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# PROTECTING TITLE VII'S ANTIRETALIATION PROVISION IN THE WAKE OF *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

*Kimberly A. Pathman*

**ABSTRACT**—In 2013, the Supreme Court changed the course of its decades-long practice construing Title VII's antiretaliation provision broadly to protect employees. The Court held in *University of Texas Southwestern Medical Center v. Nassar* that plaintiffs must assume the onerous, if not impossible, task of proving retaliation claims using the "but-for" causation standard. This high burden of proof not only forces employees with limited information to analyze an employer's multifaceted motivations, but also it allows employers to skirt around Title VII liability. This decision is troubling because it runs contrary to Congress's intent to strengthen antidiscrimination laws. Although Justice Ginsberg called for prompt congressional action in her dissent, there is little chance a statutory fix will be enacted in the near future. This Note therefore argues that courts and the EEOC must employ their own stopgap measures to protect employees from *Nassar*'s adverse effects. It outlines two alternatives to congressional action: first, a judicial reinterpretation of but-for causation that employs modern principles of tort law to create a more realistic burden for plaintiffs; second, an EEOC enforcement mechanism that encourages compliance with antiretaliation laws and effectively roots out frivolous retaliation claims. These proposals are intended to shift the conversation away from the changes Congress should make to Title VII's language if and when it does take action, to alternative and practicable solutions that can help stem *Nassar*'s adverse effects while we wait on Capitol Hill.

**AUTHOR**—J.D. Candidate, Northwestern University School of Law, 2015; B.A., *cum laude*, Georgetown University, 2010. Many thanks to Professor Susan Provenzano for her advice, guidance, and encouragement throughout the process of writing this Note. I also am grateful to the *Northwestern University Law Review* editors and staff for their thoughtful feedback and editorial work. Finally, my deepest thanks and love to my mother and lifetime editor, Elena, and to Robert Meara, Carolina Perez, and Sydney Kestle for their incredible love, support, and encouragement. All errors and omissions are my own.

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## INTRODUCTION

For over two decades, Congress and the Supreme Court have struggled to clarify the issue of factual causation in individual disparate treatment employment discrimination cases.[1] In *Price Waterhouse v. Hopkins*,[2] the

[1] There are two types of individual disparate treatment cases. Both deal with employment actions due to one's protected status, but pretext cases involve adverse employment actions allegedly based on only an impermissible discriminatory intent. Mixed-motive cases, on the other hand, involve an adverse employment action allegedly based on both a lawful business justification and an impermissible discriminatory intent.

[2] 490 U.S. 228 (1989).

Supreme Court developed a new, plaintiff-friendly proof framework that allowed claimants to prove their individual disparate treatment claims under a lesser "motivating factor" causation standard.[3] The Court's decision was controversial, however, because it was also thought to "undermine[] protection of federal equal employment opportunity laws"[4] by allowing an employer to escape liability under Title VII if it could prove it would have made the same employment decision absent discrimination.[5] In response to this decision, Congress enacted the Civil Rights Act of 1991.[6] Although the 1991 Civil Rights Act rejected *Price Waterhouse*'s "same decision" defense to mixed-motive cases, it partially codified *Price Waterhouse* by expressly permitting mixed-motive analysis in Title VII[7] discrimination cases, as well as its accompanying "motivating factor" causation standard.[8] Thus, in mixed-motive cases, Title VII plaintiffs need only demonstrate that their protected trait played a contributing or "motivating factor" in the adverse action, even though other factors also influenced the decision.[9]

The Civil Rights Act of 1991, however, failed to address whether the mixed-motive framework also applies to other employment discrimination statutes, such as the Age Discrimination in Employment Act (ADEA) or the Americans with Disabilities Act (ADA).[10] Furthermore, because the

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3 *Id.* at 249. The new proof framework gave plaintiffs the freedom to choose which framework they would use to prove their individual disparate treatment cases. Those who did not follow *Price Waterhouse*'s mixed-motive proof framework had to use the proof framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which requires that plaintiffs meet the more stringent "but-for" standard of causation. *See infra* Part I.B.

4 CHARLES V. DALE, CONG. RESEARCH SERV., CRS 92-85 A, THE CIVIL RIGHTS ACT OF 1991: A LEGAL HISTORY AND ANALYSIS 1 (1992).

5 *See Price Waterhouse*, 490 U.S. at 258 (holding that "when a plaintiff in a Title VII case proves [a protected trait] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [protected trait] into account").

6 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *see also* DALE, *supra* note 4.

7 § 107, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2012)).

8 *See id.*

9 For examples of mixed-motive discrimination cases, see *Price Waterhouse*, 490 U.S. 228, and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which allowed a plaintiff to allege both real disciplinary issues and that her sex played a role in her termination. For more on mixed-motive Title VII retaliation cases that were decided prior to *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), see *infra* Part IV for a discussion of *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), and *Fabela v. Socorro Independent School District*, 329 F.3d 409 (5th Cir. 2003).

10 *See* Robert Tananbaum, Note, *Grossly Overbroad: The Unnecessary Conflict over Mixed Motives Claims in Title VII Anti-Retaliation Cases Resulting from* Gross v. FBL Financial Services, 34 CARDOZO L. REV. 1129, 1138 (2013) ("Congress made various amendments to the ADEA as part of the 1991 Act, but did not add a mixed motives provision as it did to Title VII. Therefore, whether Congress intended mixed motives claims to be available under the ADEA had not been made explicit to that point."); *see also* Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67, 84 (2013)

Civil Rights Act of 1991 only added statutory language to Title VII's antidiscrimination section, it was unclear whether the mixed-motive framework also applied to Title VII's antiretaliation provision.[11] Antiretaliation cases, while often arising from claims of antidiscrimination, also deal with employment actions due to one's protected conduct, such as reporting discrimination to the Equal Employment Opportunity Commission (EEOC).

For almost twenty years after the Civil Rights Act of 1991, some courts applied the mixed-motive "motivating factor" framework to Title VII antiretaliation claims and even other antidiscrimination statutes.[12] In 2009, however, the Supreme Court decided in *Gross v. FBL Financial Services, Inc.* not to extend the mixed-motive proof framework to ADEA cases.[13] Four years later, the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* also rejected the motivating factor causation standard in Title VII antiretaliation cases.[14] Instead, the Court held that a Title VII retaliation plaintiff must prove that "the desire to retaliate was the but-for cause of the challenged employment action."[15] In other words, a plaintiff must show that the protected activity was of high relative importance to the employer, and but for the plaintiff's protected conduct, he or she would not have suffered the adverse action.

The Supreme Court, which once interpreted statutory antiretaliation provisions broadly to protect employees,[16] changed its course with

("Congress amended certain aspects of the ADA in the 1991 Act as well, but did not incorporate the motivating factor language.").

[11] *See* Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either* Price Waterhouse*'s or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (But Should)*, 64 ALA. L. REV. 1067, 1068–69 (2013).

[12] *Id.* at 1079–85 (illustrating that some courts after the 1991 Civil Rights Act applied the motivating factor standard to retaliation claims); *see also* Anderson, *supra* note 10, at 89 (noting that after the Civil Rights Act of 1991, some lower courts assumed the mixed-motive framework could be applied to ADA claims and generally applied Title VII's motivating factor standard to such claims).

[13] 557 U.S. 167, 174 (2009) (rejecting the use of the mixed-motive framework in ADEA claims because "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor"). Instead, the *McDonnell Douglas* "but-for" proof framework applies to all ADEA claims. See *infra* Part I.B for further discussion of this proof framework.

[14] *See* 133 S. Ct. 2517, 2533 (2013).

[15] *Id.* at 2528.

[16] *See infra* Parts III.A–B. *See generally* David A. Drachsler, *Supreme Court Sets High Bar for Title VII Retaliation Claims*, 64 LAB. L.J. 205, 205 (2013) ("The Supreme Court has set an extraordinarily high bar for an employee to prove retaliation under Title VII of the Civil Rights Act of 1964. This burden is not demanded of almost any other employee claiming retaliation under a wide variety of other laws prohibiting retaliation."); Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 451 (2010) ("In Supreme Court retaliation cases, despite the

*Nassar*.[17] By requiring plaintiffs to prove retaliation claims using "but-for" causation, the Court forced plaintiffs to analyze an employer's multifaceted motivations and explain them away in complicated counterfactuals to demonstrate that, in the absence of protected activity, the adverse action would not have been taken.[18] Commentators agree it is difficult, if not impossible, for an employee to discern a decisionmaker's thinking process.[19] The high bar plaintiffs must meet to establish but-for causation runs counter to the public policy of Title VII, which "is to enable employees to engage in protected activities without fear of retaliation."[20] A less restrictive causation standard, such as a motivating factor standard, is better suited for retaliation cases, particularly mixed-motive cases, because plaintiffs need not engage in an in-depth investigation of the employer's motivations. Furthermore, those who engage in motivating factor discrimination will not go unpunished because there would be a lower threshold for holding discriminating employers liable. The motivating factor causation standard would ensure optimal deterrence against retaliation by only requiring plaintiffs to show that their protected conduct was a contributing factor that had a tendency to affect the employment decision.

In her *Nassar* dissent, Justice Ginsburg decried the divergence from custom, stating that the majority was "guided neither by precedent, nor by the aims of legislators who formulated and amended Title VII."[21] Noting that "[s]hut from the Court's sight is a legislative record replete with statements evincing Congress'[s] intent to strengthen antidiscrimination laws and thereby hold employers accountable for prohibited discrimination,"[22] Justice Ginsburg suggests the Court was blinded by "a zeal to reduce the number of retaliation claims filed against employers."[23] The consequences of this willful blindness are grave: deserving retaliation

Court's employer-friendly outlook and conservative judicial philosophy, it has protected employees who act to enforce society's laws.").

[17] *See* William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 142 (2013) (finding that the Court's discussion of meritless claims and the high volume of retaliation cases "is a rather bald assertion that the Court intends to reduce the number of retaliation claims that are asserted and that go to trial"); Moberly, *supra* note 16, at 445 (positing that a but-for causation standard, such as the one adopted in *Nassar*, would be "devastating" to retaliation claimants).

[18] *See* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 881–82 (2010).

[19] *See* Drachsler, *supra* note 16, at 209.

[20] *See* John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539, 547 (2007).

[21] 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting).

[22] *Id.* at 2545–46.

