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The Supreme Court's Heightened Retaliation Standard in Nassar: A Prudent Limitation or a Misguided Restriction to Title VII Claims?

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THE SUPREME COURT'S HEIGHTENED RETALIATION STANDARD IN *NASSAR*: A PRUDENT LIMITATION OR A MISGUIDED RESTRICTION TO TITLE VII CLAIMS?

UNITED STATES SUPREME COURT

University of Texas Southwestern Medical Center v. Nassar[1]
(decided June 24, 2013)

While suspect class status-based discrimination claims and activity-based retaliation claims were once governed by "motivating factor" causation, in a landmark decision, the United States Supreme Court recently ruled that "but-for" causation must be used to establish claims of activity-based employment discrimination.[2] However, the Court declined to raise the standard for suspect status-based discrimination claims and left American jurists with several unanswered questions. Will valid Title VII claims based wholly on circumstantial evidence still have the resilience to survive the *prima facie* stage? What are the implications for related state claims? Are all employment discrimination claims destined to require this higher standard of proof? United States district courts now face the challenge of interpreting the legal consequences of the Supreme Court ruling and applying a higher standard of review.

I. CONTEXT OF THE COURT DECISION

An extensive review of the Court's holding indicates that judicial resource concerns influenced the decision to make it harder for Title VII claims to survive summary judgment. Exploration of the history and context surrounding this most recent Supreme Court decision may shed light on the thrust and momentum of labor law and civil rights issues in America today. A full appreciation of the implications of this heightened causation standard requires an examination of the controversy that gave rise to the momentous change.

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[1] 133 S. Ct. 2517 (2013).
[2] *Id.* at 2520 (2013).

Naiel Nassar is a "medical doctor of Middle Eastern descent who specializes" in infectious diseases, particularly HIV/AIDS treatment.[3] In 1995, he was hired by the University of Texas Southwestern Medical Center ("UTSMC") to serve dual positions as both a University faculty member and Associate Medical Director of the Amelia Court HIV/AIDS Clinic at Parkland Hospital, a clinical healthcare facility affiliated with the University.[4] After taking a sabbatical for additional medical training from 1998 to 2001, Dr. Nassar resumed his position at the hospital and returned to the University as an Assistant Professor of Internal Medicine and Infectious Diseases.[5] His employment continued without incident until 2004.[6]

For Dr. Nassar, everything changed in June 2004, when UTSMC hired Dr. Beth Levine as the Chief of Infectious Disease Medicine, a position which made her Nassar's ultimate supervisor.[7] From the start, Nassar claims that Levine treated him differently than she treated his colleagues, interrogating him for one-and-one-half hours with a long line of questions, while speaking with other staff members for only fifteen or twenty minutes, during her initial interviews with the faculty.[8] Nassar claims that Levine disproportionately criticized his productivity and effectiveness and unjustifiably scrutinized his billing practices.[9] Nassar also claims that, toward the end of 2005, when UTSMC considered hiring a physician of Middle Eastern descent, Levine remarked that "Middle Easterners are lazy" and that she successfully opposed the hiring of that physician by the University.[10] Upon learning that Parkland Hospital hired the physician independently of UTSMC, Levine reportedly commented that the hospital had "hired another one," which was taken to mean "another person . . . who is Muslim and who is dark-skinned."[11]

UTSMC painted a decidedly different picture of the facts, stating that Levine was rarely even on site because she focused on re-

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[3] *Id*. at 2523.

[4] Brief for the Petitioner at 6, Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484) [hereinafter *Petitioner*].

[5] *Nassar*, 133 S. Ct. 2523.

[6] Brief for Respondent at 4, Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484) [hereinafter *Respondent*].

[7] *Id*.

[8] *Id*. at 5.

[9] *Id*.

[10] *Id*.

[11] *Respondent*, *supra* note 6, at 5-6.

search, not patient care.[12] When she was at the HIV/AIDS Clinic, UTSMC claimed that Levine not only gave Nassar the highest evaluation ratings and praise, but even suggested that Nassar seek a promotion and submitted a recommendation letter on his behalf.[13] However, Nassar was dissatisfied with Levine's recommendation and believed Levine was actually attempting to delay his promotion.[14] Thus, beginning in 2005, Nassar began exploring the possibility of working for Parkland Hospital directly, rather than continuing via his UTSMC faculty position under Levine.[15] This move proved to be problematic for everyone involved.

Nassar's proposal to leave UTSMC and to work solely for Parkland Hospital was initially met with opposition.[16] Pursuant to an affiliation agreement between the school and the hospital, as well as to Parkland Hospital's rules and bylaws, physicians at the hospital were required to be faculty members of UTSMC to satisfy the criteria for the institution's designation as a teaching hospital.[17] Still, negotiations continued with at least one member of the hospital, who told Nassar that if he were to resign from the medical school, there would be "no reason for [the hospital] not to employ" him.[18]

Spurred on by a verbal employment offer, salary negotiations and e-mail exchanges detailing the steps necessary to finalize his direct employment with Parkland Hospital, Nassar submitted his formal resignation from UTSMC in July 2006.[19] In actuality, Parkland Hospital had yet to officially offer Nassar a position by this time, and although an offer had been drafted with a tentative starting date of July 10, 2006, this offer letter was unsigned and unsent when Nassar resigned from the school on July 3.[20]

In his resignation letter, Nassar wrote that continued harassment and discrimination by Levine were the main reasons for his departure and alleged that Levine's attitude "stems from religious, racial and cultural bias against Arabs and Muslims that have resulted in

