

# Employment Practices Liability

April 22, 2020

## U.S. Supreme Court Declines to Review “But For” Standard Applied by Second Circuit to Disability Discrimination Claims in Employment Context

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On April 20, 2020, the U.S. Supreme Court denied a petition for certification filed by Richard Natofsky seeking clarification regarding the standard of causation in disability discrimination claims made pursuant to the Americans with Disabilities Act (“ADA”). Specifically, the petitioner challenged the Second Circuit’s decision applying “but for” causation to his disability discrimination claim, and presented for review the question of whether the ADA permits employees to proceed under a mixed-motives causation standard before the burden shifts to employers to ultimately prove that a non-disability based reason was the but for cause of the adverse employment action. The U.S. Supreme Court declined to review the question.

### Background

Approximately a year prior, on April 18, 2019, the U.S. Court of Appeals for the Second Circuit applied a “but for” causation standard to Natofsky’s disability discrimination claim brought pursuant to the Rehabilitation Act. While the Second Circuit applied the “but for” standard of causation, as opposed to the “mixed motive” standard, the court expressly stated that a “but for” standard did not mean that disability would have to be the sole cause for the adverse employment action.

The case involved an employee, Richard Natofsky, who suffered from severe hearing impairment and speech impairment. In 2012, the City of New York hired Plaintiff as its Director of Human Resources and Budget for the Department of Investigation (“DOI”). The Plaintiff testified that he informed his supervisor of his disability at the beginning of his employment. In May 2014, following a negative performance review, the DOI informed Plaintiff of its intention to demote him. Plaintiff’s demotion included a salary reduction. Subsequent to his demotion, the DOI appointed two non-disabled employees to fill the Plaintiff’s position. In response to his demotion, Plaintiff wrote two letters protesting DOI’s decision. In December 2014, the Plaintiff resigned from the DOI.

After his resignation, the Plaintiff filed a claim with the U.S. District Court for the Southern District of New York alleging a violation of the Rehabilitation Act, in that his employer discriminated against him on the basis of disability, failure to accommodate, and retaliation. The District Court granted the Defendant’s motion for summary judgment, noting, *inter alia*, that Plaintiff failed to show that his demotion resulted from discrimination.

### Second Circuit Analysis:

On appeal, Plaintiff argued that the District Court erred because its ruling relied on the sole cause standard. The Court decided that the causation standard that governs disability discrimination complaints brought pursuant to the Rehabilitation Act or the ADA is the same, and that standard is the “but for” causation standard.

The Court substantially reviewed the standard of causation applicable to claims raised under the ADA. Plaintiff argued that he presented sufficient evidence for a fact finder to conclude that his disability was a motivating

factor. In contrast, Defendant argued that if the Rehabilitation Act does indeed incorporate, by reference, the ADA’s causation standard, then, the “but for” standard must be applied, instead of the “mixed-motive” test.

Under the mixed-motive test, a Defendant may be liable if plaintiff shows that discrimination was a motivating factor in the defendant’s adverse employment action.” If the Defendant can establish that it would have taken the same action, regardless, it can avoid liability. The Court pointed out that historically, the Second Circuit applied the mixed motive standard to ADA claims, requiring only that disability be one of the employer’s motivating factor in its adverse employment action, rather than its “sole but-for cause.”

However, in its analysis, the Court concluded that the “but for” standard applies to employment discrimination claims made pursuant to the ADA. Specifically, the ADA does not include certain Title VII provisions permitting plaintiffs to establish employment discrimination by showing that discrimination was a motivating factor in the employer’s adverse decision and limiting remedies available to the plaintiff. The ADA does not state that a violation occurs when discrimination is shown to be a motivating factor in an employer’s decision.

The Court concluded that Plaintiff failed to show that the adverse actions that he faced, would not have occurred, but for his disability. Accordingly, the Court affirmed the District Court’s decision.

### Conclusion

In employment discrimination cases brought in the Second Circuit, a plaintiff must show that, but for the plaintiff’s disability, the adverse employment action would not have occurred. With that being said, this is distinguishable from the “sole cause” standard, therefore, an employer should not regard defending ADA claims as an easy win, because this may very well still be an uphill battle.

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