UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER v. NASSAR: WILL PLAINTIFFS' CLAIMS OF RETALIATION BE MORE DIFFICULT TO PROVE?

ALIX VALENTI*

I. INTRODUCTION

Claims of unlawful discrimination in the workplace are typically accompanied by allegations of retaliation. Statutes prohibiting employment discrimination also contain provisions barring retaliation against employees for making a complaint alleging discrimination. In order to present a prima facie case of retaliation plaintiffs must prove (1) that they engaged in protected activity under Title VII or another statute; (2) that the employer was aware of this activity; (3) that the employer took adverse action against the plaintiff; and (4) that a causal connection existed between the protected activity and the adverse action. Initially, most practitioners believed that as long as a retaliatory motive played a part in the adverse employment action, causality could be established.[1] Recently, however, the U.S. Supreme Court ruled that the employer's actions must have been motivated solely by the desire to retaliate.[2] This holding represents a departure from the Court's previous decisions that seemed to favor plaintiffs in

* Ph.D., J.D., LL.M., Associate Professor of Legal Studies and Management, University of Houston-Clear Lake.

[1] Michael C. Harper, *The Causation Standard in Federal Employment Law*: Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 81 (2010).

[2] Univ. of Tex. Sw. Medical Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

retaliation actions.[3] This paper will examine the history of the Courts' treatment of retaliation claims under Title VII of the Civil Rights Act followed by a discussion of its most recent decision. The paper will also examine the potential impact of the decision on plaintiffs' ability to successfully raise the pretext issue.

II. SUPREME COURT'S TREATMENT OF RETALIATION CLAIMS UNDER TITLE VII

Retaliation is defined by the EEOC as any adverse action taken by an employer against an employee because the employee exercised his or her rights under the law.[4] While retaliation can occur in a number of different contexts,[5] a claim by an employee based on retaliation is typically based on discrimination under Title VII. The anti-retaliation provision under Title VII states:

> 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

[3] At least one author has commented that the decision will result in fewer claims of retaliation. Natalie C. Rougeux, *Oh, What a Tangled Web We Weave When We Decipher Employee Leave*, 61 FED. LAW 38, 43 (2014).

[4] EEOC. *Facts about Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited, Aug. 18, 2014).

[5] Over 40 federal statutes contain provisions banning retaliation, from the whistle-blowing protection under Sarbanes-Oxley, 18 U.S.C. § 1514A(a) (2012), to employee protection under OSHA, 29 U.S.C. § 660(c)(1) (2012). For an excellent summary of federal laws containing anti-discrimination provisions, *see* John O. Shimabukuro, L. Paige Whitaker & Emily E. Roberts, *Survey of Federal Whistleblower and Anti-Retaliation Laws,* CONG. RES. SERV., Washington, D.C. (2013).

> an investigation, proceeding, or hearing under this subchapter.[6]

In determining whether the plaintiff suffered an adverse employment action, several circuit courts of appeals looked to whether the plaintiff had suffered "a materially adverse change in h[is] employment status" or in the terms and conditions of his employment.[7] Employment actions that had been deemed sufficiently disadvantageous to constitute an adverse employment action included termination of employment, a demotion, decrease in wage or salary, a material loss of benefits, or significantly diminished material responsibilities.[8]

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[6] 42 U.S.C. § 2000e-3(a) (2012).

[7] *E.g.*, Williams v. R.H. Donnelley, Corp., 368 F.3d 123 (2d Cir. 2004); Burlington N. & Santa Fe Ry. Co., v. White, 364 F.2d 789, 795 (6th Cir. 2004) (en banc); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). The Fifth and Eighth Circuits interpreted the statue to require an ultimate employment decision, such as hiring, firing, promotion, demotion, or compensation. Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997). Similarly, a district court in the Fourth Circuit also applied the "ultimate employment standard". Raley v. Bd. of St. Mary's Cnty. Comm'rs, 752 F. Supp. 1272 (D. Md. 1990) (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (a Title VII discrimination case)). The Tenth Circuit stated that the conduct must constitute "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aquilino v. Univ. of Kansas, 268 F.3d 930, 934 (10th Cir. 2001) (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)). Both the Seventh and DC Circuits had applied a standard that was similar to the one ultimately adopted by the *Burlington* Court. Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C.Cir. 2006); Washington v. Illinois Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005).The Ninth Circuit adopted a broader standard based on EEOC guidelines. Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

[8] Galabya v. N.Y.C. Bd. of Educ., 202 F.3d 636 (2d Cir. 2000). The court stated that a materially adverse change must be "more disruptive than mere inconvenience or an alteration of job responsibilities," and can include, for example, "termination of employment, a demotion accompanied by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly

In *Burlington Northern & Santa Fe Railway Co. v White*[9], the Supreme Court announced a different standard. The *Burlington* Court ruled that "the anti-retaliation provision [of Title VII], unlike [Title VII's] substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[10] Rather, to prevail on a claim for retaliation under Title VII, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.[11] The Court noted the differences between the language of Title VII's substantive prohibition, which refers expressly to an employee's "compensation, terms, conditions, or privileges of employment," and the language of its retaliation prohibition, which contains no such reference.[12] Observing that Title VII's primary goal is to promote "a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the Court pointed out that "[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[13] In addition, the Court adopted a broad stance in its interpretation of the anti-retaliation statute, holding that it provides a remedy for an

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diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.* at 640.

[9] 548 U.S. 53 (2006). In *Burlington*, the plaintiff had been hired as a railroad "track laborer," which included both the operation of a forklift as well as less desirable track laborer chores. After she filed a sexual harassment complaint against her male supervisor, White was taken off forklift duty and assigned only other track laborer tasks. White sued, asserting the change of duties was retaliation. The Supreme Court held that reassignment of duties, together with a temporary suspension, was an adverse employment action.

[10] *Id*. at 68.

[11] *Id*. at 64.

