

# TITLE VII RETALIATION CLAIMS: BUT-FOR CAUSATION GETS BACK AT *PRICE WATERHOUSE* IN THE WAKE OF *UNIVERSITY OF TEXAS SOUTHWEST MEDICAL CENTER V. NASSAR*, 133 S. CT. 2517 (2013)

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## I. INTRODUCTION

Nearly fifty years ago, the federal government of the United States of America passed into law the Civil Rights Act of 1964 in order to promote the protection of constitutional rights and provide relief against discrimination.<sup>1</sup> Twenty-five years later, in *Price Waterhouse v. Hopkins*, the Supreme Court established a burden-shifting framework that allowed an employer to defend particular actions that may have involved discrimination in Title VII claims.<sup>2</sup> Congress addressed the Court's burden-shifting framework two years later in the Civil Rights Act of 1991, by specifically identifying a restriction against mixed-motive discrimination<sup>3</sup> and the resultant responsibility of an employer to defend such questionable employment practices.<sup>4</sup>

In *University of Texas Southwest Medical Center v. Nassar*, the Supreme Court addressed the applicability of the Civil Rights Act of 1991 to activities relating to the facilitation of anti-discrimination enforcement.<sup>5</sup> This case is important because it creates a higher burden of proof for a plaintiff in a Title VII retaliation case.<sup>6</sup>

This Note will argue that the Supreme Court's holding in *Nassar* misinterpreted the legislative action implemented in the Civil Rights Act of 1991 in order to adopt the but-for causation standard supported in the dissenting opinion from *Price Waterhouse*. This interpretation imposes the burden upon a plaintiff of establishing but-for causation regarding the discriminatory motives of an employer in Title VII retaliation claims.<sup>7</sup>

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241 (1964).

2. 490 U.S. 228, 258 (1989).

3. 42 U.S.C. § 2000e-2(m) (2013).

4. *Id.* § 2000e-5(g)(2)(B).

5. 133 S. Ct. 2517, 2528–31 (2013).

6. *Id.* at 2533.

7. *Id.*

Additionally, the Supreme Court inappropriately based its deviation from the *Price Waterhouse* precedent on the similarity among provisions of Title VII and the unrelated Age Discrimination in Employment Act of 1967 (ADEA),<sup>8</sup> despite previously recognizing the clear intentions of Congress to treat the statutory schemes in a different manner.<sup>9</sup>

The resultant framework of the *Nassar* decision creates a paradoxical employment environment regarding discrimination. Previous legislation and court rulings served to protect employees from mixed-motive adverse employment decisions up to the point of making a discrimination complaint, while the *Nassar* decision, based on precedent related to a separate statutory scheme, cuts that protection short and insulates an employer from liability for actions after an employee initially complains.<sup>10</sup>

## II. BACKGROUND

In order to fully appreciate the impact of *Nassar* on Title VII claims, it is necessary to examine the decision in *Price Waterhouse* that established a burden-shifting framework and the subsequent legislation in the aftermath of that case. Additionally, the decision in *Gross v. FBL Financial Services, Inc.*<sup>11</sup> is important to understand the path deviating the Court away from *Price Waterhouse* and the basis for the *Nassar* decision.

This Note will first examine the decision in *Price Waterhouse* and its impact on Title VII discrimination claims. Then, this Note will examine the codification of *Price Waterhouse* in the Civil Right Act of 1991. Next, this Note will discuss the Court's decision in *Gross*, when the Court deviated from the *Price Waterhouse* burden-shifting framework for ADEA claims. Finally, this Note will examine how the Court used *Gross* to extend the ADEA framework back to Title VII retaliation claims in *Nassar*.

### A. *Price Waterhouse v. Hopkins*

In *Price Waterhouse*, the plaintiff, Ms. Hopkins brought a Title VII sex discrimination suit against her employers alleging that she was denied partnership in the Price Waterhouse accounting firm based on the partnership's use of gender stereotypes in its promotional decisions.<sup>12</sup> Ms. Hopkins was a senior manager and a candidate for partnership at Price Waterhouse.<sup>13</sup> She had worked at Price Waterhouse for five years and was

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8. *Id.* at 2526–27.

