Emerging Causation Issues Since *Nassar*

23rd Annual Advanced Employment Law Course

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Today's Topic

- Causation: Why Is This Still An Issue 50 Years After The Passage Of Title VII?

Causation Issues In Employment Law

- "As things stand now, district courts in this circuit simply have no clear idea how they should instruct juries regarding what causation standard is applicable in some of the most important employment discrimination causes of action. *This is a problem in urgent need of a solution.*"

- *Johnson v. Benton County Sch. Dist.*, 926 F. Supp. 2d 899, 905 (N.D. Miss. 2013) (emphasis added).

Causation Issues In Employment Law

- The Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989), held that plaintiffs could prove a Title VII violation if they could demonstrate that discrimination was a factor, among other factors, for an adverse employment action and the employer failed to establish that it would have made the same decision absent any discrimination.

- In the Civil Rights Act of 1991, Congress codified the *Price Waterhouse* mixed-motive analysis as applied to discrimination claims, with some modifications. 42 U.S.C. § 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Causation Issues In Employment Law

- If an employer can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor," then it may limit the plaintiff's damages to injunctive relief, declaratory relief, and attorney's fees and costs. *See, e.g., Garcia v. City of Houston*, 201 F.3d 672 (5th Cir. 2000) (affirming an award of $13,603 in attorneys' fees and $4,917 in costs to the plaintiff where the plaintiff proved national origin and race discrimination, but the jury found that the employer would have taken the same action regardless of the plaintiff's national origin or race).

Causation Issues In Employment Law

- In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court expressly rejected the "direct evidence" requirement in Title VII mixed-motive cases. In order to qualify for a mixed-motive jury instruction, "a plaintiff need only present sufficient evidence [either direct or circumstantial] for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Id.* at 101.

- The question of when a mixed-motive jury instruction is appropriate in a Title VII discrimination case has engendered considerable confusion.

Causation Issues In Employment Law

- To obtain a mixed-motive instruction, the plaintiff does not need to concede that the employer's given reason for termination is true, in whole or in part. *Smith v. Xerox Corp.*, 602 F.3d 320, 333 (5th Cir. 2010)*, abrogated on other grounds*, *University of Tex. Southwestern Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517 (2013).

- "Put another way, if the district court has before it substantial evidence supporting a conclusion that both a legitimate and an illegitimate (*i.e.*, more than one) motive may have played a role in the challenged employment action, the court may give a mixed-motive instruction." *Id.*

Causation Issues In Employment Law

- In considering summary judgment, post-*Desert Palace*, the Fifth Circuit has indicated that courts should apply a modified *McDonnell Douglas* approach in discrimination cases under Title VII. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011) (stating that if the employer sustains its burden, the *prima facie* case dissolves, and the burden shifts back to the plaintiff to establish either: (1) that the employer's proffered reason is not true but is instead a pretext for discrimination; or (2) that the employer's reason, while true, is not the only reason for its conduct, and another "motivating factor" is the plaintiff's protected characteristic)

Causation Issues In Employment Law

Cat's Paw Causation Issue

- *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).
- In this USERRA case, the plaintiff sought to hold his employer liable for the animus of a non-decisionmaker. Under Seventh Circuit precedent, an employer would be held liable only if the non-decisionmaker exerted such "singular influence" over the decisonmaker to make the decisionmaker no more than a rubber stamp.
- The Supreme Court reversed. It rejected the "singular influence" test and stated that the correct test of employer liability was one of proximate cause. "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Id.* at 1193.
- *Haire v. Board of Supervisor of LSU Ag. & Mech. Coll.*, 719 F.3d 356 (5th Cir. 2013) (reversing summary judgment for employer based partially on "cat's paw" doctrine; a fact question existed on whether, in making a promotion decision, the Chancellor took into account the allegedly sexist remarks of a third-party).

Causation Issues In Employment Law

ADEA

- "Because of" means "but-for" causation in cases arising under the ADEA. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167, 176 (2009).

- The *Gross* decision has created uncertainty and opened up a reexamination of causation standards in other statutes that is currently working its way through the courts. *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Texas L. Rev. 859, 909–17 (2012) (discussing application of *Gross* to non-ADEA federal statutes).

- "But for" causation is not "sole" causation. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n. 10 (1976) (distinguishing sole causation from but for causation).

Causation Issues In Employment Law

- Based on *Gross*, some courts have held that that *Staub*'s "proximate causation" standard does not permit the application of the "cat's paw" doctrine in cases under the ADEA.

- *See, e.g., Sims v. MVM, Inc.*, 704 F.3d 1327, 1336 (11th Cir. 2013) ("Because the ADEA requires a 'but-for' link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a 'motivating factor' in the adverse employment decision, we hold that *Staub*'s 'proximate causation' standard does not apply to cat's paw cases involving age discrimination."); *see also Holliday v. Commonwealth Brands, Inc.*, 483 Fed. Appx. 917, 922 n. 2 (5th Cir. 2012) (expressing doubt about the theory's application to ADEA claims).

Causation Issues In Employment Law

Title VII Retaliation

- *University of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

- Retaliation claims under Title VII must be proved according to principles of "but for" causation, not the lessened "motivating factor" test.

- The court relied heavily on the statutory language, and reasoned that applying a lower standard could contribute to frivolous retaliation claims. It declined to defer to the EEOC's view, determining that the EEOC's guidance lacks "persuasive force"

Causation Issues In Employment Law

ADA

- Before *Gross* was decided in 2009, courts held that the motivating factor standard of causation applied in ADA cases. *See, e.g., Pinkerton v. Spellings*, 529 F.3d 513, 518 & n. 30 (5th Cir. 2008).

- Post-*Gross*, that has changed. *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (en banc) (applying "but-for" causation to ADA cases); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (same).

- Further complicating matters, the ADA Amendments Act of 2008 slightly altered the causation language in the statute, prohibiting an employer from discharging "a qualified individual on the basis of disability," rather than forbidding discrimination "because of" disability.

- *Johnson v. Benton County Sch. Dist.*, 926 F. Supp. 2d 899, 905 (N.D. Miss. 2013) (applying "but for" causation in an ADA case); *but see Hamilton v. Oklahoma City Univ.*, 911 F. Supp. 2d 1199, 1207 (W.D. Okla. 2012) (declining to adopt "but for" causation)

Causation Issues In Employment Law

FMLA

- The Tenth Circuit observed that, as a result of *Gross*, "there is a substantial question whether a mixed motive analysis would apply in a retaliation claim under the FMLA." *Twigg v. Hawker Beechcraft Corp*., 659 F.3d 987, 1004 (10th Cir. 2011).

- But, in *Hunter v. Valley View Local Schools*, 579 F.3d 688 (6th Cir. 2009) the Sixth Circuit held that specific language in FMLA regulations supports the continued applicability of the mixed-motive option post-*Gross*.

- In *Johnson*, 926 F. Supp. 2d at 905, the district court agreed with, and followed *Hunter,* but acknowledged the uncertainty in this area of the law, and explicitly sought guidance from the Fifth Circuit.

- The Fifth Circuit did not address the question, but indicated it was an existing issue in *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 390 (5th Cir. 2013).

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