[12] *Id*. at 62.

[13] *Id.* at 63.

expansive range of retaliation, including actions that may well occur outside the work environment.[14]

After the Court's decision in *Burlington*, several commentators noted that an increase in employee claims involving retaliation could be expected given this pro-plaintiff decision, because the Court's standard was more favorable to plaintiffs than that previously adopted by many of the federal courts of appeals.[15] It was suggested that the position adopted by the Supreme Court would call into question a broader range of employer conduct that does not directly affect key employment decisions or conditions, and would make it more difficult for employers to defend against a claim of retaliation at the summary judgment stage of a case.[16]

Although the Supreme Court's appeared to loosen the standard that plaintiffs must prove in retaliation cases, many courts continue to require employees to show that they suffered some economic loss due to the retaliation.[17] In *Fuentes v. Postmaster General of United States Postal Service*,[18] the appellate court stated that the term "adverse employment action" includes only "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." In cases where the

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[14] *Id.* Previous cases held that the anti-retaliation statute could extend beyond the work environment when the adverse employment action was against a former employee. Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996); Beckham v, Grand Affair, Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987). In *McKenzie v. Atl. Richfield Co*., 906 F. Supp. 572 (D. Colo. 1995), the court held that an employee who is discriminated against because of his spouse's protected activity may claim retaliation. *Id*. at 575.

[15] Erwin Chemerinsky, *Workers Win in Retaliation Case*, 43 TRIAL 58 (January, 2007); Eileen Kaufman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1981*, 22 TOURO L. REV. 1059 (2007); Ramona L. Paetzold, *Supreme Court's 2005-2006 Term Employment Law Cases: Do New Justices Imply New Directions*? 10 EMP. RTS. & EMP. POL'Y J. 303 (2006).

[16] Emily White, Burlington Northern & Santa Fe Railway Co., v. White: *The Supreme Court Bolsters Worker Protections by Setting Broad Retaliation Test*, 27 BERKELEY J. EMP. & LAB. L. 530 (2006).

[17] Sykes v. Pennsylvania State Police, 311 F. App'x 526, 529 (3rd Cir. 2008).

[18] 282 F. App'x 296, 301 (5th Cir. 2008).

adverse employment action takes the form of rude conduct and an otherwise hostile work environment, the circuits are generally in agreement that such behavior falls into the definition of "normal petty slights, minor annoyances, [and] simple lack of good manners" that the *Burlington* Court expressly characterized as non-actionable.[19] Thus, claims of retaliation continue to require a showing of some tangible harm, such as loss of employment, reduction in pay, or a significant change in employment circumstances.[20]

A few years later, in *Thompson v. North American Stainless, LP*,[21] the Supreme Court again appeared to favor the plaintiff in a retaliation case by recognizing a cause of action for third-party retaliation. In *Thompson*, the plaintiff claimed that he was the subject of retaliation when his fiancé, who worked for the same employer, filed a sex discrimination charge with the EEOC. The Court agreed, stating that an "aggrieved person" includes any person whose interests fall within the zone of interests covered under the statute.[22] Citing *Burlington*, the Court held that Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct.[23] Clearly, noted the Court, a reasonable worker might be dissuaded from filing a charge with the EEOC if she knew that her fiancé would be fired because of her actions.[24] Comments on the case, similar to those made after the *Burlington* decision, suggested that the decision was a

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[19] 548 U.S. at 68. *E.g*., Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 619(8th Cir. 2007); Pittman v. General Nutrition Corp., 515 F. Supp. 2d 721, 743 (S.D. Tex. 2007).

[20] Alix Valenti, Burlington Northern & Santa Fe Railway Co. v. White: *Are Plaintiffs More Successful in Litigating Retaliation Claims?* 11(2) ALSB J. EMP. & LAB. L.146, 175 (2009).

[21] 131 S. Ct. 863 (2011).

[22] *Id.* at 870.

[23] *Id.* at 868.

[24] *Id*.

significant expansion of Title VII's retaliation protection[25] and signaled the Court's inclination to broadly construe anti-discrimination laws.[26]

III. THE CAUSATION ISSUE AND THE SUPREME COURT'S RECENT INTERPRETATION

In addition to proving that the actions taken were sufficiently adverse, the plaintiff must also establish causality between the making of a complaint and the adverse employment action. The third prong of the statute requires evidence that the employer took the adverse action because the employee engaged in protected activity. Causality can be established if there exists direct or other non-circumstantial evidence.[27] For example in *Patane v. Clark*,[28] the plaintiff testified that she had overheard her supervisor conspiring to drive her out of her job and that another professor, to whom she reported, issued a negative performance review, constantly monitored her actions, and picked up her telephone. Thus, the court found sufficient direct evidence of causation between the time of the complaint and the adverse action even though a one-year gap existed between the complaint and the retaliation.

Absent direct evidence, however, causation is inferred by the temporal proximity between the protected activity and the employer's action. When the adverse employment action takes place immediately after the protected activity, courts generally find sufficient evidence of causation.[29] In most cases, however, the

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[25] Brandon Underwood, *Tread Lightly: Third-Party Retaliation Claims after* Thompson v. North American Stainless, 38 IOWA J. CORP. L. 463 (2013).
[26] Frank J. Cavico & Bahaudin G. Mujtaba, *Managers Be Warned! Third-Party Retaliation Lawsuits and the United States Supreme Court*, 2 INT'L J. BUS. & SOC. SCIENCES 8, 16 (2011).
[27] Vance v. Chao, 496 F. Supp. 2d 182, 186 (D.D.C. 2007).
[28] 508 F.3d 106 (2d Cir. 2007).
[29] Troy B. Daniels & Richard A. Bales, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII*

employment action does not occur immediately after the protected activity. Where the only evidence of a connection between the protected activity and the adverse action is "temporal proximity," courts have held that the proximity must be "very close".[30] Very close has been defined as 21 days,[31] two weeks,[32] three weeks,[33] and, in one case, over two months.[34]

