Texas A&M Law Review

Volume 1 | Issue 1 Article 2

2013

Is It "A" or Is It "The"? Deciphering the Motivating-Factor Standard in Employment Discrimination and Retaliation Cases

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IS IT "A" OR IS IT "THE"? DECIPHERING THE MOTIVATING-FACTOR STANDARD IN EMPLOYMENT DISCRIMINATION AND RETALIATION CASES

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ABSTRACT

The recent Supreme Court decision in University of Texas Southwestern Medical Center v. Nassar *has brought exposure to a prevalent problem in employment discrimination and retaliation cases: there is great discrepancy in how plaintiffs have to prove and courts have to assess these claims. Depending on whether the case is based on discrimination or retaliation pursuant to the ADA, ADEA, or Title VII, the standard that needs to be met might be that the plaintiff must prove that discrimination was "the" motivating-factor for the adverse employment action or that it was "a" motivating-factor for the action. Adding even greater confusion is the fact that, if an employee argues that they are the victim of discrimination (such as on the basis of national origin) and retaliation, the employee might have to prove that their national origin was "a" motivating-factor in the discrimination case and "the" motivating-factor in the retaliation aspect of the case.*

If this sounds confusing to scholars and attorneys, imagine how confusing these various standards within one case can be for potential litigants, judges unfamiliar with employment law, and a member of the jury! This Article delves into these muddy waters and attempts to highlight the issues, spotlight the statutes, and ultimately formulate a working motivating-factor standard that can be infused into all of the various employment discrimination statutes and thus result in a consistency in interpretation and application.

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I. INTRODUCTION

"Heads the employer wins, tails the employee loses."[2] This statement precisely underscores the problematic court interpretations relative to the interplay between anti-discrimination and retaliation statutes, and whether the statutes in question call for a single-motive (but-for, or "the" motivating-factor) or mixed-motive (a coexistent illegitimate and legitimate reason for the adverse employment action, or essentially using the "a" motivating-factor standard while allowing all of the evidence to factor into the ultimate level of employer liability) assessment of the motivating-factor standard in employment discrimination and retaliation cases. The Supreme Court, in particular, seems to be interpreting the motivating-factor standards within these statutes in a way that will result in a victory for the employer at the expense of the employee. Instead, what the Court should be doing is interpreting the statutes according to Congressional intent. While logic suggests that the best course of action is for Congress to provide consistency and clarity relative to the motivating-factor standards for the various anti-discrimination and retaliation statutes, such as Title VII, the ADA, and the ADEA, the level of dysfunction[3] systemic in today's legislature makes such a premise unlikely. Nevertheless, this Article ventures to explore the current path of the courts as it relates to interpreting the standard a plaintiff must meet in these employment actions, and subsequently what steps are most apropos to allow these

2. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2545 (2013) (Ginsburg, J., dissenting).

3. Dimond, Diane, *There Ought to Be a Law Against an "Incompetent" Congress*, HUFFINGTON POST (June 29, 2013), http://www.huffingtonpost.com/diane-dimond/there-ought-to-be-a-law-a_b_3522154.html?utm_hp_ref=tw.

statutes to be more seamless and less subject to creative court interpretation. While this Author ultimately favors the usage of an "a" motivating-factor standard rather than the more restrictive "the" motivating-factor standard, what is most important is the usage of a consistent standard between statutes and in the analysis of both discrimination and retaliation claims.

Among the courts, there seems to be a great deal of confusion regarding motivating-factor standards in employment discrimination claims. Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other such acts all essentially have the same goal: to prevent discrimination in the workplace based on factors such as race, sex, age, disability, religion, national origin, etc. However, the standard that must be met in order to prove such discrimination varies depending upon which statute the suit is brought under. In the wake of the June 24, 2013, Supreme Court *Nassar* decision, there seems to be a differentiation in how discrimination versus retaliation cases are analyzed as well. Confusion may be alleviated if there was one motivating-factor standard rather than one for each statute. This Article will first look at background cases that underscore the development and current state of the various statutory motivating-factor standards. It will then delve into an analysis of the standards generally and the *University of Texas Southwestern Medical Center v. Nassar* Supreme Court decision specifically. Finally, this Article will conclude with a proposed singular standard that could ease the confusion for all of the employment discrimination statutes as well as the rationale for having such a standard.

II. Background

In cases of employment discrimination, there are various statutes an individual can file suit under based on the reason the individual is alleging discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of such individual's race, color, religion, sex, or national origin."[4] The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer to discriminate against an individual "because of such individual's age."[5] Title I of the Americans with Disabilities Act of 1990 (ADA) makes it unlawful to "discriminate against a qualified individual on the basis of disability."[6] These statutes also provide that retaliatory conduct towards someone who alleges discrimination or participates in assisting someone in the advancement of a discrimination claim is unlawful.[7]

4. 42 U.S.C.S. § 2000(e)-2(a)(1) (LexisNexis 2013).
5. 29 U.S.C.S. § 623(a)(1) (LexisNexis 2013).
6. 42 U.S.C.S. § 12112(a) (LexisNexis 2013).
7. *See generally* 42 U.S.C.S. § 2000(e)-2(a)(1); 29 U.S.C.S. § 623(a)(1); 42 U.S.C.S. § 12112(a).

Under Title VII of the Civil Rights Act of 1964, *Price Waterhouse v. Hopkins* set employment discrimination cases on a path away from a but-for or "the" motivating-factor standard and towards a more liberal "a" motivating-factor standard.[8] *Price Waterhouse* considered the because-of language in Title VII of the Civil Rights Act of 1964 in mixed-motive cases and stated that "while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ [or bona fide occupational qualification]), it is free to decide against a woman for other reasons."[9] Consequently, the following standard emerged:

> [O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.[10]

As Justice Brennan stated in the holding of *Price Waterhouse*, in a plurality of four Justices:

> [W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[11]

This rule emerged as the standard under Title VII of the Civil Rights Act of 1964.

However, just two years after *Price Waterhouse*, Congress passed a new law amending Title VII of the Civil Rights Act of 1964.[12] The Civil Rights Act of 1991 enacted two new standards in mixed-motive cases.[13] The first standard states the following: "Except as otherwise provided in this subchapter [(42 USCS §§ 2000e et seq.)], 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."[14] The second standard provides that "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff."[15] A plaintiff's remedies include only "declaratory relief, certain types of injunctive relief [(limited)], and attorney's fees and costs."[16] It should

8. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
9. *Id.* at 244.
10. *Id.* at 244–45.
11. *Id.* at 258.
12. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003).
13. *Id.* at 94.
14. *Id.*; 42 U.S.C.S. § 2000e-2(m) (LexisNexis 2013).
15. *Desert Palace, Inc.*, 539 U.S. at 94.
16. *Id.*; 42 U.S.C.S. § 2000e-5(g)(2)(B) (LexisNexis 2013).

be noted that the Supreme Court in its *Nassar* decision, discussed later in this Article, essentially eviscerates the relevance of *Price Waterhouse* because its underlying premise is codified in the 1991 amendment to Title VII.

