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But-for Nassar, There Would Not Be a Causation Conundrum in Title VII Retaliation Litigation: How University of Texas Southwest Medical Center v. Nassar Makes It Harder for Employees to Prevail

Katherine Todd Stark
Suffolk University Law School

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**BUT-FOR NASSAR, THERE WOULD NOT BE A
CAUSATION CONUNDRUM IN TITLE VII
RETALIATION LITIGATION: HOW UNIVERSITY
OF TEXAS SOUTHWEST MEDICAL CENTER V.
NASSAR MAKES IT HARDER FOR EMPLOYEES
TO PREVAIL**

I. INTRODUCTION

Meet Bob. He is a chef who works for a gourmet restaurant at a private golf club. The golf club is affiliated with a café that operates at the golf club and is open to the public. By agreement between the golf club and the café, the café must utilize kitchen staff from the golf club on an as needed basis. Bob has worked at the golf club for almost a decade and frequently fills in at the café. When Bob gets a new boss at the golf club, things start to go wrong. His boss treats him differently from the rest of the kitchen staff. For example, the new boss holds 15-20 minute introductory meetings with each kitchen staff member to get better acquainted, but spends over an hour and a half with Bob, scrutinizing his resume and reading from a list of prepared questions. The new boss also starts asking about Bob to see what kind of information others may have about his work ethic and productivity, despite being told by Bob's former supervisor that he is the hardest working chef the golf club has ever seen. When the golf club hires another cook that looks just like Bob, the boss is overheard saying, "they hired another one." Bob's new boss has also been heard making comments that "African Americans are lazy." Bob is African American.

Sick and tired of being treated differently, Bob meets with management at the café and asks if he can permanently work there in order to avoid working for the golf-club boss. The café agrees, and Bob resigns from the golf club, making sure to tell the President of the club that the reason for his resignation is his supervisor's discriminatory harassment, stemming from her bias against African Americans. Instead of saying he is sorry to see Bob go, the President rushes to the boss's defense, and feels the need to publicly exonerate her. The President calls the café to remind management that only kitchen staff from the golf club is allowed to work there, and Bob is no longer an employee of the golf club. The café then tells Bob he is out of a job.

What one would expect to happen next in this storyline is the typical bread-and-butter of plaintiff employment discrimination litigators: the aggrieved employee arrives at the office, tells a similar story, and the litigator gets to work filing suit against the employer for violating Title VII of the Civil Rights Act of 1964.¹ Given a fact pattern similar to Bob's, the litigator would allege two specific violations of Title VII: first, that the employer has violated 42 U.S.C. § 2000e-2(a) because Bob has suffered *status-based discrimination* which prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, in employment decisions such as hiring or firing,² and second, that the employer has violated 42 U.S.C. § 2000e-3(a) for *retaliating* against Bob for having opposed, complained of, or for seeking remedies for the discrimination he faced.³ Many plaintiffs in situations similar to Bob's "often raise the two provisions in tandem."⁴

However, the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*⁵ has now "driven a wedge" between these "previously symbiotic claims" by holding that the standard of causation a plaintiff must prove for each claim is different: a lessened mixed motive standard applies to discrimination claims, while a stricter but-for causation applies to retaliation claims.⁶ To establish discrimination, the plaintiff employee need only show that status-based discrimination was one among several motivating factors in the employer's adverse action.⁷ Whereas for a retaliation claim, the plaintiff employee must prove the *sole*

¹ See The Civil Rights Act of 1964, 42 U.S.C. § 2000e (2016) (providing for equal employment opportunity laws). The Civil Rights Act of 1964 will be discussed in detail *infra*, but in general it is described as "provid[ing] remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers," and "central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522 (2013).

² See 42 U.S.C. § 2000e-2(a) (defining unlawful employment practices); *Nassar*, 133 S. Ct. at 2525-30 (referring to § 2000e-2(a) as "status-based discrimination" provision of the Civil Rights Act of 1964).

³ See 42 U.S.C. § 2000e-3(a) (2016) (describing unlawful employment practices related to enforcement proceedings); *Nassar*, 133 S. Ct. at 2522-23 (referring to section 2000e-3(a) as "retaliation provision" of the Civil Rights Act of 1964). However, as pointed out by Justice Ginsburg in her dissent, "[t]his form of discrimination is commonly called 'retaliation,' although Title VII itself does not use that term." *Nassar*, 133 S. Ct. at 2534.

⁴ See *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting) (noting complexity of discrimination cases).

⁵ 133 S. Ct. 2517(2013).

⁶ See *id.* (discussing discrepancy between standards as announced by majority's decision).

⁷ See *id.* ("An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act.").

reason for the employer's retaliation was connected to status-based discrimination.⁸ Thus, following the easier mixed motive standard for discrimination claims, a complaint can survive even where the employer can establish a lawful motive in addition to an impermissible one, but a retaliation complaint cannot survive unless the employee proves the causal link between injury and wrong is so closely related, that the injury would not have occurred *but-for* the act.⁹

Although the Court had treated retaliation as a form of discrimination under Title VII (and thus applied the mixed motive standard) prior to *Nassar*, the decision made clear that retaliation claims now require a heightened burden of proof.¹⁰ As applicable to Bob's situation discussed above, Bob must prove that being African American was *one* of the motives for the alleged status-based discrimination, but must also prove that his complaint about the racial discrimination was the *only* reason why he lost his job.¹¹ Understandably, Bob and the rest of us may be confused as to why the standards of causation differ where retaliation has previously been considered a form of discrimination itself.

This Note will explore the merits of the various approaches to determining the standard of causation under Title VII retaliation claims, as well as the purpose of Title VII in affording employees workplace protections.¹² Next, this Note will examine the Supreme Court's decision in *Nassar* in order to analyze the efficacy of the stricter standard of but-for causation set forth in the context of Title VII anti-retaliation claims.¹³ Lastly, this Note will argue that the stricter standard is at odds with Congressional intent.¹⁴ Ultimately, it will be argued that the *Nassar* approach is problematic for plaintiff's attorneys, too confusing for juries,

⁸ See *id.* (explaining new standard) (emphasis added).

⁹ See *id.* at 2522-23 (reiterating mixed motive theory suffices for status-based discrimination claims established by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

¹⁰ See *Nassar*, 133 S. Ct. at 2537-38 (Ginsburg, J., dissenting) (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("Adverting to the close connection between discrimination and retaliation for complaining about discrimination, this Court has held, in a line of decisions unbroken until today, that a ban on discrimination encompasses retaliation."); *Jackson v. Birmingham Bd. of Edu.*, 544 U.S. 167, 173-74 (2005) (holding in context of sex discrimination, retaliation against person complaining is "another form of intentional sex discrimination"); *Gómez-Pérez v. Potter*, 553 U.S. 474, 479-91 (2008) (holding Age Discrimination in Employment Act of 1967 bars discrimination and retaliation "based on age."); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 447-57 (2008) (finding that under 42 U.S.C. § 198 "retaliation for race discrimination constitutes discrimination based on race").

¹¹ See cases cited *supra* note 10.

¹² See *infra* Part II (providing background prior to *Nassar*).

¹³ See *infra* Part III (discussing *Nassar*).

¹⁴ See *infra* Part IV.

and contrary to the spirit and precedent of the Title VII protections.¹⁵

II. BACKGROUND: SETTING THE STAGE FOR NASSAR

A. Title VII and the Civil Rights Act of 1964

In order to frame the legal backdrop in which the *Nassar* opinion originated, it is essential to understand the purpose and history of Title VII of the Civil Rights Act of 1964, and the cases that followed interpreting that statute.¹⁶ Congress enacted Title VII to address the pervasive problem of employment discrimination,¹⁷ and it applies to almost all employers of fifteen or more employees.¹⁸ It proscribes discrimination in employment on the basis of race, color, religion, sex, or national origin.¹⁹ Title VII also makes it an “unlawful employment practice” to discriminate against any individual because the individual has complained of, opposed, or participated in a proceeding about prohibited discrimination.²⁰ Section 2000e-3(a) is referred to as the retaliation provision of Title VII,²¹ and the Court has recognized that without the anti-retaliation provision, the status-based discrimination provision would be hollow:

There is strong reason to believe that Congress intended

¹⁵ See *infra* Part IV.

¹⁶ The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2016).

¹⁷ See Robert Tananbaum, Note, *Grossly Overbroad: The Unnecessary Conflict over Mixed Motives Claims in Title VII Anti-Retaliation Cases Resulting from Gross v. FBL Fin. Serv.*, 34 CARDOZO L. REV. 1129, 1132 n.21 (2013) (dating race and gender discrimination to pre-colonial America and describing its persistence). The groups chosen by Congress to fall within the protections of Title VII had historically suffered discrimination in employment. *Id.*

¹⁸ See 42 U.S.C. §§ 2000e-2000e-17(b) (2012) (explaining definition of employer).

¹⁹ 42 U.S.C. § 2000e-2a)(1) (“It shall be an unlawful employment practice for an employer 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 . . .”).

²⁰ See 42 U.S.C. § 2000e-3(a) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.”); *Nassar*, 133 S. Ct. at 2528 (referring to § 2000e-3(a) as “antiretaliation provision”).

²¹ See *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534-35 (2013) (Ginsburg, J., dissenting) (“Backing up that core provision, Title VII also makes it an ‘unlawful employment practice’ to discriminate against any individual ‘because’ the individual has complained of, opposed, or participated in a proceeding about, prohibited discrimination This form of discrimination is commonly called ‘retaliation,’ although Title VII itself does not use that term.” (quoting 42 U.S.C. § 2000e-3(a) (emphasis added))).

the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a work place where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.* their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.* their conduct.