Retaliation Claims, 44 GONZ. L. REV. 493, 494 (2009). Circumstantial evidence will support a claim for retaliation where the plaintiff is fired one day after the company learned about his filing an EEOC complaint; a reasonable finder of fact could infer the requisite causation. Pantoja v. Am. NTN Bearing Mfg. Corp., 495 F.3d 840 (7th Cir. 2007). Similarly, an employee established causal connection between his EEOC charge and his termination, as required for prima facie case of retaliation under ADEA, where he was terminated on day that employer learned of charge. Mickey v. Zeidler Tool and Die Co., 516 **F**.3d 516 (6th Cir. 2008). Where plaintiff made a request for information to support his discrimination claim and was transferred to a new, less responsible job a week later, the court found that there was sufficient causation – the retaliatory action "followed closely on the heels" of the protective activity. Kessler v. Westchester Cnty. Dep't of Social Servs., 461 F.3d 199, 210 (2d Cir. 2006). A five-day span between the plaintiff's engagement in protected activity and employer's alleged retaliation was sufficient to establish "causal link" element of retaliation. Evans v. City of Houston, 246 F.3d 344, 354 (5th Cir. 2001).

[30] Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001); Summers v. Winter**,** No. 08-2039, 2008 WL 5227192 at *4 (11th Cir. Dec. 16, 2008); Pittman v. Gen'l Nutrition Corp., 515 F. Supp. 721, 737 (S.D. Tex. 2007).

[31] DiCarlo v. Potter, 358 F.3d 408, 422 (6th Cir. 2004). Where plaintiff's employment was terminated about a month after her first written complaint, the court nevertheless found that any temporal proximity between her complaint and the termination of her employment was weak, especially in light of the other strong evidence that her termination was for a reason other than her complaints. Banta v. OS Restaurant Servs, Inc., No. C07-4041-PAZ, 2008 U.S. Dist. LEXIS 97279 at *50 (N.D. Iowa, Dec. 1, 2008).

[32] Feingold v. New York, 366 F.3d 138, 156-57 (2d Cir. 2001).

[33] Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 (10th Cir. 2001).

[34] King v. Rumsfield, 328 F.3d 145, 151 (4th Cir. 2003). The DC Circuit applies a 3-month rule of thumb to establish causality on the basis of temporal proximity alone. Rattigan v. Gonzales, No. 04-2009, 2007 WL 1577855 (D.C.C. May 31, 2007). However, the Tenth Circuit held that a lapse of three months was insufficient to establish a causal connection. Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997).

Generally courts will not find evidence of temporal proximity if the time difference is three to four months or more.[35] The Tenth Circuit held that three and one half months between the EEOC charge and denial of tenure was too much time to establish causation by temporal proximity alone.[36] Similarly, a gap of six months from the filing of the lawsuit and eleven months from filing of the EEOC charge is also "too great to establish retaliation based merely on temporal proximity."[37] The Fifth Circuit held that an employee who was fired seven months after she filed an EEOC charge could not prevail on a claim of retaliation based solely on temporal proximity.[38]

Third Circuit applies an "unusually suggestive" test in examining the causality between the protected act and the adverse act. When plaintiff had received prior warnings for absences and had received a written reprimand, the court held that the discipline was for a highly plausible, legitimate, non-retaliatory reason.[39] The timing of the incidents must be sufficiently close to be "unduly suggestive," and there must be other evidence to suggest a causal connection.[40]

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[35] *E.g.*, Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2005); Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000).
[36] Meiners v. Univ. of Kansas, 359 F.3d 1222, 1231 (10th Cir. 2004).
[37] Foster v. Solvay Pharmaceuticals, Inc., 160 F. App'x. 385, 389 (5th Cir. 2005). *But see* Garvin v. Potter, 367 F. Supp. 2d 548, 571 (S.D.N.Y. 2005) (an eleven-month time period between the EEOC complaint and the beginning of the pattern of disciplinary actions supported a finding that there was a genuine issue of material fact as to whether the actions were taken in retaliation for the plaintiff's protected conduct).
[38] Bell v. Bank of Am., 171 F. App'x 442, 444 (5th Cir. 2006).
[39] Link v. Trinity Glass Int'l, No. 05-6342, 2007 WL 2407101, *7 (E.D. Pa. Aug. 22, 2007).
[40] Morrison v. Carpenter Technology Corp., 193 F. App'x 148, 155 (3d Cir. 2006) (citing Thomas v. Town of Hammonton, 351 F.3d 108, 114 (3d Cir. 2003)).

The Fifth Circuit noted that "temporal proximity alone will be insufficient to prove proximity; it is just one of the elements".[41] Thus, other facts such as poor performance, improper conduct, prior disciplinary record, and reports of disruptiveness will undermine a claim for retaliation based on temporal proximity even if only 3 and 1/2 months.[42] Similarly, the Seventh Circuit holds that a short period of time between the filing of a charge of discrimination and the adverse employment action is "rarely enough by itself" to create a prima facie case of retaliation.[43] Nevertheless, the court of appeals found the timing of the plaintiff's discipline as "extremely suspicious" and reversed the district court's summary judgment motion for the employer.[44]

As noted above, however, when there is additional evidence to support retaliation, for example, evidence of disparate treatment, the court will find sufficient evidence to permit the inference that retaliatory conduct was motivated by a previous lawsuit.[45] Timing is not important when the facts clearly indicate an unbroken chain of action from the time an employer first learns of a claim to the adverse action.[46] Time is also not necessary to establish causation when there is other non-circumstantial or direct

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[41] Strong v. Univ. Healthcare Sys. L.L.C., 482 F.3d 802, 807-808 (5th Cir. 2007). *But see* Weeks v. NationsBank, N. A., No. CIV.A. 3:98–CV–1352M, 2000 WL 341257 (N.D. Tex. Mar.30, 2000), where a district court held that three months was close enough to establish a prima facie case. The court noted that the causation prong of the *prima facie* test is less stringent than is the "but-for" test applicable to the ultimate question of whether the defendant unlawfully retaliated against the plaintiff. *Id*. at *3. The plaintiff failed to establish but-for caution when the bank was able to show legitimate business reasons for the termination. *Id*. at *4.