The remainder of this section is comprised of cases relevant to this topic, the first representing the "pretext case" under Title VII.

A. *McDonnell Douglas Corp. v. Green*

In this case Percy Green, an African-American male, worked for McDonnell Douglas Corp. as a mechanic and laboratory technician.[17] Due to a general reduction in the corporation's workforce, Green was laid off.[18] Green applied for reemployment when McDonnell Douglas began advertising for jobs in which he was qualified.[19] Green, however, was rejected for the job because he participated in a "stall-in" and "lock-in," relating to the civil rights movement.[20] Green claimed that "his discharge and the general hiring practices of [McDonnell Douglas] were racially motivated."[21] Green filed suit under Title VII of the Civil Rights Act of 1964.[22] The Court held that while Title VII does not require an employer to rehire an employee who has been discharged, it does not allow the employer to use the employee's actions "as a pretext for the sort of discrimination prohibited by § 703(a)(1)."[23] The employee must "be afforded a fair opportunity to show that . . . [the employer's] stated reason for . . . [the employee's] rejection was in fact pretext."[24] Essentially this means that the employee must be given a fair opportunity "to demonstrate by competent evidence" that the reasons for which the employee was rejected "were in fact a cover-up for a racially discriminatory decision."[25]

B. *Gross v. FBL Financial Services, Inc.*

In this case, Jack Gross began working for FBL Financial Services, Inc. in 1971 and had achieved the position of claims administration director by 2001.[26] In 2003, at age 54, Gross was reassigned as claims project coordinator, which he considered to be a demotion, and transferred many of his responsibilities to a lady put in a newly created position, who happened to be in her early forties.[27] Gross filed suit alleging that his reassignment was a violation under the ADEA, a

17. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).
18. *Id.*
19. *Id.* at 796.
20. *Id.*
21. *Id.* at 794.
22. *Id.* at 797.
23. *Id.* at 804.
24. *Id.*
25. *Id.* at 805.
26. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 170 (2009).
27. *Id.*

statute prohibiting discrimination against an employee "because of such individual's age."[28] A big issue in this case was the mix up between the standards set forth under Title VII and the ADEA; the ADEA is not governed by Title VII decisions (such as *Price Waterhouse*).[29] The following is the ADEA standard: "To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[30] The plaintiff must prove this claim by a preponderance of the evidence, using either direct or circumstantial evidence.[31] In this instance, the burden of persuasion does not shift to the employer to show that the same action would have been taken despite the employee's age.[32]

C. *Quantum Chemical Corp. v. Toennies*

This case involves a Texas statute, the Texas Commission on Human Rights Act (TCHRA), which is patterned after Title VII.[33] Ralf Toennies worked for DuPont, which was bought by Quantum Chemical, as an engineer.[34] He was promoted in 1989.[35] Prior to 1994, Toennies had received satisfactory employee evaluations; however, in early 1994, he received an employee evaluation indicating his performance was below expectations, which occurred just after he started reporting to a new supervisor.[36] At age 55, Toennies lost his job in late 1994.[37] Toennies filed suit under the TCHRA "alleging that age discrimination motivated the firing."[38] The court held that an employment discrimination plaintiff must "show that discrimination was a motivating factor in an adverse employment decision."[39] The court stated that two types of employment discrimination cases exist under Title VII: (1) the pretext case (*McDonnell Douglas*) and (2) the mixed-motive case (*Price Waterhouse*).[40] However, this state statute does not differentiate between these two types of cases because the federal courts are not united on how to apply the Title VII standard.[41] Therefore, the statute's plain meaning constitutes the standard.[42]

28. *Id.*
29. *Id.* at 173.
30. *Id.* at 176.
31. *Id.* at 177–78.
32. *Id.* at 180.
33. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 474 (Tex. 2001).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 474–75.
38. *Id.* at 475.
39. *Id.* at 482.
40. *Id.* at 476.
41. *Id.* at 482.
42. *Id.*

D. *Woodson v. Scott Paper Co.*

In this case James W. Woodson, an African-American employee, sued his employer, Scott Paper Company, for "unlawful racial discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 . . . and the Pennsylvania Human Relations Act."[43] At the district court level, the employer won on the unlawful discrimination count and the employee won on the retaliation claim.[44] From 1970, when Woodson started working for the company, until 1988, Woodson received many promotions.[45] However, beginning in 1988, Woodson was denied for several product system leader positions.[46] At this point, Woodson filed racial discrimination charges against his employer.[47] In 1990, Scott Paper Company gave Woodson one of three product system leader positions, but the division he was in charge of "was the smallest and worst performing."[48] When Woodson was awarded this position, a supervisor told him that he should now focus his attention on this new position.[49] Scott Paper Co. implemented a "forced ranking" system of all company employees pursuant to a reorganization and cost reduction program in 1991.[50] Woodson was ranked number twenty-five; subsequently, the bottom five employees were terminated, one of which was Woodson.[51] In this case, determinative effect was used.[52] The appellate court agreed that "Third Circuit precedent required a district court to instruct the jury that it can hold a defendant liable only if the prohibited activity had a determinative effect on the decision to terminate the plaintiff."[53] As a result, the appellate court held that the district court had "abused its discretion in failing to instruct the jury that improper motive must have had a determinative effect on the decision to fire Woodson."[54]

E. *Lewis v. Humboldt Acquisition Corp.*

In this case, Susan Lewis brought suit under Title I of the ADA, prohibiting "discrimination 'because of' the disability of an employee."[55] When presenting the claim to the jury, each party wanted the standard to be different: the employer wanted the jury to be instructed that the employee "could only prevail if the company's deci-

43. Woodson v. Scott Paper Co., 109 F.3d 913, 916 (3d Cir. 1997).
44. *Id.*
45. *Id.* at 917.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 918.
51. *Id.*
52. *Id.* at 932.
53. *Id.*
54. *Id.* at 935.
55. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 313 (6th Cir. 2012).