[23] *Id.* at 2547. For the majority's discussion of the "ever-increasing frequency" of retaliation claims filed with the EEOC and the threat of frivolous claims "siphon[ing] resources from efforts by employer, administrative agencies, and courts to combat workplace harassment," see *id.* at 2531–32.

claimants with valuable information will be deterred from having their day in court because employees have limited access to information that might evince an employer's intent.[24]

Although Congress has intervened when the Supreme Court acts counter to the legislature's intent,[25] the calls to action by Justice Ginsburg and other scholars[26] will likely go unanswered.[27] Commentators argue that Congress is unlikely to fix the language in Title VII's retaliation provision.[28] Most of Congress's attention is going to the more "dramatic" cases from the Supreme Court's 2013 term and today's Congress "shows little interest in the plight of victims of job discrimination."[29] There is no compelling figure such as Lilly Ledbetter—who incited the media outcry when the Supreme Court denied her compelling gender pay equality claim

[24] *See id.* at 2547 (Ginsburg, J., dissenting) ("When assessing an employer's multiple motives, 'to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different.'" (quoting Gross v. FBL Fin. Servs., Inc., 557 U. S. 167, 191 (2009) (Breyer, J., dissenting))); *see also* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 71–72 (2010) ("[P]roving that . . . consideration [of a forbidden status category or activity] actually occurred within the conscious, or unconscious, thought processes of decision makers is usually problematic." (footnote omitted)); Michael J. Zimmer, *Hiding the Statute in Plain View:* University of Texas Southwestern Medical Center v. Nassar, 14 NEV. L.J. 705, 718–19 (2014) ("Undermining the significance and usefulness of being protected from retaliation makes the antidiscrimination statutes much less available to workers in an at-will world where challenging the employer is extremely risky.").

[25] Regarding the Civil Rights Act of 1991, Congress abrogated ten Supreme Court decisions when it amended Title VII and the ADA; regarding the Ledbetter Fair Pay Act of 2009, Congress addressed the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); and regarding the Americans with Disabilities Act Amendments Act of 2008, Congress abrogated two Supreme Court decisions. *See* Corbett, *supra* note 17, at 141.

[26] *See Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) (calling on Congress to promptly remedy the Court's "misguided judgment" as it did once before with the Civil Rights Restoration Act); *see also, e.g.*, Corbett, *supra* note 17, at 142 (urging Congress not to "continue its approach of simply fixing what it considers errant decisions" and instead implement a "thorough reform" of employment discrimination law as the United Kingdom's Parliament recently did); Harper, *supra* note 24, at 144–45 (suggesting that Congress should broadly consider the issue of causation for all federal employment statutes and should clarify provisions, express mandates or add new definitions).

[27] *See, e.g.*, Joanna L. Grossman & Deborah L. Brake, *Revenge: The Supreme Court Narrows Protection Against Workplace Retaliation in* University of Texas Southwestern Medical Center v. Nassar, VERDICT (July 9, 2013), http://verdict.justia.com/2013/07/09/revenge-the-supreme-court-narrows-protection-against-workplace-retaliation-in-university-of-texas-southwestern-medical-center-v-nassar [http://perma.cc/V4TP-NA8G] ("Whether the current Congress has the political will to take up Justice Ginsburg's challenge is another matter. It strikes us, frankly, as unlikely, in light of other challenges facing Congress and the present political environment.").

[28] *See, e.g.*, Corbett, *supra* note 17, at 142 (noting the "most curious" failure of Congress to respond to *Gross* and the failure of the Protecting Older Workers Against Discrimination Act (POWADA)).

[29] Jeffrey Toobin, *Will Ginsburg's* Ledbetter *Play Work Twice?*, NEW YORKER, June 24, 2013, http://www.newyorker.com/online/blogs/comment/2013/06/ruth-bader-ginsburg-ledbetter-play.html [http://perma.cc/N383-APFF].

due to a procedural technicality—to "bring the cause to life" and lobby for change.[30] Because a statutory fix is not feasible at this time, alternative means of addressing *Nassar*'s prohibitive but-for causation standard are necessary.

This Note suggests two alternatives to a statutory "patch" or overhaul. The first alternative is a judicial reinterpretation of but-for causation using modern principles of tort law to create a standard that is easier for plaintiffs to meet. A second option is an EEOC enforcement mechanism that encourages compliance with antiretaliation laws and effectively roots out frivolous retaliation claims. These fixes diminish any potential windfall defendants may gain if they are able to escape liability in a mixed-motives retaliation case while simultaneously serving the purpose of Title VII by reducing the incidence of retaliation and rewarding employer compliance.

Part I provides an overview of Title VII and the two proof frameworks courts applied to Title VII retaliation cases prior to *Nassar*: the *McDonnell Douglas Corp. v. Green* framework, which is premised on but-for causation,[31] and the mixed-motive framework developed by *Price Waterhouse v. Hopkins* and codified in part by the Civil Rights Act of 1991, which employs a "motivating factor" causation analysis.[32] Part II examines the Supreme Court's historical treatment of Title VII retaliation claims and contrasts the broad protections afforded to retaliation plaintiffs in *Burlington Northern & Santa Fe Railway Co. v. White*[33] and *Thompson v. North American Stainless, LP*[34] with the stringent, pro-employer ruling in *Nassar*.[35] Part III posits that even if *Nassar*'s outcome was proper, plaintiffs with stronger cases, such as Kim Smith in *Smith v. Xerox Corp.*[36] and Alicia Fabela in *Fabela v. Socorro Independent School District*,[37] will now face prohibitive costs in bringing their retaliation claims. To allow for claims such as Kim Smith's and Alicia Fabela's to succeed under *Nassar*, Part IV begins with the argument that it is imprudent to wait for legislative intervention and instead suggests a judicial fix for the but-for causation standard using principles of tort law. Part IV concludes with an examination of whether a novel EEOC enforcement mechanism that roots

[30] *Id.*

[31] *See* 411 U.S. 792, 802–05 (1973).

[32] 490 U.S. 228, 244–45 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075, *as recognized in* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

[33] 548 U.S. 53 (2006).

[34] 131 S. Ct. 863 (2011).

[35] 133 S. Ct. 2517 (2013).

[36] 602 F.3d 320 (5th Cir. 2010), *abrogated by Nassar*, 133 S. Ct. 2517.

[37] 329 F.3d 409 (5th Cir. 2003).

out retaliation in a more meaningful way by creating compliance incentives could temper *Nassar*'s negative impact on future retaliation claimants.

## I. DEVELOPMENT OF TITLE VII PROOF FRAMEWORKS

### A. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964[38] is "the flagship of federal employment discrimination law."[39] It prohibits an employer from discriminating in employment decisions against employees *because of* their race, color, religion, sex, or national origin.[40] Civil rights advocates, concerned with the denial of equality in the workplace, steered the passage of Title VII, a "radical" socioeconomic intervention by the U.S. government.[41]

Within Title VII, two key provisions provide protections to workers: the antidiscrimination provision[42] and the antiretaliation provision.[43] The antidiscrimination provision prohibits employers from discriminating in any employment decision based on an employee's protected status. The antiretaliation provision, on the other hand, protects employees from an employer's adverse retaliatory action to an employee's (1) opposition to a prohibited practice under Title VII, or (2) participation in a Title VII investigation, proceeding, or hearing.[44] Although Title VII's legislative history contains scarce information regarding the antiretaliation provision,

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[38] Pub. L. No. 88-352, §§ 701–16, 78 Stat. 253, 253–66 (codified as amended at 42 U.S.C §§ 2000e–2000e-17 (2012)).

[39] THOMAS R. HAGGARD ET AL., UNDERSTANDING EMPLOYMENT DISCRIMINATION 4 (2d ed. 2008).

[40] 42 U.S.C. § 2000e-2(a) (2012).

[41] SEAN FARHANG, THE LITIGATION STATE 94 (2010).

[42] § 2000e-2(a) ("It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

[43] § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

[44] For a comparative analysis of the language and purpose of Title VII's discrimination and retaliation provisions, see Moberly, *supra* note 16, at 409–10.

the Supreme Court has traditionally considered the provision's key function as "enforcing [Title VII] and advancing the Act's goals."[45]

### *B. The Creation of Pretext Analysis and the Introduction of "But-For" Causation in Employment Discrimination Cases:* McDonnell Douglas Corp. v. Green

In 1973, the Court established in *McDonnell Douglas Corp. v. Green* a proof framework premised on but-for causation that serves as the foundation for Title VII individual disparate treatment claims.[46] McDonnell Douglas Corp. laid off Percy Green, an African-American mechanic and lab technician, in the course of a general reduction in workforce.[47] Following his termination, Green protested his discharge and the company's general hiring practices in a "stall-in."[48] Approximately one year later, when McDonnell Douglas Corp. publicly advertised for qualified mechanics, Green reapplied but the manufacturer refused him the position on the basis of his participation in the stall-in.[49]

In determining whether racial discrimination motivated the refusal to rehire Green, the Court established a proof framework which required a pretext analysis based on but-for causation. Under this framework, the plaintiff must establish a prima facie case by proving: (1) he is in a protected class; (2) he applied to and was qualified for an open job position; (3) he was rejected despite his qualifications; and (4) the position remained open after he was rejected.[50] Once the plaintiff establishes his prima facie case, the employer has the burden of production to show a "legitimate, nondiscriminatory reason for the employee's rejection."[51] The burden then shifts back to the plaintiff, who has the ultimate burden of persuasion to show that the "[plaintiff]'s stated reason for [the defendant]'s rejection was in fact pretext" and that his protected status was the but-for cause of the adverse action.[52] This proof framework was designed "not to force plaintiffs to prove the insufficiency of a good motive as well as the existence of a discriminatory motive, but rather to offer only an option to assist plaintiffs with the difficult proof of covert discrimination."[53] The

[45] *Id.* at 386.

[46] 411 U.S. 792 (1973).

[47] *Id.* at 794.

[48] *Id.* "Stall-ins" were popular civil rights demonstrations that involved obstruction of traffic on roads leading to a plant or factory. *Id.*

[49] *Id.* at 796.

[50] *Id.* at 802.

[51] *Id.*

[52] *Id.* at 804.

[53] Harper, *supra* note 24, at 79. It is important to note that historically, the *McDonnell Douglas* framework was imported into Title VII retaliation cases, as well as cases under different employment

Court accordingly held that on retrial, Green must be allowed to demonstrate that McDonnell Douglas Corp.'s reason for refusing to re-employ him was a pretext for discrimination; he carried his burden of establishing a prima facie case of racial discrimination and McDonnell Douglas Corp. successfully rebutted his claim, pointing to his prior unlawful acts.[54]

### *C. Rise of the Mixed-Motive Proof Framework and "Motivating Factor" Causation*

*1.* Price Waterhouse v. Hopkins.—One of the most important (and controversial) cases in employment discrimination jurisprudence is the Supreme Court's 1989 *Price Waterhouse v. Hopkins* decision.[55] In this case, the Court established a new framework for mixed-motive cases as an alternative to the *McDonnell Douglas* pretext framework.[56] Mixed-motive cases are a class of individual disparate treatment cases where there is evidence of discriminatory motive in addition to other nondiscriminatory reasons for the adverse action. Furthermore, *Price Waterhouse* introduced the "motivating factor" causation standard to Title VII discrimination jurisprudence.[57]

Ann Hopkins worked for the accounting firm Price Waterhouse for five years when she was nominated as a candidate for partnership.[58] In considering whether Hopkins was denied partnership by Price Waterhouse's Policy Board because of her gender, the four-Justice plurality took issue with the fact that the Policy Board, in response to some of the partners' negative reactions to Hopkins's management style, recommended that Hopkins act more femininely, wear make-up and jewelry, and style her hair.[59] These reactions, in conjunction with opinions that she was abrasive and had problems getting along with the staff, resulted in eight partners

discrimination statutes such as the Age Discrimination in Employment Act (ADEA). *See, e.g.*, Cofield v. Goldkist, Inc., 267 F.3d 1264, 1267 n.6 (11th Cir. 2001) ("Although the *McDonnell Douglas* framework originally applied to Title VII cases, it is now widely accepted that the framework applies to claims of discrimination under the ADEA as well.").

