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Disabled Worker Must Show 'But-For' Cause to Prove Bias (1)

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- Rehabilitation Act incorporates ADA's disability bias standard
- Test under ADA now 'but-for' cause, not 'motivating factor'

A former director with the New York City Department of Investigation failed to show he was demoted or otherwise discriminated against because of his hearing disability, a divided Second Circuit ruled April 18 in a case of first impression.

The ruling adds to a growing number of appeals court cases that say workers must meet a stricter legal test to prove federal disability discrimination claims, based on a pair of recent U.S. Supreme Court decisions. It's an issue that has attracted the attention of federal lawmakers, who re-introduced in February a bill that would overturn cases that make it harder for workers to show that bias caused a termination, demotion, or other adverse action.

In Richard Natofsky's case against New York City, a "but-for" causation standard applies to his disability discrimination claims, the U.S. Court of Appeals for the Second Circuit held in a 2-1 decision. This means that bias must be a reason behind an employer's actions, but not necessarily the only cause. A more lenient test that allows bias to be a "motivating factor" no longer governs, the majority said.

The court joined the Fourth, Sixth, and Seventh circuits in holding that the Supreme Court's rulings in *Gross v. FBL Financial Services Inc.* and *University of Texas Southwest Medical Center v. Nassar* require the "but-for" standard in Americans with Disabilities Act cases.

That higher threshold applies even though, as a public employee, Natofsky was required to bring his disability bias claims under the Rehabilitation Act. A 1992 amendment to that law requires that the ADA's disability bias standard be used to analyze Rehabilitation Act employment discrimination claims, Judge John F. Keenan said for the majority.

Judge Denny Chin dissented. He agreed that the Rehabilitation Act incorporates the ADA's standard for proving disability discrimination. But for "more than two decades," that standard has been the motivating factor test, Chin said. Nothing the Supreme Court said in *Gross*, an age discrimination case, or *Nassar*, a national origin-based retaliation case, changed that, he said.

Natofsky's attorneys, Samuel Maduegbuna and William Cowles of Maduegbuna Cooper LLP, told Bloomberg Law that they're considering filing a petition for full Second Circuit review of the case.

'Silver Lining'

One "silver lining" from the ruling, they said, is the court's clarification that "but-for" doesn't mean "sole cause" for Rehabilitation Act job bias claims.

This was the correct holding based on Supreme Court precedent, professor Michael Foreman, the director of Penn State Law's Civil Rights Appellate Clinic, said. Some trial judges have wrongly interpreted that line of cases, said Foreman, who isn't involved in Natofsky's case.

Cowles said many district court judges within the Second Circuit and across the country seem to be using the "sole cause" standard. The circuit includes Connecticut, New York, and Vermont.

"We are quite happy with the fact there's a clarification of that standard in Rehabilitation Act cases," Maduegbuna said.

The lower court in Natofsky's case mistakenly applied the sole-cause standard, the Second Circuit said. But the city was still entitled to summary judgment under the but-for test, the majority ruled.

There was "ample evidence" showing Natofksy's demotion from his $125,000-per-year director of budget and human resources position to an associate staff analyst job at $68,466 annually was justified by his record of poor performance, the majority said.

Natofsky failed to show a proposed change in his hours and vacation time amounted to an adverse employment action because the proposal was dropped after he objected, the court said. Even if it hadn't been dropped, it likely wasn't disruptive enough to support a bias claim, it said. The same was true of a poor performance review he received, which he didn't show had any negative ramifications, the court said.

Judge John M. Walker Jr. joined the majority opinion.

The city's Office of Corporation Counsel, which represented the government, didn't immediately respond to Bloomberg Law's request for comment.

The case is Natofsky v. City of New York, 2d Cir., No. 17-02757, 4/18/19.

(Updated with additional reporting.)

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