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[12] *Petitioner*, *supra* note 4, at 6.
[13] *Id*. at 6-7.
[14] *Id*. at 7.
[15] *Respondent*, *supra* note 6, at 6.
[16] *Nassar*, 133 S. Ct. at 2524.
[17] *Petitioner*, *supra* note 4, at 8.
[18] *Id*. at 8-9; *Respondent*, *supra* note 6, at 6.
[19] *Respondent*, *supra* note 6, at 6.
[20] *Petitioner*, *supra* note 4, at 9.

a hostile work environment."[21] The letter sent shock waves through the hospital, prompting numerous discussions about how to address the issue.[22] While some hospital staff members wanted Nassar to "sit tight," others, including Dr. Gregory Fitz, Nassar's direct supervisor, expressed consternation over the allegations.[23] Fitz told another employee that Levine had been "publicly humiliated" by the letter and that it was "very important that she be publicly exonerated."[24] At trial, this employee testified that Fitz admitted to blocking Nassar's employment at the hospital in retaliation for sending the resignation letter.[25] Negotiations permanently ceased less than a month later, when Nassar accepted a job in California near the end of July 2006.[26]

II. LITIGATION AND THE OPPOSING ARGUMENTS

Pursuing his claim against the school, and in an effort to exhaust all administrative remedies, Nassar filed charges with the Equal Employment Opportunity Commission ("EEOC"), which found "credible, testimonial evidence" of discriminatory animus and retaliation.[27] Nassar then brought suit in the United States District Court for the Northern District of Texas, alleging two distinct violations of Title VII—constructive discharge and retaliation.[28] Nassar's claim for constructive discharge, under Title VII of the Civil Rights Act of 1964,[29] was based on the allegation that Levine's racially and religiously motivated harassment effectively forced him to resign.[30] His second claim, under section 2000e-3(a), was based upon Fitz's having prevented Parkland Hospital from hiring Nassar, in retaliation for complaining about Levine's harassment.[31]

The trial was bifurcated and, after a charge conference for the liability phase, a dispute arose between the parties regarding the ap-

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[21] *Respondent*, *supra* note 6, at 6-7.
[22] *Id*. at 7.
[23] *Id*.
[24] *Nassar*, 133 S. Ct. at 2524.
[25] *Petitioner*, *supra* note 4, at 10.
[26] *Id*.
[27] *Respondent*, *supra* note 6, at 8.
[28] *Petitioner*, *supra* note 4, at 10-11.
[29] 42 U.S.C. § 2000e-2(a) (2013).
[30] *Nassar*, 133 S. Ct. at 2524.
[31] *Id*.

propriate jury instructions for Nassar's retaliation claim.[32] UTSMC initially submitted its proposed jury instructions with a retaliation charge that would have allowed for a finding of liability if there was a mixed-motive for the adverse action against Nassar.[33] Thus, it is not surprising that, when the charge conference took place on May 21, 2010, UTSMC did not object to the mixed-motive retaliation instruction that was ultimately agreed upon.[34] However, on May 24, the day the jury was to be charged, counsel for UTSMC asked the district court for permission to raise a new objection to the causation standard of the retaliation charge.[35] Instead of the mixed-motive retaliation charge, UTSMC asked for instructions which would hold it liable for retaliation only if Fitz's action was the "but-for" cause of Nassar's barred employment, *i.e.*, that Fitz would have approved Nassar's direct employment with Parkland Hospital absent the retaliatory animus created by Nassar's complaint of discrimination.[36] The trial court rejected this request in light of precedent, decided little more than a month earlier, which held that a heightened causation standard was inappropriate for Title VII claims.[37] Regardless, the court stated that the objection had "probably" been waived, since the deadline for objections had passed.[38] Ultimately, the district court's instructions were that, to establish liability, Nassar had to prove that retaliation was a motivating factor for UTSMC's conduct, although other factors might have been a consideration.[39]

The jury returned a verdict in favor of Nassar on both the constructive discharge and retaliation claims.[40] At the subsequent damages phase, the trial court instructed the jury on UTSMC's affirmative defense, namely that the school would not be liable for damages or back pay if it showed, by a preponderance of the evidence, that it would have taken the same action absent a retaliatory motive.[41] The jury found that UTSMC did not carry its burden of showing that it

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[32] *Petitioner*, *supra* note 4, at 11; *Respondent*, *supra* note 6, at 8.

[33] *Respondent*, *supra* note 6, at 8.

[34] *Id*.

[35] *Id*. at 8-9.

[36] *Petitioner*, *supra* note 4, at 11.

[37] Smith v. Xerox Corp., 602 F.3d 320, 333 (5th Cir. 2010) (stating then-current precedent for issuing mixed-motive jury instructions).

[38] *Respondent*, *supra* note 6, at 9.

[39] *Id*.

[40] *Id*.