54 *McDonnell Douglas*, 411 U.S. at 807.

55 *See* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 208 (2014).

56 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

57 *See id.* (requiring that the plaintiff show that gender "played a motivating part in an employment decision").

58 *Id.* at 233.

59 *Id.* at 235.

recommending that Hopkins be denied partnership.[60] Hopkins was accordingly "held" for reconsideration.[61]

Analyzing the meaning of Title VII's "because of" language in § 2000e-2, the plurality stated: "[S]ince we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[62] In permitting the use of a mixed-motive framework, the plurality held that a plaintiff has to demonstrate only that the protected trait played a "motivating factor" in the adverse action.[63] In a blow to employees, however, the *Price Waterhouse* plurality provided a "same decision" defense to employers that allowed them to escape liability if they could prove that they "would have made the same decision even if [they] had not allowed [the protected trait] to play such a role."[64] The Court therefore reversed the lower court's judgment against Price Waterhouse because even though Hopkins proved that gender played a motivating part in an employment decision, Price Waterhouse must prove by a preponderance of the evidence—not clear and convincing evidence—that it would have made the same decision even if her gender had not been taken into account in order to avoid liability.[65]

The same decision provision launched a "swift and vigorous countermobilization by civil rights groups and their allies in Congress" to buttress Title VII's employee protections in the face of the Supreme Court's efforts to cut back Title VII litigation.[66] Despite its complications,[67] *Price Waterhouse* transformed Title VII litigation by establishing a mixed-motive framework in which plaintiffs could prove discrimination using a motivating factor standard and employers could argue a same decision affirmative defense that, if successful, allowed them to evade liability.[68]

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[60] *Id.* at 233–35.

[61] *Id.* at 233.

[62] *Id.* at 241.

[63] *Id.* at 258.

[64] *Id.* at 244–45.

[65] *Id.* at 258.

[66] FARHANG, *supra* note 41, at 172.

[67] Justice O'Connor authored a concurrence that is generally viewed as the controlling opinion in *Price Waterhouse*. In her concurrence, she called for a narrower, more defendant-friendly "substantial factor" causation standard, as opposed to the broader, plaintiff-friendly "motivating factor" standard, in linking the "illegitimate criterion" with the adverse action. *Price Waterhouse*, 490 U.S. at 261–79 (O'Connor, J., concurring in the judgment). As a result, the divided court's four opinions created considerable confusion because each proposed a different causation standard. *Compare id.* at 258 (plurality opinion) (adopting a "motivating factor" standard), *with id.* at 265 (O'Connor, J., concurring in the judgment) (adopting a narrower "substantial factor" standard), *id.* at 259 (White, J., concurring in the judgment) (accepting Justice O'Connor's "substantial factor" standard), *and id.* at 281 (Kennedy, J., dissenting) (holding that Title VII liability required "but-for" causation).

[68] *See id.* at 258 (plurality opinion).

*2. Section 107 of the Civil Rights Act of 1991.*—The 1991 Civil Rights Act's[69] amendments to Title VII "sought, manifestly, to restore nearly all aspects of Title VII's private enforcement regime to their condition prior to the summer of 1989,"[70] i.e., to the time before cases such as *Price Waterhouse* were decided. The political atmosphere was crucial to ensuring the 1991 Civil Rights Act's passage. Only a year before, President George H.W. Bush vetoed what would have been the Civil Rights Act of 1990.[71] By 1991, an impending presidential election and the Hill–Thomas Senate hearings[72] focused enough attention on issues relevant to the Civil Rights Act of 1991, such as workplace sexual harassment, that the legislation garnered overwhelming congressional support.[73]

In response to *Price Waterhouse*, § 107 of the Civil Rights Act of 1991 added a new section to Title VII's antidiscrimination provision, modifying and codifying in part *Price Waterhouse*'s mixed-motive framework.[74] In doing so, the 1991 Act expressly permitted mixed-motive cases, stating an employment practice could be found unlawful "even though other factors also motivated the practice," and formally codified the plurality's motivating factor standard in 42 U.S.C. § 2000e-2(m).[75] The 1991 Civil Rights Act also added a provision to Title VII that rejected *Price Waterhouse*'s same decision defense, which had allowed employers to escape liability, and instituted a modified defense wherein employers would be found partially liable even if they met their burden of persuasion.[76] Specifically, when an employer successfully made a same

[69] Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075.

[70] FARHANG, *supra* note 41, at 189.

[71] *Id.* at 187.

[72] *See id.* at 187–88. In 1991, Congress was conducting Clarence Thomas's Supreme Court nomination hearings when Anita Hill, an EEOC employee Thomas formerly supervised, accused him of sexual harassment. The nation was "riveted" by televised hearings discussing these allegations, and this national coverage brought attention to the seriousness and pervasiveness of sexual harassment in the workplace. *Id.* at 187. At the same time, the 1992 presidential elections were approaching and Republican opponents to the Civil Rights Act of 1991 felt tremendous pressure to compromise and pass the bill after a former Klansman, David Duke, made a strong second-place showing in the Republican primaries for the Louisiana governorship. *Id.* at 188. In order to disassociate themselves with Duke, many Republicans felt it was necessary to cooperate with Democrats and pass a civil rights bill. *Id.*

[73] *See id.* at 187–89; *see also* DALE, *supra* note 4, at 3.

[74] 42 U.S.C. § 2000e-2(m) (2012). It is important to note the 1991 Civil Rights Act also expanded Title VII remedies to include compensatory and punitive damages for victims of intentional discrimination and additionally permitted jury trials under Title VII. DALE, *supra* note 4, at 2.

[75] "Except as otherwise provided in this subchapter, 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." § 2000e-2(m); *see also* Harper, *supra* note 24, at 92.

[76] § 2000e-5(g)(2)(B) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court: (i) may grant declaratory relief, injunctive

decision showing, the employee was automatically eligible for declaratory relief, injunctive relief, and attorney's fees and costs, but not damages or reinstatement.[77]

For nearly two decades following the Civil Rights Act of 1991, courts inconsistently applied the *McDonnell Douglas* and mixed-motive frameworks (both the 1991 Act's and *Price Waterhouse*'s) to Title VII antidiscrimination, Title VII antiretaliation, as well as Age Discrimination in Employment Act (ADEA) and Americans with Disabilities Act (ADA) cases.[78] Although the 1991 Civil Rights Act only amended provisions within Title VII, many courts applied the rule of *in pari materia*[79] to the three statutes, linking their "because of" language and extending the new Title VII discrimination analysis to similar Title VII retaliation, ADEA, and ADA claims.[80]

### *D. Setting the Stage for* Nassar*:* Gross v. FBL Financial Services, Inc. *and the Supreme Court's Refusal to Extend the Mixed-Motive Framework to the ADEA*

The Supreme Court's 2009 *Gross v. FBL Financial Services, Inc.* decision[81] has been described by scholars as surprising,[82] confusing,[83] and

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relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).").

[77] *Id.*

[78] Corbett, *supra* note 17, at 139. For a discussion of how courts analyzed Title VII retaliation claims after the Civil Rights Act of 1991, see Rosenthal, *supra* note 11, at 1079–89. For a discussion of ADEA cases decided after the 1991 Civil Rights Act, see Anderson, *supra* note 10, at 80; Harper, *supra* note 24, at 100–04; and Tananbaum, *supra* note 10, at 1137–41.

[79] *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 59 n.* (Philadelphia, William Young Birch & Abraham Small 1803) ("It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with a reference to each other . . . ."); *see also* Anderson, *supra* note 10, at 77.

[80] *See* William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 686–87 (2010) ("Courts, lawyers, and others have spoken essentially a single language of employment discrimination law as they have applied most of the same theories, frameworks, and principles to all of the laws. The minor variations in the law applicable to the different employment discrimination statutes might be likened to different dialects. . . . With a common language, the [lower courts] built a tower that was largely symmetrical regardless of which part came into view—Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans With Disabilities Act (ADA). Despite minor variations, symmetry seemed to be a salient characteristic of the [law].").

[81] 557 U.S. 167 (2009).

[82] *See* Corbett, *supra* note 17, at 139.

[83] *See* Brian S. Clarke, *The* Gross *Confusion Deep in the Heart of* University of Texas Southwest Medical Center v. Nassar, 4 CALIF. L. REV. CIRCUIT 75, 75 (2013).

complicating because it violated the *in pari materia* construction of Title VII and the ADEA by declining to extend the mixed-motive motivating factor proof framework to ADEA cases.[84]

The Supreme Court held that "the Court's interpretation of the ADEA is not governed by Title VII decisions such as . . . *Price Waterhouse*" and ruled that mixed-motive claims are not permitted by the text of the ADEA.[85] Instead, the court held that plaintiffs with disparate treatment ADEA claims "must prove that age was the 'but-for' cause of the employer's adverse decision."[86] Although the ADEA was modeled after Title VII and the two statutes were often interpreted similarly,[87] the Court rejected the application of the motivating factor standard to ADEA cases. It relied on Congress's failure to make similar changes to the ADEA when it amended Title VII with the Civil Rights Act of 1991 to expressly allow mixed-motive discrimination suits.[88] The Court focused on the meaning of the ADEA's phrase "*because of* such individual's age," interpreted it as requiring but-for cause, and placed the burden on plaintiffs to prove "by a preponderance of the evidence" that age was the but-for cause of the adverse action.[89]

*Price Waterhouse* and the 1991 Civil Rights Act permitted plaintiffs to prove Title VII's "because of" language in mixed-motive discrimination suits with a motivating factor, rather than but-for, causation analysis. Following *Gross*, however, courts and scholars were unsure whether it "close[d] the door to any argument that 'because of' language could mean 'motivating factor,' rather than the 'but for' standard for retaliation claims under Title VII, the ADEA, and other older statutes."[90] This confusion set the stage for *University of Texas Southwestern Medical Center v. Nassar*,[91] in which the Supreme Court addressed the question of whether mixed-motive claims are permitted in Title VII antiretaliation cases.