[42] Strong, 482 F.3d at 808.

[43] Lang v. Dep't of Children & Fam. Servs. 361 F.3d 416, 419 (7th Cir. 2004).

[44] *Id*. at 420.

[45] Campbell v. Univ. of Akron, 211 F. App'x 333, 351 (6th Cir. 2006).

[46] Richard v. Bd. of Supervisors of La. State Univ., 960 So. 2d 953, 971 (La. Ct. App. 2007).

evidence.[47] For example, if the employee can prove an intent to retaliate the courts will find in favor of the plaintiff.[48]

If the employer can show that disciplinary actions or reprimands occurred *before* the protected activity took place, it will likely prevail on the temporal proximity issue. Reassignment and denial of training opportunities before the complaint negates the causal link.[49] Causation was negated when plaintiff was told two months before her participation in an EEOC investigation that would not receive a pay raise. In *Dehart v. Baker Hughes Oilfield Operations., Inc*.,[50] the court found no causation based on the employee's prior disciplinary record and the fact that the employer followed its policy and procedures. The employee had been previously reprimanded for taking leave without authorization and for poor attendance and insubordination. Similarly, the decision not to promote the plaintiff before the complaint was filed, plus previous disciplinary problems, defeats the causal connection between the complaint and the employment decision.[51] In one case, however, the Court of Appeals for the Tenth Circuit held that an action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.[52]

Further, subjective belief that incidents were retaliatory is not sufficient to establish the causal link between the incidents and the EEOC complaint,[53] or beliefs that incidents were motivated by personal dislike, not retaliation,[54] are not sufficient. An

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[47] Vance v. Chao, 496 F. Supp. 2d 182, 186 (D.D.C. 2007).
[48] Terry v. Ashcroft, 336 F.3d 128, 141 (2nd Cir. 2003).
[49] Grother v. Union Pac. RR Co., No. 04-3279, 2006 WL 3030769, *4 (S.D. Tex, 2006).
[50] 214 F. App'x 437, 443 (5th Cir. 2007).
[51] Bryan v. Chertoff, 217 F. App'x 289, 293 (5th Cir. 2007).
[52] Sauers v. Salt Lake Cnty., 1 F.3d 1122, 1128 (10th Cir. 1993). Direct evidence existed in the form of a tape recorded conversation that the employee's supervisor feared that she would file a sexual harassment complaint against him.
[53] Peace v. Harvey, 207 F. App'x 366, 369 (5th Cir. 2006).
[54] Allen v. Nat'l RR Passenger Corp., 228 F. App'x 144, 148 (3rd Cir. 2007).

employee's speculation that she did not receive a "Far Exceeds" rating in her performance review was found to be insufficient to establish a retaliation claim.[55]

IV. THE SUPREME COURT'S DECISION IN *NASSAR*

The Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*[56] makes it more difficult for plaintiffs to establish causation because it eliminates the mixed-motive approach in retaliation cases. The Court held that as long as an employer's explanation of its actions against the plaintiff does not evince a discriminatory motive, the employer will prevail in the retaliation action, even if there exists other evidence of a retaliatory motive. Under the Court's ruling, an employee claiming retaliation must prove that the protected activity was the "but-for cause" of the alleged adverse action. This is a more demanding criterion than the motivating-factor standard which had been adopted by the court of appeals.[57]

The petitioner, who was of Egyptian descent, was a physician and a member of the faculty at University of Texas Southwestern Medical School (UTSW). As part of an agreement with Parkland Hospital (Parkland), the petitioner provided patient care at an outpatient care clinic at Parkland, which, starting in 2004, was headed by Dr. Beth Levine. The petitioner claimed that Dr. Levine demanded that the petitioner begin billing patients for his services, even though his salary for clinical services was covered under a federal grant, that she unduly questioned his productivity, and that she made comments such as "Middle Easterners are lazy," and that such behavior was evidence of discrimination based on his religion and ethnic heritage.[58] Because of this perceived bias, the petitioner applied for employment

[55] Hare v. Potter, 220 F. App'x 120, 131 (3rd Cir. 2007).
[56] 133 S. Ct. 2517 (2013).
[57] *Id*. at 2534.
[58] *Id*. at 2523.

directly at Parkland without also being on UTSW's faculty. On June 3, 2006 Parkland offered the petitioner a job to work directly in the clinic on Parkland's payroll, effective July 10, 2010, but only if he resigned from UTSW. The petitioner resigned his job at UTSW that same day by sending a letter to the department chair, Dr. Fitz, and other faculty members in which he claimed that he was leaving because of the harassment by Dr. Levine. In the letter, the petitioner wrote: "The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine .... I have been threatened with denial of promotion, loss of salary support and potentially loss of my job . . . . [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment."[59] After reading the letter, Dr. Fitz was concerned over the petitioner's accusations, saying that Dr. Levine had been "publicly humiliated by th[e] letter" and that it was "very important that she be publicly exonerated."[60] Dr. Fitz then opposed Parkland's hiring of the petitioner, on the grounds that the offer violated the affiliation agreement's requirement that all Parkland staff physicians be members of UTSW's faculty.[61] Parkland revoked the offer, and the petitioner moved to California where he accepted a position at a smaller clinic.