sion to fire her was 'sole[ly]' because of Lewis's disability, a term that appears in the Rehabilitation Act but not in the ADA"; and the employee argued that she "could prevail if her disability was 'a motivating factor' in the company's employment action, a phrase that appears in Title VII but not in the ADA."[56] Lewis was a registered nurse at one of Humboldt Acquisition Corporation's retirement homes.[57] Lewis was dismissed from work in March of 2006 and sued in 2007 under the ADA, claiming that she was fired "because she had a medical condition that made it difficult for her to walk and that occasionally required her to use a wheelchair."[58] The court had long applied the "solely" standard for both the ADA and the Rehabilitation Act because of the similar language, but over time, it has become clear that "solely" is not a part of the ADA standard.[59] In addition, the court could not incorporate "'a motivating factor' from Title VII into the ADA" for the same reasons.[60] Both the ADEA and the ADA "bar discrimination 'because of' an employee's age or disability, meaning that they prohibit discrimination that is a 'but-for' cause of the employer's adverse decision."[61] On appeal, the Sixth Circuit reversed the district court's decision and ruled in favor of Lewis and asserted that the but-for standard appears to be articulated by the statute and not a sole-cause standard.[62]

F. *Desert Palace, Inc. v. Costa*

In *Costa*,[63] Catharina Costa filed suit against the Las Vegas Hotel and Casino alleging sex discrimination and harassment under Title VII due to a male co-worker being given a five-day suspension for an altercation with her—whereas she was terminated.[64] The harassment allegation was dismissed by the trial court, but the discrimination allegation was allowed to proceed to trial under the premise that Costa was disciplined more harshly than her male counterparts for the same conduct.[65] The district court gave the jury a mixed-motive instruction.[66] However, on appeal, the Ninth Circuit "vacated and remanded, holding that the District Court had erred in giving the mixed-motive instruction because respondent had failed to present 'substantial evidence of conduct or statements by the employer directly re-

56. *Id.* at 314.
57. *Id.*
58. *Id.*
59. *Id.* at 315–17.
60. *Id.* at 317.
61. *Id.* at 321.
62. *Id.* at 321–22.
63. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).
64. *Id.* at 95–96.
65. *Id.* at 96.
66. *Id.*

flecting discriminatory animus.'"[67] The Supreme Court considered the issue and noted that Title VII was silent with respect to the type of evidence required in mixed-motive cases.[68] As such, the Court ruled that mixed-motive plaintiffs must only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that a protected characteristic was a motivating factor for the adverse employment action taken.[69] As the *Desert Palace* case states it: "In order to avail itself of the affirmative defense, the employer must 'demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor.'"[70] In addition, *Desert Palace* held that circumstantial evidence was sufficient in mixed-motive cases and that direct evidence of discrimination was not necessary.[71]

G. *Head v. Glacier Northwest, Inc.*

Matthew Head worked for Glacier Northwest, Inc. as a barge offloader.[72] Early in 2001, Head was diagnosed with either depression or bipolar disorder and missed two months of work by means of a Family Medical Leave of Absence because of this disability.[73] When returning to work in May 2001, Head was restricted to working the day shift with limitations on the number of hours he could work per day and each week.[74] In June 2001, Head was fired after getting a loader stuck in the mud.[75] Head filed discrimination claims and retaliation claims under both the ADA and Oregon state statutes.[76] At the district court level, the jury's verdict was in favor of Glacier, the employer.[77] However, single-motive, because-of jury instructions were given.[78]

On appeal, the court discussed two alternatives proposed in *Costa*.[79] The first alternative stated the following:

> [I]f the judge determines that the only reasonable conclusion the jury could reach is that discriminatory animus is the sole reason for the challenged action or that discrimination played no role in the decision, the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason.[80]

67. *Id.* at 97.
68. *Id.* at 99.
69. *Id.* at 101.
70. *Id.* at 94–95.
71. *Id.* at 101.
72. Head v. Glacier Nw., Inc., 413 F.3d 1053, 1057 (9th Cir. 2005).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1058.
78. *Id.* at 1057.
79. *Id.* at 1065–66.
80. *Id.* at 1066.

The second alternative stated the following:

> [This alternative] applies in a case in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate. In that case the jury should be instructed to determine whether the discriminatory reason was "a motivating factor" in the challenged action.[81]

The appellate court determined that the second standard, rather than the first, should have been applied in this case.[82] Therefore, the court adopted "a 'motivating factor' standard for causation in the ADA context."[83] In terms of the discrimination claims, the court stated that Head could have been fired "because he violated the equipment policy, because Glacier perceived him as being disabled, or because of some combination."[84] In terms of the retaliation claims, Head could have been fired "because he violated the equipment policy, because he requested a reasonable accommodation, or because of some combination of the two."[85]

H. *White v. Baxter Healthcare Corp.*

In *White v. Baxter Healthcare Corp.*,[86] Todd White alleged that supervisor Tim Phillips harbored discriminatory animus towards African-Americans and made several comments about no one wanting to be around a black man, circulated emails that appeared to be racial in nature, and referred to a sales representative as "that black girl" instead of by her actual name.[87] He subsequently was bypassed for a promotion, received a deficient performance evaluation, and received a lower raise than anticipated.[88] These events prompted him to file a charge with the EEOC and, after receiving his Right-To-Sue letter, file a lawsuit.[89] The district court dismissed the case on summary judgment.[90] The Sixth Circuit reversed and remanded, holding[91] that in order to defeat summary judgment plaintiffs merely must produce evidence (1) of an adverse employment action, and (2) that a protected characteristic under Title VII was a motivating factor for the adverse action.[92] The *White* Court further stated that a plaintiff can defeat summary judgment "simply by showing that the defendant's

81. *Id.*
82. *Id.*
83. *Id.* at 1067.
84. *Id.* at 1066.
85. *Id.*
86. White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008).
87. *Id.* at 385.
88. *Id.* at 387–89.
89. *Id.* at 389.
90. *Id.* at 384.
91. *Id.* at 406.
92. *Id.* at 400, 406.

consideration of a protected characteristic 'was a motivating factor for any employment practice, *even though other factors also motivated the practice*.'"[93] The court indicated that this new burden at the summary judgment stage is "not onerous" and should keep a case from trial "only where the record is devoid of evidence" supporting the plaintiff's claim.[94] The court also stated that it is "irrelevant" whether the plaintiff presents direct or circumstantial evidence supporting the claim, and that direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive jury instruction under Title VII.[95]

I. *Schott v. Care Initiatives*

Donna Schott worked as an administrator of a nursing home in Kingsley, Iowa.[96] Schott alleged claims of age discrimination in violation of an Iowa statute as well as the ADEA.[97] The court addresses in this case that the state standards and federal standards may be different.[98] Care Initiatives filed for summary judgment on Schott's claims but the court denied the motion on both the federal and state claims.[99] The court applied the *McDonnell Douglas* burden-shifting analysis on both the state and federal age discrimination claims because both were based on circumstantial evidence.[100] The court, using a but-for standard, found that Schott established a prima facie case of age discrimination (terminated and replaced by someone younger).[101] In addition, Care Initiatives gave "legitimate, nondiscriminatory reasons for its decision to terminate her."[102] However, Schott prevailed because she "generated genuine issues of material fact on the 'pretext' issue."[103]