## II. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*: REJECTING THE LIBERAL "MOTIVATING FACTOR" CAUSATION STANDARD

*University of Texas Southwestern Medical Center v. Nassar* presented the Supreme Court with the opportunity to answer whether Title VII retaliation claimants can apply the mixed motive framework of Title VII's

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[84] *See* Moberly, *supra* note 16, at 443–44.
[85] *Gross*, 557 U.S. at 175.
[86] *Id.* at 176.
[87] Moberly, *supra* note 16, at 443.
[88] *Gross*, 557 U.S. at 174 ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").
[89] *Id.* at 176–77.
[90] Moberly, *supra* note 16, at 444.
[91] 133 S. Ct. 2517 (2013).

antidiscrimination provision.[92] Naiel Nassar, a medical doctor of Middle Eastern descent, was a member of the University's faculty and a staff physician at the medical center.[93] Nassar believed his superior, Dr. Beth Levine, was biased against him based on his religion and ethnicity.[94] After preliminary negotiations with the hospital suggested he might be able to work at the hospital without also being on the University's faculty, he resigned his teaching post to avoid further harassment from Levine.[95] When he did so, he sent a letter to a number of persons, including Levine's supervisor Dr. Gregory Fitz, stating that he resigned because Levine was harassing him based on her "religious, racial and cultural bias against Arabs and Muslims."[96]

Upset by Nassar's letter, Fitz said that Nassar publicly humiliated Levine with his letter and that Levine should be publicly exonerated.[97] Fitz protested that the hospital's offer to Nassar was inconsistent with the affiliation agreement's requirement that all staff physicians also be faculty members of the University.[98] Accordingly, the hospital withdrew Nassar's offer, and Nassar filed suit claiming status-based discrimination and retaliation.[99]

The Supreme Court rejected the Fifth Circuit's application of a mixed-motive framework to Nassar's claim and argued instead that, similar to *Gross*'s requirement for ADEA suits, a plaintiff claiming retaliation under Title VII must prove "the desire to retaliate was the but-for cause of the challenged employment action."[100] The Court based its reasoning on an analysis of the "because of" language in Title VII's antiretaliation provision,[101] finding that there was no "meaningful textual difference"

[92] *See id.* at 2523. For pre-*Nassar* examples of the confusion surrounding which framework applied to antiretaliation cases, see Clarke, *supra* note 83, at 81–82, and Corbett, *supra* note 17, at 139, which notes that the breadth of *Gross*'s holding was left unanswered by the Court.

[93] *Nassar*, 133 S. Ct. at 2523.

[94] *Id.*

[95] *Id.* at 2523–24.

[96] *Id.* at 2524.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 2528. It is noteworthy that under this heightened but-for requirement, "burden-shifting no longer applies, since the plaintiff bears the burden of ruling out that legitimate reasons would have resulted in the same adverse employment action." Ryan J. Vlasak, *Defining Supervisor Control and Causation in Wrongful Discharge Litigation*, *in* WRONGFUL DISCHARGE LITIGATION STRATEGIES 6 (2013), *available at* 2013 WL 5290496.

[101] 42 U.S.C. § 2000e-3(a) (2012) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter*." (emphasis added)).

between the text in the antiretaliation provision and that analyzed in *Gross*.[102]

The Court noted that when Congress added the motivating factor provision to Title VII with the 1991 Civil Rights Act, Congress inserted it in Title VII's antidiscrimination provision but took no action to include it in the antiretaliation provision.[103] The Court concluded that because Title VII is a "detailed statutory scheme" and was not phrased by Congress in broad and general terms, it would be improper to treat bans on status-based discrimination as also prohibiting retaliation.[104] Furthermore, the Court found that a motivating factor analysis in retaliation claims was inappropriate because the motivating factor provision in § 2000e-2(m) does not explicitly include retaliation as one of the prohibited discriminatory actions.[105] Accordingly, it reasoned that it would be "improper to conclude that what Congress omitted from the statute is nevertheless within its scope" due to § 2000e-2(m)'s "clear language."[106] In addition to rejecting the argument that the motivating factor standard applies to retaliation cases, the Court held that the *Price Waterhouse* standard did not apply because *Price Waterhouse* was superseded by the 1991 Civil Rights Act, thus requiring retaliation plaintiffs prove but-for cause under the *McDonnell Douglas* framework.[107]

It is noteworthy that the Court expressed concern over the fact that retaliation claims are being made "with ever-increasing frequency" and that "lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from [the] efforts by employer, administrative agencies, and courts."[108] The Court was particularly concerned by the potential that, with a lower causation standard, employees who know they are about to be terminated for poor performance could potentially bring unfounded retaliation claims to forestall the lawful employment action.[109] The Court thus manipulated Title VII's antiretaliation provision to serve as a strict gatekeeper in the name of keeping out future invidious claimants and ensuring the "fair and responsible allocation of resources in the judicial and litigation systems."[110]

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[102] *Nassar*, 133 S. Ct. at 2528.
[103] *Id.* at 2529.
[104] *Id.* at 2529–30.
[105] *See id.* at 2528.
[106] *Id.*
[107] *Id.* at 2534.
[108] *Id.* at 2531.
[109] *Id.* at 2532.
[110] *Id.* at 2531–33. For further discussion of the benefits of *Nassar*, see Alan Rupe et al., *U.S. Supreme Court Clarifies the Plaintiff's Burden of Proof in Title VII Retaliation Actions*, 83 J. KAN. B. ASS'N, 24, 28 (2014), which states:

In her dissent, Justice Ginsburg argued that the Court "seized on a provision, § 2000e-2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation."[111] She highlighted the similar wording used in Title VII's antidiscrimination and antiretaliation provisions and noted the Court's historical holdings found "a ban on discrimination encompasses retaliation."[112] Additionally, Justice Ginsburg argued that it is illogical to believe that Congress meant for retaliation victims to have fewer protections when the statute does not mention retaliation.[113] She found that because the motivating factor provision includes "any employment practice," retaliation claims are included in its scope.[114] In the conclusion of her dissent, Justice Ginsburg called upon Congress to intervene to address *Nassar*'s "misguided judgment."[115]

Because the political climate is not prime for congressional action, it is likely her proclamation will go unanswered.[116] Congress failed to enact the Protecting Older Workers Against Discrimination Act (POWADA) in 2009 following *Gross*,[117] and it is even less likely, in light of today's bipartisan congressional gridlock, that any legislation amending 42 U.S.C. § 2000e-3(a) will gain sufficient attention or support.[118]

## III. The Changing Tides: Supreme Court Interpretation of Title VII's Antiretaliation Provision

Prior to *Nassar*, the Court's employee retaliation jurisprudence was traditionally pro-employee, as evidenced by its broad interpretations of statutory antiretaliation provisions.[119] Given the Court's reputation as pro-

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*Nassar* establishes a simple and universally applicable rule that a jury should be instructed with a "but for" causation standard under every federal employment statute except Title VII's prohibition against discrimination. In these cases, a one-size-fits-all rule was much needed, considering that the proper causation standard had before depended upon answering such hazy questions as whether the plaintiff produced a "thick cloud of smoke" to support her allegations of discrimination.

[111] *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting).

[112] *Id.* at 2535, 2537.

[113] *Id.* at 2541.

[114] *Id.* at 2539 (quoting 42 U.S.C. § 2000e-2(m) (2012)).

[115] *Id.* at 2547.

[116] *See infra* Part V; *see also* Toobin, *supra* note 29.

[117] *See* Corbett, *supra* note 17, at 142.

[118] *See* Alex Rogers, *Don't Be Fooled, It's Gridlock Time in Washington*, TIME (Jan. 16, 2014), http://swampland.time.com/2014/01/16/dont-be-fooled-its-gridlock-time-in-washington/ [http://perma.cc/8VFT-RR62].

[119] *See, e.g.*, *infra* Parts III.A–B; *see also* Moberly, *supra* note 16, at 380–92; Rosenthal, *supra* note 11, at 1112–13. Scholars believe that the Court's pro-employee stance is due to its belief that "protecting employees from retaliation will enhance the enforcement of the nation's laws," particularly Title VII. *E.g.*, Moberly, *supra* note 16, at 378.

employee in retaliation cases, the outcome in *Nassar* was particularly surprising because the Court reverted to the pro-employer stance that it is known for taking in other contexts.[120] This Part discusses some of the groundbreaking cases in which the Supreme Court broadly interpreted Title VII's antiretaliation provision and juxtaposes these cases with *Nassar*.

### *A.* Burlington Northern & Santa Fe Railway v. White*'s Broad Construction of the Adverse Action Standard*

The Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White* examined the scope of Title VII's antiretaliation provision to determine what types of employer conduct are unlawful.[121] After Sheila White filed two separate discrimination charges with the EEOC, she was suspended without pay for allegedly being "insubordinate" and was only reinstated after she filed a grievance.[122] White then filed a retaliation suit alleging that her suspension and change in responsibilities violated Title VII's retaliation provision.[123]

The Court established a minimum requirement that plaintiffs must make a showing that "a reasonable employee would have found the challenged action materially adverse."[124] The Court inferred this standard from the statutory text and practice and stated that it believed that the provision's standard for judging harm must be objective and that an objective standard is judicially administrable.[125] This standard is considerably employee-friendly because the context surrounding an alleged retaliatory action will be taken into account, rather than specific prohibited acts, and the standard only screens out claims involving "petty slights, minor annoyances, and simple lack of good manners."[126]

Essentially, the materially adverse standard casts a broad net that holds employers liable for as many acts as possible that are likely to dissuade employees from opposing unlawful employment practices. Applying the new materially adverse standard to White's case, the Court found that the reassignment of her responsibilities and her suspension without pay would

[120] Michael Zimmer tempers this assertion when he claims that "[i]n other ways, it was not a surprise that the Court would move its retaliation jurisprudence more in line with its recent pro-employer, anti-civil rights interpretation of statutes typified by its decision in *Gross v. FBL Financial Services*." Zimmer, *supra* note 24, at 705. For a discussion of the Court's pro-employer stance in other contexts, see Moberly, *supra* note 16, at 377 & n.4, and Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 917–18 (2009).

[121] 548 U.S. 53 (2006).

[122] *Id.* at 58.

[123] *Id.* at 59.

[124] *Id.* at 68.

[125] *Id.* at 68–69.

[126] *Id.* at 68.

have been materially adverse to a reasonable employee and upheld the jury's findings of retaliation.[127]

By broadly interpreting Title VII's antiretaliation provision in *Burlington*, the Supreme Court enhanced the enforcement of Title VII by ensuring that plaintiffs would continue to have unfettered access to Title VII's remedial mechanisms.