The petitioner sued on two grounds: that UTSW's blocking his appointment to Parkland was a constructive discharge of employment and that Dr. Fitz's actions were retaliation for the petitioner's claim of discrimination. Following receipt of a mixed-motive instruction, the jury found for the petitioner on both issues, but the court of appeals reversed on the constructive discharge issue.[62] On the issue of retaliation, the court of appeals held that the evidence supported a finding that Dr. Fitz was motivated, at

[59] Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 471 (5th Cir. 2012).
[60] 133 S. Ct. at 2524.
[61] *Id.*
[62] Nassar, 674 F.3d at 453.

least in part, to retaliate against the petitioner for his disparaging remarks about Dr. Levine.[63]

The Supreme Court reversed, holding that the mixed motive approach taken by the court of appeals was incorrect.[64] The Court applied the same reasoning that it took with respect to its interpretation of the Age Discrimination in Employment Act of 1967 (ADEA)[65] in *Gross v. FBL Financial Services, Inc*.[66] The language in both the ADEA and anti-retaliation statute under Title VII makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria.[67] The Court stated: "Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross,* the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[68] This standard makes plaintiffs' burden of proving retaliation more difficult because they must show that, but for their protected activity, they would not have

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[63] *Id.* at 454.

[64] 133 S. Ct. at 2534. The Court also rejected the more employee-friendly standard adopted by the EEOC. EEOC, *Compliance Manual*, Section 8: Retaliation n.45 (May 20, 1998), *available at* http:// www.eeoc.gov/policy/docs/retal.html.

[65] 29 U.S.C. § 623 (2012).

[66] 557 U.S. 167 (2009).

[67] 42 U.S.C. § 2000e-3(a) (2012). Congress passed the Civil Rights Act of 1991 which clarified the standard for status-based discrimination. 42 U.S.C. § 2000e-2(m) (2012) provides that an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Under the revised statutory language, a plaintiff can obtain declaratory relief, attorney's fees and costs, and injunctive relief based on a showing that race, color, religion, sex, or nationality was a motivating factor in an adverse employment action, but is not entitled to reinstatement or monetary damages. However, the Court noted, these amendments to Title VII do not apply to claims of retaliation. 133 S. Ct. at 2328.

[68] *Id*. at 2533.

suffered the adverse employment action.[69] Thus, the burden of proof shifts to the plaintiff who must prove that a retaliatory motive was the *sole* reason for the decision; if the illegitimate factor was merely a determinative factor in the adverse employment decision, the employer will most likely prevail.

The decision of the Supreme Court in *Nassar* was not unexpected. After its decision in *Gross*, most circuits applied the but-for standard in non-Title VII discrimination claims, including claims of retaliation.[70] As stated by the Seventh Circuit, "unless a statute ... provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[71] The Fifth Circuit, which is normally more employer-friendly, was one

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[69] The Court's decision appeared to be motivated at least in part by its concern for reducing frivolous claims and the increase in litigation under anti-retaliation statutes. *Id*. at 2531. One author lamented that the Court's interpretation of the law was merely to arrive at the end result it sought. In *Gross*, the Court distinguished Title VII from ADEA, yet it used the same "because of" language from *Gross* to apply a but-for approach for Title VII retaliation claims. Kendall. D. Isaac, *Is It "A" or Is It "The"? Deciphering the Motivating-Factor Standard in Employment Discrimination and Retaliation Cases*, 1 TEX. A&M L. REV. 55, 71 (2013).

[70] Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (But Should)*, 64 ALA. L. REV. 1067 (2013). Before the Supreme Court's decision in *Gross*, the courts were generally split regarding which approach to follow in retaliation claims. In circuits which continued to follow the Civil Rights Act as it existed prior to the 1991 amendments (i.e., applied the *Price Waterhouse* standard), if a plaintiff demonstrates that a protected trait played a motivating factor in an adverse employment action, a defendant can avoid Title VII liability as long as it could prove that it would have made the same decision regardless of the retaliatory motive. Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1471 (10th Cir. 1992) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). Other courts held that the 1991 amendments were intended to overturn *Price Waterhouse* in all Title VII actions and thus although plaintiffs were entitled to damages, such damages were limited. deLlano v. North Dakota State University, 951 F. Supp. 168 (D.N.D. 1997).

[71] Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010).

of the few circuits that continued to apply the motivating factor approach in retaliation cases.[72] In addition, the Fifth Circuit also applied the rule articulated in *Price Waterhouse v. Hopkins*[73] which held that when the plaintiff establishes that at least one motivating factor was unlawful retaliation, then it is incumbent upon the employer to prove that it would have made the same decision absent the retaliatory motive, thus passing the burden of proof to the employer.

Using this standard in what had been treated by the Fifth Circuit as a mixed motive case, the jury in the *Nassar* case found that UTSW retaliated against the petitioner by blocking his employment by Parkland because he engaged in a protected activity and awarded him $438,167.66 in back pay and benefits and $3,187,500.00 in compensatory damages.[74] Evidently, the jury rejected UTSW's argument that its decision to prevent the petitioner from working at Parkland was a routine application of Parkland's agreement to use only UTSW doctors. On appeal, the Fifth Circuit noted in a footnote that its decision in *Smith v. Xerox Corp*.[75] required it to apply a mixed motive approach;[76] further,

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[72] Smith v. Xerox Corp, 602 F.3d 320 (5th Cir. 2010). The court distinguished the two issues, noting: "To state the obvious, *Gross* is an ADEA case, not a Title VII case." *Id*. at 329. Further, the court applied the *Price Waterhouse* test (decided before the 1991 amendments) which provided that the "because of" language in the context of Title VII authorized a mixed-motive framework. *Id*. The court stated that, "as an inferior court," it could not ignore the application of the *Price Waterhouse* standard absent that case being overruled by the Supreme Court. *Id*. In a dissenting opinion, Judge Jolly called the decision "lame," arguing that the majority mischaracterized the case as a mixed motive case when the issue should have been analyzed as a pretext case. *Id*. at 336. *See* notes 76 and 95 through 98 and accompanying text *infra*.