[41] *Id*.; *Petitioner*, *supra* note 4, at 11.

would have taken the same action without considering the protected activity.[42] It awarded Nassar $436,168 in back pay and $3,187,500 in damages, which the district court reduced to $300,000, in accordance with Title VII's cap on compensatory damages.[43] The court also awarded $489,927.50 in attorney's fees.[44]

UTSMC moved for a directed verdict on the basis of its affirmative defense, but the trial court denied the motion, noting the existence of "a great deal of evidence on both sides."[45] On appeal, the Fifth Circuit vacated the constructive discharge verdict, concluding that Nassar failed to prove an aggravating factor necessary to establish the claim.[46] As for the retaliation claim, the court of appeals upheld the verdict, explaining that the jury "heard conflicting evidence about the timing and motivation of Fitz's opposition" and resolved the conflict against UTSMC.[47] This affirmation was based on the theory that retaliation claims under Section 2000e-3(a) were governed by the same standard that applied to status-based discrimination claims under Section 2000e-2(a)—motivating factor causation.[48] Having disallowed some of Nassar's damages, the Fifth Circuit then remanded the case back to the district court for a new trial on the correct measure of damages for the retaliation verdict.[49]

UTSMC then petitioned the Fifth Circuit for a rehearing *en banc* on the issue of the mixed-motive retaliation instruction, but the court denied rehearing by a vote of 9-6.[50] Judge Smith, joined by three dissenting judges, supported UTSMC's position in his dissent, asserting that *Smith v. Xerox Corp.*,[51] with its lowered standard of causation, was "an erroneous interpretation of the statute and controlling caselaw" that should be overruled.[52] At the same time, Judge Elrod concurred for an entirely different reason, based on the Universi-

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[42] *Id*.

[43] *Respondent*, *supra* note 6, at 10.

[44] *Petitioner*, *supra* note 4, at 11.

[45] *Respondent*, *supra* note 6, at 10.

[46] Nassar v. Univ. of Texas Sw. Med. Ctr., 688 F.3d 211, 211 (5th Cir. 2012); *Petitioner*, *supra* note 4, at 12.

[47] *Respondent*, *supra* note 6, at 10.

[48] *Nassar*, 133 S. Ct. at 2524 (citing *Smith*, 602 F.3d at 330).

[49] *Petitioner*, *supra* note 4, at 12.

[50] *Nassar*, 688 F.3d at 211.

[51] 602 F.3d at 330.

[52] *Nassar*, 688 F.3d at 213 (Smith, J., dissenting).

ty's waiver.[53] By not objecting in a timely manner to the motivating factor jury instruction during the charge conference, Judge Elrod concluded that UTSMC waived its chance to make the argument on appeal, a fact which was compounded by UTSMC's own concession that *Smith* was controlling and would have foreclosed its objection to the mixed-motive charge on the merits.[54] And yet, Judge Smith came to the opposite conclusion, that the objection was preserved, citing the Federal Rules[55] and UTSMC's use of but-for causation as an affirmative defense.[56] The Fifth Circuit's denial was followed by a petition for a writ of certiorari, which was granted.[57]

In its petition to the United States Supreme Court, UTSMC argued that the "case should begin and end with" the plain language of the statutory text.[58] Under the Court's reading of Title VII, a plaintiff should have to prove that retaliation was "the reason" for an adverse employment action, *i.e.*, was its "but-for" cause.[59] According to UTSMC, Congress's selective tailoring of protected classes in the 1991 Civil Rights Act amendments to Title VII was intentionally written to exclude the remaining provisions, namely retaliation.[60] Basically, it argued that the 1991 amendments should be seen as a case of *expressio unius est exclusio alterius*.[61]

UTSMC consistently rested its arguments on a foundation laid by *Gross v. FBL Financial Services, Inc.*[62] and argued that the materially identical language of the Age Discrimination in Employment Act of 1967[63] ("ADEA") requires plaintiffs to prove but-for causation, so the same text in Title VII should also utilize this standard.[64] Further, UTSMC contended that a failure to extend the *Gross* standard to retaliation claims would be "a jurisprudential step backward," and stressed the public policy reasons for abandoning a mixed-motive

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[53] *Id*. at 211 (Elrod, J., concurring).

[54] *Id*. at 211-12.

[55] FED. R. CIV. P. 51(b)-(c).

[56] *Nassar*, 688 F.3d, at 214 n.1 (Smith, J., dissenting).

[57] Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 979, 979 (2013).

[58] *Petitioner*, *supra* note 4, at 14.

[59] *Id*. at 13; *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[60] *Petitioner*, *supra* note 4, at 13.

[61] The expression of one thing is the exclusion of another.

[62] 557 U.S. 167 (2009).

[63] 29 U.S.C. § 623(a)(1) (making it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.") (emphasis added).

[64] *Petitioner*, *supra* note 4, at 13.

burden shifting analysis.[65] By proclaiming the simplicity of *Gross*, UTSMC sought to supplant the framework of *Price Waterhouse v. Hopkins*,[66] which complicated matters by allowing the employee to prevail when a discriminatory motive was a motivating factor in an employment decision, but nevertheless relieving the employer of liability if it could show by a preponderance of the evidence that the employment decision would have been made absent the unlawful reason.[67]

UTSMC attacked *Price Waterhouse*, which was adopted in part and vacated in part by Congress in the 1991 Civil Rights Act, citing Justice Kennedy's dissent, which predicted that the framework would "result in confusion" and "more disarray in an area of the law already difficult for the bench and bar."[68] Under *Price Waterhouse*, as refined by the 1991 Act, "a plaintiff [may] obtain declaratory relief, attorney's fees, and costs . . . based solely on proof that race, color, religion, sex, or national[origin] was a motivating factor in" an adverse employment action, subject to what is essentially a but-for affirmative defense that relieves the employer of liability for damages if it can prove it would have made the decision without the improper motivation.[69] UTSMC argued that this framework was complex, impractical, and susceptible to abuse, as mixed-motives are easy to allege and subjective intent is difficult to disprove.[70]

Instead, UTSMC advocated the adoption of the causation standard in *Gross*, to be governed by the burden shifting test articulated in *McDonnell Douglas Corp. v. Green*.[71] Under this framework, the plaintiff-employee bears the initial burden and must establish a *prima facie* case of discrimination by a preponderance of the evidence.[72] "The burden then [] shift[s] to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection."[73] Once the employer has stated a valid reason, the burden shifts again, and the employee must then "demonstrate by competent

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[65] *Id*.