To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination.²²

However, this would not achieve the second objective because it would not deter the many forms that effective retaliation can take, therefore failing to fully achieve the anti-retaliation provision's purpose of "[m]aintaining unfettered access to statutory remedial mechanisms"²³ Moreover, the anti-retaliation provision is crucial to the overall purpose of Title VII in protecting employees because the "fear of retaliation is the leading reason why people stay silent" about the discrimination they have encountered or observed.²⁴

B. *Price Waterhouse* and the 1991 Amendments to the Civil Rights Act

In 1989, the Court considered the causation standard for status-based discrimination in Title VII claims in *Price Waterhouse v. Hopkins*.²⁵ In particular, the Court addressed "what it means for an action to be taken 'because of' an individual's race, religion, or nationality."²⁶ The Court held that the requisite standard of causation for section 2000e-2(a) status-based discrimination claims to be a "mixed motive theory."²⁷ The Court

²² *Burlington N. & Santa Fe Ry. V. White*, 548 U.S. 53, 63 (2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973)).

²³ *Id.* at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

²⁴ *See Nassar*, 133 S. Ct. at 2534-35 (Ginsburg, J., dissenting).

²⁵ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-58 (1989) (laying framework for analyzing Title VII discrimination claims).

²⁶ *Nassar*, 133 S. Ct. at 2525-26.

²⁷ *See id.* (providing holding of the *Price Waterhouse* Court).

explained that under such theory, a plaintiff can prevail if he or she can show *one* of the prohibited traits “was a ‘motivating’ or ‘substantial’ factor in the employer’s decision.”²⁸ Furthermore, the Court elaborated that once a plaintiff has shown the status-based discrimination to be at least one of several motivating factors in the unlawful employment decision, the burden of persuasion then shifts to the employer to prove it would have made the same employment decision in the absence of all discriminatory animus.²⁹ Thus, *Price Waterhouse* established a burden-shifting framework for status-based discrimination claims, and concluded that the lessened-causation standard, (*i.e.* mixed motive theory) applies.³⁰

Congress later codified this mixed motive standard of causation, and adjusted the burden shifting framework established in *Price Waterhouse* by amending Title VII and other federal antidiscrimination statutes with the Civil Rights Act of 1991 (“the Amendments”).³¹ The purposes of the Amendments were to provide additional protections to the Civil Rights Act of 1964 against unlawful discrimination in employment, and “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes.”³² Specifically, the Amendments

²⁸ See *id.* at 2526 (explaining *Price Waterhouse* holding).

²⁹ See *id.* (“In other words, the employer ha[s] to show that a discriminatory motive was not the but-for cause of the adverse employment action.”).

³⁰ See *id.* at 2526-27. Ultimately, the plurality in *Price Waterhouse* concluded that a Title VII plaintiff need only show that a prohibited factor contributed to the employment decision - not that it was the *but-for* or *sole cause*. See *id.* at 2539 (Ginsburg, J., dissenting) (“Congress endorsed the plurality’s conclusion that, to be actionable under Title VII, discrimination must be a motivating factor in, but need not be the but-for cause of, an adverse employment action.”); see also 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, <https://verdict.justia.com/2013/07/09/revenge-the-supreme-court-narrows-protection-against-workplace-retaliation-in-university-of-texas-southwestern-medical-center-v-nassar>.

In its statutory form, the plaintiff’s burden is to prove that discrimination was ‘a motivating factor’ for the adverse decision. That alone results in a finding of employer liability. However, upon proof by the employer that it would have money damages, but may still be on the hook for attorneys’ fees and injunctive relief.

Id.

³¹ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amending the Civil Rights Act of 1964); see also *Nassar*, 133 S. Ct. at 2520-21, 2523, 2538. (“This principle is the result of an earlier case from this Court, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and an ensuing statutory amendment by Congress that codified in part and abrogated in part the holding in *Price Waterhouse* . . .”).

³² See Civil Rights Act of 1991 § 3 (outlining purposes of Act). The House Report regarding the Civil Rights Act of 1991 similarly describes the Amendment’s two primary purposes:

added subsection 2000e-2(m) which provides that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.”³³

C. Gross v. FBL Financial Services, Inc.

In 2009 the Court had the opportunity to address the issue of causation that ultimately set the stage for *Nassar* but in the context of the Age Discrimination in Employment Act of 1967 (ADEA).³⁴ In *Gross v. FBL Financial Services, Inc.*,³⁵ plaintiff employee Gross produced evidence at trial that age discrimination was a motivating factor in his employer’s decision to demote him.³⁶ At the close of trial and over FBL’s objection, the District Court instructed the jury to enter a verdict for Gross if they found that he was demoted because of his age; thus, age would be considered a motivating factor if the jury determined it was a reason for the demotion.³⁷ The jury returned a verdict for Gross, but the Eighth Circuit reversed the holding that the *Price Waterhouse* “mixed motive” standard applies only in status-based discrimination cases under Title VII— not the

The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

H.R. REP. No. 102-40, pt. 2 (1991).

³³ 42 U.S.C. § 2000e-2(m).

³⁴ Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1967). The ADEA provides:

It shall be unlawful for an employer-- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; (2) to limit, segregate, or classify his employees 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 age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

³⁵ 557 U.S. 167 (2009).

³⁶ *See id.* at 169-70 (stating cause of action).

³⁷ *See id.* at 171-73 (describing disputed jury instructions).

ADEA.³⁸ The Court ultimately agreed with the Eighth Circuit, reasoning that because Title VII was amended by the Civil Rights Act of 1991 to codify the mixed motive standard of causation requirement in status-based discrimination claims,³⁹ Congress acted intentionally by failing to make the same amendment to the ADEA.⁴⁰ Thus, in the absence of language expressly permitting a mixed-motive theory of causation, the language “because of” should bear ordinary meaning- *i.e.* the plaintiff must prove that age was the “but for” cause of the adverse employment decision under the ADEA.⁴¹ Ultimately, the Court determined that although sharing similar purposes to protect employees from discrimination in the workplace, Title VII status-based discrimination claims (allowing for the lesser-standard) are separate and distinct from the ADEA’s disparate treatment claims (which require but-for causation).⁴²

D. *Smith v. Xerox Corp.*

In 2010, the Fifth Circuit was tasked with determining exactly the same issue the Court would later take up and reverse in *Nassar*: whether the mixed-motive framework applies to retaliation claims under Title VII.⁴³ In *Smith v. Xerox Corp.*,⁴⁴ employee plaintiff Kim Smith brought two Title VII actions against her former employer Xerox for status based discrimination and retaliation.⁴⁵ On appeal, Xerox challenged the district

³⁸ See *id.* at 172-73 (stating holding and subsequent cause for reversal).

³⁹ See *id.* at 186-87 (discussing Congress’s motive for passing the Civil Rights Act of 1991).

⁴⁰ See *Gross*, 557 U.S. at 174. The Court discussed Congress’s different actions in the ADEA:

Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(m) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . . We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.

Id.

⁴¹ *Id.* at 176-77.

⁴² *Id.* at 176-.

⁴³ See *Smith v. Xerox Corp.*, 602 F.3d 320, 325-26 (5th Cir. 2010) (discussing Title VII framework for retaliation claims).

⁴⁴ 602 F.3d 32 (5th Cir. 2010).

⁴⁵ See *id.* at 320 (discussing facts of the case). Smith alleged that Xerox discriminated against her based on her age and sex, and then terminated her in retaliation for filing a complaint

court's jury instructions on a mixed-motive theory of causation in regards to the retaliation claim.⁴⁶ The Fifth Circuit recognized the Court's reasoning in *Gross* that the ADEA and Title VII are two distinct statutory schemes, and but-for causation is presumed in the absence of express language authorizing the mixed motive standard.⁴⁷ However, the court rejected this "simplified" application of *Gross* as set forth in Xerox's argument; that because the wording of section 2000e-2(m) of Title VII authorizing mixed motive theory claim doesn't include the term "retaliation" but-for causation is the standard.⁴⁸ The Fifth Circuit reasoned that because the *Gross* Court made clear that its focus was on ADEA, the decision did not affect Title VII claims, which permits mixed-motive jury instructions, even in the context of retaliation.⁴⁹

III. FACTS

A. The Creation of the Causation Conundrum: *Nassar*

i. Facts of the Case

Dr. Naiel Nassar, a medical doctor of Middle Eastern descent who specializes in the treatment of HIV/AIDS, was hired to work as a faculty member of the University of Texas Southwestern Medical Center ("University") in 1995.⁵⁰ The University is affiliated with Parkland

with the Equal Employment Opportunity Commission. *Id.* at 323.

⁴⁶ *Id.* at 323.

⁴⁷ *See id.* at 328-29 (discussing *Gross*).

⁴⁸ *See id.* at 328 ("The text of § 2000e-2(m) states only that a plaintiff proves an unlawful employment practice by showing race, color, religion, sex, or national origin was a motivating factor.").

⁴⁹ *See Smith*, 602 F.3d at 329-30 ("To state the obvious, *Gross* is an ADEA case, not a Title VII case."). The court made clear its belief that the *Price Waterhouse* holding "remains our guiding light," as it determined the "because of" language in the context of Title VII authorizes the mixed-motive framework. *Id.* at 329. Moreover, the court noted the dissent's observation that the Seventh Circuit has twice explained that a plaintiff must prove but-for causation in *all* suits absent a contrary statutory provision. *See id.* at 329 n.28 ("The dissent characterizes as 'lame' our distinction between age discrimination cases under the ADEA and retaliation cases under Title VII"). However, the court concluded that those decisions were limited to examining the effect of remedy provisions under the 1991 Civil Rights Act amendments, and not on the issue of whether the motivating factor framework is appropriate in a Title VII retaliation case. *See id.* at 329 ("Because we believe that *Gross* does not unequivocally control whether a mixed-motive jury instruction may be given in a Title VII retaliation case, we must continue to allow the *Price Waterhouse* burden shifting in such cases unless and until the Supreme Court says otherwise.").

⁵⁰ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013).