[73] 490 U.S. 228 (1989).

[74] Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 3:08-CV-1337-B, 2010 WL 3000877 (N.D. Tex. July 27, 2010).

[75] 602 F.3d at 330.

[76] 674 F.3d 448, 454 n.16. On a motion for a rehearing which was denied, Judge Smith dissented from that denial and in a dissenting opinion suggested that the

since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," the court could find no basis to upset the jury's verdict that UTSW retaliated against Nassar because of his complaints of racial discrimination.[77]

V. IMPLICATIONS OF *NASSAR*

The Supreme Court has clarified that in all but Title VII discrimination cases the employee must prove, under a "but-for" standard, that the adverse employment action would not have occurred absent a discriminatory animus. Under the more lenient mixed motive standard as long as the plaintiff can present some evidence of a discriminatory intent, the burden shifted to the employer to prove by a preponderance of the evidence that the employment action would have taken place even absent that prohibited motive. Under *Nassar*, the employer no longer has the burden of proving that a discriminatory animus was not the motivating factor for the employment decision. Scholars have suggested that this ruling simplifies jury instructions at trial as the burden of proof is placed solely on the plaintiff,[78] although the net impact may be fewer verdicts for employees[79] and fewer reversals on appeal.

At the summary judgment stage, it has been suggested that the Court's decision will not have a substantial impact. Arguably, when an employee presents evidence of both a discriminatory motive and a legitimate non-discriminatory motive, a genuine issue

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Smith v. Xerox Corp. case was erroneously decided and should be overturned. 688 F.3d 211, 213-214.

[77] 674 F.3d 448, 454.

[78] Alan Rupe, Jason Stitt & Mark Kanaga, *U.S. Supreme Court Clarifies the Plaintiff's Burden pf Proof in Title VII Retaliation Actions*, 83 J. KAN. B. ASSN. 24, 29 (2014).

[79] Richard L. Wiener & Katlyn S. Farnum, *The Psychology of Jury Decision Making in Age Discrimination Claims,* 19 PSYCHOL., PUB. POL'Y, & L. 395 (2013).

of material fact arises, thus precluding a motion for summary judgment. However, although courts may have stated that a mixed motive standard was being applied, in fact they may have been filtering out cases as long as employers were able to show a plausible reason for their actions.[80] Thus, this paper examines whether, after the Supreme Court's decision in *Nassar,* plaintiffs' claims of pretext will be affected.

In the typical retaliation claim, plaintiffs must first state a prima facie case that (1) that they engaged in protected activity under Title VII or another statute; (2) that the employer was aware of this activity; (3) that the employer took adverse action against the plaintiff; and (4) that a causal connection existed between the protected activity and the adverse action. Defendants then file a motion for summary judgment alleging that the plaintiff did not meet his or her burden in alleging one or more of the required conditions[81] and/or that there exists a legitimate, nondiscriminatory

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[80] Jeffery M. Hirsch, *The Supreme Court's 2012-2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17, EMPL. RTS. & EMPL. POL'Y J.157, 167 (2013).

[81] According to the district court opinion in *Nassar*, the jury found that UT Southwestern retaliated against Dr. Nassar by blocking or objecting to his employment by Parkland because he engaged in protected activity. 2010 WL 3000877, at *1. According to the facts in the opinion, the petitioner's protected activities were (1) that on several occasions, he met with Dr. Fitz, the department chair, to complain that his billings were being overly scrutinized and (2) his letter of resignation in which he cited as his reason to resign, the "continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine . . . ." 674 F.3d at 451. A "protected activity," for purpose of showing Title VII retaliation claim, is defined as opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII. Ackel v. Nat'l Commcns., Inc**.**, 339 F.3d 376, 386 (5th Cir. 2003). Protected activity does not require a formal complaint to an administrative or regulatory authority. Internal complaints to a human resources representative or contact with an attorney have been found to be "protected activity" for purposes of the statute. However, informal discussions with a supervisor where there are no allegations of discriminatory conduct will not be treated as protected activity. **Drake v. Magnolia Management Corp.**, 115 F.

reason for the action. Once a defendant has presented its reason for taking the adverse employment action complained of, the plaintiff can present evidence to rebut the defendant's testimony by establishing that the defendant's proffered explanation is merely a pretext for the alleged retaliatory action.[82] A plaintiff may be successful in successful in establishing pretext if the plaintiff can show that the employer's explanation for its action was untrue. In *Mickelson v. New York Life Insurance Company*,[83] the plaintiff filed a complaint with the EEOC was later denied permission to work part-time. The court noted that while the timing between these events, alone, would not support an inference of causation, if the employee could show that the employer's proffered reason for taking adverse action was false, a jury could infer that the employer was lying to conceal its retaliatory motive.[84] The defendant's proffered reason for denying the plaintiff's request was that the plaintiff's position must be filled by a regular, full-time employee. But this argument was contradicted by evidence that three months later, the defendant permitted another employee to return to work on a part-time basis following a back injury. Thus, the court found that the defendant's justification of its denial of her request was pretextual.[85]

Supp. 2d 712, 723 (E.D. La. 2000), aff'd, 265 F.3d 1059 (5th Cir. 2001). Thus, Dr. Nassar had to rely solely on his letter of resignation as the basis for his claim. Under the EEOC Compliance Manual, it would appear that Dr. Nassar's protest of Dr. Levine's conduct contained in his letter of resignation was sufficient to be considered as an opposition to a practice believed to be unlawful discrimination and thus a protected activity. EEOC, *Compliance Manual*, Section 8: Retaliation, B. Protected Activity: Opposition (May 20, 1998), *available at* http:// www.eeoc.gov/policy/docs/retal.html.

[82] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[83] 460 F.3d 1304 (6th Cir. 2006).

[84] *Id.* at 1317.