J. *Burlington Northern and Santa Fe Railway Co. v. White*

Plaintiff Sheila White brought a sexual harassment and retaliation allegation against her employer due to her being reassigned from her position as a forklift driver after complaining that her supervisor was treating her in a disparate manner due to her sex.[104] After filing an EEOC charge, she was suspended without pay.[105] Burlington later determined the suspension was unwarranted and provided her with

93. *Id.* at 401 (emphasis added).
94. *Id.* at 400.
95. *Id.* (citing Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)).
96. Schott v. Care Initiatives, 662 F. Supp. 2d 1115, 1116 (N.D. Iowa 2009).
97. *Id.*
98. *Id.* at 1120.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1121.
104. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).
105. *Id.*

back pay.[106] Ms. White, however, filed an additional retaliation charge, and eventually filed suit on the bases that: (1) changing her job responsibilities, and (2) suspending her for thirty-seven days without pay amounted to unlawful retaliation in violation of Title VII.[107] The Supreme Court, affirming the judgment of the Sixth Circuit in Ms. White's favor on both retaliation counts, held that a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context.[108] A materially adverse employment action in the retaliation context consists of any action that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[109] This more liberal definition permits actions not materially adverse for purposes of an anti-discrimination claim to qualify as such in the retaliation context.[110]

K. *University of Texas Southwestern Medical Center v. Nassar*

Dr. Naiel Nassar was a faculty member at the Southwestern Medical Center and also a staff physician at Parkland Memorial Hospital.[111] The hospital and the university had an agreement that required the hospital to offer vacant staff physician positions to university faculty members.[112] Dr. Nassar made a claim that his supervisor, Dr. Levine, was biased against him despite her being involved in a promotional opportunity for him.[113] His complaint stemmed from several alleged comments she made, including a statement that "Middle Easterners are lazy."[114] Dr. Nassar, of Middle Eastern descent, complained to Levine's supervisor, Dr. Fitz, about feeling discriminated against.[115] Afterwards he entered into negotiations with the hospital, offering to remain on as a physician but resign from the university.[116] When the hospital seemed willing to accept this proposal, he issued a resignation letter to the university wherein he stated that he was resigning due to Dr. Levine's harassment and discrimination.[117] Upset by this public embarrassment to Dr. Levine, Dr. Fitz objected to the hospital hiring Dr. Nassar.[118] When the hospital rescinded its offer,

106. *Id.*
107. *Id.* at 59.
108. *Id*. at 68.
109. *Id.*
110. *Id.* at 69 (noting that a supervisor's failure to invite an employee to lunch could, under certain circumstances, amount to materially adverse retaliation action).
111. Univ. of Tex. Sw. Med. Ctr. v. Nassar*,* 133 S. Ct. 2517, 2523 (2013).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 2524.
118. *Id.*

Dr. Nassar eventually filed suit under Title VII alleging race discrimination and retaliation.[119]

Following receipt of a mixed-motive instruction, the jury found for the plaintiff on both counts.[120] On appeal to the Fifth Circuit, the court vacated the constructive discharge racial discrimination allegation but affirmed the retaliation verdict, stating that "retaliation claims brought under § 2000e-3(a)—like claims of status-based discrimination under § 2000e-2(a)—require only a showing that retaliation was a motivating factor for the adverse employment action rather than its but-for cause."[121] Certiorari was granted to assess the proper motivating-factor standard for retaliation cases.[122]

The Court first looked at the traditional view of tort claims, pursuant to the Restatement of Torts, and the prevalent view that there must be proof that the defendant's conduct did in fact cause the plaintiff's injury (but-for analysis).[123] The Court presumed that this background was representative of Congress' intent absent an indication in the statute to the contrary.[124] The Court then acknowledged that the 1991 amendment to the Civil Rights Act of 1964 was intended to codify the burden-shifting and lessened-causation framework (allowing a mixed-motive instead of a but-for, motivating-factor standard) of the *Price Waterhouse* case while eliminating the ability for the employer to defeat liability by showing that it would have made the termination decision based solely upon the legitimate termination reason.[125] Instead, the statute allowed the employer to be able to reduce its liability to the employee with such evidence, and if deemed liable would only have to provide the plaintiff with declaratory and injunctive relief and attorney fees and costs but not monetary damages and a reinstatement order.[126] However, the Court noted that Title VII's anti-retaliation provision is set forth in a different section of the Act than its status-based discrimination provision(s).[127] In the anti-retaliation section, it used the term "because" in describing the protection afforded.[128] In particular, it states in relevant part that:

> 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 sub-

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* It should be noted that the Fifth Circuit subsequently reversed course and determined that the mixed-motive standard that applies to status-based discrimination claims does not apply to retaliation claims. *See, e.g.*, Carter v. Luminant Power Servs. Co., 714 F.3d 268 (5th Cir. 2013).
123. *Nassar*, 133 S. Ct. at 2524–25.
124. *Id.* at 2525.
125. *Id*. at 2526.
126. *Id*.
127. *Id.* at 2528.
128. *Id.*

> chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[129]

The Court went to great lengths to compare this provision to the ADEA statute at issue in the *Gross* case because both use the "because" terminology in explaining the criteria relevant to the protection.[130] The Court indicated that if Congress intended to make the same motivating-factor standard apply to all Title VII claims, it could have done so.[131] Instead, Congress limited the mixed-motive standard to just five of the seven protected categories under the Act, namely those articulated in § 2000e-2, where particularly it states that:

> [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.[132]

The Court was of the opinion that if Congress intended for retaliation—by way of either the employee's direct opposition to employment discrimination or the employee's submission of or support for a complaint that alleges employment discrimination—to be included within this standard, it would have simply indicated as such.[133] In vacating the decision of the Fifth Circuit and remanding it back for further proceedings, the Court also stressed its concern that allowing a lessened standard for retaliation claims would greatly burden employers and the court system due to the fact that retaliation claims filed with the EEOC has nearly doubled in the past fifteen years—from just over 16,000 in 1997 to over 31,000 in 2012—and that these retaliation claims are now the largest category of claims filed with the EEOC except for race discrimination.[134] Because the Fifth Circuit has reversed course and has already issued a ruling consistent with the Court's opinion that retaliation claims are only entitled to a but-for or because-of analysis, it is a certainty that Nassar's victory will now be vacated in full.