Memorial Hospital (“Hospital”), and through an affiliation agreement the Hospital is obliged to fill its staff physician posts with University faculty.⁵¹ As a University faculty member, Dr. Nassar also practiced medicine at the Hospital.⁵² In 2004 Dr. Beth Levine was hired as the University’s Chief of Infectious Disease Medicine, and became Dr. Nassar’s supervisor at the clinic.⁵³

From the start, Dr. Levine treated Dr. Nassar differently.⁵⁴ Before Dr. Levine even began officially working the University, she held fifteen to twenty minute meetings with potential subordinates, yet spent over an hour and a half reviewing Dr. Nassar’s resume in detail and asking him prepared questions.⁵⁵ Dr. Levine also expressed concern about Dr. Nassar’s productivity and work ethic, despite receiving assurances that he was in fact a hard worker.⁵⁶ Moreover, the following year Dr. Levine disagreed with the hiring of a physician who was also of Middle Eastern descent, like Dr. Nassar.⁵⁷ When the Hospital hired the physician, Dr. Levine remarked to another doctor that the Hospital had “hired another one,” and that “Middle Easterners are lazy.”⁵⁸

Due to Dr. Levine’s hostility, Dr. Nassar engaged in discussions with the Hospital about remaining employed there despite the affiliation agreement, since he wanted to resign from the University to avoid Dr. Levine’s supervision.⁵⁹ The Hospital verbally offered Dr. Nassar a position as a staff physician, and Dr. Nassar proceeded to resign from the University.⁶⁰ Upon his resignation, Dr. Nassar wrote a letter to Dr. Gregory Fitz, Chair of Internal Medicine and Levine’s immediate supervisor, that “[t]he primary reason [for] resignation . . . [is] the

⁵¹ *Id.* at 2535-36.

⁵² *Id.* at 2523. Due to the fact that “the University specializes in medical education for aspiring physicians, health professionals, and scientists . . . the Hospital permits the University’s students to gain clinical experience working in its facilities.” *Id.* By means of the affiliation agreement, most of the staff physician positions at the Hospital are filled by faculty members. *Id.*

⁵³ *Id.* at 2523, 2535.

⁵⁴ *Id.* at 2523. In his complaint, Dr. Nassar alleged Dr. Levine’s bias toward him “manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that ‘Middle Easterners are lazy.’” *Id.*

⁵⁵ *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting).

⁵⁶ *Id.* at 2535-36. According to Dr. Kesier, Dr. Nassar’s direct supervisor, Dr. Levine “never seemed to [be] satisf[i]ed” with his assurances that Dr. Nassar was in fact working *harder* than the other physicians. *Id.* at 2535 (emphasis added).

⁵⁷ *Id.* at 2536.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2536 (2013).

continuing harassment and discrimination . . . by . . . Dr. Beth Levine.”⁶¹ Though Dr. Nassar had met with Dr. Fitz several times to complain about Dr. Levine’s alleged harassment, Dr. Fitz sided with Dr. Levine and thought that she should be “publicly exonerated.”⁶² Dr. Fitz then protested to the Hospital, asserting that the offer to employ Dr. Nassar was inconsistent with the affiliation agreement’s requirement that all staff physicians must also be members of the University faculty.⁶³ The Hospital subsequently withdrew its offer to employ Dr. Nassar.⁶⁴

ii. Take One: The Jury Finds For Nassar On His Title VII Retaliation Claim

Dr. Nassar filed suit, alleging two discrete Title VII violations.⁶⁵ First, he alleged that Levine’s racially and religiously motivated harassment resulted in his constructive discharge from the University, in violation of 42 U.S.C. § 2000e–2(a), which prohibits *status-based discrimination*.⁶⁶ Second, Dr. Nassar claimed that Dr. Fitz’s efforts to prevent the Hospital from hiring him was retaliation for complaining about Levine’s discrimination, in violation of § 2000e–3(a), which prohibits employer retaliation “because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge.”⁶⁷ The jury found for Dr. Nassar on both claims.⁶⁸

iii. Take Two: The Fifth Circuit Affirms Finding of Retaliation

The Fifth Circuit vacated Nassar’s constructive-discharge claim, concluding that he had submitted insufficient evidence.⁶⁹ However, citing *Smith v. Xerox Corp.*,⁷⁰ the court affirmed the lower court’s retaliation finding on the theory that retaliation claims brought under § 2000e–3(a)—

⁶¹ *Id.* (alterations in original).

⁶² *Id.* at 2524. After reading the letter, Dr. Fitz expressed consternation at Dr. Nassar’s accusations, saying that Levine had been “publically humiliated by the letter” and that it was “very important that she be publicly exonerated.” *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See Nassar*, 133 S. Ct. at 2520.

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.* at 2520, 2524, 2528.

⁶⁸ *Id.* at 2536. Dr. Nassar was initially awarded over \$400,000 in back pay and more than \$3 million in compensatory damages. *Id.*

⁶⁹ *Id.* at 2524.

⁷⁰ 602 F.3d 320 (5th Cir. 2010).

like § 2000e-2(a) status-based claims—require only a showing that retaliation was a *motivating factor for the adverse employment action*, not its but-for cause.⁷¹ The Fifth Circuit also found that Dr. Nassar produced sufficient evidence to support a finding that Fitz was motivated, at least in part, to retaliate against him for his complaints regarding Levine’s discrimination.⁷²

iv. Final Cut: The Supreme Court Reverses and Determines Stricter Causation Test Applies to Title VII Retaliation Claims

The Supreme Court granted certiorari to finally decide the proper standard of causation for Title VII retaliation claims.⁷³ Writing for the sharply divided Court, Justice Kennedy held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened “mixed motive” standard.⁷⁴ The Court found its decision in *Gross* to be particularly relevant.⁷⁵ As discussed above, the *Gross* Court concluded that in the context of the ADEA, a plaintiff must prove that “age was the ‘but-for’ cause of the employer’s adverse decision” because the ordinary meaning of language “because of” found in the statute is indicative of Congress’s decision not to include a “careful[ly] tailor[ed] ‘motivating factor’ claim” provision.⁷⁶ Although the whole sticking point of the Court’s decision in *Gross* was that despite having similar wording and being enacted contemporaneously the ADEA and Title VII must be read separately, the *Nassar* Court nevertheless reasoned that because the anti-retaliation provision of Title VII uses the same “because of” language as the anti-retaliation provision of the ADEA, the conclusion is the same: but-for causation applies.⁷⁷

The majority concluded with two additional justifications for

⁷¹ See *id.* (describing holding of the case); see also 42 U.S.C. § 2000e-2(m) (“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.”).

⁷² *Nassar*, 133 S. Ct. at 2520.

⁷³ *Id.*

⁷⁴ *Id.* at 2525-28 (explaining standards for providing retaliation claims).

⁷⁵ See *id.* at 2527 (analyzing *Gross* with the facts of *Nassar*); see also *supra* note 33 (providing relevant language of 29 U.S.C. § 623(a)).

⁷⁶ *Nassar*, 133 S. Ct. at 2527.

⁷⁷ See *id.* at 2527-28 (“Given the lack of any meaningful textual different between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.”).

adapting the but-for standard of causation.⁷⁸ First, the stricter standard is needed because “claims of retaliation are being made with every increasing frequency . . . [and] ha[ve] now outstripped those for every type of status-based discrimination except for race.”⁷⁹ As a result, lessening the standard would contribute to the filing of frivolous claims and upset the balance of fair and responsible allocation of resources in the judicial and litigation systems.⁸⁰ Second, although the Equal Employment Opportunity Commission’s (EEOC) guidance manual has adopted and applied the motivating-factor provision’s lessened causation standard to retaliation claims, it fails to address the specific provisions and detailed scheme of Title VII as opposed to other broad federal antidiscrimination statutes it is not controlling.⁸¹ Therefore, the Court will not give deference to the EEOC’s use of the motivating-factor standard in retaliation claims.⁸²

Ultimately, the Court found that Dr. Nassar could not prove but-for causation in regards to the retaliation claim because the affiliation agreement between the Hospital and the University precluded the Hospital from making Dr. Nassar the job offer.⁸³ Since the Hospital provided a

⁷⁸ See *id.* at 2531-32 (discussing both strict and lessened causation standards).

⁷⁹ *Id.* at 2531. At the time of the decision, the number of retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) had nearly doubled in the past 15 years, from just over 16,000 in 1997 to over 31,000 in 2012. *Id.* That number has since increased to over 38,000 retaliation claims being filed with the EEOC for the fiscal year of 2013. See United States Equal Employment Opportunity Commission, *Retaliation Based Charges FY 1987-FY 2015*, <http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> (last visited February 23, 2016).

⁸⁰ *Nassar*, 133 S. Ct. at 2531-32. Justice Kennedy also expresses concern that the mixed motive standard would make it “far more difficult to dismiss dubious claims at the summary judgment stage.” *Id.* at 2532.

⁸¹ See *id.* at 2531-32 (discussing differences between EEOC guidelines and language of Title VII).

⁸² *Id.* at 2517, 2533 (rejecting argument that EEOC views are entitled to deference under Court’s decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). In *Skidmore*, the Court held that although rulings, interpretations and opinions of the Administrator of the Fair Labor Standards Act were not controlling upon the courts by reason of their authority, they do however “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” See *Skidmore*, 323 U.S. at 139-40 (describing holding of the case). Furthermore, the *Skidmore* Court concluded that agency views should be given deference where “the policies at issue are made in pursuance of an official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.” *Id.* However, the Court also noted that the weight of an agency’s judgments in a particular case will ultimately depend upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140.