[85] *Id.*

There is no "mechanical formula" for finding pretext.[86] Pretext can be established through "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions."[87] For example, when presented with inconsistent and contrary explanations for the employer's opposition to the plaintiff's unemployment benefits claim, the court concluded that a jury could reasonably find that the stated reasons were false to cover up a discriminatory purpose.[88] On the other hand, in conducting a pretext analysis it is not the court's job to engage in second guessing of an employer's business decisions.[89] The law does not require that the employer make proper decisions, only non-retaliatory decisions. Even a decision based on incorrect information can be a legitimate reason.[90] The Third Circuit noted that to discredit the defendant, "the plaintiff cannot simply show that the defendant's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."[91] In addition, the plaintiff's perception of the decision is irrelevant – the courts will determine the legitimacy of the employer's action through the perception of the employer.[92]

A close proximity in time between the plaintiff's claim and the adverse employment action is one factor that the courts will examine in determining the issue of pretext.[93] Pretext can also be established based on a disparate treatment argument. For example, if the employer offers a nondiscriminatory explanation of why an employee was terminated, the employee may be able to establish

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[86] Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 6 (1st Cir. 2000).
[87] Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).
[88] Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1093 (10th Cir. 2007).
[89] Bryant v. Compass Gp. USA, Inc., 413 F.3d 471, 478 (5th Cir. 2005).
[90] Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991).
[91] Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).
[92] Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980).
[93] Lin v. Rohm and Hass Co., 293 F. Supp. 2d 505, 514-15 (E.D. Pa. 2003).

pretext if he or she can show that other similarly situated employees not in a protected class were not terminated.[94]

In analyzing whether *Nassar* changes the plaintiff's burden in establishing pretext, it is useful to review the distinction between the motivating factor approach from a claim of pretext. Both the majority and dissenting opinions in *Smith v. Xerox Corp*.[95] provided explanations. The majority noted that pretext cases involve an investigation of the true reason for an employer's action, which is either legal or illegal, while motivating factor cases involve employment decisions based on multiple factors, or mixed motives, at least one of which is determined to be illegal and prohibited by statute and one of which may have been legitimate.[96]

The dissenting opinion in *Smith* disagreed with this analysis, noting that under these definitions, any pretext argument is a mixed motive argument. Instead Judge Jolly defined a pretext case as one in which the employee prevails because the reason or reasons given by the employer were spurious. No specific showing of illegal animus toward the employee is required; the employee must prove only that the employer's reasons are false or otherwise unsupportable. Because the employer is in the best position to explain its justification for its actions, the jury may infer discrimination if it concludes that the explanation is false.[97] Conversely, in a mixed-motive case, there are both valid, non-pretextual reasons for an adverse employment action as well as other invalid, discriminatory factors contributing to the employment decision. As long as the employee can show that,

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[94] Floyd v. Amite Cnty. Sch. Dist., No. 3:04CV78TSL-JCS, 2008 WL 2954972, *8 (S.D. Miss. July 29, 2008). In *Floyd*, although there were other teachers involved in grade inaccuracies and other infractions, the plaintiff, as principal, was unable to identify a single similarly situated employee who was treated more favorably than he under "nearly identical circumstances." *Id*.
[95] 602 F.3d 320 (5th Cir. 2010).
[96] *Id.* at 326.
[97] *Id*. at 339.

notwithstanding the validity of the employer's stated motives for its actions, another factor was the motive to illegally discriminate, he or she will prevail. This argument requires a showing of a specific illegal animus toward the employee that factored into the adverse employment action, said Judge Jolly.[98]

Whether a case is characterized as a mixed motive case or a pretext case is sometimes difficult. In *Terry v. Ashcroft*[99] the plaintiff raised several actions taken by the employer after he filed and EEOC claim which arguably were adverse employment actions. The employer argued that the plaintiff was not promoted because other employees were more qualified. However, the fact that a less qualified employee was promoted plus notations in the plaintiff's file that an action was "pending" were evidence of a motivating factor as well as sufficient to establish that the employer's action as pretextual.[100] Similarly, the court found that the plaintiff's transfer to another unit, which the plaintiff argued was designed to induce him to quit, was motivated by retaliation based on evidence presented at trial of comments made by his supervisors.[101] Further, the employer's proffered reason for the transfer was deemed pretextual because the plaintiff countered the explanation with a comment made by the personnel supervisor, "you mean to say he really showed up."[102]

In retaliation cases, the Fifth Circuit appeared to apply both mixed motive and but-for standards in analyzing the pretext argument. In a case involving a retaliatory FMLA discharge case, the court of appeals for the Fifth Circuit applied a mixed-motive framework, stating that even though the plaintiff conceded that discrimination was not the sole reason for her dismissal, she could nevertheless argue that discrimination was a motivating factor in

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[98] *Id*. at 340.
[99] 336 F.3d 128 (2nd Cir. 2003).
[100] *Id*. at 142.
[101] *Id.* at 144.
[102] *Id.* at 147.

the decision.[103] As long as she could prove that discrimination was a motivating factor in the employment decision, the burden shifts to the employer to prove that it would have taken the same action despite the discriminatory animus.[104] Under this standard, evidence of hostile remarks and the close proximity in time were sufficient to raise the issue that retaliation contributed to the decision to fire the employee.[105] Following the Fifth Circuit decision, the district court for the Northern District in Mississippi applied a mixed-motive approach where the plaintiff alleged that the employer's explanation for a one-month suspension was retaliatory for her having filed a sexual harassment claim.[106]

In another case involving pretext, however, the district court for the Southern District of Texas followed a but-for standard in which the burden of proof shifts to the employee to prove pretext. In *Guerra v. North East Independent School District,*[107] the court stated: "In a pretext case, the causation standard is whether the employer would have taken the action 'but for' the improper characteristic -- a more stringent standard than 'motivating factor."[108] Similarly, in *Pittman v. General Nutrition Corp*.[109] the court first noted that if the employee can prove a retaliatory motive, the burden then shifts to the employer to establish that it would have reached the same result regardless of the discriminatory motive. Once the employer proffered a