9. *Id.* at 2527.

10. *Id.* at 2533–34.

11. 557 U.S. 167 (2009).

12. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989).

13. *Id.* at 232.

instrumental in acquiring a contract in excess of twenty-five million dollars with the Department of State.<sup>14</sup>

Despite Ms. Hopkins's qualifications, the record demonstrated that there were issues with her "interpersonal skills."<sup>15</sup> However, it was also clear that Ms. Hopkins did not fulfill the gender role that some members of the partnership expected of her.<sup>16</sup> Expectations of lady-like behavior were evident, and the record indicated some members of the partnership even advised her to correct her unfeminine behavior.<sup>17</sup> Additionally, at least one member of the partnership had a history of discrimination against female candidates for partnership, and the other members had taken no action to correct his behavior.<sup>18</sup> This member was even allowed to continue submitting his opinion on further candidates.<sup>19</sup>

The lower court found there to be both legitimate and discriminatory issues involved in the evaluation of Ms. Hopkins's candidacy for partnership, and it held Price Waterhouse was liable for its behavior.<sup>20</sup> It also held that Price Waterhouse could have defeated liability for equitable relief if it had shown by clear and convincing evidence that it would have come to the same decision even if the discriminatory motivation was removed from its decision.<sup>21</sup> However, as the decision against Ms. Hopkins's promotion was clouded with so many indications of discriminatory motives, Price Waterhouse could not demonstrate a motivation that was sufficiently independent of discrimination.<sup>22</sup>

The Supreme Court granted certiorari to address the requisite burden of proof for the plaintiff and the defendant in a Title VII suit.<sup>23</sup> A major dividing line in the Court's decision related to whether the statutory scheme necessitated but-for causation in order for a plaintiff to prevail. Where the plurality came together was on the agreement that the burden of proof for a defendant was by a preponderance of the evidence, as opposed to clear and convincing evidence.<sup>24</sup>

The majority opinion of the Court identified that, in other incidents where clear and convincing evidence is necessary, it is required of a plaintiff and acts as a protection for a defendant.<sup>25</sup> An exception to this, and another instance requiring clear and convincing evidence, was in the situation where

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14. *Id.* at 233–34.

15. *Id.* at 234–35.

16. *Id.* at 235.

17. *Id.*

18. *Id.* at 236.

19. *Id.*

20. *Id.* at 236–37.

21. *Id.* at 237.

22. *Id.*

23. *Id.* at 232.

24. *Id.* at 258.

25. *Id.* at 253.

a federal agency wished to show a plaintiff in a Title VII claim was not entitled to relief.<sup>26</sup> The Court differentiated that instance from the facts of *Price Waterhouse*, as the prior case involved a situation related to damages after initial liability was determined, and the case at hand dealt with the initial determination of liability.<sup>27</sup>

Justice O'Connor made the argument in her concurring opinion that a burden-shifting framework is common in a number of judicial areas, as there is only a certain extent to which a plaintiff can go in establishing a prima facie case.<sup>28</sup> In the setting of a Title VII claim, after an employee has demonstrated a prima facie case, it is appropriate for the burden to shift to the defendant, because there is no longer a good faith presumption.<sup>29</sup> The situation would not exist absent the employer's allowance of discriminatory motives intermingled with legitimate motives.<sup>30</sup>

On the issue of but-for causation, the majority opinion addressed the paradoxical burden the dissent would impose on a plaintiff in a Title VII claim involving mixed-motives.<sup>31</sup> Basically, if two forces are at play, and it is unknown whether one or both of the forces is the but-for cause, determining the but-for cause would not be possible.<sup>32</sup> It cannot be the case that there is no cause.<sup>33</sup>

In the concurrence, Justice O'Connor did not agree on the metaphysical contemplations, but instead advocated a position that deemed a higher burden of proof for the plaintiff as unreasonable for practical standards of accessibility to the facts.<sup>34</sup> A plaintiff can only show that discrimination was involved to a substantial degree but cannot "pinpoint discrimination as the precise cause of her injury."<sup>35</sup>

The dissent took a position favoring strict but-for causation.<sup>36</sup> The dissent believed that the Civil Rights Act of 1964 was "not concerned with the mere presence of impermissible motives."<sup>37</sup> Rather, the Act is only "directed to employment decisions that result from these motives."<sup>38</sup>

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26. *Id.* at 253–54.