[66] 490 U.S. 228, 241 (1989).

[67] *Petitioner*, *supra* note 4, at 28.

[68] *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting); *Petitioner*, *supra* note 4, at 25.

[69] *Nassar*, 133 S. Ct. at 2526.

[70] *Petitioner*, *supra* note 4, at 30-31.

[71] *Id*. at 28 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[72] *McDonnell Douglas Corp.*, 411 U.S. at 802.

[73] *Id*.

evidence that the presumptively valid reasons for rejection were in fact a coverup for a [ ] discriminatory reason."[74]

By adopting the but-for standard of *Gross* and using the *McDonnell Douglas* burden-shifting framework to establish proof, the Court, UTSMC urged, could avoid all the uncertainties that dogged the *Price Waterhouse* test.[75] According to UTSMC, Title VII retaliation, the ADEA, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act of 2008 should all be governed by a but-for causation standard.[76] Finally, in light of its argument to adopt a but-for standard, UTSMC believed that it was entitled to judgment as a matter of law, given the facts, under its suggested framework.[77]

In his reply petition to the United States Supreme Court, Nassar echoed the sentiments of Judge Elrod, arguing that the Court should not decide the case on the merits because UTSMC forfeited its challenge to the mixed-motive retaliation charge.[78] If the Court were to decide on the merits, Nassar presented two possible theories which would resolve the case in his favor, both of which addressed the amendments contained in the 1991 Civil Rights Act.[79] Specifically, Nassar's counsel addressed the addition of sections 703(m) and 706(g)(2)(B) to Title VII, which collectively codified the mixed-motive standard and limited-remedy affirmative defense.[80]

Nassar argued that, because it is unlawful for race, color, religion, sex, or national origin to be a motivating factor in employment decisions, retaliation for activities taken in defense of any of these protected statuses is equally unlawful.[81] Essentially, "retaliation for opposing discrimination on the basis of a protected characteristic is itself discrimination on that basis."[82] Nassar argued that this interpre-

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[74] *Id.* at 805.

[75] *Petitioner*, *supra* note 4, at 28.

[76] *Id.*

[77] *Id.* at 35.

[78] *Respondent*, *supra* note 6, at 11.

[79] *Id.* at 11-12.

[80] *Id.* at 12; s*ee 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."), *and* 42 U.S.C. § 2000e-5(g)(2)(B) ("[if] respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages.").

[81] *Respondent*, *supra* note 6, at 12.

[82] *Id.*

tation would not only create uniformity, but also be consistent with EEOC policy.[83]

In the alternative, even if the Court were to adopt UTSMC's interpretation of the 1991 Civil Rights Act amendments, Nassar argued that retaliation claims would still be governed by the lesser standard articulated in the *Price Waterhouse* burden-shifting analysis.[84] Under that framework, an employee need only show a mixed-motivation for an adverse employment decision.[85] Nassar also argued that the decision in *Gross* was specifically applied to ADEA age discrimination claims, not to Title VII (another case of *expressio unius est exclusio alterius*), and supported the assertion by quoting the *Gross* opinion: "[courts] must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[86] Nassar further highlighted the distinction between the ADEA and Title VII by noting that the ADEA actually includes a provision that would immunize employers who discriminate based on age, so long as the decision was also based on "reasonable factors other than age."[87] Finally, even if the Court were to find that the *Gross* standard applied, Nassar argued the case should be remanded for trial.[88] Considering that the jury failed to accept UTSMC's affirmative defense under the but-for causation standard at the damages phase, it is reasonable to believe that a jury instructed under the but-for *Gross* standard would similarly find for Nassar at the liability stage of a bifurcated trial.[89]

Not to be outdone, UTSMC, in its reply brief, refined its position and stressed that, under *Gross*, the 1991 amendments were dispositive evidence of Congressional intent to require a higher standard of causation for retaliation claims.[90] UTSMC began by noting that both parties agreed that the Title VII retaliation provision contained identical language to the ADEA age-discrimination provision.[91] Be-

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[83] *Id.*

[84] *Id.*

[85] *Price Waterhouse*, 490 U.S. at 241 (majority opinion).

[86] *Gross*, 557 U.S. at 174 (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

[87] *Respondent*, *supra* note 6, at 13; s*ee also* 29 U.S.C. § 623(f).

[88] *Nassar*, 133 S. Ct. at 2517.

[89] *Respondent*, *supra* note 6, at 13-14.

[90] Reply Brief for Petitioner at 1, Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484) [hereinafter *Petitioner Reply*].

