline office, began in September 2006 when Chase hurt his knee on the job and missed a week of work.

That November, King allegedly got on the public address system at the post office to say, "Will [Chase], the injury fraud specialist, please report to the office," then began laughing as soon as he got off the system.

The union representative for the branch apparently witnessed the incident, which he regarded as inappropriate, and testified that fellow workers and customers may have heard the announcement.

Tensions increased in the summer of 2010 when a woman struck the plaintiff's parked vehicle while the plaintiff was inside. The woman died, and Chase suffered a sprained shoulder and a damaged rotator cuff.

King, who responded to the scene and saw the severity of the accident, allegedly pressured Chase not to file for worker's compensation because he didn't want it to show up in the office statistics and potentially impact his own pay and bonuses.

Nonetheless, Chase submitted a claim, which was approved. He also applied for FMLA leave. His 12 weeks of leave for calendar year 2010 expired Oct. 12 of that year. At the start of 2011, he was eligible to take up to another 12 weeks, which would expire no later than March 26.

When Chase came to the branch to file his injury paperwork in the summer of 2010, King — who Chase described as having a preconceived notion that employees requiring medical leave were faking their injuries — allegedly made another PA announcement di-

rected at the plaintiff, calling him "the biggest fraud when it comes to injuries." Co-workers and customers could apparently hear this announcement.

On Sept. 18, 2010, Brookline police arrested Chase and his brother, who was also an employee at the Brookline post office, for cocaine possession with the intent to distribute. King, who learned of the arrest in the newspaper, said he was concerned about the seriousness of the charges and the publicity it could generate for the post office. Yet while the charges were pending, King also apparently continued to urge Chase — who was still on medical leave — to return to work.

In January 2011, King began the process of seeking to terminate Chase, who received a notice of removal in February. That summer, the cocaine charge against Chase was reduced to simple possession and he was placed on probation. Meanwhile, an arbitrator upheld his removal and his termination from the post office took effect on Sept. 30, 2011.

In June 2012, Chase sued the postal service and King individually, alleging that the defendants used his drug arrest as a pretext to fire him for taking protected FMLA leave.

The postal service moved for summary judgment. King also moved to dismiss the claims against him, arguing that as a federal employee he couldn't be held individually liable under the FMLA.

Sufficient facts

Addressing the defendants' motion for summary judgment, Woodlock noted that "[b]ecause the framework for analyzing FMLA retaliation claims is adopted from the Title VII arena, the defendants argue that following *Nassar*, plaintiffs alleging FMLA retaliation must establish but-for causation."

Chase, on the other hand, argued that he only needed to demonstrate that his taking of FMLA leave was a "motivating factor" in the decision to terminate him, the judge said.

He continued, "[t]he handful of courts that have had the occasion to consider the impact of *Nasser* on FMLA retaliation claims have generally avoided answering the question, with none concluding that *Nassar* changed the causation standard for FMLA retaliation claims."

After a lengthy legal analysis, the judge opted to avoid answering the question as well, deciding he could rule in the plaintiff's favor under either causation standard.

As Woodlock noted, the record showed that King repeatedly asked the plaintiff to return to work during the pendency of the criminal case and that King waited nearly five months after the plaintiff's arrest — while the plaintiff continued to be absent from work for medical reasons — to initiate the termination process. Meanwhile, the judge observed, the plaintiff offered evidence of three other employees who were arrested on drug charges but not terminated.

"[This] would warrant a trier of fact weighing the credibility of the witnesses to conclude that Mr. King was simply fed up with Mr. Chase's leave-taking, which included a lengthy period of FMLA leave, and decided to use the arrest as an excuse to fire him," said the judge, denying summary judgment on the retaliation claim.

Woodlock also denied King's motion to dismiss the FMLA counts against him in his individual capacity, rejecting his argument that the FMLA does not provide for individual liability for public employees who otherwise qualify as "employers" under the statute.

Noting a split in the circuits on the issue, Woodlock elected to follow his Massachusetts colleague, U.S. District Court Judge Joseph L. Tauro, who fell in line with the majority of circuits by ruling in 2011 that the definition of "employer" includes supervisors employed by public entities.

Temporary uncertainty?

Lewis said Woodlock's decision to "punt" on the question of the proper causation standard for FMLA retaliation claims could create uncertainty for employers for the time being.

"Now they're still faced with the chance that a court will apply the motivating factor standard, which is a much tougher standard for employers," she said. "They'll then have to show that [FMLA leave] didn't even enter into the decision-making process."

Lewis said that practitioners on each side will argue that under either standard, their client is likely to prevail.

"Unfortunately, if you're a management attorney, you may have facts under which you can overcome the but-for standard but not the mixed motivation standard," she said. "It will really be those cases that are a close call that will bring the issue to a head."

Meanwhile, Jodoin found Woodlock's ruling on individual liability to be of considerable interest.

"I think it's significant because we really didn't have anything binding in the 1st Circuit," she said. "But now we have two district court judges in Massachusetts saying public employees shouldn't be treated differently than other employees. If you retaliate against someone, you should be held liable for it."

Lewis said she was not surprised by Woodlock's finding on this issue.

"I have long advised employers to train supervisors and managers well because they might no longer escape individual liability under the FMLA," she said.

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