⁸³ See *Nassar*, 133 S. Ct. at 2517, 2532. The Court admitted that if the motivating-factor standard applied to the retaliation claim, the University may be liable where “Dr. Fitz’s alleged desire to exonerate Dr. Levine” motivated his enforcement of the affiliation agreement, which resulted in the hospital rescinding Dr. Nassar’s job offer, even if it could also be shown that the

legitimate reason for rescinding the job offer despite the fact that retaliation indeed could have played a role in that decision, applying the stricter but-for standard defeated Dr. Nassar's retaliation claim where he could not prove retaliation was the *only* reason the job offer was rescinded.⁸⁴

v. A Scathing Dissent: The Majority Complicated An Already Complicated Subject

In a powerful dissent, Justice Ginsburg joined by Justices Breyer, Sotomayor, and Kagan argued that mixed-motive theory should apply to retaliation claims: “[R]etaliation in response to a complaint about [proscribed] discrimination *is* discrimination’ on the basis of the characteristic Congress sought to immunize against adverse employment action.”⁸⁵ This is evident arguably because plaintiffs often raise the status-based discrimination proscription with the proscription against retaliation in Title VII suits.⁸⁶ Furthermore, the dissent points out that the Court has long acknowledged the symbiotic relationship between proscriptions on discrimination on retaliation, as anti-retaliation provisions “see[k] to secure [that] the primary objective of creating a workplace where employee feel free to approach officials with their grievances” which in turn should eliminate discrimination in the work place.⁸⁷ Justice Ginsburg illustrates this concept by showing that “in a line of decisions unbroken until today,” “this Court has held,” “that a ban on discrimination encompasses retaliation,” and “[t]here is no sound reason in this case to stray from [those] decisions.”⁸⁸

The dissent also relies heavily upon the fact that the mixed-motive provision was enacted as part of the Civil Rights Act of 1991, which amended Title VII with the stated purpose to provide “additional protections against unlawful discrimination in employment,” and to “respon[d] to a number of . . . decisions by [this Court] that sharply cut

terms of the affiliation agreement precluded the hospital hiring Dr. Nassar in the first place. *Id.*

⁸⁴ See *id.* at 2532-33 (detailing analysis of stricter but-for standard).

⁸⁵ See *id.* at 2525 (emphasis in original) (quoting *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 179, n.3 (2005)).

⁸⁶ *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting) (“[T]he ban on discrimination and the ban on retaliation against a discrimination complainant have traveled together: Title VII plaintiffs often raise the two provisions in tandem.”).

⁸⁷ See *id.* at 2537 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, 67 (2006)).

⁸⁸ See *id.* (alterations in original); *supra* note 6 (detailing Court's history of finding discrimination as encompassing retaliation, supporting application of mixed motive standard).

back on the scope and effectiveness’ of antidiscrimination laws.”⁸⁹ Thus the overall purpose of the amendments, according to the dissent, was to expand all anti-discrimination protections.⁹⁰ This is evidenced by the Congressional codification of the *Price Waterhouse* “mixed motive” standard applicable in Title VII discrimination claims, as well as Congress’ modification of the *Price Waterhouse* “burden shifting” test to make it more amenable to employees.⁹¹

Moreover and critical to the causation conundrum at issue, the dissent sharply criticizes the Court’s reliance on *Gross*—since the Court previously found “because of” language in context of the ADEA to require but-for causation, it is logical to assume that the word “because” in Title VII’s retaliation provision likewise bars the mixed-motive standard.⁹² The dissent points out that this is akin to reading two separate statutes together (the ADEA and Title VII), while refusing to read two Title VII provisions together (the status-based proscription and the proscription of retaliation).⁹³ Thus, instead of crossing statutory lines, the dissent argues that the Court should adhere to the standard principle of statutory interpretation that identical phrases appearing in the *same* statute ordinarily bear a consistent meaning: thus Title VII’s discrimination and retaliation provisions both require the mixed motive standard.⁹⁴ The dissent warns that requiring juries to be instructed on two different standards of causation will cause major confusion in future Title VII retaliation litigation:

The Court shows little regard for trial judges who must instruct juries in Title VII cases in which plaintiffs allege both status-based discrimination and retaliation. Nor is the Court concerned about the

⁸⁹ See *id.* at 2538 (citing H.R. Rep. No. 102-40, pt. 2, at 2-4 (1991)) (analyzing purpose of the Civil Rights Act of 1991) (emphasis added).

⁹⁰ See *id.* at 2538-39 (discussing impetus of amendments to increase protection against discrimination).

⁹¹ See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2539 (2013) (explaining codification of standard). As discussed *supra*, the *Price Waterhouse* “mixed motive” standard allows a plaintiff to show that a prohibited factor contributed to the employment decision, but the employer can still escape liability by showing that it would have taken the same action regardless of the improper motive. *Id.*; see *supra* Part II.B (discussing *Price Waterhouse* framework). The 1991 amendments reaffirmed that *any* reliance on prejudice in making an employment decision is prohibited, as section 2000e-5(g)(2)(B) codified that an employer will no longer be shielded if a proper motive, along with an improper one, motivated the adverse employment decision. *Nassar*, 133 S. Ct. at 2539.

⁹² *Nassar*, 133 S. Ct. at 2545 (Ginsburg, J., dissenting).

⁹³ See *id.* at 2545 (“[W]hen conducting statutory interpretation, we ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’”)

⁹⁴ See *id.* (relying on *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007)) (declining mixed motive standard).

capacity of jurors to follow instructions conforming to today's decision. Causation is a complicated concept to convey to juries in the best of circumstances. Asking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion. That would be tolerable if the governing statute required double standards, but here, for the reasons already stated, it does not.⁹⁵

Also troubling for the dissent was the fact that when more than one factor contributes to a plaintiff's injury, but-for causation precludes a Title VII plaintiff alleging retaliation, as one cannot establish liability if the firing was prompted by both legitimate and illegitimate factors.⁹⁶ This is precisely what happened to Dr. Nassar: his job was rescinded for both a legitimate purpose (enforcement of the affiliation agreement) and illegitimate purpose (complaining about the discrimination he faced at work).⁹⁷

Moreover, Justice Ginsburg reflects that both "plurality and concurring opinions in *Price Waterhouse* indicate[] that a strict but-for test is particularly ill suited to employment discrimination cases."⁹⁸ Even if the test is appropriate in some tort contexts, "it is an entirely different matter to determine a 'but-for' relation when . . . consider[ing], not physical forces, but the mind-related characteristics that constitute motive."⁹⁹ 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."¹⁰⁰

Lastly, the dissent points out that requiring but-for causation in the context of Title VII had been rejected before.¹⁰¹ As the Congressional Record reflects, when Title VII was enacted in 1964, Congress considered and ultimately rejected an amendment that would have placed the word "*solely*" before "because of [the complainant's] race, color, religion, sex, or national origin."¹⁰² Senator Case, a prime sponsor of Title VII, commented

⁹⁵ *Nassar*, 133 S. Ct. at 2546 (2013) (Ginsburg, J. dissenting).

⁹⁶ *See id.* (declaring majority's determination erroneous in light of existing tort law).

⁹⁷ *See id.*

⁹⁸ *Id.* at 2547.

⁹⁹ *Id.* (quoting *Gross v. FBL Fin. Serv.*, 557 U.S. 167, 190 (2009) (Breyer, J., dissenting)).

¹⁰⁰ *Id.* (quoting *Gross*, 557 U.S. at 191 (Breyer, J., dissenting)); *see also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) ("[A]t . . . times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs.") (O'Connor, J., concurring).

¹⁰¹ *See Nassar*, 133 S. Ct. at 2547 (analyzing Congress' decision to omit "*solely*" before "because" from Act).

¹⁰² *Id.*; *see* 110 CONG. REC. 2728, 13837-138 (1964) (illustrating rejected amendment language).

that a “sole cause” standard would render the Act “totally nugatory.”¹⁰³ With even the prime sponsor of Title VII himself concluding the requirement of sole cause in the context of Title VII would render the act inoperative, the dissent agrees and concludes with a call to action: “Today’s misguided judgment . . . should prompt yet another Civil Rights Restoration Act.”¹⁰⁴

B. The State of the Law Post-Nassar: The Causation Conundrum Continues

The *Nassar* Court relied heavily upon its reasoning in *Gross v. FBL Financial Services, Inc.* in determining but-for causation as the proper standard for retaliation claims in Title VII context.¹⁰⁵ However, the *Gross* Court neither explained exactly what it meant by “but-for causation,” nor clearly articulated the standard to be followed.¹⁰⁶ In fact, up until *Nassar*, “chaos and confusion surround[ed] the issue of factual causation in employment discrimination disparate treatment doctrine.”¹⁰⁷ Moreover, the reasoning that the Court employed to arrive at its decision left it open to interpretation as to whether all federal statutes with similar “but for” causality language without an explicit mixed motive provision require the stricter but-for test.¹⁰⁸ Though *Nassar* determined “but-for” causation as the standard to apply to Title VII retaliation claims, the legal framework necessary to analyze such claims remains unclear.¹⁰⁹ Thus chaos and

¹⁰³ *Nassar*, 133 S. Ct. at 2547 (discussing one congressional representative’s opinion regarding amendment). According to the Merriam-Webster Dictionary, “nugatory” is defined as “of little or no consequence,” “having no force,” and “inoperative.” MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/nugatory> (last visited May 16, 2016).

¹⁰⁴ *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting).

¹⁰⁵ See *id.* at 2527-28 (“[T]hat opinion [Gross] holds two insights for the present case. The first is textual and concerns the proper interpretation of the term “because” as it relates to the principals of causation underlying both § 623(a) [of the ADEA] and § 2000e-3(a) [of Title VII]. The second is the significance of Congress’ structural choices in both Title VII itself and the law’s 1991 amendments.”).

¹⁰⁶ See Tananbaum, *supra* note 17, at 1140 (illuminating Court’s reliance upon various interpretations of “but for” or “cause in fact” standard).

¹⁰⁷ See Brian S. Clarke, *The Gross Confusion Deep in the Heart of University of Texas Southwest Medical Center v. Nassar*, 4 CAL. L. REV. 75, 75 (2013) (assigning confusion to *Gross*). By granting certiorari to hear *Nassar*, the Supreme Court had “a golden opportunity” to clarify *Gross* and “explain the nature and scope of the cause-in-fact standard” in the context of Title VII. See *id.* at 76 (explaining issue in *Nassar*).

¹⁰⁸ See Tananbaum, *supra* note 17, at 1140 (discussing difficulties with applying *Gross* ruling).

¹⁰⁹ See *Stoner v. Ark. Dep. of Corr.*, 983 F. Supp. 2d 1074, 1098 (E.D. Ark. 2013) (declining to extend Title VII employer liability).

confusion still run rampant in the circuit courts, as illustrated *infra*.