III. Analysis

Perhaps most concerning with the Court's decision in *Nassar* is the discussion regarding the rise in retaliation claims. The Court seems

129. *Id.* (quoting 42 U.S.C. § 2000e-3(a) (2006)).
130. *Id.* at 2528–31.
131. *See id.* at 2530.
132. *Id*. at 2526 (quoting U.S.C.S. § 2000e-2(m) (LexisNexis 2013)).
133. *Id.* at 2528, 2532.
134. *Id*. at 2531; *Charge Statistics FY 1997 Through FY 2012*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited June 20, 2013) (showing that in 2000 to 2011, retaliation filings increased from 19,694 to 37,334 (a 90% increase), while EEOC filings generally increased from 77,444 to 99,947 (a 29% increase)).

bothered by the notion that a lessening of the causation standard for retaliation claims could "contribute to the filing of frivolous claims, which would siphon resources from the efforts by employer[s], administrative agencies, and the courts [trying] to combat workplace harassment."[135] The Court then provides a scenario where, if a lessened causation standard applies, an employee brings both an unfounded discrimination and retaliation claim and details how an employer might be able to escape going to trial on the discrimination claim yet still be subjected to a trial on the retaliation action.[136]

In essence, the Court seems to support the notion that, not only are retaliation claims generally easier to prove, adding a lessened mixed-motive standard would lead to retaliation cases surviving summary judgment at a ratio much greater than status-based discrimination cases. One need only look at the Court's statement in the *Burlington Northern* case—that a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context—to see why the Court feels this way.[137] But is this a justifiable reason for adding a larger hurdle for retaliation claims? Is this decision allowing employers to retaliate against those that protest discrimination while giving the employer little fear of reprisal? If this is the case, why would anyone try to oppose discrimination? And with less whistleblowers, there will be less discrimination claims with witnesses readily available to support the claims and, as such, a higher number of cases dismissed on summary judgment. Perhaps that is the motive!

Before discussing the various motivating-factor standards in more depth and analyzing how to simplify the approach, it is somewhat instructive to first consider the very astutely drafted dissent of Justice Ginsburg in the *Nassar* case.

A. *The Dissent*

First citing to the *Burlington* decision, Justice Ginsburg, joined in her dissent by Justices Breyer, Sotomayor, and Kagan, points to the Court's recognition that effective protection against retaliation is essential to providing effective protection against workplace discrimination.[138] Indeed, fear of retaliation is why people stay silent and do not report discrimination or support co-workers in their pursuit of a rem-

135. *Nassar*, 133 S. Ct. at 2531–32.

136. *Id.* at 2532.

137. *See* Barnett Brooks, Gail Farb & Mandi Ballard, *The Future of Retaliation Claims*, SHRM HR MAGAZINE (January 2011), *available at* http://www.shrm.org/publications/hrmagazine/editorialcontent/2011/0111/pages/0111ballard.aspx. In this article, the authors argue that the *Burlington* case would open the floodgate to retaliation claims and lawsuits, pointing to the drastic increase in EEOC retaliation charge filings and subsequent lawsuits filed. *Id.*

138. *Nassar*, 133 S. Ct. at 2534, (Ginsburg, J., dissenting).

edy for discrimination they might be experiencing.[139] She also notes that historically the ban on discrimination and the ban on retaliation have travelled together; Title VII complainants tend to raise both provisions of the Act in tandem.[140] As such, she posits that reigning in retaliation claims by making them meet a stricter standard than discrimination claims certainly was not Congress' intent in amending Title VII in 1991.[141] But, this is exactly what the Court does in seizing upon § 2000e-2(m)—adopted by Congress in an attempt to strengthen Title VII—and turning it into a measure to reduce the force of retaliation claims.[142]

Of note, Justice Ginsburg points to the Court's statements that Congress made no assertion relative to an intent to include retaliation in the amended mixed-motive standard articulated in the § 2000e-2(m); however, the Court neglects to look at the House Report, particularly Part II, which does elude to such an intent.[143] The Court was not persuaded by the EEOC's interpretation of § 2000e-2(m)—an interpretation that considered retaliation claims to be within § 2000e-2(m)—because the Court determined that this interpretation suffered from a lack of depth. In response, Justice Ginsburg pointed to EEOC discussion that, she argued, clearly showed how and why the EEOC reached the conclusion that it did, which was that Congress intended retaliation and discrimination claims to share the same mixed-motived standard.[144] The Court, as its precedence in *Skidmore* dictates, should have afforded deference to the interpretation of the statute in the EEOC's compliance manual and internal directives.[145] In fact, until this very ruling, the Court had been very clear that retaliation is actually a manifestation of status-based discrimination, and the *Jackson* case explained that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."[146] In the Title IX case *Jackson*, as well as the ADEA case *Gomez-Perez v. Potter*, the Court actually read retaliation into the statute even though it was silent on the sub-

139. *Id.* at 2534–35.

140. *Id.* at 2535.

141. *Id*.

142. *Id.*

143. *Id.* at 2539.

144. *Id*. at 2545. The EEOC discussed how the Third Circuit discussed, although did not hold, that in enacting § 2000e-2(m) Congress knew that courts tended to borrow from discrimination law in determining the burdens and order of proof in retaliation cases. Woodson v. Scott Paper Co., 109 F.3d 913, 934 (3d Cir. 1997). It was plausible that Congress expected the same practice to continue. *Id.* Although the Third Circuit did not subscribe to this theory in its ultimate decision, the EEOC found this logic sound and subscribed to it in its Compliance Manual, at 614:0008, n.45. *Id.*

145. *See Nassar*, 133 S. Ct. at 2540; *see also* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

146. *Nassar*, 133 S. Ct. at 2537; *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005).

ject.[147] In a complete reverse of course, the Court is now reading retaliation unfavorably when the statute seems to suggest otherwise.

Most unfortunate about the *Nassar* decision is that the Court seems to interpret the law in a manner to get the end result it seeks. The dissent discusses how the Court took great pains in its decision in *Gross* to distinguish the ADEA from Title VII and to state that uniform interpretation of two statutes is sometimes unwarranted; yet, the Court freely borrows because-of language from *Gross* to reach the end result it desires in the case at bar.[148] So, the employer prevailed in *Gross* because, according to the Court, the ADEA's anti-discrimination prescription is not like Title VII's, but the employer prevails again in *Nassar* because there is no textual difference between the ADEA's use of "because" and the use of the same word in Title VII's retaliation provision.[149] When this Author was in law school, one of his professors quipped that courts tend to decide how they want the case to resolve and then merely conjure up an opinion that supports that decision. Perhaps it is the "tail wags the dog" phenomenon: the concern about a rise in retaliation claims and employee-friendly retaliation decisions is trumping a larger issue of the proper interpretation of Title VII in relation to these claims. As Justice Ginsburg states, "What sense can one make of this other than 'heads the employer wins, tails the employee loses?'"[150]

B. *The EEOC Perspective*

As noted in the *Nassar* dissenting opinion, the EEOC has taken the position that the standard applicable to retaliation cases should mirror that given to discrimination cases. Specifically, the EEOC Compliance Manual states the following:

> E. PROOF OF CAUSAL CONNECTION
> In order to establish unlawful retaliation, there must be proof that the respondent took an adverse action because the charging party engaged in protected activity. Proof of this retaliatory motive can be through direct or circumstantial evidence. The evidentiary framework that applies to other types of discrimination claims also applies to retaliation claims.[151]

This statement clearly shows the EEOC's expectation that retaliation claims within a statute will be treated identically to how discrimina-

147. *See Jackson*, 544 U.S. at 174; *see also* Gomez-Perez v. Potter, 128 S. Ct. 1951 (2008) (holding that federal employees can sue for retaliation under the ADEA, even though the ADEA only expressly authorizes a retaliation claim in private-sector actions).