[91] *Id.*

cause *Gross* required the ADEA provision to be proven by a but-for standard of causation, it followed that the identical language of the Title VII retaliation provision should require an identical causation standard.[92]

Stating that its rationale was clear-cut, UTSMC argued that the 1991 amendments only authorized mixed-motive treatment for discrimination claims made on the basis of race, color, religion, sex, or national origin—not for claims of retaliation, which Congress specifically addressed in a different provision of Title VII.[93] Further, UTSMC charged Nassar's counsel with attempting "to override Title VII's plain text and structure by relying on a line of decisions holding that, when Congress has *not* specifically addressed retaliation, a broad 'general' prohibition on class-based discrimination can be construed to encompass retaliation."[94] To UTSMC, Nassar's argument was fallacious because the Court had already determined that "Title VII's specificity makes it 'vastly different' from such general provisions."[95]

Attacking Nassar's reliance on *Price Waterhouse*, UTSMC posited that the 1991 amendments and subsequent interpretation in *Gross* had eliminated *Price Waterhouse*'s *stare decisis* effect, due to both the purposeful division of status-based and conduct-based provisions contained in 42 U.S.C. section 2000e, *et seq.*, and since the 1991 Civil Rights Act subsequently abrogated *Price Waterhouse* in part.[96] With those 1991 amendments, "Congress's careful tailoring" was intended to imply that only Title VII class-based discrimination claims should be subject to a lower standard of causation.[97] According to UTSMC, Nassar's interpretation would force juries to apply up to three different standards to any given controversy, something UTSMC classified as "the worst of all worlds."[98]

Also in its reply brief, UTSMC stressed the policy considerations for applying a more stringent standard of causation to retaliation claims.[99] Citing the potential for abuse, UTSMC pointed out that re-

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[92] *Id.*

[93] *Id.*; *see also* 42 U.S.C. § 2000e-2(m).

[94] *Petitioner Reply*, *supra* note 90, at 1.

[95] *Id.* at 1-2.

[96] *Id.* at 16.

[97] *Id.* at 17.

[98] *Id.* at 18.

[99] *Petitioner Reply*, *supra* note 90, at 20.

taliation claims have become the single-most litigated type of discrimination claim.[100] With the high costs of defending against even meritless claims, shifting the burden of proof onto employers would make the cost of doing business even higher.[101] UTSMC also noted that retaliation claims usually do not result in summary judgment under the mixed-motive standard, as the subjective nature of the claim forces "defendant[s] to try to prove a negative."[102]

Finally, in terms of public policy, UTSMC argued that applying a mixed-motive standard would render Title VII's retaliation provision a "thought control bill."[103] Because it is inevitable that an employer will harbor some degree of hurt or resentment upon learning of an employee complaint, it would be improper to assume that a material issue of fact exists when that umbrage played no meaningful part in a subsequent adverse employment decision.[104] To do so would be tantamount to assuming employer malfeasance, and there is no basis for this presumption within the context of routine employment decisions.[105]

As to the facts in the instant case, UTSMC argued that there was no dispute that the school would have taken the same action, as it had a clear policy requiring hospital physicians to be members of UTSMC faculty.[106] It had twice denied Nassar's request to circumvent the policy before the impetus for retaliation even occurred.[107] As a result, even if an improper retaliatory animus later became an additional motive, that retaliation was irrelevant to the employment decision.[108] Thus, under what it called the "correct legal standard" of but-for causation, UTSMC asked the Court to grant judgment as a matter of law.[109]

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[100] *Id*.; *see* Brief of the Chamber of Commerce of the United States of America and the Retail Litigation Center as Amici Curiae in Support of Petitioner at 16-17, Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484) (noting that 16,394 EEOC retaliation claims were filed in 1997, while 31,208 retaliation claims were filed with the EEOC in 2012. Retaliation claims accounted for 38.1% of all discrimination charges filed in 2012. Retaliation has been the most frequently alleged type of claim since 2009.).

[101] *Petitioner Reply*, *supra* note 90, at 20.

[102] *Id*.

[103] *Id*. at 21.

[104] *Id*.

[105] *Id*.

[106] *Petitioner Reply*, *supra* note 90, at 22.

[107] *Id*.

[108] *Id*.

[109] *Id*. at 22-24.

III. SPLIT DECISION

Nassar was argued before the Court on April 24, 2013, and decided on June 24, 2013.[110] Speaking for the majority in the 5-4 decision, Associate Justice Kennedy first delivered a preamble to establish the context of the decision.[111] Before discussing the merits, he began by affirming the basic premise that a plaintiff's right to compensation was contingent upon the showing of a causal link between the injury sustained and the wrong alleged.[112] The standard of causation required then depends upon the wrong alleged.[113]

While noting that Title VII is the centerpiece of federal legislation geared toward prohibiting wrongful discrimination, the majority remarked on the distinction between its status-based versus activity-based forms.[114] Citing *Price Waterhouse*, the Court affirmed that a lesser standard was still appropriate for establishing status-based discrimination under Title VII.[115] That is, to establish a claim based on race, color, religion, sex, or national origin, an employee need only show that discrimination was a motivating factor in an employment decision.[116] With this in mind, the Court then addressed whether that same standard of causation is applicable to claims of activity-based discrimination, namely retaliation under section 2000e-3(a).[117]

In considering the appropriate standard, the Court looked to its holding in *Gross*, as it related to the issue of causation for establishing age-based discrimination under the ADEA.[118] However, the standard in *Gross* was a higher barrier to plaintiffs, according to the Court's interpretation of the ADEA, as an employee had to show that age discrimination was so closely related to an adverse employment action that the adverse action would not have occurred but for the unlawful motive in order to establish liability.[119] The Court found that analysis and *Gross*'s standard of causation to be instructive in

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110 *Nassar*, 133 S. Ct. at 2518.
111 *Id*. at 2522.
112 *Id*.
113 *Id*. at 2525.
114 *Id*. at 2522-23.
115 *Nassar*, 133 S. Ct. at 2522-23.
116 *Id*. at 2523.
117 *Id*.
118 *Id*.
119 *Id*.

