Employees Rejoice - Employers Beware

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It is not uncommon for an employee to be demoted or terminated in retaliation for making a complaint concerning employment discrimination. However, proving retaliation is not always easy, and employees who are subjected to retaliation often believe that they will not be able to prove it without a "smoking gun." This is particularly true after the Supreme Court's decision in Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013). In Nassar, the Supreme Court held that an employee must prove that their complaint of discrimination was the "but for" cause of their termination, rather than merely a "motivating factor." After Nassar, employers may feel less vulnerable to retaliation claims.

Thankfully for employees – and to the chagrin of employers – the Second Circuit's recent decision in Kwan v. The Andalex Group, LLC, 737 F.3d 834 (2d Cir. 2013) has made it easier for employees to get to trial on retaliation claims. The decision involved an appeal from an order of the lower court that granted summary judgment in favor of the defendant, Andalex Group, LLC. The lower court's order dismissed the plaintiff Zann Kwan's claims for retaliation in violation of Title VII, the New York State Human Rights Law and the New York City Human Rights Law. The Second Circuit reversed the dismissal of Kwan's retaliation claims.

It is important that employees and employers take note of and fully understand the decision in Andalex. The decision makes it easier for an employee to avoid having his or her retaliation case dismissed before trial, and, in turn, increases the likelihood that an employer will face trial on a retaliation claim.

Employees wondering whether they have enough evidence to prove their claim of retaliation should take note of the decision's discussion concerning methods of proof in retaliation cases.

- Even if there is no direct evidence that a decision-maker knew that the terminated employee made a complaint of discrimination, knowledge can be inferred if there is evidence that a corporate officer knew about the complaint.
- Close proximity in time between a complaint and an employee's termination can be used to demonstrate that there is a causal connection between the complaint and termination. Even five months may be short enough to demonstrate causality.
- An employee may prove that retaliation was a "but for" cause of his or her termination with evidence demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, non-retaliatory reasons for its actions. This means that if an employer does not maintain a consistent and unwavering explanation for a termination decision, the employee can use this as evidence of retaliation.
- If an employee can demonstrate close temporal proximity in time between a complaint and his or her termination, and can raise doubt as to the truth or consistency of an employer's justification for the termination decision, the employee should be permitted to proceed to trial on the retaliation claim.

The Andalex decision also dispelled the notion that the Nassar case would make it more difficult for an employee to get to trial on a retaliation claim. Specifically, Andalex held:

- It is possible to have multiple “but for” causes. This means that an employee can still prevail on a retaliation claim even if his or her protected complaint was not the sole cause for the termination. Put another way, even if an employer has many reasons for terminating an employee, the employee can still prevail on a retaliation claim if there is evidence that he or she would not have been terminated if he or she had not complained.
- As long as there is some evidence that retaliation played a role in an employee’s termination, a jury, and not a judge, should determine whether the role amounts to a “but for” cause rather than simply a motivating factor. This is a very important point because it significantly undercuts the significance of Nassar. As employee can still get to a jury so long as he or she has some evidence that retaliation motivated his or her termination.

For employees, the decision reinforces the fact that an employee need not present a “smoking gun,” or even direct evidence of retaliation, in order to prevail on his or her claim for retaliation. If an employee has been fired after making a complaint of discrimination, and the employer’s reason for the termination is not air tight and consistent, the employee may have a strong claim for retaliation. This is so despite the recent Supreme Court decision in Nassar.

For employers, the decision stresses the importance of a consistent and unwavering explanation when terminating an employee who has complained of discrimination. Given the Andalex decision, it is important to ensure that the explanation for the termination decision that is provided at the time of the termination is the same explanation that is provided to the Equal Employment Opportunity commission and throughout subsequent litigation.

For more information, both employees and employers can contact Wigdor LLP at (212) 257-6800

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