### *B.* Thompson v. North American Stainless, LP*: Extending Protected Status to Third-Parties*

In 2011, the Supreme Court examined in *Thompson v. North American Stainless, LP* whether a third party may sue under Title VII's retaliation provision if the individual is punished as a result of his close relation with a complaining employee.[128] Petitioner Eric Thompson and his fiancée, Miriam Regalado, were both employees of North American Stainless.[129] Three weeks after Regalado filed a charge with the EEOC alleging sex discrimination, Thompson was fired.[130] He alleged that North American Stainless fired him to retaliate against Regalado for filing her EEOC charge.[131]

The Court found that Thompson's termination violated Title VII because the antiretaliation provision prohibits a broad range of employer acts, and reasonable workers might be dissuaded from engaging in protected activity if they knew a loved one would be fired.[132] The Court ruled that Thompson fell "within the zone of interests protected by Title VII" because he was an employee of North American Stainless and not an accidental victim of retaliation.[133]

*Thompson*'s finding that Title VII protects third-party victims of retaliation falls in line with the Supreme Court's historically broad, employee-friendly interpretations of Title VII's antiretaliation provision. The tides may be turning, however, as evidenced by the Supreme Court's narrow rendering of Title VII's antiretaliation provision in *Nassar*.

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[127] *Id.* at 70–73.
[128] 562 U.S. 170 (2011).
[129] *Id.* at 172–73.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 174.
[133] *Id.* at 178. The Court adopted the "zone of interests" test because it allows any plaintiff with an interest protected by Title VII to sue while effectively screening out those who "might technically be injured" per Article III but have interests unrelated to Title VII. *Id.*

## IV. *NASSAR*'S INCONSISTENT CONSEQUENCES

Many scholars decry *Nassar*'s failure to extend the mixed-motive, motivating factor analysis to Title VII cases. They argue that employing but-for causation in Title VII retaliation cases will "likely further depress the already dismal success rates of anti-discrimination plaintiffs"[134] and "encourage or require lower courts to require something approaching 'sole' causation in many federal civil rights cases . . . —a virtual impossibility in practical terms."[135] Furthermore, some believe such a standard will impose a burden on plaintiffs that "is not demanded of almost any other employee claiming retaliation under a wide variety of other laws prohibiting retaliation."[136] By interpreting Title VII's antiretaliation provision differently from its antidiscrimination provision, the *Nassar* decision is at odds with the Court's traditional *in pari materia* interpretation of employment discrimination statutes, particularly because the two provisions are within the same statute.[137] Some may argue that treating the two sections *in pari materia* would create a redundancy within Title VII, which most courts try to avoid when interpreting statutes, but the sections deal with two related—yet different—aspects of employment discrimination law, and construing the sections *in pari materia* would afford greater protections to claimants and achieve more of Title VII's overarching goals.

Furthermore, requiring a showing of but-for causation effectively hinders the retaliation provision's purpose of maintaining "unfettered" access to statutory remedial mechanisms[138] because it would not deter the many forms that retaliation can take.[139] Instead, the standard "lets discriminators get away with discrimination, under-deters discrimination, and unfairly allocates windfall in overdetermined cases entirely to defendants."[140] This Part argues that public policy and congressional intent

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[134] Katie Eyer, *Sole Motives and* University of Texas Southwestern Medical Center v. Nassar, CONCURRING OPINIONS (June 17, 2013), http://www.concurringopinions.com/archives/2013/06/sole-motives-and-university-of-texas-southwestern-medical-center-v-nassar.html [http://perma.cc/J6P-SBU3] (citing Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012)).

[135] *Id.*

[136] Drachsler, *supra* note 16, at 205.

[137] *See* Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

[138] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (discussing the primary purpose of antiretaliation provisions).

[139] *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 64 (2006) (noting that one of the antiretaliation provision's objectives is deterring the "many forms that effective retaliation can take"); *see also* Sanchez, *supra* note 20, at 546–47.

[140] Katz, *supra* note 18, at 880 (explaining the normative problems with *Gross*'s definition of "because of" in ADEA cases); *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 494 (2006).

provide victims of retaliation with broader protections under Title VII than victims of discrimination.[141] To support such assertions, it examines two easily successful, pre-*Nassar* mixed-motive retaliation cases and illustrates the difficulties these plaintiffs would now face using a but-for causation standard to prove their claims.

### *A.* Fabela v. Socorro Independent School District

Before the *Gross* Court imposed the first restrictions on the use of the mixed-motive framework, in *Fabela v. Socorro Independent School District* the Fifth Circuit examined whether plaintiff Alicia Fabela's termination was causally linked with a prior discrimination charge Fabela filed with the EEOC.[142] While working at another school in the District, Fabela filed a charge with the EEOC alleging the school's principal discriminated against and sexually harassed her.[143] The EEOC dismissed her charge and Fabela requested an immediate transfer to another school, which was granted.[144] For the following five years, Fabela received positive evaluations at her new post until, in 1997, she started having problems with a new principal, Reinhart.[145]

Disagreements between Reinhart and Fabela ultimately led to Reinhart recommending Fabella's immediate discharge in a letter to the Assistant Superintendent, Marcee.[146] Marcee concurred with Reinhart's recommendation and authored Fabela's official notice of dismissal.[147] Fabela appealed her termination. During a review session conducted by the District, Marcee testified that the District wished to terminate Fabela because she was a "problem employee" and, in citing various instances of her "problem behavior," mentioned the fact that "Fabela had filed an unsubstantiated EEOC claim in 1991."[148] Marcee also asked the Director of Personnel Services to read the EEOC determination letter aloud during the review session.[149]

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[141] *See Burlington*, 548 U.S. at 66 ("[W]e do not accept . . . [the] view that it is 'anomalous' to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of . . . discrimination.").

[142] 329 F.3d 409, 414, 416 (5th Cir. 2003), *overruled on other grounds by* Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010). In *Xerox Corp.*, 602 F.3d at 330, the Fifth Circuit ruled on the issue of *Fabela*'s direct evidence requirement and held that, in light of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), *Fabela*'s direct evidence requirement for Title VII retaliation cases is invalid.

[143] *Fabela*, 329 F.3d at 411.

[144] *Id.* at 412.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 412–13.

[148] *Id.* at 413 (internal quotation marks omitted).

[149] *Id.*

The district court granted summary judgment in favor of the District, finding that, despite direct evidence of Marcee's statements, it, "standing alone, was insufficient to allow a reasonable jury to find a causal connection between the EEOC charge, and Fabela's dismissal."[150] The Fifth Circuit reversed the lower court's finding, holding that it erred in failing to evaluate whether Fabela's direct evidence "*truly* standing alone" was sufficient to support a causal nexus between Fabela's protected conduct and her termination.[151] The court accordingly applied the *Price Waterhouse* framework, remarking in a footnote, "[T]o successfully establish the element of causation . . . Fabela's evidence does not have to support the conclusion that retaliation was the only motive or even that it was the determinative motive, only that it was among the motivating factors which led to the adverse action."[152] The Fifth Circuit found the direct evidence was sufficient to support a causal nexus and that a reasonable jury could conclude that Fabela was dismissed, in part, because of her 1991 EEOC charge.[153]

Because *Nassar*'s stringent but-for causation standard would today require Fabela to prove that her 1991 EEOC charge was the main driving force behind her termination, the Fifth Circuit would presently be forced to reject her retaliation claim due to the precedent set forth by the Supreme Court. This outcome seems absurd, given that strong direct evidence such as Marcee's testimony is rare in retaliation cases and that most claims are founded upon weaker forms of evidence.[154] That cases such as Fabela's could easily be screened out under *Nassar*'s but-for analysis reveals the overdeterrent effect of the Court's opinion and how it runs counter to public policy and the primary purposes of Title VII's retaliation provision.

### *B.* Smith v. Xerox Corp.

Prior to *Nassar*, the Fifth Circuit in *Smith v. Xerox Corp*. rejected the application of *Gross* to Title VII retaliation claims and held that claimants may use a mixed-motive analysis to prove that their protected conduct was a motivating factor in an adverse employment action.[155]

Kim Smith was an employee of Xerox Corporation for nearly twenty-two years, during which time she received positive evaluations and, in 2003, an award only bestowed on the company's top eight performing

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[150] *Id.* at 416.

[151] *Id.* at 416–18.

[152] *Id.* at 417 n.7.

[153] *Id.* at 416–17.

[154] *See id.* at 415 (noting it is an "unusual instance" when plaintiffs are able to support their claims with direct evidence of retaliatory motive).

[155] *See* 602 F.3d 320, 330 (5th Cir. 2010), *abrogated by* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

employees.[156] In 2005, however, Steve Jankowski became the manager of Smith's sales territory, and at the same time, her territory and the number of agents she supported was reduced.[157] Soon, Smith was unable to meet her sales goals, and Jankowski sent her a Performance Improvement Process (PIP) warning letter and placed Smith on a ninety-day warning period, followed by a sixty-day probationary term because Smith was not meeting her revenue plan.[158] The letter stated that if Smith failed to perform at a satisfactory level, including "making up her entire year's shortfall and meeting 100% of her revenue plan," she could be terminated.[159]

After Jankowski denied Smith's request to reconsider the duration of her probation period, Smith filed a discrimination charge with the EEOC. The charge alleged that Jankowski placed her in the PIP intending to terminate her employment and that he did so based on her age, gender, and race.[160] At the conclusion of her probationary period, Smith was terminated.[161] Although she had only achieved approximately 74% of her revenue goals by that point, Smith argued that Jankowski terminated her out of retaliation for her EEOC charge.[162]

Smith provided strong circumstantial evidence to show that Jankowski began the termination process before the end of her probation period, contrary to company policy. First, Smith provided a fax sent to human resources, dated seven business days after her EEOC charge was filed.[163] The fax included an involuntary termination request form seeking Smith's termination.[164] Second, a human resources manager testified that the "letter of concern" Jankowski sent Smith several weeks after Smith filed her EEOC charge would violate company policy if Jankowski sent it without first speaking with Smith to get an explanation about Smith's actions in the workplace (which Smith alleged he failed to do).[165] Third, Jankowski's signature and the human resources manager's signature on the involuntary termination request form were both dated several days before Smith alleges revenue numbers typically became available for the preceding month.[166]

The Fifth Circuit held that, even though there was a legal business justification that "Jankowski naturally would demand that Smith meet high

[156] *Id.* at 323.
[157] *Id.*
[158] *Id.* at 323–24.
[159] *Id.* at 324.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 323, 325.
[166] *Id.* at 325.

standards, the failure of which could lead to adverse consequences," Smith's evidence proved her EEOC discrimination claim was a "motivating factor in the termination decision."[167] It thus upheld in part the lower court's jury instruction on the mixed-motive framework.[168]

Although Smith's case did not involve the strong, direct evidence of retaliation like that presented in *Fabela*, it is arguable that Smith's circumstantial evidence of retaliatory intent was more likely to yield a successful claim than Nassar's. Under *Nassar*'s but-for causation standard, Smith would likely have been unable to meet her burden of proving that, but for her EEOC charge, her termination would not have occurred.