Before being abrogated by *Nassar*, the Fifth Circuit had initially rejected the “sole cause” interpretation established by *Gross* in *Smith v. Xerox*, which left intact the *Price Waterhouse* mixed motive framework and other Title VII cases as precedent under which the lesser causation standard was found permissible in retaliation cases.¹¹⁰ On the other hand, the Seventh Circuit foreshadowing *Nassar*, had already begun to apply *Gross*’s reasoning that strict but-for causation applies to *all* federal discrimination statutes, such as the Americans With Disabilities Act (ADA).¹¹¹ The Eastern District of Arkansas has observed and considered that both the Fifth and Sixth Circuits continue to apply the *McDonnell Douglas* framework to retaliation claims, though the Eighth Circuit has yet to conclusively rule on the matter.¹¹² The First Circuit has even expressly adopted the *McDonnell Douglas* framework post-*Nassar*: “[r]etaliatory termination claims based circumstantial evidence are evaluated using the McDonnell Douglas burden-shifting framework.”¹¹³

¹¹⁰ See *Smith v. Xerox Corp.*, 602 F.3d 320, 333 (5th Cir. 2010) (considering mixed-motive standard); see also Tananbaum, *supra* note 17, at 1140-43 (discussing Fifth Circuit’s approach).

¹¹¹ See Tananbaum, *supra* note 17, at 1144 (emphasis added). The Seventh Circuit expounded (expounding on mixed motive cases in much greater detail in *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010)). In *Serwatka v. Rockwell Automation, Inc.*, an employee alleged that her employer discharged her because she was disabled, in violation of the Americans with Disabilities Act (ADA). *Id.* at 958. The jury found both that the employer discharged the employee on the basis of her disability and that it would have discharged her regardless of her condition (i.e., the employer had mixed motives). See Tananbaum, *supra* note 17, at 1144-45. The Seventh Circuit ultimately found such claim insufficient under the ADA, interpreting *Gross* to “bar mixed motives claims under any federal statute not expressly authorizing them.” *Id.* at 1145; see also *Serwatka*, 591 F.3d at 962 (“*Gross* makes clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute’s ‘because of’ language demands proof that a forbidden consideration—here, the employee’s perceived disability—was a ‘but for’ cause of the adverse action complained of.”).

¹¹² See, e.g., *Stoner*, 983 F. Supp. 2d at 1098 (citing *Bishop v. Ohio Dep’t. of Rehab. & Corr.*, 529 F. App’x 685 (6th Cir. 2013)); *Nicholson v. City of Clarksville*, 530 F. App’x 434, 445-46 (6th Cir. 2013); *Coleman v. Jason Pharm.*, 540 F. App’x 302, 303-06 (5th Cir. 2013). The *McDonnell Douglas* burden-shifting framework provides that in order to make a *prima facie* showing of retaliation, the plaintiff must show that she engaged in protected conduct, that she suffered an adverse employment action, and that a causal nexus exists between the protected activity and the adverse action. *Stoner*, 983 F. Supp. 2d at 1097. In *Stoner*, the court denied summary judgment on the employer’s Title VII retaliation claim where the record permitted a reasonable juror to conclude that the employer’s desire to retaliate the plaintiff for her complaint was the “but-for” cause of the adverse employment decision. *Id.* at 1098.

¹¹³ See *Santos-Santos v. P.R. Police Dep’t*, 63 F. Supp. 3d 181, 189 (D.P.R. 2014) (citing *Gerald v. University of Puerto Rico*, 707 F.3d 7, 24 (1st Cir. 2013)) (explaining requirement for *prima facie* showing of retaliation). According to the framework established in *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination. *Id.* at 189. “If [s]he succeeds, an inference of discrimination arises, and the burden of production shifts to the defendant to produce evidence that the challenged employment action was taken for a legitimate

The district courts within the Second Circuit, however, have tread cautiously with *Nassar*'s sole causation interpretation in the context of the Fair Housing Act, and have recently called for clarification on the standard in the context of the Americans with Disabilities Act (ADA) in *Sherman v. Cnty. of Suffolk*.¹¹⁴ Denying summary judgment to Suffolk County, N.Y., on former corrections officer Steven Sherman's claims that he was fired because of a knee injury and in retaliation for complaining about discrimination, the U.S. District Court for the Eastern District of New York found that Sherman raised triable questions about whether his injury and complaint were the "but for" cause of his termination or simply played a role in the decision, i.e. was a motivating factor.¹¹⁵ The court observed, however, that *Nassar* and conflicting district court decisions within the Second Circuit left an "open question" about the appropriate causation standard that may soon need to be resolved, as some district courts in the circuit have "read the writing on the wall" and concluded that ADA claims require "but for" causation while others have continued to rely on pre-

non-discriminatory reason." *Id.* If the employer supplies a legitimate non-discriminatory reason, then the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the "employer's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory." *Id.* at 189-90. In *Santos-Santos*, the defendant employer made a *prima facie* showing of legitimate reasons for transferring the plaintiff employee to another department, which she alleged to be retaliation. *Id.* at 190. The court held that in order to properly defeat defendants' reasons for the retaliatory actions, plaintiff had to provide evidence to demonstrate pretext, "which can be shown by such weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Id.* at 190 (citing *Gomez-Gonzalez v. Rural Opportunities, Inc.*, 626 F.3d 654, 662-63 (1st Cir. 2010)). Since the plaintiff employee failed to offer evidence that the alleged wrong was pre-textual, the court granted summary judgment for the defendant. See *Santos-Santos*, 63 F. Supp. 3d at 190-91 (providing holding of case).

¹¹⁴ 71 F.Supp. 3d 332 (E.D. NY 2014); see *Ponce v. 480 East 21st St., LLC*, 12 Civ. 4828, 2013 U.S. Dist. LEXIS 122769, *11-12, n.5 (E.D.N.Y. Aug. 28, 2013). Discussing Title VII and *Nassar*:

Courts have assumed that a plaintiff states an FHA retaliation claim by alleging that a retaliatory motive played a part in the adverse action - but this assumption was taken from Title VII standards. The Supreme Court recently [in *Nassar*] changed that principle in the Title VII context, holding that a plaintiff must prove that an illegal motive was the sole reason for the adverse action. Because that decision was based, in part, on Title VII's statutory scheme and the specific text of its retaliation provision, this Court would be hesitant to apply that change in law to the FHA.

Id. (internal citations omitted).

¹¹⁵ See Chris Opfer, *Court Calls for Second Circuit Clarification on Causation Standard in Disability Lawsuits*, BLOOMBERG BNA, www.bna.com/court-calls-second-n17179921765 (last visited March 28, 2016) (discussing need for clarification on application of but-for causation standard to ADA claims post-*Nassar*).

Gross circuit precedent allowing ADA claims to proceed on a mixed-motive theory.¹¹⁶

The Eastern District of Pennsylvania, as part of the Third Circuit, has similarly considered but-for causation post-*Nassar* in the context of the ADA and Family Medical Leave Act (FMLA) in *Berkowitz v. Oppenheimer Precision Products, Inc.*¹¹⁷ The court stated that even if but-for causation applies to the ADA and FMLA, summary judgment was not proper where the employee presented evidence to rebut the employer's nondiscriminatory reasons for termination as pretextual, since a reasonable juror could find "'but-for'" the request for an ADA accommodation and FMLA leave, the employee would not have been terminated.¹¹⁸

On the opposite end of the spectrum, a superior court in Connecticut has flat out rejected the reasoning of *Nassar* in interpreting state employment retaliation laws.¹¹⁹ While the defendant employer in *Gonska v. Highland View Manor*¹²⁰ argued that Connecticut must look to federal precedent for guidance in the area of employment retaliation, it follows that the court should apply the but-for causation standard announced in *Nassar*.¹²¹ In declining to require but-for causation as the standard in the state law retaliation provision at issue, the court noted it had "previously found compelling reasons to believe that our state appellate courts would not choose to follow the 'but-for' causation standard articulated by the United States Supreme Court in the *Nassar* and *Gross* cases, in connection with . . . state . . . retaliation statutes."¹²² The court

¹¹⁶ See *Opfer*, *supra* note 115. In *Sherman v. County of Suffolk*, the Eastern District of New York noted that the Second Circuit has yet to overturn a ruling issued before the *Gross* and *Nassar* decisions, in which the appeals court held that an ADA discrimination plaintiff need only show that the worker's disability played a motivating role in an adverse employment decision. 71 F. Supp. 3d at 348 (emphasis added) (citing *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000)). The *Sherman* Court also cited an unpublished opinion rendered after the Supreme Court decisions in *Gross* and *Nassar* in which the Second Circuit held that the mixed-motive standard still applied in ADA cases. *Id.* (emphasis added) (citing *Perry v. NYSARC, Inc.*, 424 Fed. App'x 23 (2d Cir. 2011)).

¹¹⁷ No. CIV. 13-4917, 2014 LEXIS 152533 (E.D. Pa. Oct. 28, 2014).

¹¹⁸ See Jay-Anne B. Casuga, *Judge Considers Nassar's But-For Standard, Sends ADA, FMLA Retaliation Claims to Trial*, BLOOMBERG BNA, Oct. 29, 2014, http://news.bna.com/edIn/display/alpha.adp?mode=topics&letter=C&frag_id=58560896&item=1866&prod=edIn (discussing but-for standard in context of ADA and FMLA in *Berkowitz*, 2014 LEXIS 152533).

¹¹⁹ See *Gonska v. Highland View Manor, Inc.*, No. CV126030032S, 2014 WL 3893100, at *7 (Conn. Super. Ct. June 26, 2014) (declining to follow but-for causation standard in state law employment retaliation context claims).

¹²⁰ *Id.*

¹²¹ See *id.* (arguing applicable standard).

