# On Law

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## Supreme Court Raises Bar to Prove Discriminatory Retaliation Cases

*Elizabeth Rae-O'Donnell*

In a 5-4 decision announced June 24, 2013, the United States Supreme Court made it more difficult for workers to prove they have been retaliated against on the job.

In the decision of *University of Texas Southwestern Medical Center v Nassar*, the Court clarified the standard for plaintiffs who claim they have faced negative employment decisions in retaliation for complaints of employment discrimination in Title VII actions. Title VII of the Civil Rights Act of 1964 prohibits employers from making employment related decisions where the decision is motivated by a person's trait, such as race, color, religion, sex or national origin. Justice Kennedy, in writing for the majority, noted that a plaintiff, in making a retaliation claim, must establish that his or her protected activity (e.g., filing the Complaint), was the "but for" cause of the alleged adverse action by the employer. The "but for" test is commonly used to determine actual causation. The test in the retaliation context simply asks: but for the existence of a complaint, would the employment action have occurred?

In a thorough examination of the text, structure and history of Title VII, including the Civil Rights Act of 1991, Justice Kennedy said that retaliation cases should have a higher standard of proof than in regular employment discrimination cases under Title VII. In a typical discrimination case, employers can be liable if wrongful discrimination is a "motivating factor" in the employment decision.

The case concerns Naiel Nassar, a physician of Middle Eastern descent, who resigned from his university position claiming illegal discrimination from a supervisor based upon unlawful considerations of his religious and ethnic heritage. He further claimed he was retaliated against and was not allowed to keep his job at an affiliate hospital due to his complaints. The university's Chair of Internal Medicine had protested the plaintiffs continued employment at the affiliate hospital because once an employee resigned from the university, they could no longer work at the hospital pursuant to an underlying agreement.

Mr. Nassar sued the university claiming racial and religious discrimination and retaliation. Originally, the jury found for the plaintiff on all counts and awarded him $400,000 in back pay and $3,000,000 in compensatory damages, later reduced to $300,000 by the District Court. The Court of Appeals affirmed in part and vacated in part, but affirmed the retaliation award ruling that the Chair of Internal Medicine was motivated, at least in part, to retaliate against the plaintiff for his complaints about his supervisor.

The United States Supreme Court granted review of the case on the issue of the proper standard of causation for Title VII retaliation claims because the U.S. Circuit Courts of Appeals were divided on the correct standard. Up until this case, the

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## Supreme Court Raises Bar (cont.)

First, Sixth and Seventh Circuits required plaintiffs to show there would have been no adverse action but for the plaintiff's complaint, while the Fifth and Eleventh Circuits required plaintiffs to show that a desire to retaliate was a "motivating" factor on the employer's part.

Justice Kennedy noted that the proper causation standard in retaliation cases was needed because the number of such cases with the EEOC had nearly doubled in the last 15 years, rising to more than 31,000 in 2012. Ultimately, the Court vacated the Fifth Circuit's decision and remanded the case for further proceedings consistent with the Supreme Court's decision.

In sum, employers who are now defending Title VII retaliation cases can successfully argue that the plaintiff has the burden of proving that he or she would not have experienced a negative employment action "but for" his or her prior complaint. In turn, the employer is not liable if it would have taken the same action, i.e., discipline, termination or not hired an applicant for other non-discriminatory reasons. Further, defendants in Title VII retaliation claims may also consider if they have grounds to ask for reconsideration if prior Court rulings have allowed a plaintiff to use a "motivating" factor standard. Finally, an employer's best protection against retaliation claims continues to be written documentation demonstrating legitimate non-discriminatory business reasons for taking unfavorable employment actions against employees.

*Elizabeth Rae-O'Donnell*

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# Livonia Attorney Obtains Favorable Results for Municipal Clients

Lindsey Kaczmarek, Associate Attorney in our Livonia office, recently obtained favorable results in a FOIA lawsuit and in a civil rights lawsuit for two of the Firm's municipal clients.

In the FOIA lawsuit, the plaintiff claimed that the municipality charged unreasonably high duplication fees and labor fees without justification. In efforts to obtain costs and attorney fees, the plaintiff alleged that the imposition of excessive fees served as a "constructive denial" of their FOIA request.

Ms. Kaczmarek filed a motion for summary disposition on behalf of the municipality. She argued that the municipality charged duplication fees and labor fees in accordance with FOIA. She also argued that the plaintiff's "constructive denial" theory lacked merit. While acknowledging that costs and fees are available when a party challenges non-disclosure of records, Ms. Kaczmarek pointed out that such forms of relief are not likewise available when a party challenges fees for records. The Court found Ms. Kaczmarek's arguments persuasive and granted the motion for summary disposition.