Nassar.[120]

After a brief recitation of the facts, the Court engaged in a more thorough analysis of the legislative and jurisprudential histories of causation as applied to tort law, noting that the usual standard of proof required a plaintiff to show that harm would not have occurred but for the defendant's conduct.[121] While recognizing that *Price Waterhouse* lessened the causation standard for status-based discrimination claims and that the Civil Rights Act of 1991 codified its framework in part, the Court nevertheless referred to *Price Waterhouse* and the 1991 amendments as creating "a problem of causation."[122] The majority found that the instruction provided by *Gross*, as it applied to the ADEA, was an adequate solution to this problem and should therefore provide the framework for Title VII retaliation claims, including *Nassar*.[123]

The balance of the majority opinion was almost entirely an endorsement of UTSMC's position. First, the Court found that, given the lack of any meaningful textual difference between the ADEA and Title VII retaliation provisions, it was proper to conclude, as in *Gross*, that Nassar's retaliation claim should require proof that retaliation was the but-for cause of an employment decision.[124] Second, although the Court acknowledged that retaliation fell within the definition of "unlawful employment practice[s]," the majority interpreted section 2000e-2(m) not to cover all employment practices, but rather only five of the seven discriminatory actions listed in the main provision—those related to status.[125] Because the retaliation provision was placed in a separate subsection, the majority reasoned that Congress intended to distinguish between the two classes of discrimination because "[j]ust as Congress' choice of words is presumed to be deliberate, so too are its structural choices."[126] The specificity of language in Title VII also weighed in favor of the majority's adoption of the

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

[121] *Id*. at 2525; *see also* RESTATEMENT (FIRST) OF TORTS: NEGLIGENCE § 431 cmt. a (1934) (discussing the distinction between cause in the philosophical sense and substantial cause for determining liability).

[122] *Nassar*, 133 S. Ct. at 2526.

[123] *Id*. at 2527.

[124] *Id*. at 2528.

[125] *Id*.; *see* 42 U.S.C. § 2000e-2(m) ("[A]n 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.").

[126] *Nassar*, 133 S. Ct. at 2529.

but-for standard.[127] By enumerating the specific practices Congress sought to prohibit under a motivating factor framework, it expressly excluded retaliation; therefore, "it [would] be incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation."[128]

Next, the Court discussed public policy reasons for adopting a heightened causation standard for retaliation claims.[129] Noting the importance of a fair and responsible allocation of judicial resources and the increasing frequency of retaliation claims, the majority predicted that adopting a lowered standard of causation would contribute to the filing of frivolous claims.[130] To illustrate this point, it posed a hypothetical in which an employee, who knows that an adverse employment action is pending, makes an unfounded accusation of discrimination to forestall that adverse action.[131] Once the adverse action does occur, the hypothetical employee could claim retaliation and prevail under a mixed-motive standard of proof.[132] Even if the employer were to prevail, which would be difficult at the summary judgment stage, the reputational and financial costs would be high for an employer whose actions were not, in fact, the result of a discriminatory motive.[133]

The majority then rejected Nassar's penultimate argument, that of giving deference to EEOC guidelines, stating that the agency's explanations of the Title VII provision lacked the persuasive force necessary to be given deference.[134] Finally, the Court quickly dispensed with Nassar's argument that *Price Waterhouse* was controlling even if the section 2000e-2(m) standard did not apply, stating that the part of the *Price Waterhouse* framework which survived the 1991 amendment would still be inconsistent with the statutory interpretation of the word "because," in light of *Gross*'s plain meaning interpretation of a substantially similar statute. In summation, the Court proclaimed that "a plaintiff making a retaliation claim under section 2000e-3(a) must establish that his or her protected activity

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127 *Id*.
128 *Id*. at 2530.
129 *Id*. at 2531-32.
130 *Id*.
131 *Nassar*, 133 S. Ct. at 2532.
132 *Id*.
133 *Id*.
134 *Id*. at 2533 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

was a but-for cause of the alleged adverse action by the employer."[135]

However, not everything went according to plan for UTSMC, as the Court denied grant of judgment as a matter of law and instead remanded *Nassar* back to the Fifth Circuit for further proceedings consistent with its opinion.[136]

IV. A VIGOROUS DISSENT

Justice Ginsburg authored a strong dissent, which was joined by Justices Breyer, Sotomayor, and Kagan.[137] The dissent admonished the majority for seizing upon a provision that was "adopted by Congress as part of an endeavor to strengthen Title VII, and turn[ing] it into a measure reducing the force of the ban on retaliation."[138] Turning the plain language reasoning of the majority on its head, Justice Ginsburg pointed out that both Title VII's main provision, section 2000e-2(a), and the subsection addressing retaliation, section 2000e-3(a), contain identical language addressing causation: "because of."[139] Wrongful discrimination and retaliation for reporting it are so bound together, she wrote, as to be inextricable, as the Court has repeatedly held.[140] Because retaliation in response to discrimination *is* discrimination, Justice Ginsburg concluded that there is no reason to apply a different standard of proof.[141]

The dissent also accused the majority of misapprehending the lessons of past decisions and showing little regard for trial judges.[142] The Court agreed that a motivating factor standard must be used for establishing proof under section 2000e-2(a), so the majority was itself complicating the adjudication process by requiring a higher standard

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[135] *Id*. at 2534.

[136] *Nassar*, 133 S. Ct. at 2534.

[137] *Id*. (Ginsburg, J., dissenting).

[138] *Id*. at 2535.