¹²² *Id.* (citing *Bissonnette v. Highland Park Market, Inc.*, No. HHDCV106014088S, 2014 WL 815872, at *3 (Conn. Super. Ct. Jan. 28, 2014)).

further stated that “while often a source of great assistance and persuasive force . . . it is axiomatic that decisions of the United States Supreme Court are not binding on Connecticut courts tasked with interpreting our General Statutes. Rather, Connecticut is the final arbiter of its own laws.”¹²³ In rejecting the but for test and applying the *McDonnell Douglas* burden shifting analysis with the motivating factor standard, the court held that “[a] plaintiff can establish causation either by showing that the protected activity was followed close in time by adverse action, or through evidence of retaliatory animus directed against the plaintiff . . .”¹²⁴ The court found the more lenient standard appropriate in the employment context because using the evidence and considering the unique circumstances of each case, the trier of fact is ultimately “in the best position to make an individualized determination of whether the temporal relationship between an employee’s protected activity and an adverse action is causally significant.”¹²⁵

Surprisingly, clarification of the but-for causation standard may be imbedded in a criminal case decided several months after *Nassar*.¹²⁶ In *Burrage v. United States*, the Supreme Court examined but-for causation in the context of a criminal prosecution of Burrage, a drug dealer who was convicted for the unlawful distribution of heroin that resulted in the death of another person in violation of the Controlled Substances Act (CSA).¹²⁷ At trial, two medical experts testified regarding the cause of the victim’s death and determined that because multiple drugs were present in his system, heroin “was a contributing factor” in the death.¹²⁸ Burrage argued for an acquittal because there was no evidence that heroin was the but-for

¹²³ *Id.*

¹²⁴ *Gonska*, 2014 WL 3893100, at *9. The ultimate issue considered in *Gonska* was “whether the plaintiff [could] show a sufficient causal connection between the exercise of protected activity and her termination to defeat summary judgment.” *Id.* In finding that the plaintiff had met this burden, the court made two findings. *Id.* First, a reasonable trier of fact could determine that the temporal proximity between the plaintiff’s protected activity and her termination gave rise to an inference of retaliation based on her positive employment record and in light of her being fired only two months after complaining about the defendant’s conduct. *Id.* Though the defendant proffered a legitimate reason for her termination, in light of the evidence given by the plaintiff, summary judgment was inappropriate. *Id.* Second, there was also direct evidence of retaliatory animus due to a change in testimony between the incident and the plaintiff’s filing suit from which the trier of fact could draw a reasonable inference that the reasons proffered for the plaintiff’s termination were mere pretext. *Id.* at *10.

¹²⁵ *See id.* at *9 (justifying more lenient standard).

¹²⁶ *See Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (holding defendant distributing drugs that killed victim not independent cause of death, but-for not met).

¹²⁷ *Id.* at 885. “The Controlled Substances Act imposes a 20-year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug, when ‘death or serious bodily injury results from the use of such substance.’” *Id.* at 885 (citing 21 U.S.C. §841(a)(1), (b)(1)(A)-(C)).

¹²⁸ *Id.* at 885-86.

cause of death, because it was only a contributing factor.¹²⁹ The Supreme Court granted certiorari to determine whether Burrage could be convicted under the CSA's "death results" provision, which in turn called for clarification of the appropriate causation standard.¹³⁰

The Court went on to interpret the phrase "results from" in the CSA to require actual causality, and cited to their holding in *Nassar* that "[i]n the usual course," this requires proof "that the harm would not have occurred" in the absence of—that is, but for—the defendant's conduct."¹³¹ Writing for the majority, Justice Scalia provided two scenarios illustrating but-for causation.¹³² First, where A shoots B, who is hit and dies, A *actually* caused the death of B, since *but-for* A's conduct B would not have died.¹³³ Second, and of particular importance to be discussed *infra*, Scalia stated that but-for causation can still result when a predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, "it was the straw that broke the camel's back."¹³⁴ Scalia then illustrates the proverbial "straw that broke the camel's back" by pointing to a situation in which poison is administered to a man suffering from multiple diseases.¹³⁵ The poison is still a but-for cause of his death, even if the diseases played a role, "so long as, without the incremental effect of the poison, he would have lived."¹³⁶

¹²⁹ *Id.* at 886.

¹³⁰ *Id.* at 885.

¹³¹ See *Burrage*, 134 S. Ct. at 887-88 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2525 (2013)) (defining "results from"). The Model Penal Code similarly reflects this understanding of but-for causation: "[c]onduct is the cause of a result" if "it is an antecedent but for which the result in question would not have occurred." *Id.* at 888 (quoting MODEL PENAL CODE § 2.03(1)(a) (defining "resulting from").

¹³² *Id.* at 888.

¹³³ *Id.*

¹³⁴ *Id.* Justice Scalia uses the anecdote to illustrate that though there may be thousands of causes, like "wisps of straw," responsible for a certain result, to be a "but-for" cause of harm the action must actually do damage equivalent to "breaking the camel's back." *Id.* at 888.

¹³⁵ *Id.*

¹³⁶ *Burrage v. United States*, 134 S. Ct. 881, 888 (2014) (emphasis added). Justice Scalia also uses a baseball game to illustrate but-for requirement. *Id.* If, for example, the visiting team's leadoff batter hits a home run in the first inning, and the visiting team goes on to win 1-0, everyone would agree that the victory resulted from the home run. *Id.* However, it is inconsequential that the win was also a result of *other* necessary factors, like skillful pitching. *Id.* There is little rationale to say that an event (the win) was the outcome of an earlier action (the home run) if that action (the home run) was an extraneous contributing role in generating the event (the win). *Id.* Had the winning team won 5 to 2 rather than 1 to 0, it would be surprising to find out that the victory resulted from the leadoff batter's home run because under those circumstances, the home run was only a contributing factor to the win and no longer the but-for cause. *Id.* In light of this explanation of but-for causation, the Government needed to prove that the heroin played a direct role in death, akin to the leadoff batter hitting a home run in the first inning and the subsequently winning 1-0. *Id.*

Using this interpretation of but-for causation, the Court reversed Burrage's conviction because the district court had improperly instructed the jury that the Government was required only to prove "that the heroin distributed by the Defendant was a contributing cause . . . of death."¹³⁷ The Court reasoned that since "results from" language requires but-for causation, it only makes sense that in order to sentence Burrage to a mandatory minimum sentence of twenty years, the heroin had to be at least one but-for or independent cause that resulted in the death, like "the straw that broke the camel's back."¹³⁸ Ultimately, without evidence that the victim would have lived but for the heroin distributed by Burrage, the conviction had to be reversed.¹³⁹

The importance of *Burrage* in the context of Title VII retaliation claims is significant, yet subtle.¹⁴⁰ The Court provided additional clarification of the but-for causation standard that any average layperson can understand with analogies to baseball and familiar proverbs.¹⁴¹ Specifically, Justice Scalia's discussion of the causation requirements being met when the predicate act is "the straw that broke the camel's back" suggests that in a Title VII retaliation case, the protected conduct could be *one of many* "but-for" causes leading to the adverse employment action.¹⁴² Moreover, the opinion also routinely refers to "*a* but-for" cause as opposed to "*the* but-for" cause.¹⁴³ This description of the causation standard certainly appears to be more akin to the motivating factor standard, articulated in *Price Waterhouse*, than the strict sole but-for standard announced in *Gross* and *Nassar*.¹⁴⁴ Under both *Burrage* and *Price Waterhouse*, the employer can be motivated by any number of reasons, and a plaintiff can still prevail so long as she can show that it was the protected conduct that ultimately pushed the employer to take retaliatory action.¹⁴⁵ Thus, the *Burrage* decision "must be considered a win" for plaintiff's counsel, but it remains to be seen whether trial courts will incorporate

¹³⁷ *Id.* at 886, 892.

¹³⁸ *Id.*

¹³⁹ *Id.* at 892. It was conceded that there was no evidence that the victim, Joshua Banka, would have lived but for his heroin use. *See id.*

¹⁴⁰ *See id.* at 888 (explaining but-for causation using analogies).

¹⁴¹ *See Burrage v. United States*, 134 S. Ct. 881, 888 (2014) (explaining but-for causation using analogies); *see also* Tom Harrington, *The Rebranding of 'But-For' Causation In Title VII Cases*, LAW360, June 4, 2014, <http://www.law360.com/appellate/articles/531781> (highlighting how *Burrage* clarified but-for causation in employment law context).

¹⁴² *See Harrington, supra* note 141 (drawing possible inferences from *Burrage* in context of Title VII retaliation claims).

¹⁴³ *Id.* (noting subtle language shift in articulation of but-for causation standard).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Justice Scalia's "straw that broke the camel's back" analogy into jury instructions to clarify confusion regarding the applicable causation standard.¹⁴⁶

C. Post-*Nassar* Problems for Plaintiff Litigators

Due to circuit court confusion surrounding the causation standard, its interpretation and application, it is difficult for plaintiff-employees' attorneys to uniformly know what to expect in crafting arguments and defenses.¹⁴⁷ Particularly in litigation concerning Title VII retaliation claims, there is always back and forth by counsel regarding an employer's "legitimate business reasons" in making an adverse action against an employee after they have complained of discrimination, and whether or not those reasons are merely masking a retaliatory motive.¹⁴⁸ Summary judgment is proper when there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."¹⁴⁹ Retaliation cases in particular are usually won or lost at the summary judgment phase by plaintiff's counsel demonstrating, or employer's counsel attacking, causation.¹⁵⁰ Consequently, *Nassar* has made it easier for employers to win at the summary judgment stage by "requiring a restrictive view of causation in workplace retaliation cases."¹⁵¹ Instead of having to prove that retaliation was at least one of the reasons behind the retaliatory action complained of, *Nassar*'s holding requires an employee alleging retaliation to prove that retaliation was the *sole* reason for taking that action.¹⁵² Ultimately, plaintiff employee litigators wishing to pursue retaliation claims on behalf of their clients have been left in an uncertain legal

¹⁴⁶ *Id.*

¹⁴⁷ See Harrington, *supra* note 141 (discussing implications of but-for causation standard in Title VII litigation)

¹⁴⁸ See Harrington, *supra* note 141 (discussing implications of but-for causation standard in Title VII litigation).

¹⁴⁹ See *Ponte v. Steelcase Inc.*, 741 F.3d 310, 319 (1st Cir. 2014) (quoting *Cortés-Rivera v. Dep't of Corr. & Rehab.*, 626 F.3d 21, 26 (1st Cir. 2010); see also FED. R. CIV. P. 56(a) ("Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.")).