This standard is particularly difficult for plaintiffs such as Smith to show given the need for complex counterfactuals. Xerox's policies "permit, and arguably encourage, lesser actions such as reassignment or demotion, rather than termination, for an employee with a tenure and track record as lengthy as Smith's."[169] Therefore, under a but-for standard, Smith must show that Xerox's claims that Smith was fired because she failed to meet her revenue goals were false. Only after ruling out all other possibilities, and providing affirmative evidence to show that her protected EEOC action was the real cause of her termination, would her retaliation claim have prevailed. It would have been nearly impossible, given the limited information she had and the numerous factors that contributed to her termination, for Smith to have proven by a preponderance of the evidence that her EEOC charge was the primary cause for her termination.

Smith represents a typical retaliation plaintiff with evidence stronger than the plaintiff in *Nassar*, and yet it is unlikely her claim would prevail under today's Title VII retaliation jurisprudence.[170] While the Court's concern over frivolous retaliation claims and the resulting waste of courts'

[167] *Id.* at 334.

[168] *Id.* at 334, 336.

[169] *Id.* at 334.

[170] Similar cases have been rejected under the post-*Nassar* but-for standard that would have prevailed under the motivating factor standard. *See, e.g.*, Shumate v. Selma City Bd. of Educ., No. 11-00078-CG-M, 2013 WL 5758699, at *2 (S.D. Ala. Oct. 24, 2013) ("Shumate could defeat summary judgment with that evidence when she didn't have to show that her protected conduct was the reason she didn't get the job, just that it factored in to the decision. But post-*Nassar*, Shumate has to meet a higher standard . . . [, which the] evidence does not support . . . ."); Foster v. Univ. of Md. E. Shore, No. TJS-10-1933, 2013 WL 5487813, at *6 (D. Md. Sept. 27, 2013) ("Even assuming that these instances are 'probative of causation,' Ms. Foster cannot now meet the heightened causation standard under *Nassar*."); Hubbard v. Ga. Farm Bureau Mut. Ins. Co., No. 5:11-CV-290 (CAR), 2013 WL 3964908, at *1 (M.D. Ga. July 31, 2013) ("In its original Order, the Court also cited evidence that only a week to ten days after her complaint, Board members began meeting with Plaintiff's direct supervisor about her employment. While this evidence, combined with the temporal proximity of less than three months, was enough to satisfy a 'motivating factor' causation standard, it is not enough to satisfy the 'but-for' causation standard."). It is noteworthy that all of these cases held in favor of the plaintiffs pre-*Nassar* but found for the defendants in subsequent post-*Nassar* motions to reconsider.

time and resources may be valid,[171] Smith's case illustrates how *Nassar*'s but-for standard filters out valid retaliation claims and leaves victims without remedies, contrary to congressional intent.[172]

## V. ALTERNATIVE MECHANISMS TO CIRCUMVENT *NASSAR*'S POTENTIALLY NEGATIVE IMPACT AND PROTECT RETALIATION CLAIMANTS

Applying *Nassar*'s but-for causation standard to Alicia Fabela's and Kim Smith's cases highlights the incredibly overbroad screen-out rate the but-for causation standard will have on Title VII claimants with strong evidence of retaliation.[173] Despite the Court's deviation from its traditional broad construction of antiretaliation statutes,[174] it is unlikely that the bills proposed after *Nassar* by Senator Tom Harkin and Representative George Miller to clarify the appropriate standards for federal employment discrimination and retaliation claims will gain any traction in Congress.[175] Thus, to stem *Nassar*'s negative impact on future Title VII retaliation claimants, alternative "fixes" that counterbalance *Nassar* and fortify Title VII's antiretaliation enforcement are necessary.[176]

This Part proposes two possible solutions. First, it offers a judicial fix that courts and even the EEOC can use to reinterpret the meaning of but-for causation, in line with modern principles of tort law, to limit the number of

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171 *See supra* Part II.

172 *See* Kimberly Cheeseman, Recent Development, Smith v. Xerox Corp.*: The Fifth Circuit Maintains Mixed-Motive Applicability in Title VII Retaliation Claims*, 85 TUL. L. REV. 1395, 1404 (2011) ("The Fifth Circuit's decision is consistent with Congress's intent to ensure that the outlet for plaintiffs experiencing civil rights violations in the workforce is not constricted to the point of closure.").

173 Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 30 (1991) ("[T]he policies underlying Title VII require that it should *not* be that hard for the plaintiff to establish a violation."). Gudel further notes:

> [P]lacing the burden on the plaintiff in a Title VII case to establish "but for" causation is simply incompatible with the nature of Title VII as a remedial statute. This intuition is usually coupled with another one: that fairness requires that the burden of proof in mixed motive cases be placed on the defendant because the defendant's actions have created the problem of proof.

*Id.* at 32 (footnote omitted); *see also* 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 186 (2d ed. 2011) ("In a number of cases, however, the but-for test of factual cause puts the plaintiff out of court, even though the defendant is clearly negligent.").

174 *See, e.g.*, Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 66 (2006) ("[W]e do not accept . . . [the] view that it is 'anomalous' to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of . . . discrimination.").

175 This assertion is supported by the fact that both Senator Harkin and Representative Miller's bills are stuck at the committee stage. *See* S. 1391, 113th Cong. (2013); H.R. 2852, 113th Cong. (2013); *see also supra* Part II.

176 *Cf.* Tananbaum, *supra* note 10, at 1151 ("Anti-retaliation provisions are just as important as anti-discrimination provisions . . . and just as difficult to prove, because employees have little access to employers' decision-making processes and will not easily be able to show any more than motivating factor causation.").

discriminators that escape liability. Second, it recommends an agency fix in which the EEOC's enforcement powers are enhanced by simple changes to its enforcement powers, which will encourage compliance with Title VII's antiretaliation provision, root out frivolous retaliation claims, and ensure that noncomplying employers do not experience any windfalls.[177]

### *A. The Judicial Fix: Lower Courts Should Apply Principles of Modern Tort Law to Title VII Retaliation Cases*

In *Nassar*, the Court imported principles of tort law into employment discrimination law under the assumption that this was Congress's intent "absent an indication to the contrary in [Title VII] itself."[178] Supporting Justice Ginsburg's dissent,[179] many scholars[180] criticize the Court's "[oversimplification of] modern tort law and its approach to causation"[181] by adopting the but-for causation requirement and argue that its interpretation fails to reflect the complexities of modern tort law.[182] Employment discrimination law is not based on the common law, does not involve objectively measurable or observable physical phenomena, and most closely mirrors the law of intentional torts instead of the law of negligence.[183] Despite the fact that it is problematic to apply principles of causation to employment discrimination law, the judicial fixes suggested in this section operate under the Supreme Court's presumptions as announced in *Nassar*.[184]

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[177] Robert Tananbaum discusses how the but-for causation standard allows potentially discriminatory employers to escape liability. *Id.* at 1158 ("Where the employer has articulated a legitimate potential justification for its decision, it seems virtually impossible for the employee then to demonstrate that the impermissible retaliatory motive was a necessary reason in the employer's calculus.").

[178] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2520 (2013).

[179] *See id.* at 2534–47 (Ginsburg, J., dissenting).

[180] *See, e.g.*, Clarke, *supra* note 83, at 80–81; Katz, *supra* note 140, at 544; Tananbaum, *supra* note 10, at 1149.

[181] John K. DiMugno, *United States Supreme Court Curtails Federal Protection of Consumers and Employees*, 34 CAL. TORT REP. 204, 208 (2013).

[182] *See* Katz, *supra* note 140, at 494 ("[D]isparate treatment law should adopt some of the parts of tort law it seems to have left behind in its partial borrowing of causal concepts."); Zimmer, *supra* note 24, at 712 n.39.

[183] *See* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1242 (1988) ("Tort law has its genesis in the common law. Since the national policy against discrimination in employment is not based on the common law, a strong argument can be made that causal analysis should not be as critical an element in employment discrimination law as it is in the law of negligence." (footnote omitted)); DiMugno, *supra* note 181, at 207–08 (arguing but-for causation was developed to analyze physical actions resulting from a defendant's negligence, not intentional torts); Gudel, *supra* note 173, at 88–89.

[184] For an analysis of how courts have dealt with the issue of tort-like causation in other civil rights cases, see Joel Flaxman, Note, *Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 MICH. L. REV. 1551, 1554–63 (2007), which discusses

Two steps are relevant to employment discrimination plaintiffs in the but-for analysis: first, they must speculate and create a counterfactual hypothesis removing the defendant's wrongful conduct from the picture; and second, they must then determine whether their injuries still would have occurred absent the defendant's improper conduct.[185] Requiring plaintiffs to formulate counterfactuals based on events that never occurred creates difficulties in tort law,[186] and more so in the employment discrimination context where plaintiffs are often at a disadvantage because they do not have access to all the factors an employer took into account when making its decision.[187] As a result, by the early twenty-first century, courts applying tort principles began to move away from using but-for causation in all common law tort cases.[188] Otherwise, a strict application in cases involving multiple causes "would defeat liability, because a plaintiff would not be able to show that but for the negligent conduct of one defendant the plaintiff would not have been injured."[189] Such results were thought to violate "both an intuitive sense of causation and good legal policy."[190]

Accordingly, the law evolved to analyze factual causation in a more realistic way. Courts began accounting for multiple causal factors and determining cases involving multiple tortious causes by inquiring whether the defendant's actions were a substantial factor in bringing about the plaintiff's harm.[191] Notably, section 27 of the *Restatement (Third) of Torts* does not use "substantial factor" terminology and merely mandates that if several causes are sufficient by themselves to cause the plaintiff's harm, they are each factual causes of the plaintiff's harm.[192] Although section 27's

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how lower courts did not adhere closely to the Supreme Court's mandate in *Martinez v. California*, 444 U.S. 277 (1980), and instead adopted a different construction of "common law" causation analysis.

[185] MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 240 (2008).

[186] 1 DOBBS ET AL., *supra* note 173, § 187.

[187] *See* Vlasak, *supra* note 100, at 6.

[188] G. EDWARD WHITE, TORT LAW IN AMERICA 316 & n. 45 (expanded ed. 2003).

[189] *Id.* at 316 & nn. 45–46.

[190] 1 DOBBS ET AL., *supra* note 173, § 189.

[191] *See, e.g.*, Knodle v. Waikiki Gateway Hotel, Inc., 742 P.2d 377, 386 (Haw. 1987) (finding that the "substantial factor" inquiry is the "touchstone when the issue of causal relation must be submitted to the jury); Roberson v. Counselman, 686 P.2d 149, 152–60 (Kan. 1984) (noting critical commentary on the use of the "but for" test of causation and upholding consensus that a jury must decide whether "conduct was a substantial factor in bringing about the harm"); Nazareno v. Urie, 638 P.2d 671, 677 (Alaska 1981) (permitting jury findings that defendant's conduct was a substantial factor in bringing about plaintiff's harm); *see also* GEISTFELD, *supra* note 185, at 253; Clarke, *supra* note 83, at 80–81.