148. *Nassar*, 133 S. Ct. at 2544–45 (Ginsburg, J., dissenting); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–76 (2009).

149. *Nassar*, 133 S. Ct. at 2544–45 (Ginsburg, J., dissenting).

150. *Id*.

151. EEOC Compl. Man. § 8(E) (1998), *available at* http://www.eeoc.gov/policy/docs/retal.html.

tion claims are treated. This expectation is logical, of course, because having various standards would result in confusion within the statute and within court cases where a plaintiff attempts to litigate both discrimination and retaliation claims. The Court recognizes this expectation when it applies the identical standard to ADA and ADEA discrimination and retaliation claims, yet the Court ignores this basic principle when looking at Title VII claims—no doubt in an attempt to curb the influx of retaliation cases that have grown exponentially in the past decade.[152]

To underscore this rise in successful retaliation claims concern, in February 2013, the EEOC won a $675,000 retaliation verdict against RadioShack but was unsuccessful in the discrimination allegation against the employer.[153] This type of case has been a common theme in recent years and has even led plaintiff attorneys to encourage employees to bring retaliation claims, not discrimination claims, because they are (or were before the *Nassar* decision) easier to win.[154] A review of this statement listed on Attorney Glenn McGovern's website describes the common sentiment:

> 5. Choose a case where there is employer retaliation.
> Juries hate employers who retaliate against people who testify for others in a discrimination investigation or who report sexual harassment or discrimination. Retaliation violates the Golden Rule. Instead of a 55%-65% statistical chance of success with a sexual harassment claim or racial discrimination claim there is a 98% per cent [sic] chance of success in an employment retaliation case. This is based on Jury Verdict Research studies. It is actually easier to win a retaliation case then [sic] a racial discrimination case. You can have a very weak discrimination case and a very strong retaliation case that will save the day.[155]

With this type of blatant advertising, and insurance companies that provide EPL (employment practices liability) insurance to employers sounding the alarm,[156] it is no wonder that the Court became con-

152. *See EEOC Wins Second Victory Against RadioShack in Retaliation Case*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 28, 2013), http://www.eeoc.gov/eeoc/newsroom/release/2-28-13a.cfm (stating that in fiscal year 2012, the EEOC received 37,836 charges alleging retaliation). This constituted 38.1% of the total number of charges, the highest percentage for retaliation charges in history, and the largest number of any basis for a discrimination charge. *Id.*

153. *Id.*; *see* EEOC v. RadioShack Corp., Civil No. 10–cv–02365–LTB–BNB, 2012 WL 6090283 (D. Colo. Dec. 6, 2012).

154. *See* Glenn C. McGovern, *My Top 10 Ways to Win an Employment Case*, GLENNMCGOVERN.COM, http://www.glennmcgovern.com/CM/Custom/My-Top-10-Ways-To-Win-An-Employment-Case.asp (last visited July 9, 2013).

155. *Id.*

156. Art Seifert, *EPL Business Battles Retaliation Claims Boom*, THE ROUGH NOTES COMPANY (June 2012), *available at* http://roughnotes.com/rnmagazine/2012/june2012/2012_06p016.htm. The article points out that:

> • According to data from the U.S. Equal Employment Opportunity Commission (EEOC), retaliation claims have increased 100% from 1992 to 2006;

cerned. However, making it more difficult to succeed in retaliation cases is not the answer. After all, it is not uncommon for a human being to seek revenge against someone who brings an allegation against them, regardless of the allegation's truth or veracity. If the allegation is untrue, the discrimination case should lose. But should people be able to retaliate at will with the knowledge that succeeding in a retaliation allegation is even more challenging than proving discrimination? This certainly seems to be against the spirit of the statute, as well as Congressional and EEOC intent.

Consider the 2001 case of Celia Zimmerman, where the First Circuit Court upheld a $740,000 verdict against the employer and the employee's supervisor.[157] Ms. Zimmerman was a high-ranking and fast-rising employee with the company until she informed her manager that she was pregnant and subsequently needed time off work due to the pregnancy.[158] Her manager moved her to a smaller office, removed her from high-profile meetings and projects, strategically tried to turn her co-workers against her, and began giving her declining performance evaluations.[159] Eventually, she was taken off of work due to severe depressive disorder.[160] While the court found no evidence of discrimination on the basis of sex or pregnancy, it did find that the company and its manager were guilty of retaliatory conduct and tortuous interference with employment relationships.[161]

Turning to modern-day cases, clear evidence of retaliation will be excessively difficult to prove, and retaliation cases like Zimmerman's will likely prove unsuccessful in light of the increased motivating-factor standard now proffered by the *Nassar* decision.

C. *The Standards*

The following subsections will serve as a summary of the motivating-factors information provided above. Based on the information above, there are essentially three different standards that have been used with various employment discrimination statutes. However, note that the third standard has utilized various terms to essentially state the same premise: that discrimination and/or retaliation must be "the"

• In 2008, claims involving retaliation rose 23% to 32,690 claims, while non-retaliation claims rose 12% in the same period;

• A record number of retaliation claims were filed with the EEOC in 2010, about 50% more than in 2000; and

• Retaliation claims represent over 30% of all discrimination claims filed with the EEOC.

Id.

157. Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 72 (1st Cir. 2001).

158. *Id.* at 73.

159. *Id.*

160. *Id.* at 74.

161. *Id.* at 75.

cause or motivating-factor for the treatment received. These three standards are as follows:

(1) The burden-shifting and pretext standard;
(2) The mixed-motive standard; and
(3) The but-for, because-of, or sole-cause standard.