¹⁵⁰ See Harrington, *supra* note 141 (discussing implications of but-for causation standard in Title VII litigation).

¹⁵¹ See Grossman & Brake, *supra* note 30 (summarizing majority opinion in *Nassar*).

¹⁵² See *id.* (highlighting how restrictive but-for causation in workplace retaliation cases favors employers); see also Clarke, *supra* note 107, at 78 (interpreting but-for causation as sole causation test is unrealistic due to nature of employment decisions).

landscape post *Nassar*.¹⁵³

IV. ANALYSIS

A. Tort Don't Comport: Interpreting But-For Causation to Mean "Sole Cause" Is Inadequate in the Employment Context

Interpreting but-for causation to mean that a plaintiff-employee must prove that the employer's desire to discriminate or retaliate was the *sole* cause of the adverse employment action sets an unrealistic standard due to the nature of employment decisions where multiple causal factors come into play.¹⁵⁴ It is one thing to speak of a "but-for" cause in a classic tort scenario, such as where a car accident results from another car failing to stop at a red light, because there it is easier to identify the but-for cause.¹⁵⁵ In the employment context, proving but-for causation is not as clear.¹⁵⁶ In fact, it's like trying to look into the mind of the employer who obviously has an incentive to hide discriminatory and illegal motivations.¹⁵⁷ As noted by Justice Breyer in his dissent in *Gross*, "[i]t is an entirely different matter to determine a 'but-for' relation when we consider, not physical forces, but the mind-related characterizations that constitute motive."¹⁵⁸

To equate but-for causation in the employment context as meaning *sole* motive is as one employment law scholar put it, "too stupid to take

¹⁵³ See Grossman & Brake, *supra* note 30 (summarizing majority opinion in *Nassar*); Clarke, *supra* note 106, at 78 (interpreting but-for causation as sole causation test is unrealistic due to nature of employment decisions).

¹⁵⁴ See Clarke, *supra* note 107, at 76 ("Logically, every occurrence has a virtually infinite number of factual causes . . . without which the event at issue would not have occurred.").

¹⁵⁵ See Harrington, *supra* note 141 (noting but-for causation works better in tort cases as opposed to employment cases).

¹⁵⁶ See Harrington, *supra* note 141 (noting but-for causation works better in tort cases as opposed to employment cases).

¹⁵⁷ See *id.* (describing but-for causation easier to determine in tort context rather than employment context).

¹⁵⁸ *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 190 (2009) (Breyer, Souter, & Ginsburg, JJ. dissenting). Justice Breyer further elaborated that:

[T]o 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. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

Id. at 191.

seriously.”¹⁵⁹ Under this interpretation, Dr. Nassar would have to prove that the only reason the University decided to enforce the affiliation agreement (which precluded him from working at the Hospital) was in retaliation for complaining of the discrimination he faced at the hand of Dr. Levine.¹⁶⁰ Using the sole cause interpretation as the Court did, the fact that the affiliation agreement existed was enough of a legitimate reason to preclude Dr. Nassar from proving retaliation.¹⁶¹

It is key to distinguish the fact that the Hospital was well aware of the agreement when it verbally extended an offer of employment to Dr. Nassar after he informed them of his plan to resign from the University.¹⁶² It was not until Dr. Nassar’s supervisor, Dr. Fitz, protested to the Hospital that the affiliation agreement forbade the job offer that retaliation came into play.¹⁶³ It is an undisputed fact that Dr. Fitz was angry with Dr. Nassar for complaining about Dr. Levine’s discrimination and that he sided with Dr. Levine.¹⁶⁴ Under the motivating factor standard of causation, Dr. Nassar could surely connect Fitz’s comments to retaliatory conduct, but under the strict sole-cause, he could not.¹⁶⁵

Inherently, this makes little sense and asks the plaintiff to prove the state of mind of the person or entity accused of retaliation—something that both Justices Breyer and Ginsburg have expressed concern with.¹⁶⁶ Large and sophisticated employers of medical and educational professionals, such as hospitals and universities, most likely have detailed employee policies and procedures in place, and may not uniformly enforce them.¹⁶⁷ The reality of the situation is that had Dr. Fitz not thrown a fit about Dr. Nassar working at the Hospital, Dr. Nassar may have well enjoyed employment there.¹⁶⁸ Because Dr. Nassar cannot possibly compel Dr. Fitz to admit that he made sure the agreement was enforced only to spite Dr. Nassar for complaining about Dr. Levine’s discrimination, the application of but-for causation as sole cause unfairly precludes a legitimate retaliation claim

¹⁵⁹ See Clarke, *supra* note 107, at 76 (acknowledging that but-for causation as sole causation test is unrealistic).

¹⁶⁰ See *supra* note 69 and accompanying text.

¹⁶¹ See discussion *supra* Part III.A.iv (reviewing Supreme Court’s reasoning for heightened standard).

¹⁶² See discussion, *supra* Part III.A.i (detailing facts of *Nassar* case).

¹⁶³ See discussion *supra* Part III.A.i (detailing facts of *Nassar* case).

¹⁶⁴ See discussion *supra* Part III.A.i (outlining facts of case).

¹⁶⁵ See discussion *supra* Part III.A.i (outlining facts of case).

¹⁶⁶ See discussion *supra* Part III.A.v (discussing dissenting opinions).

¹⁶⁷ See discussion *supra* Part III.A.v (discussing dissenting opinions).

¹⁶⁸ See discussion *supra* Part III.A.v (discussing dissenting opinions).

even under protective Title VII legislation.¹⁶⁹ Much of this confusion stems from the Court's initial decision that but-for causation is required for retaliation claims under the ADEA in *Gross v. FBL*.¹⁷⁰

Taking a closer look at the decision, the Court was all over the place in its discussion of causation, which ultimately provided mixed messages.¹⁷¹ Instead of clearly defining the but-for causation standard, it muddled several interpretations which ranged from the traditional but-for test found in Prosser & Keeton on Torts, "necessary condition" statutory language discussed in *Burr*, and finding but-for causation to exist where a protected trait was the factor that mattered in the employer's decision according to *Biggins*.¹⁷² Given the absence of coherent textual guidance as to the meaning of but-for causation, the only thing clear in *Gross* is that based on the plain meaning of the words the Court used, a protected trait must be "*the* but for cause" and "*the* reason" for the decision, instead of "*a*" or "*one of several*".¹⁷³ Though discussing several different interpretations of "but-for" causation and how they differ, the *Gross* Court ultimately adopted the most restrictive version available, interpreting "but-for" causation under the ADEA to require the "sole cause" standard.¹⁷⁴

Thus, *Gross* inadvertently "opened the door for interpreting factual causation in the *disparate treatment context* as sole cause."¹⁷⁵ Though the *Nassar* Court reiterated that Title VII specifically provides for the mixed motive standard for disparate treatment claims, the Court borrowed *Gross*'s restrictive interpretation of but-for causation as sole causation.¹⁷⁶ As

¹⁶⁹ See discussion *supra* Part III.A.v (discussing dissenting opinions).

¹⁷⁰ See discussion *supra* Part II.C (discussing determination of but-for causation required for ADEA retaliation claims).

¹⁷¹ See *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 180-92 (2009) (Stevens & Breyer, JJ dissenting). In discussing the applicable causation standard, the *Gross* Court cited two cases and a treatise on the law of torts. *Id.* It cited *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) for the proposition that the protected trait had to play a role in the employer's decision-making process as well as having a determinative influence on the outcome, thus concluding that under the ADEA, age had to be *the* factor at issue with an employer's decision. See *id.* at 176 (discussing *Hazen Paper Co.* case). The Court then cited *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007) for the proposition that the statutory phrase "based on" indicates a "but-for" causal relationship, and that "consideration of the [impermissible factor] must [have been] a *necessary condition*" for the adverse action. *Id.* (citing *Burr*, 551 U.S. at 63). Lastly, the Court also cited to the basic statement of the traditional but-for cause test that "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Id.* at 176-77 (citing W. Page Keeton ET. AL. PROSSER AND KEETON ON TORTS (5th ed. 1984)).

¹⁷² See discussion *supra* Part II.C (explaining *Gross* Court's interpretation of case and tort law in finding but-for causation).

¹⁷³ Clarke, *supra* note 107, at 78 (citing *Gross*, 557 U.S. at 176, 180) (emphasis added).

¹⁷⁴ See *id.* at 79 (explaining word choice led to *sole* cause interpretation).

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ See discussion *supra* Part III.A.iv (discussing *Nassar*).

indicated by the dissenters, the majority read two separate statutes together (*i.e.*, the ADEA and Title VII), and refused to extend the statutorily prescribed mixed motive provision found under Title VII disparate treatment claims to Title VII retaliation claims.¹⁷⁷ Moreover, if there can be any justification for using the strict, sole cause interpretation under the ADEA, it is because the statute is designed to prohibit discrimination of *one* protected trait: age.¹⁷⁸

B. Clarify But-For Causation in the Unique Context Title VII

Though the Court had a “golden opportunity” to clarify the nature and scope of the cause-in-fact standard in *Nassar*, it missed the mark as confusion in its application still abounds.¹⁷⁹ The current interpretation as “sole cause” seems to defy the purpose of the 1991 Amendments to the Civil Rights Act codifying the motivating factor standard of *Price Waterhouse* to increase protections in the disparate treatment context.¹⁸⁰ Despite the plurality and dissent in *Price Waterhouse* disagreeing on the term “but-for” causation, both were concerned with the shortcomings of the strict, traditional standard.¹⁸¹ The plurality focused its inquiry on whether a protected trait was *a factor* in the employment decision at the moment it was made, describing its approach as “seek[ing] to determine the content of the *entire set of reasons* for [the adverse employment] decision.”¹⁸² The dissent similarly explained the standard as satisfied whenever discrimination was a necessary element of the *set of factors* that caused the decision.¹⁸³

With this in mind, over twenty-five years ago, the *Price Waterhouse* Court agreed that but-for cause does not mean *sole* cause.¹⁸⁴ While the dissent labeled the standard “but-for cause,” it is evident that the plurality and dissent acknowledged a version of causation in which

¹⁷⁷ See discussion *supra* Part III.A.iv (stating statutory interpretation discourages application of rules under one statute to different statute without critical examination).