[139] *Id*. at 2534. *Compare* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . privileges of employment, because of such individual's race, color, religion, sex, or national origin"), *with* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

[140] *Nassar*, 133 S. Ct. at 2535; *see also* Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 179 n.3 (2005) (noting that discrimination and retaliation are intertwined).

[141] *Nassar*, 133 S. Ct. at 2535.

[142] *Id*.

of proof for claims under section 2000e-3(a), which were often brought together by a single claimant.[143] This disparity will cause jurors to "puzzle over the rhyme or reason for the dual standards."[144]

After its own recitation of the facts in *Nassar*, the dissent explored the Congressional intent of the Civil Rights Act of 1991.[145] Looking to the House Reports written during the enactment of the 1991 legislation, Justice Ginsburg presented direct evidence that Congress actually intended the amendments to provide additional protections and "'respon[d] to a number of . . . decisions by [this Court] that sharply cut back on the scope and effectiveness' of anti-discrimination laws."[146] Thus, the 1991 abrogation of *Price Waterhouse* was not meant to limit the scope of such discrimination claims, but to expand them and provide additional protections.[147] As further proof, the dissent pointed out that section 2000e-5(g)(2)(B), the affirmative defense provision added during the 1991 amendments, did not completely shield employers from liability, but merely limited plaintiff's remedies to declaratory or injunctive relief, reasonable attorney's fees, and costs.[148]

Next, asserting that the Court's conclusions defied logic,[149] the dissent criticized the majority's reasoning, item by item.[150] Justice Ginsburg pointed out that the Court's categorization of retaliation as a distinct concept from status-based discrimination ran afoul of precedent.[151] The dissent also called it "strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant [that] protection . . . to have *less* force than the protection available when the statute does not mention retaliation."[152]

Characterizing the Court's *volte-face* as "particularly imprudent," the dissent rebuked the majority for defying congressional in-

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[143] *Id*.

[144] *Id*.

[145] *Id*. at 2538.

[146] *Nassar*, 133 S. Ct. at 2538; s*ee* H.R. Rep. No. 102-40, pt. II, pp. 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 695-96.

[147] *Nassar*, 133 S. Ct. at 2538-39.

[148] *Id*. at 2539.

[149] *Id*. at 2545.

[150] *Id*. at 2541-47.

[151] *Id*. at 2541; s*ee Jackson*, 544 U.S. at 174.

[152] *Nassar*, 133 S. Ct. at 2541 (emphasis added).

tent to toughen antidiscrimination laws.[153] With underwhelming arguments, the majority had misinterpreted a clear message from Congress, and this was the reason why it could not point to a single instance in which an antidiscrimination law was found *not* to cover retaliation.[154]

The dissent then questioned the majority's dismissal of EEOC guidelines.[155] By unfairly refusing to accord the EEOC any deference, the dissent claimed that the Court's adoption of a heightened standard creates a system in which proven retaliation is permitted to go unpunished.[156] This was a point the EEOC recognized.[157]

In the next main focal point of the dissent, Justice Ginsburg attacked the Court's reading of *Gross* and subsequent application in *Nassar*.[158] While the Court in *Gross* took great pains to distinguish between ADEA claims and Title VII claims, the dissent charged the majority with now attempting to invoke a uniform interpretation.[159] According to the majority, the employer in *Gross* prevailed because the ADEA was not like Title VII, but the employer in *Nassar* should prevail because there is "no meaningful textual difference" between the ADA and Title VII.[160] To Justice Ginsburg, this was the equivalent to saying: "heads the employer wins, tails the employee loses."[161] Instead, she urged that a standard principle of statutory interpretation should apply—that identical phrases appearing in the same statute should be construed to have the same meaning.[162] Thus, Title VII's retaliation provision should be governed by the same standard of causation as its status-based counterpart, which permits mixed motive claims.[163]

The dissent then categorized the majority as insensitive to trial judges.[164] Given that causation is a complicated concept to explain to a jury under even the best of circumstances, a verdict requiring

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153 *Id*. at 2542.
154 *Id*.
155 *Id*. at 2543-44.
156 *Id*. at 2544.
157 *Nassar*, 133 S. Ct. at 2544.
158 *Id*. at 2544-45.
159 *Id*.
160 *Id*. at 2545.
161 *Id*.
162 *Nassar*, 133 S. Ct. at 2545.
163 *Id*.
164 *Id*. at 2546.

multiple standards of causation was inappropriate, given that the governing statute did not require double standards, and was "virtually certain to sow confusion" upon practical application.[165]

Justice Ginsburg pointed out that the "substantial factor" theory of causation poked holes in the majority's argument that but-for causation was "textbook tort law."[166] As previously made evident by the arguments presented and rejected in *Price Waterhouse*, "a strict but-for test is particularly ill-suited to employment discrimination cases," considering that motive is based on subjective intent.[167] The dissent argued that this was precisely the reason that Congress considered and rejected an amendment which would have placed the word "solely" before "because of race, color, religion, sex, or national origin," because elevating the standard would render the Act "totally nugatory."[168]

Closing, Justice Ginsburg criticized the majority's decision as being at odds with the Court's jurisprudential history.[169] With "zeal to reduce the number of retaliation claims," the majority overreached both precedent and congressional intent.[170] In its effort to shield employers, the dissent admonished the majority for "reach[ing] outside of Title VII to arrive at an interpretation of 'because' that lacks sensitivity to the realities of life at work."[171]

Yet, while Justice Ginsburg took the majority to task for its unspoken motives, she did little to address the judicial resource concerns behind the majority's holding. Other than pointing out that it seemed driven to reduce the number of retaliation claims, the dissent failed to address whether the majority's concerns were at all legitimate or relevant to the appropriate standard of causation. In balancing those interests, perhaps the heightened causation policy might be considered sound after all. Congress could choose to ratify the majority and codify the holding in *Nassar*, in which case committee reports will provide a good indication of whether Congress considered

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[165] *Id*.