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[103] Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 333 (5th Cir. 2005).
[104] *Id*.
[105] *Id*. at 335. Even under the mixed motive standard, the court held that the employer met its burden of proof that it would have fired he plaintiff despite any retaliatory motive. *Id*. at 336.
[106] Brockington v. Circus Circus Mississippi, Inc., No. 2:07cv1, 2008 WL 2079130 *5 (N.D. Miss. May 15, 2008). Here, the court noted that where the plaintiff, a bartender, was suspended one week after making the claim and other employees were not disciplined for the same actions, giving free drinks to customers, the plaintiff could establish pretext even under a but-for standard.
[107] 496 F.3d 415 (5th Cir. 2007).
[108] *Id*. at 418.
[109] 515 F. Supp. 2d 721, 735 (S.D. Tex. 2007).

nondiscriminatory purpose for the adverse employment action, the employee had the burden of proving that but for the discriminatory purpose he would not have been terminated.[110] Summary judgment was awarded to the employer because the employee could not show that employer's explanation for terminating employee, falsification of expense reports, was a pretext for discharge after the employee exercised his protected rights.[111] The issue, said the court, is what the employer believed when it made the termination decision.[112]

An employer's explanation for its actions will not be deemed a pretext if the employee cannot show that the employer's explanation is false or unworthy of credence.[113] Further, the employer is not required to prove the absence of a retaliatory motive, but only that there is a legitimate nondiscriminatory reason for its action. To establish pretext the plaintiff must show that the action would not have occurred but for the protected activity.[114]

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[110] *Id*. at 738-39 (citing Septimus v. Univ. of Houston, 399 F.3d 601, 607 (5th Cir. 2005)). In *Pittman* the plaintiff claimed that he was terminated because he opposed an allegedly racially discriminatory policy which prevented Black employees from being promoted above a certain level and because he filed an EEOC claim. The court found that his subsequent termination was sufficiently close in time to raise an inference of causation. Thus, the employer was obliged to provide a nondiscriminatory explanation of the termination, in this case, falsification of expense reports.

[111] 515 F. Supp. 2d at 739. Because the plaintiff was not able to refute the employer's honest belief that he had lied and that according to policy, he should be terminated, the court held that his burden of establishing pretext was not fulfilled. *Id.* at 741.

[112] *Id.* at 740.

[113] Floyd v. Amite Cnty. Sch. Dist., No. 3:04CV78TSL-JCS, 2008 WL 2954972 *3 (S.D. Miss. July 29, 2008).

[114] Rivers v. Baltimore Dep't of Recreation and Parks, No. R-87-3315, 1990 WL 112429 at *11 (D. Md. Jan 9, 1990). In *Rivers*, the plaintiff, a Black man, complained that his failure to be promoted was discriminatory, and that after making this complaint, he received a reprimand. The court held that such "evidence alone does not demonstrate that but for his complaints, he would not have been reprimanded for committing [certain] infractions." *Id*.

Given the facts of *Nassar*, the question arises whether the court of appeals decision would have been different under a but-for standard. The court of appeals in affirming the district court on the retaliation issue apparently treated the issue as one of pretext stating: our review is limited to determining "only whether the record contains sufficient evidence for a reasonable jury to have made its ultimate finding that [the employer's] stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another motivating factor."[115] Applying a mixed motive approach to the pretext issue, the court of appeals determined that the defendant had not met its burden of proof that its policy requiring that Parkland employ only UTSW doctors was the reason for blocking Dr. Nassar's appointment.

Following the Supreme Court's ruling, in any retaliation action where the employer offers a nondiscriminatory explanation for its action, the plaintiff must prove that the explanation is pretext or that but for the discriminatory animus, the adverse action would not have taken place. In essence all cases that might have been considered under the mixed motive standard are now treated as pretext cases where the burden of persuasion had always remained with the plaintiff to prove that the employer's reason was a pretext once the employer proffers of a legitimate, non-retaliatory reason for an adverse employment action.[116] If the plaintiff is successful in convincing the court that the employer's explanation was false or implausible, the issue of mixed motive becomes irrelevant as there remains only one motive, presumably discriminatory, that can explain the adverse employment action. Thus, the sole question remaining with respect to the causality issue is whether there existed temporal proximity between the protected activity and the employer's action, a question that was not addressed by the *Nassar* Court since it appeared that the action

[115] 674 F.3d at 454 (quoting DeCorte v. Jordan, 497 F.3d 433, 437-48 (5th Cir. 2007)).
[116] Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir.1980).

blocking the petitioner's appointment to Parkland took place immediately after the letter was delivered.

Applying this reasoning to the facts of *Nassar*, strong evidence existed against UTSW that its preventing the petitioner from working at Parkland was motivated solely by its anger at the petitioner for disparaging Dr. Levine's reputation; thus, it can be speculated that a court would have denied UTSW's motion for summary judgment because the evidence suggested the existence of animosity. Even though under a but-for approach the burden shifts to the plaintiff to show that the only reason for the adverse employment action was a retaliatory motive, Dr. Nassar, nevertheless, may have been successful in proving that UTSW's reliance on the agreement with Parkland was merely a pretext for its true motive of retaliation. Moreover, if the case as remanded, goes to a second trial, it is likely that a jury might find for the petitioner even under a more stringent "but-for" jury instruction.

VI. CONCLUSION

The Supreme Court's decision in *Nassar* signals a change in its previous employee-friendly approach to claims of retaliation. If the employee is not able to demonstrate that the employer's explanation for the adverse employment action was in fact a pretext, the employee must be able to prove that the action was motivated solely by a discriminatory animus. This presents a difficult but not insurmountable challenge, and the question will ultimately turn on the specific facts of the case.