1. Title VII

In Title VII cases, it should be noted that *McDonnell Douglas* has never been overruled and remains widely utilized. Because many employment suits get dismissed at the motion for summary judgment stage and circuit courts have utilized varying approaches to looking at these cases when a Rule 56[162] summary judgment motion is pending, plaintiffs need to determine and clearly articulate whether they will be pursuing their claims against the employer based upon a *McDonnell Douglas* burden-shifting framework or based upon a mixed-motive motivating-factor framework (bringing the Act's 1991 amendment into focus).[163]

a. Civil Rights Act of 1964: Price Waterhouse v. Hopkins *(mixed-motive cases)*

Price Waterhouse defines the following standard for mixed-motive cases:

> [W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision if it had not taken the plaintiff's gender into account.[164]

b. Civil Rights Act of 1991 (Amended Civil Rights Act of 1964): Two new standards in mixed-motive cases

The first new standard states the following:

> [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.[165]

The second new standard states the following:

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162. FED. R. CIV. P. 56.

163. Christopher J. Emden, *Subverting Rule 56?* McDonnell Douglas*,* White v. Baxter Healthcare Corp.*, and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY L. REV. 139, 153–56 (2010).

164. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

165. 42 U.S.C.S. § 2000e-2(m) (LexisNexis 2013); Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003).

> [T]he employer has a limited affirmative defense that does not absolve it, but restricts the remedies available to a plaintiff.[166]

In summary, the first standard establishes the unlawful employment practice. The second standard requires that an employer show the same action would have occurred even without the "impermissible motivating factor" if the employer wants to assert the affirmative defense.[167]

c. Pretext Case: McDonnell Douglas v. Green

Under the *McDonnell Douglas* burden-shifting framework, the plaintiff has to establish a prima facie case of racial discrimination under Title VII, by showing:

> (i) [T]hat he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[168]

Then, the burden shifts to the employer, who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[169] Next, the employee must "be afforded a fair opportunity to show that [employer's] stated reason for [employee's] rejection was in fact pretext."[170] Ultimately, the employee has to be able to show that "the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision."[171]

2. The ADA and the ADEA

The ADA and the ADEA possess the same motivating-factor standard.[172] Despite what the Ninth Circuit decided in *Head*, the disability discrimination case discussed earlier, plaintiffs must currently show that age or disability is a "'but-for' cause of the employer's adverse decision" under both the ADA and the ADEA.[173] Either direct or circumstantial evidence may be used to prove but-for causation by a preponderance of the evidence.[174] In addition, the burden does not shift to the employer to show that the same action would have been taken despite age or disability.[175]

166. *Desert Palace, Inc.*, 539 U.S. at 94.
167. *Id.* at 94–95.
168. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
169. *Id.*
170. *Id.* at 804.
171. *Id.* at 805.
172. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012).
173. *Id.*; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).
174. *Gross*, 557 U.S. at 177–78.
175. *Id.* at 179.

Specifically, the ADEA utilizes the because-of language, which has been deemed to require a tort-based, but-for analysis. The statute states that:

> (a) Employer practices
> 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 . . . .[176]

Similarly, the ADA provides that:

> (a) General rule
> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
> (b) Construction
> As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee *because of* the disability of such applicant or employee . . . .[177]

3. Rehabilitation Act

Although only briefly mentioned in this Article, the Rehabilitation Act uses the more difficult sole-cause standard.[178] The analysis of claims under the ADA roughly parallels those brought under the Rehabilitation Act of 1973.[179] However, the standard of proof under each are currently different.[180] This is odd considering the fact that the Rehabilitation Act specifically provides that:

176. 29 U.S.C. § 623 (2012) (emphasis added).
177. 42 U.S.C. § 12112 (2012) (emphasis added).
178. *Lewis*, 681 F.3d at 313–14.
179. *See* 29 U.S.C. § 794 (1995); *see also* Maddox v. Univ. of Tenn., 62 F.3d 843, 846 n.2 (6th Cir. 1995), *abrogated by Lewis*, 681 F.3d at 312.
180. Note that the *Gross* holding stands for the proposition that a plaintiff must prove that his or her age was the *determining factor* of the adverse action, not the "sole cause" of the adverse action and not a "motivating factor" in the adverse action. *Gross*, 557 U.S. at 174. This suggests that the more difficult standard to meet is the sole-cause standard. *See* R. Scott Oswald, *ADEA Claims in the Wake of* Gross v. FBL Financial Services Inc., CORPORATE COUNSEL (Jan. 9, 2013), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202583743012&ADEA_Claims_in_the_Wake_of_Gross_v_FBL_Financial_Services_Inc#ixzz2YNdNgZXU.

> (g) Standards used in determining violation of section:
> The standards used to determine whether this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.[181]

4. Retaliation

The prima facie elements of retaliation in Title VII claims are similar but distinct from those of a discrimination claim. The elements are:

> (1) She engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment.[182]

As noted above in the *Burlington Northern* case, the Supreme Court held that a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context.[183] However, it has seemingly become more onerous following the *Nassar* decision.

The retaliation claims in ADA and ADEA cases have the same standards, both the but-for standard and the because-of standard, that are found in discrimination claims under those statutes. As this Article states, the only statute that now curiously has a separate discrimination and retaliation standard is Title VII, courtesy of the *Nassar* decision.

IV. Proposing a Unified Motivating-Factor Standard

Although the language in these statutes is often confused, the different portions seem to mirror one another more than expected. Based on, essentially, the three standards listed above, it is not difficult to eliminate one of these standards from being part of a more all-encompassing motivating-factor standard. When the Civil Rights Act of 1991 was enacted, it amended the because-of standard in Title VII to become more similar to a motivating-factor standard. The standard in Title VII can also be deemed a mixed-motive standard due to the employer's ability to limit its liability substantially if it can show that it

181. 29 U.S.C. § 791 (2012).
182. Morris v. Oldham Cnty. Fiscal Ct., 201 F.3d 784, 792 (6th Cir. 2000).
183. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 66 (2006).

would have made the same decision due to a co-existent legitimate reason for the adverse employment action. The sole-cause standard from the Rehabilitation Act should not be considered because it is an outlier, it is the most narrowly defined and difficult to meet, and it does not relate to any other standard mentioned in any meaningful way.

Additionally, while the burden-shifting approach in *McDonnell Douglas* has stood the test of time for forty years, its current application is causing confusion among the circuits. Courts are essentially confused as to whether they should be looking at a mixed-motive burden-shifting approach or a single-motive burden-shifting approach when deciding whether a case should survive summary judgment. However, with clarity in the approach, the dilemma can be minimized if not removed altogether. *McDonnell Douglas* is still relevant for its articulation of the prima facie case, but, by using the standard articulated in the Act's 1991 amendment, the burden-shifting approach should be clarified to reflect the employer's need to articulate the mixed-motive standard for the purposes of reducing liability, as opposed to the employer needing to articulate a legitimate, non-discriminatory reason for its decision (the current test) in order to fully defeat liability. Lastly, if the employee can prove that the proffered reason of the employer is pretext, a lie, this should serve to defeat the employer's ability to limit its liability and re-open the full panacea of remedies that the statute provides for the plaintiff/employee.