[166] *Id*.

[167] *Nassar*, 133 S. Ct. at 2547; *see Gross*, 557 U.S. at 190 (Breyer, J., dissenting).

[168] *Nassar*, 133 S. Ct. at 2547; *see* 110 Cong. Rec. 2728, 13837-38 (1964) (commenting that a sole cause standard would render the Act "totally nugatory," New Jersey Republican Senator Clifford Case partnered with Pennsylvania Democrat Joseph Clark to advocate the adoption of motivating factor language within Title VII).

[169] *Nassar*, 133 S. Ct. at 2547.

[170] *Id*.

[171] *Id*.

chilling retaliation claims and lightening court dockets to be unspoken directives from the case.

As far as the left side of the Court is concerned, with the majority having issued the opinion, it is now up to the legislature to formally express its intent by modifying the retaliation statute to be more specific. Indeed, as Justice Ginsburg pointed out, this "misguided judgment . . . should prompt yet another Civil Rights Restoration Act."[172] By formally declaring a lower uniform standard of causation, the legislature could decisively put this debate to rest once and for all. Justifications for such a policy are not only logical, but also firmly rooted in American legislative history. Historically underprivileged classes are entitled to suspect status classification. To afford any real protection, policy-makers cannot merely prohibit employment discrimination based on an employee's status. Congress must also afford heightened protection for the courageous employee who actually reports being abused because of that immutable characteristic. It is pointless to afford heightened scrutiny to the treatment of a class, only to relax scrutiny for treatment in retaliation to complaints made in the class's defense. However, even if logic is on Justice Ginsburg's side, with a stalled Congress and an employer-friendly socio-political environment, it will likely be some time before such an Act passes through Congress.

In a per curiam opinion delivered on August 1, 2013, the Fifth Circuit vacated the district court's decision in its entirety and remanded the case back to the trial court for proceedings consistent with the Supreme Court's opinion.[173] That case is still pending as of the time this case note was written.

V. IMPLICATIONS ON STATE DISCRIMINATION LAWS

The *Nassar* decision may also prove to be significant for its effect on analogous state discrimination and retaliation laws. Although state discrimination laws operate independently of federal civil rights legislation, it is reasonable to assume that the Court's interpretation will influence state judges and legislators alike. While brevity precludes extensive analysis, a comparison between the federal approach and that adopted by New York may prove instructive to understanding the implications of the *Nassar* holding.

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[172] *Id.*

[173] Nassar v. Univ. of Texas Sw. Med. Ctr., 537 F. App'x 525, 525 (5th Cir. 2013).

New York pioneered legislation to prohibit employment discrimination in 1945, making it the first state in the nation to ban status-based prejudice in the workplace.[174] Although the Ives-Quinn Anti-Discrimination Law only recognized race, creed, color, and national origin as protected classes, it was re-named the New York State Human Rights Law and has been substantially expanded "to stay current with the changing American culture and with the needs of New Yorkers."[175] The current law protects additional classes, including gender, sexual orientation, marital status, military status, and physical disability.[176]

New York has also expanded protection outside of the sphere of employment to regulate housing, finance and banking, accommodations, and non-sectarian educational institutions.[177] However, although New York has taken a more expansive view toward protected classes, when it comes to retaliation claims the New York State Court of Appeals has looked to the federal courts for guidance. On several occasions, the court has noted that " '[b]ecause both the [New York] Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law . . . proves helpful to the resolution of [New York state claims].' "[178] Knowing the persuasive force of federal case law, New York civil rights lawyers can do little more than wait and see if the heightened federal retaliation standard will impact their causation burden in future state discrimination claims.

VI. CONCLUSION

It is ironic that a federal law designed to prevent discrimination has been itself interpreted to discriminate among and between protected classes and activities. Although valid Title VII claims generally should still survive *prima facie* scrutiny, the heightened causa-

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[174] *Agency History*, NEW YORK STATE DIVISION OF HUMAN RIGHTS, http://www.dhr.ny.gov/agency-history (last visited May 2, 2014).

[175] *Id.*

[176] *Mission Statement*, NEW YORK STATE DIVISION OF HUMAN RIGHTS, http://www.dhr.ny.gov/mission-statement (last visited May 2, 2014).

[177] *Id.*

[178] Forrest v. Jewish Guild for the Blind, 819 N.E.2d 998, 1006 n.3 (N.Y. 2004) (quoting Matter of Aurecchione v. New York State Div. of Human Rights, 771 N.E.2d 231, 233 (N.Y. 2002)).

tion standard will unquestionably reduce the number of retaliation cases that ultimately make it to trial. Thus, the majority accomplished what the dissent claimed to be its target objective. But, it may have come at the expense of aggrieved employees, who will be unable to satisfy the higher standard of causation with only limited circumstantial proofs. Unless the legislature intervenes and formally establishes a lower standard, it is likely that the Court's majority will gradually begin to insist on applying but-for causation to all employment discrimination claims. If that trend continues, the once ubiquitous Title VII claim will become just another relic of a bygone era in United States constitutional history.

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