In the civil rights lawsuit, the plaintiff raised claims of unreasonable search, unreasonable seizure, free speech retaliation, malicious prosecution and municipal liability.

After difficulties arose in obtaining discovery from the plaintiff, Ms. Kaczmarek filed a motion to dismiss for failure to prosecute the action. She noted that the plaintiff refused to cooperate with discovery, despite numerous efforts to accommodate him. She argued that the municipality and its officers were prejudiced by their inability to evaluate and defend against the plaintiff's claims. While the motion was pending, the plaintiff failed to appear for his deposition. Ms. Kaczmarek filed a supplemental brief in support of the motion to dismiss. In a written opinion and order, the Court stated that the plaintiff's inaction was unacceptable and granted the motion to dismiss.

*Lindsey Kaczmarek*

*Lindsey Kaczmarek, an attorney in our Livonia office, concentrates her practice on municipal law, utility law and appellate law. She can be reached at (734) 261-2400 or lkaczmarek@cmda-law.com.*

# From Law Clerk to Associate Attorney

We are pleased to announce that a familiar face in our Livonia office is one of the Firm's newest attorneys. Adam Strong joined the Firm in 2009 as a law clerk. Attorneys and support staff immediately took to his thoroughness, reliability and kind personality. When he recently passed the bar exam to become an attorney, we were delighted that he accepted the Firm's offer to continue his legal career at CMDA.

Mr. Strong focuses his practice on civil defense litigation, municipal law and corporate and business law. Additionally, he is an active member of the State Bar of Michigan in the Law Practice Management section and Young Lawyers section.

Mr. Strong received a Juris Doctor degree from Wayne State University and a Bachelor of Business Administration degree from Northwood University.

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# Account Stated and Open Account Actions Involving Sale of Goods Subject to Michigan's Six-Year Limitations Period

*Gerald C. Davis*

Whether you are a landlord, a small business owner or an individual, undoubtedly you will find yourself in a position in which someone owes you or your business money. Collections can be difficult to pursue on your own, especially when the debtor is resistant to paying his or her debt. Attorneys are often contacted for assistance with collecting debts. Various legal theories can be used when filing a lawsuit, such as breach of contract, equitable theories, account stated and open account claims.

On July 30, 2013 the Michigan Supreme Court defined these alternative theories of recovery more clearly in the case of *Fisher Sand & Gravel Co. v Neal A. Sweebe*. In this case, Fisher Sand & Gravel Company sought payment for concrete supplies it provided to Mr. Sweebe on account more than four years after the last payment was made by the defendant. Sweebe countered that the Michigan Uniform Commercial Code's (UCC's) four-year limitations period barred Fisher's claims. The trial and appeals courts agreed with Sweebe and dismissed Fisher's claims. The Michigan Supreme Court, however, held that account stated and open account actions are subject to the six-year limitations period provided by MCL § 600.5807(8), even when the actions are based on a debt stemming from the sale of goods.

According to the Court, the UCC's four-year limitations period only applies to breach of contract claims involving the sale of goods. An action on an account stated is an action to enforce a subsequent promise to pay an account. Similarly, an open account claim "is an action to collect on the single liability stemming from the parties' credit relationship regardless of the underlying transactions comprising the account." Neither involves the sale of goods. Accordingly, the UCC's four-year limitations period did not bar Fisher's claims.

Consequently, when the party that owes money makes statements or sends writings disputing or inquiring into the accuracy of the claimed amount owed to the creditor, these statements can be viewed as denials of the balance due on open account. It is therefore wise for every debtor presented with a bill to immediately dispute the balance due with an expression that their silence, conduct, statements or writings is deemed to be an admission of the amount on open account or account stated. A debtor should never respond with silence to any claim by a creditor for monies due, unless the amount is undisputed by the debtor.

The Supreme Court quoted Professor Arthur Corbin, in his treatise on contract law, which stated: "If a claimant renders an account and it is assented to as correct by the other party with an express or implied promise to pay, an action may be maintained on the promise. The account stated is a new, independent cause of action, superseding and merging the antecedent cause of action." In other words, the agreed statement serves in place of the original account and it becomes an original demand and amounts to an express promise to pay the actual sum stated. Accordingly, greater care must be taken in responding to subsequent claims from a creditor as to the amount due, than perhaps in creating the original obligation upon which a breach of contract action was founded.

*Gerald C. Davis*

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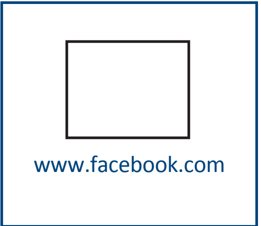

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To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features should be addressed to the attention of Jennifer Sherman.

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