While the ADA and ADEA still regularly and rightfully utilize *McDonnell Douglas* in tandem with the but-for/because-of standard, it would be more logical for all of the similarly situated employment discrimination statutes to follow a similar path. As such, the standard from Title VII, the ADA, and the ADEA (and arguably the Rehabilitation Act as well) should all be incorporated into one standard. The most logical standard is the one most recently articulated by Congress in Title VII: the "a" motivating-factor standard coupled with the mixed-motive analysis. However, one could legitimately argue that a but-for— "the" motivating-factor standard—should apply to all of the discrimination and retaliation statutes, thus mirroring it after the ADEA and ADA. In the end, consistency is more important to this Author than deciding which motivating-factor standard should ultimately control the statutes.

For the purposes of developing a proposed standard, the more liberal standard articulated in Title VII will be considered. The reason for using this standard is because it would serve as a greater deterrent to discriminatory and retaliatory animus in the workplace. The proposed standard that seems to mesh all of these standards together will consist of four parts.

The first part uses the first step of the *McDonnell Douglas* standard: establishing a prima facie case of discrimination. The first part of the

McDonnell Douglas standard seems ambiguous enough to incorporate both the "a motivating factor" in the Civil Rights Act of 1991 and the but-for causation of the ADA and ADEA standards. It would be wise for Congress to articulate a clear test that states that the but-for test is no longer applicable to any employment discrimination or retaliation cases.

For the second part of the proposed standard, the second standard of the Civil Rights Act of 1991 and the second part of the *McDonnell Douglas* standard can be combined. Essentially, both of these portions of the standards give the employer an opportunity to respond. As in *McDonnell Douglas*, the burden should shift to the employer at this point.[184] The employer can provide "legitimate, nondiscriminatory" reasons[185] for rejecting the employee, which would have resulted in the same way had the discriminatory purpose not been considered at all.[186] As in the Civil Rights Act of 1991, this is the employer's limited affirmative defense: it may possess the ability to limit the liability that will be imposed through clearly articulating the mixed-motive.[187]

The third part should be taken from the third part of the *McDonnell Douglas* standard, allowing the employee/complainant/plaintiff the opportunity to show that the reasons provided by the employer are only there to "cover-up for a [ ] discriminatory decision."[188] This could bring out the real reasons for discrimination, such as not wanting to provide a reasonable accommodation. In addition, it could give the employee/complainant/plaintiff the opportunity to show why damages against the employer should not be limited.[189]

Lastly, the fourth part should incorporate retaliation into the standard so that it is clear that discrimination and retaliation should be treated identically in the enforcement of these statutes. This proposed standard should be implemented into Title VII as well as the ADA, ADEA, and the Rehabilitation Act. An example of this new Motivating-Factor Standard is as follows:

Motivating-Factor Standard

1. Employee/Complainant/Plaintiff has the initial burden of establishing a prima facie case of discrimination by showing:
   a. That employee belongs to a protected class;
   b. That employee applied and was qualified for the job and/or was presently working in a job and was treated differently than someone not a member of the protected class;

184. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
185. *Id.*
186. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003).
187. *Id.*
188. *McDonnell Douglas*, 411 U.S. at 805.
189. *See Desert Palace, Inc.*, 539 U.S. at 94 (explaining methods of limiting damages).

c. Despite employee's qualifications, employee was rejected/terminated and/or otherwise suffered an adverse employment action due in whole or in part to the employee's being a member of the protected class; and
d. After being rejected/terminated, and/or suffering the adverse employment action, the position remained open and employer continued to seek applicants from persons who possessed the same qualifications as employee and/or a person not in the protected class received more favorable treatment.[190]

2. The burden then shifts to the employer for the purpose of the employer asserting a limited affirmative defense.[191] The following should be included in the defense:
   a. The employer provides legitimate, nondiscriminatory reason(s) for rejecting/terminating the employee and/or adversely impacting the employee's employment, which show that the same result would have occurred without the consideration of the protected class/discriminatory factor; and[192]
   b. The employer shows that the remedies given to the plaintiff should be limited.[193]
3. Employee/Complainant/Plaintiff is then given an opportunity to show that the employer's legitimate, nondiscriminatory reasons for rejecting/terminating the employee/complainant/plaintiff were "pretext"[194] or "cover-up for a [ ] discriminatory decision."[195] Employee/Complainant/Plaintiff can rebut any of employer's reasons for limiting his or her remedies and, if rebutted by a preponderance of the evidence, the remedies will not be limited.[196]
4. The same showing of "a motivating-factor" for the employer's treatment of the employee is applicable to employee allegations of retaliatory conduct for opposing discrimination or being a witness and/or otherwise testifying in any formal or informal proceeding or investigation relative to an assertion of discrimination.

V. CONCLUSION

To alleviate confusion among the courts as to the correct motivating-factor standard, the proposed standard purports to incorporate as much of each existing standard as possible and could be used across the board for all statutes prohibiting employment discrimination.

190. *McDonnell Douglas*, 411 U.S. at 802.
191. *See id.*; *Desert Palace, Inc.*, 539 U.S. at 94.
192. *McDonnell Douglas*, 411 U.S. at 802; *Desert Palace, Inc.*, 539 U.S. at 94–95.
193. *Desert Palace, Inc.*, 539 U.S. at 94.
194. *McDonnell Douglas*, 411 U.S. at 804.
195. *Id.* at 805.
196. *See Desert Palace, Inc.*, 539 U.S. at 94 (explaining methods of limiting damages).

Frankly, it should not be as difficult as it currently is to decipher what standard applies to which statute, nor should parties be forced to utilize various standards for similarly worded statutes. This problem is exacerbated when a plaintiff asserts discrimination based upon multiple statutory reasons, such as age and sex. In such a situation, it is nonsensical to expect an (ex) employee to argue, an employer to defend, and a jury to understand that, in one instance the employee must prove that sex was "a" motivating factor for the discriminatory treatment, but, in another instance, that age was "the" motivating factor for the discriminatory treatment. Indeed, it is common that an employee could be discriminated against based upon more than one characteristic, so the employee should not have to try and argue multiple standards in the case (envision a woman being fired because the manager believes that "old men should work until they get ready to retire while old women should retire by age 60 so they can care for their grandchildren and knit sweaters"). Consistency makes sense. However, this Author learned a long time ago that sense is not all that common. Hopefully, Congress will incorporate common sense and work towards providing a more clearly articulated motivating-factor test.