

Employee Retaliation Claims: Will The Supreme Court Stem The Tide?

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It was no surprise for practitioners and their clients alike to learn that, statistically, retaliation claims remain the largest number of claims brought before the EEOC (in 2012, almost 38,000 charges alleged retaliation—38.1% of all charges). Worse, retaliation claims are expensive to defend. This point is painfully highlighted in this week's submissions with the U.S. Supreme Court.

Last week, the U.S. Chamber of Commerce (along with the Retail Litigation Center) filed with the Supreme Court an *amici curiae* brief in a case in which retaliation is the central issue. The case, captioned *Univ. of Texas Southwestern Medical Center v. Nassar* (U.S. No. 12-484), has been appealed from the 5th Circuit.

The underlying case arose when a doctor was not hired after he complained about his treatment at another organization. But, his complaint is of little consequence on the big stage. The central question before the Court—and the one on which the U.S. Chamber focuses—is the standard required to prove retaliation under the Civil Rights Act of Title VII. Should employees be required to prove that their employers would not have taken an adverse action against them *but for* an improper motive? Or, does the standard require employees only to show that an improper motive was one of multiple factors? The latter—a mixed-motive standard—is the one the 5th Circuit applied.

The U.S. Chamber's brief argues that the "mixed-motive standard" lowers the bar for retaliation claims, resulting in increased costs for employers. The Chamber's brief is boldly specific—it cites research estimating that in 1988, the cost of defending a wrongful discharge claim averaged more than \$80,000. The brief cites research supporting that today, it costs employers "possibly over \$500,000 to defend a case at trial."

As businesses on the front line, we, of course, already knew that.

Oral argument is scheduled for April 24, 2013.

You can follow the case and read the U.S. Chamber of Commerce's brief at the SCOTUS Blog by clicking on the following link: [University of Texas Southwestern Medical Center v. Nassar](#) .

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