[192] *See* RESTATEMENT (THIRD) OF TORTS § 27 (2006) ("If multiple acts occur, each of which alone would have been a factual cause under § 26 of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."); *see also* 1 DOBBS ET AL., *supra* note 173, § 189. Unlike section 27 of the *Restatement (Third) of Torts*, the *Restatement (Second) of Torts* uses substantial factor terminology: "If two forces are actively operating, one because of the actor's

language did not appear in the *Restatement (Second) of Torts*, which was operative when the Civil Rights Act of 1991 was passed, it would have included more conduct as a but-for cause.[193] This is significant in a post-*Nassar* world because courts could employ section 27's nuanced approach in mixed-motive cases requiring but-for causation[194] and find a defendant, who may have escaped liability under a strict but-for preponderance analysis, liable.[195] If applied to Nassar's case, a court could find that Nassar's violation of the hospital's affiliation agreement was one cause for his termination and that the retaliatory intent was also a sufficient cause in bringing about Nassar's termination, particularly because the hospital likely would have hired him had Fitz not mentioned the affiliation agreement. Therefore, the court could also find that the retaliation was a but-for cause in his termination and could hold the hospital liable for violating Title VII.

Thus, to counterbalance the deleterious effects of *Nassar*, courts should adopt the Third Restatement of Tort's sufficiency analysis because it aligns with modern tort law, reflects a practical understanding of real world events, prevents defendants from gaining a windfall by avoiding liability under a strict but-for test, and does not require complicated and often erroneous counterfactuals. More importantly, this liberal interpretation of but-for causation allows Title VII's retaliation provision to achieve its purpose of "[m]aintaining unfettered access to statutory remedial mechanisms"[196] and deterring "the many forms that effective retaliation can take."[197]

Should courts decline to adopt section 27's approach to resolving inquiries involving multiple causes, courts should adopt the liberal but-for analysis set forth by Judges Cardozo and Traynor:

> [I]f (a) a negligent act was deemed wrongful *because* that act increased the chances that a particular type of accident would occur, and (b) a mishap of that very sort did happen, this was enough to support a finding by the trier of fact that the negligent behavior caused the harm.[198]

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negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a *substantial factor* in bringing it about." RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) (emphasis added).

[193] *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1437 n.22 (2012).

[194] *See* DiMugno, *supra* note 181.

[195] *See* GEISTFELD, *supra* note 185, at 252; *see also* Katz, *supra* note 140, at 549.

[196] Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (discussing the primary purpose of antiretaliation provisions).

[197] *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 64 (2006); *see also* Sanchez, *supra* note 20, at 547.

[198] GEISTFELD, *supra* note 185, at 242–43; *id.* ("By routinely submitting these cases [applying the liberal rule of but-for causation] to the jury, courts appear to be relaxing the plaintiff's burden of proving factual causation with a preponderance of the evidence."); *see also* 1 DOBBS ET AL., *supra* note

This would mean that in the employment discrimination context, if retaliation increased the chances that the person was terminated on other grounds, and such an injury occurred, the retaliation could support a finding that it was a "but-for" cause of the harm. Under this analysis, retaliation is deemed wrongful because it discourages reasonable employees from reporting or cooperating with discrimination investigations. To establish causation, plaintiffs would have to show only that an adverse action decreased other employees' likelihood to engage in protected conduct under Title VII. Thus, in Nassar's case,[199] because Fitz's retaliatory intent prompted her to bring the affiliation agreement violation to the hospital's attention to have Nassar terminated, and he was, a court could find that her retaliatory intent was a but-for cause of Nassar's harm.

Either of these two alternatives to strict but-for causation, which still fall under the umbrella of tort law's but-for causation analysis, should be adopted by courts interpreting *Nassar* to prevent the overdetermined screen out rate that would result from a strict but-for analysis. If so, plaintiffs such as Fabela and Smith[200] will be able to meet their burden of proof and their employers will not easily escape liability.

### *B. The Agency Fix: Using the EEOC as an Effective Enforcer*

After an employee files a charge with the EEOC, a notice of the charge is sent to the employer within ten days of the filing.[201] If the charge is not sent to mediation or mediation fails, the EEOC commences an investigation to determine whether there is probable cause to believe the employer has engaged in prohibited conduct.[202] As part of its investigation, the EEOC has the power to issue subpoenas and may conduct a formal fact-finding conference.[203] If the EEOC issues a "reasonable cause" determination at the close of its investigation, it will attempt to resolve the claim through conciliation.[204] If conciliation efforts fail, the EEOC may bring a suit in federal court on behalf of the claimant or issue a right-to-sue letter.[205] Even in cases where the EEOC makes a no reasonable cause determination, it will issue a right-to-sue letter if claimants desire to pursue

173, § 191 ("Courts are avowedly liberal with such causation issues and many cases have permitted an inference of factual causation along these lines." (footnote omitted)).

[199] *See supra* Part II.

[200] *See supra* Part IV.

[201] 42 U.S.C. § 2000e-5(b) (2012).

[202] *Id.*

[203] *Id.*; *see also* § 2000e-8 (investigations); § 2000e-9 (conduct of hearings and investigations pursuant to § 161 of Title 29).

[204] § 2000e-5(b).

[205] *Id.* § 2000e-5(f)(1).

their claims privately in federal court.[206] This current system is weighed down by a case backlog due to budgetary and staff limitations, however,[207] and as a result is struggling to accomplish its mission of preventing any person from engaging in any unlawful employment practice.

Therefore, in addition to recommending courts adopt a liberalized but-for causation standard in future Title VII retaliation cases, this Note proposes a novel regulatory solution to *Nassar*'s problematic consequences: enhance the EEOC's enforcement powers such that employers are rewarded or punished based on their compliance or noncompliance with Title VII's antiretaliation provision. This fix serves to counterbalance windfalls discriminatory defendants may gain under but-for causation analysis.[208] Although the EEOC is the "sole arm of the federal government with an exclusive focus on eradicating job discrimination,"[209] the agency is currently thought to be ineffective at achieving optimal enforcement of Title VII.[210] Thus, these proposed improvements aim to help the EEOC achieve maximum enforcement despite its limited resources.[211]

First, the EEOC should charge a penalty fee at the preliminary stage in handling claims where, after a thorough investigation,[212] the EEOC finds reasonable cause to believe that employment discrimination has occurred or discriminatory employment practices are present.[213] Regulations carrying civil monetary penalties are common under other statutes such as the Fair

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[206] *Id.*; *see also* 29 C.F.R. § 1601.28(b)(3) (2014).

[207] *See infra* notes 218–19 and accompanying text.

[208] *See* Katz, *supra* note 18, at 885 ("If those who consider protected characteristics can, in some cases, . . . get away with such discrimination, then there is less than optimal deterrence.").

[209] Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 53 (1995); *see also* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 704 (2005).

[210] *See* Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 231 (2009) ("The structure of the agency, its functions, and its lack of funding all serve to make the agency ineffective at creating systemic change."); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1271 (2010); White, *supra* note 209, at 56.

[211] *See* 29 C.F.R. § 1601.21(a) (2014). The lack of EEOC personnel and resources is startling: "Most recently, the Commission operated without all five commissioners from 1997 to 2004, and without a general counsel from 2000 to 2003. Out of about 76,000 private sector charges, the EEOC has the resources to file suit in only about 300 cases." McCormick, *supra* note 210, at 219 (footnote omitted).

[212] *See* 29 C.F.R. § 1601.15(a) (2014). For a discussion of the EEOC's investigatory powers, see *Title VII: EEOC Proceedings*, *in* PRIMER ON EQUAL EMPLOYMENT OPPORTUNITY 193, 195–96 (Nancy J. Sedmak & Chrissie Vidas eds., 6th ed. 1994), and Occhialino & Vail, *supra* note 209, at 705.

[213] Other scholars have suggested similar remedies, often in the form of attorneys' fees, to enhance EEOC enforcement. *See* Modesitt, *supra* note 210, at 1271. For a discussion of the EEOC's reasonable cause standards, see *infra* note 221.

Labor Standards Act, the Occupational Safety and Health Act, and the Contract Work Hours and Safety Standards Act.[214] A similar penalty in the employment discrimination context will serve to mitigate any windfalls discriminatory employers may gain by a court's use of the but-for standard and creates additional monetary incentives for employers to vigorously enforce Title VII in the workplace.[215] Increased employer compliance in turn will lead to fewer employment discrimination claims and the EEOC will have more resources freed up to investigate and address more serious claims. To account for frivolous claims, which the agency will likely identify during its investigations and classify as "no cause," the penalty fee will only apply to cases with a reasonable cause determination.[216]

This penalty fee, in addition to encouraging compliance with Title VII,[217] could serve as a vital source of revenue for the beleaguered EEOC by covering costs incurred investigating an individual's charge.[218] It could even create space in the budget for the hiring and training of additional investigators, which would expedite the backlogged claim-handling process and lead to more efficient and thorough investigations.[219] In a further effort to balance the scales in a post-*Nassar* world, the EEOC could apply one of the liberalized but-for causation standards mentioned above[220] during its reasonable cause inquiry[221] and the conciliation stage.[222] A liberal but-for

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[214] *See* David Weil, *Implementing Employment Regulation: Insights on the Determinants of Regulatory Performance*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 429, 444 (Bruce E. Kaufman ed., 1997); *see also* Modesitt, *supra* note 210, at 1274.

[215] Some may argue that employers already have a monetary incentive not to discriminate due to the high cost of litigating employment discrimination claims, but this argument is misplaced. Many employment discrimination claims are settled through mediation or arbitration and do not make it to the litigation stage, and in many cases do not make it to the EEOC. *See* Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1, 12 (2012) ("Most people who believe they have experienced discrimination do not pursue a lawsuit."); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 498 (1993). This proposal would bolster these weak monetary incentives and make it even more appealing for employers to comply with the law.

[216] This suggestion takes into account the *Nassar* Court's concern over the filing of frivolous claims "siphon[ing] resources from efforts by employer, administrative agencies, and courts." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531 (2013).

[217] *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 520 (2001) ("Liability avoidance certainly provided crucial incentives to change, but economic and ethical motivations figured prominently [in the design and implementation of internal problem-solving processes] as well.").

[218] *See* Occhialino & Vail, *supra* note 209, at 703.

[219] David Weil illustrates how staffing limitations impacted the EEOC's rate of claims processing: "In 1993 the EEOC had 87,942 complaints filed with it (versus the 56,228 complaints it received in 1981). In that year the commission pursued a mere 481 lawsuits." Weil, *supra* note 214, at 442.