¹⁷⁸ See *supra* note 34 and accompanying text (detailing relevant provisions of ADEA).

¹⁷⁹ See *Nassar*, 133 S. Ct. at 2547; see also *supra* Part III.B (highlighting differences in standard application throughout circuits).

¹⁸⁰ See *supra* Part II.B (discussing purpose of Civil Rights Act amendments to codify mixed-motive standard for Title VII claims).

¹⁸¹ See Clarke, *supra* note 107, at 79 (discussing overlooked cause-in-fact standard in *Price Waterhouse*).

¹⁸² See *id.* at 80 (discussing but-for causation in *Price Waterhouse* when adopting motivating factor standard in disparate treatment context).

¹⁸³ See *id.* (Kennedy, J., dissenting) (citing *Price Waterhouse*, 470 U.S. 228, 284 (1989)).

¹⁸⁴ See *id.* at 79-80 (arguing but-for causation standard articulated in *Price Waterhouse* overlooked).

multiple were considered.¹⁸⁵ Though the *Nassar* Court referred to strict but-for causation as textbook tort law, the version of causation articulated by the Court in *Price Waterhouse* described a more amenable standard known as the “Necessary Element of a Sufficient Set” (“NESS”) standard.¹⁸⁶ The standard holds that a condition is a factual cause of a specific consequence if it is a “necessary element of a set of” conditions that are sufficient for the occurrence of the consequence[.]”¹⁸⁷ Consequently, both the plurality and dissent agreed that but-for causation in the disparate treatment context is established when the employer’s consideration of a protected trait was “a” necessary element of the set of factors that caused the decision, not “the” sole cause as described in *Nassar*.¹⁸⁸

Moreover, litigators pursuing retaliation claims should argue the but-for causation standard articulated by Justice Scalia in *Burrage v. United States*.¹⁸⁹ Despite *Nassar*’s interpretation of but-for cause, the *Burrage* Court articulated a but-for standard in which the protected conduct is “the straw that broke the camel’s back.”¹⁹⁰ Applying this analogy to a Title VII retaliation claim using the facts of *Nassar*, so long as the protected activity (*i.e.*, the letter complaining about Dr. Levine’s discrimination) was “the straw that broke the camel’s back,” *Nassar*’s retaliation claim could prevail.¹⁹¹ Dr. Nassar then would have the opportunity to present the jury his performance evaluations, evidence of interoffice relationships, managerial hierarchies, and informal norms and customs of the Hospital and University to determine the final straw that caused the rescinding of the offer: a long-established custom of strictly adhering to the affiliation agreement, or Dr. Fitz’s resentment of Dr. Nassar for complaining of discrimination, *i.e.*, retaliation.¹⁹²

The NESS or “straw that broke the camel’s back” interpretation is more realistic in employment disputes because it reflects the reality that

¹⁸⁵ See *Price Waterhouse*, 490 U.S. 228, 240-43 (1989) (clarifying what but-for causation actually means).

¹⁸⁶ See Clarke, *supra* note 107, at 80-81 (discussing NESS standard). The NESS standard was articulated first by Professor Richard Wright in *Causation in Tort Law*, 73 CALIF. L. REVIEW. 1735, 1790 (1985), and ultimately became incorporated into the RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM as the primary standard for factual causation. *Id.*

¹⁸⁷ See Clarke, *supra* note 107 at 81 (discussing NESS standard).

¹⁸⁸ See *id.* at 82 (arguing interpretation of but-for causation as *sole* causation sets unrealistic standard).

¹⁸⁹ See *supra* notes 127-146 and accompanying text (discussing *Burrage v. United States*, 134 S. Ct. 881 (2014)).

¹⁹⁰ See Harrington, *supra* note 141 (reflecting on recent causation opinions).

¹⁹¹ See *id.* (reflecting on recent causation opinions).

¹⁹² See *id.* at 121 (discussing factors jury must weigh in employment cases).

multiple causal factors routinely affect employment decisions.¹⁹³ This more lenient interpretation of but-for causation is startling akin to the Court's landmark decision of *Price Waterhouse*, in which the Court first endorsed the motivating factor standard for Title VII discrimination claims.¹⁹⁴

Until the standard is clarified further, counsel for Title VII plaintiffs should use the causation standard and language in *Burrage*, as it is a more favorable interpretation of but-for causation akin to the mixed motive standard.¹⁹⁵

C. Strategies for Employee Plaintiff Litigators

i. Crystal Clear Causation: Detailed Jury Instructions

Since *Nassar*, courts struggle with articulating a uniform standard that jurors will understand as meeting the “but-for requirement.”¹⁹⁶ As Justice Ginsburg predicted in *Nassar*:

[T]he Court shows little regard for the trial judges who will be obliged to charge discrete causation standards when a claim of discrimination ‘because of,’ *e.g.*, race is coupled with a claim of discrimination ‘because’ the individual has complained of race discrimination. And jurors will puzzle over the rhyme or reason for the dual standards.¹⁹⁷

For example, some jury instructions in the Fourth Circuit use the term “determinative effect” when defining the “but-for” relationship, which yielded an instruction similar to “if not for the employee’s protected conduct, employer would not have imposed a materially adverse action.”¹⁹⁸ Additionally, jurors from the Eighth Circuit were greatly confused by illustrated by causation language such as “proximate cause of death,” “a cause of death that played a substantial part in bringing about the death,” “the death must have been either a direct result of or a reasonably probable

¹⁹³ See Clarke, *supra* note 107, at 76 (discussing *Price Waterhouse* “but-for” causation).

¹⁹⁴ See *supra* Part II.B (discussing holding of *Price Waterhouse* and subsequent codification of motivating factor standard).

¹⁹⁵ See Harrington, *supra* note 141 (“[W]e’ve come almost full circle since the landmark decision of *Price Waterhouse v. Hopkins* in which the Supreme Court endorsed a motivating factor standard for discrimination claims.”)

¹⁹⁶ See *id.* (discussing implications of but-for causation standard in Title VII litigation).

¹⁹⁷ See *Univ. of Tx. Sw. Med. Ctr. V. Nassar*, 133 S. Ct. 2517, 2535 (2013) (Ginsburg, J., dissenting).

¹⁹⁸ See Harrington, *supra* note 141 (illustrating problems with how causation standard applied to jury in Title VII litigation).

consequence of the cause and except for the cause the death would not have occurred,” as evidenced in *Burrage*.¹⁹⁹ In *Burrage* the Supreme Court found the “contributing cause” instruction upheld by the Eighth Circuit inappropriate.²⁰⁰ On the other hand, *Nassar* phrased the standard as “the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”²⁰¹

A solution to jurors struggle with instruction in the context of Title VII may be found in the criminal context of *Burrage*.²⁰² The Government argued that due to distinctive problems associated with drug overdoses, in which multiple drugs are present in the victim’s system, but-for causation should not apply.²⁰³ The Government proposed that so long as the heroin distributed by the defendant contributed to an aggregate force, it was a but-for cause of death, *i.e.* a contributing factor.²⁰⁴ The *Burrage* Court rejected this “permissive” interpretation of causation in light of the language Congress chose, which required death “to result from” use of the unlawfully distributed drug and not from a “combination of factors,” as Justice Scalia noted, “but-for causation is not nearly the insuperable barrier that the Government makes it out to be.”²⁰⁵

In the criminal context of *Burrage*, forensic toxicologists could not prove the victim would have lived had he not consumed the heroin.²⁰⁶ Therefore, the Court did not want the jury to guess how much of a contributing factor the heroin played, where the experts could only attest it would be “very less likely” the victim would have died because “uncertainty of that kind cannot be squared with the beyond-a-reasonable doubt standard applied in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend.”²⁰⁷ There are no hard numbers, and employers can mask easily subjective motivations and prejudices.²⁰⁸ Accordingly, plaintiff litigators should articulate contributing cause instructions, as retaliation for complaining of protected activity may be one of several contributing causes that ultimately “breaks

¹⁹⁹ See *Burrage*, 134 S. Ct. at 886 (describing proposed jury instructions).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See *supra* Section III.B (examining but-for causation, including *Burrage* case).

²⁰³ See *Burrage*, 134 S. Ct. at 886 (discussing procedural history of case).

²⁰⁴ See *id.* (holding defendant-distributor cannot be convicted absent evidence victim would have lived but for heroin use).

²⁰⁵ See *id.* at 891 (applying “but-for” causation to drug cases).

²⁰⁶ See *id.* at 885 (discussing toxicologist report).

²⁰⁷ See *id.* at 892 (reconciling meaning of “results from” with policy concerns).

²⁰⁸ See *supra* 169-70 and accompanying text (highlighting advantages to employers under new paradigm).

the camel's back."²⁰⁹

V. CONCLUSION

Causation is a confusing subject in general, but the context in which the standard applies matters. Furthermore, the seminal case on the subject in the context of employment discrimination, *University of Texas Southwestern Medical Center v. Nassar*, has complicated the causation analysis. Though the majority characterized its interpretation of but-for causation to mean *sole* cause, it does not accord with reality in the workplace. Employees, like Nassar, will not be able to bring retaliation claims where the employer can point to at least one legitimate reason for the adverse employment decision.

Moreover, it is questionable whether juries will be able to comprehend the subtle differences in causation language, such as "motivated by" or "solely because of." This problem, however, can be rectified by proper jury instructions. As discussed *supra*, putting causation requirements in plain language that juries can understand is critical. Although it remains to be seen whether trial courts will incorporate Justice Scalia's "straw that broke the camel's back" analogy into jury instructions, trial courts should consider it since it replaces tort technicality with common sense. Retaliation claims involve stories that jurors can relate to, beginning with what happened to the employee and leaving it to the jurors to the reasons. With simpler instructions which clarify exactly what the plaintiff employee needs to prove, hopefully there can be happier endings in Title VII retaliation cases post-*Nassar*.

Katherine Stark Todd

²⁰⁹ See *supra* 169-70 and accompanying text.