[220] *See supra* Part V.A.

[221] 1 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 40.2 (2006) ("A determination of reasonable cause is a finding that it is more likely than not that the charging party, aggrieved persons, and/or members of a class were discriminated against because of a basis prohibited

standard is appropriate because these stages consider the likelihood of success if the claim results in litigation.[223]

Second, in addition to adopting punitive measures for noncompliance, the EEOC can strengthen Title VII enforcement by rewarding employers who comply with the statute's mandates. The EEOC can adopt an approval rating system, similar to a consumer report or the government's Energy Star rating,[224] in which it identifies and rewards those companies that comply with Title VII's mandates. This program could be created under the powers granted to the EEOC in § 2000e-4(h)(2), which concerns educational and outreach programs.[225] It would publish a list of the names of employers who, in the last year, had perfect or nearly perfect compliance with Title VII's provisions (as determined by the number of charges filed against a company).[226] Such a rating system not only deters violators by

by the statutes enforced by EEOC. The likelihood that discrimination occurred is assessed based upon evidence that establishes, under the appropriate legal theory, a *prima facie* case and, if the respondent has provided a viable defense, evidence of pretext." (citation omitted)). The EEOC applies a "litigation-worthy" standard during its reasonable cause determinations. Michael D. Moberly, *Admission Possible: Reconsidering the Impact of EEOC Reasonable Cause Determinations in the Ninth Circuit*, 24 PEPP. L. REV. 37, 39 n.13 (1996). Therefore, if the EEOC applies a stringent but-for standard, it will likely overdetermine and screen out numerous cases. To give plaintiffs the fairest chance at litigating their claims, the EEOC should instead apply a liberal but-for causation standard. *See id.*

[222] The conciliation stage is a thirty-day period that follows an EEOC finding of "reasonable cause" wherein the EEOC attempts to work out a settlement agreement between the parties. This occurs before a suit may be filed. 29 C.F.R. § 1601.24 (2014); *see also Title VII: EEOC Proceedings*, *supra* note 212, at 197. The issue of causation may also arise in this case as the parties consider possible remedies and determine what relief is justified based on the facts and law. The EEOC has a wide range of discretion in constructing remedies and thus can apply a more liberal standard of causation in determining an employer's liability and the remedies due to the claimant. This is a win–win system because the employer is able to save time and costs by avoiding litigation, and the employee receives relief that a court applying a stringent but-for causation standard may not grant. The EEOC Compliance manual states the liberal standards applied during the conciliation stage:

> [Parties must] [f]ashion remedies from the wide range of remedial measures available to EEOC, which has broad authority under the statutes to seek appropriate forms of relief. [The EEOC may] [t]ailor remedies, as necessary, to cure specific situations giving rise to the violations and incorporate the appropriate remedial elements described in the Remedies Policy.

1 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 60.2(a).

[223] *See* McCormick, *supra* note 210, at 204–05 (discussing the EEOC's push, and relative successes, at implementing a mediation program).

[224] *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1208 (2012); McCormick, *supra* note 210, at 230.

[225] 42 U.S.C. § 2000e-4(h)(2) (2012) ("In exercising its powers under this subchapter, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and (B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this subchapter or such law, as the case may be.").

[226] Although implementing such a system does carry its own costs, these costs can be controlled by enlisting the help of third-party entities or imposing a self-evaluation process. The costs will depend on

"impos[ing] reputational and other market pressures" on employers,[227] but it also benefits employees by making information about their employer's practices more readily accessible.[228]

These proposed administrative fixes aim to correct an imbalance of power created by the but-for causation requirement in Title VII retaliation cases. These penalties and incentives for compliance serve to "make clear that discriminatory conduct is prohibited irrespective of its effect on plaintiffs and ensure that such conduct is adequately deterred."[229] Adopting just one of these recommendations will go far in enhancing the EEOC's enforcement powers and ensuring employer compliance.[230]

Although the penalty fee recommendation requires legislative action, which, as previously discussed, is hard to come by in today's political climate,[231] these proposed fixes are more likely to garner the attention and support of Congress. Unlike the Protecting Older Workers Against Discrimination Act (POWADA),[232] which requires minute changes to obscure causation language hidden deep in an employment discrimination statute, these agency fixes involve changes to a regulatory agency with great visibility. Additionally, allowing the EEOC to charge penalties for noncompliance is a low-cost solution to address the agency's inefficiencies.

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the structure of the approval rating system, and while it will require significant investment upfront, penalty fees collected by the EEOC, such as those proposed in this section, could help offset the cost. This program could lead to greater efficiency and compliance with the laws, leading to savings for the EEOC on other fronts, such as claims investigations or litigation. *See infra* note 228; Weil, *supra* note 214, at 465 ("The review of the compliance literature suggests higher levels of compliance among firms subject to even modest regulatory pressure."). For a discussion of the costs associated with implementing a rating system, see LOUISE STONEY, UNITED WAY, FINANCING QUALITY RATING SYSTEMS: LESSONS LEARNED 2–3 (2004), *available at* http://www.earlychildhoodfinance.org/downloads/2004/StoneyQRISfinance_2004.pdf [http://perma.cc/B4WC-4AWA].

[227] Glover, *supra* note 224. These ratings systems can have a powerful effect. *See* Jessica E. Fliegelman, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 FORDHAM URB. L.J. 1001, 1006 (2010) ("[S]eventy-seven percent of consumers considered a company's 'environmentally-friendly' reputation to be significant. As a result, green advertising [such as the Energy Star label] has the potential to produce environmental benefits through greater consumer awareness because it can aid consumers in making meaningful marketplace choices." (footnote omitted)).

[228] *See* Glover, *supra* note 224, at 1208; Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 578 & n.12 (2012) ("The chief insight, based on behavioral research, is that the public faces significant cognitive limitations in processing information. . . . [E]ffective forms of regulatory disclosure are 'targeted': simplified disclosures embedded at the point of decisionmaking to 'nudge' parties along.").

[229] Katz, *supra* note 140, at 494.

[230] *See* Weil, *supra* note 214, at 465 ("The review of the compliance literature suggests higher levels of compliance among firms subject to even modest regulatory pressure.").

[231] *See* Rogers, *supra* note 118.

[232] *See* S. 1391, 113th Cong. (2013); H.R. 2852, 113th Cong. (2013).

There are several incentives for Congress to amend §§ 2000e-4 and 2000e-5 to grant the EEOC the power to impose statutory penalties for noncompliance with agency rules. First, Congress will be more inclined to spend its limited political capital rallying for a change to a visible government agency that constituents recognize and derive observable benefits from. There is little reason for Congress to expend its time and resources in the currently volatile political climate fixing the substantive language of a statute that will garner little attention or appreciation from its constituents. Second, lawmakers can see a return on their investment of political capital if they make these recommended changes to the EEOC's enforcement provisions. Constituents will likely appreciate and commend their congressmen for assuming the more favorable stance of selling proactive, rather than reactive or obscure, measures.[233]

These recommendations will help to resolve many problems plaguing discrimination claimants. Money collected from the penalty fee can be used to cover agency costs that are incurred during investigations and provide the capital needed to hire additional investigators and claim handlers. This will alleviate the backlog in cases, create more jobs, and, most importantly, promote efficient processing of claims such that meritless claims will be rooted out early on,[234] and the *Nassar* Court's concern for the judicial system's time and resources will be addressed.

## CONCLUSION

After the Supreme Court's decision in *Gross*, it is unsurprising that the *Nassar* Court rejected the use of the mixed motives framework and its "motivating factor" standard in Title VII retaliation cases in favor of the *McDonnell Douglas* framework's "but-for" requirement. Nevertheless, the Court's deviation from its traditionally broad interpretation of Title VII's antiretaliation provision is problematic because, contrary to congressional intent, the but-for standard allows discriminatory employers to escape liability in overdetermined cases. By weakening Title VII's antiretaliation provision, the Court restricted the number of retaliation victims who will

[233] For a discussion of the public's reception of private and third-party regulation programs, see Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 381–82 (2014), which notes that in areas such as product safety, third-party regulation is supported, but in matters concerning food safety, there is greater apprehension with instituting a third-party surveillance program. Because this proposed program would not implicate the public health, and would afford greater workplace protections to employees, it seems likely that this program would receive public support.

[234] *See* Robert A. Kearney, *Who's "In Charge" at the EEOC?*, 50 DRAKE L. REV. 1, 23 (2001) (noting part of the reason cases that "would have been dropped after negative determinations by the EEOC remain alive even though they are legally dead" is that the EEOC takes too long to investigate charges and before a determination can be made, claimants request early right-to-sue letters).

receive remuneration for their injuries and creates a windfall problem. Title VII's antidiscrimination provision is effectively weakened because "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses,"[235] and they will be deterred from doing so if the antiretaliation provision provides weak protections.

This Note, unlike other scholarly commentaries that call for congressional action to amend Title VII or the Civil Rights Act of 1991, suggests two alternative fixes that will counterbalance *Nassar*'s negative consequences. Courts should turn to the Restatement (Third) of Torts and adopt a similar sufficiency analysis in mixed-motive retaliation cases. If a court finds that it is not feasible to tease out whether each cause was sufficient on its own to bring about the injury, courts should then employ the liberal but-for analysis set forth by Judges Cardozo and Traynor, focusing on whether the retaliatory action increased the chances that the claimant would suffer, and did suffer, from an adverse employment action. Under either method, courts will still comply with the Supreme Court's mandate of employing a but-for causation analysis, but these liberal constructions ensure that courts are also honoring the spirit of Title VII.

While the judicial fixes are easier, and less costly, for courts to implement, it is also essential that the EEOC's enforcement powers are enhanced to ensure the Court's concerns about frivolous lawsuits are addressed. Although the penalty and reward system may be the most effective means of enhancing compliance among employers, it may face opposition by those who oppose the penalties or conferring greater power to the agency. Therefore, it may be best to first implement an employer approval rating system because it will likely face less opposition from the public. There are less obvious costs associated with such a program, and the public benefit is clear because it provides often-unavailable information to employees about their employers and the public scrutiny will incentivize greater compliance. This measure may surprisingly garner considerable support from the business community because the companies that will be featured favorably on these rankings may find this program beneficial to their public relations and recruitment efforts.

These proposals are intended to shift the conversation away from the changes Congress should make to Title VII's language to alternative and more realistic solutions, such as judicial and agency fixes that will stem any adverse effects that may arise from the *Nassar* decision. Whether these fixes are adopted independently or in conjunction with one another, they ensure that Title VII's antiretaliation provision meets its purpose of

[235] Rosenthal, *supra* note 11, at 1113 (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 67 (2006)).

providing employees with "unfettered access to statutory remedial mechanisms."[236]

[236] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (discussing the primary purpose of antiretaliation provisions).