27. *Id.* at 254.

28. *Id.* at 263–64 (O'Connor, J., concurring).

29. *Id.* at 265–66.

30. *Id.*

31. *Id.* at 240–41 (majority opinion).

32. *Id.* at 241.

33. *Id.*

34. *Id.* at 272 (O'Connor, J., concurring).

35. *Id.* at 273.

36. *Id.* at 281–82 (Kennedy, J., dissenting).

37. *Id.* at 282.

38. *Id.*

## B. Civil Rights Act of 1991

Two years after the *Price Waterhouse* decision, Congress passed the Civil Rights Act of 1991 in order to, among other things, “respond to recent decisions by the Supreme Court” and to “provide adequate protection to victims of discrimination.”<sup>39</sup> The law added §§ 2000e-2(m) and 2000e-5(b)(2).<sup>40</sup> In § 2000e-2(m), the law codified the restriction against mixed-motive discrimination actions by employers.<sup>41</sup> In § 2000e-5(b)(2), the law codified the effects of the burden-shifting framework, placing the burden on the defendant after the plaintiff establishes an initial *prima facie* case.<sup>42</sup>

## C. *Gross v. FBL Financial Services, Inc.*

In *Gross*, the fifty-four-year-old plaintiff alleged age discrimination after his employer reallocated his duties partially to another employee in her early forties.<sup>43</sup> The plaintiff filed suit, alleging violations of the ADEA.<sup>44</sup>

The plaintiff prevailed in the district court, but the decision was appealed based on a questionable jury instruction related to the requisite burden of proof.<sup>45</sup> The district court required only a showing by a preponderance of the evidence that discrimination was a motivating factor in the employment decision before the burden shifted to the defendant, but on appeal, the U.S. Court of Appeals for the Eighth Circuit held that the burden-shifting framework from *Price Waterhouse* controlled ADEA claims.<sup>46</sup> Under that framework, the plaintiff must show direct evidence of discrimination, as opposed to a showing by a preponderance of the evidence, before the burden shifts to the defendant.<sup>47</sup>

The Supreme Court overturned the circuit court, ruling that *Price Waterhouse* was not controlling on ADEA claims.<sup>48</sup> The Court identified ADEA claims and Title VII claims as controlled by different statutory schemes and necessarily subject to different rules.<sup>49</sup>

The Court went on to note that Congress did not similarly amend the ADEA after the *Price Waterhouse* decision as it had amended Title VII through the Civil Rights Act of 1991.<sup>50</sup> The Court equated this legislative

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39. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 3 (1991).

40. *Id.* § 107.

41. 42 U.S.C. § 2000e-2(m) (2013).

42. *Id.* § 2000e-5(g)(2)(B).

43. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 170 (2009).

44. *Id.*

45. *Id.* at 170–71.

46. *Id.*

47. *Id.* at 171–72.

48. *Id.* at 173–74.

49. *Id.*

50. *Id.* at 174–75.

inaction as an intention to exclude ADEA claims from the *Price Waterhouse* burden-shifting framework.<sup>51</sup>

Absent the applicability of *Price Waterhouse*, the Court looked to the ADEA to provide a standard that could defeat the Court's presumptive application of but-for causation.<sup>52</sup> The Court held that no such provision was present, and ruled that "the plaintiff retains the burden of persuasion to establish . . . the 'but-for' cause of the employer's adverse action."<sup>53</sup>

### III. EXPOSITION OF THE CASE

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court saw another Title VII case involving mixed-motives, but this time in the form of a discrimination-based retaliation claim.<sup>54</sup> The Court came to a different decision in *Nassar* than it did in *Price Waterhouse*.<sup>55</sup> The Court adopted the but-for requirement present in the *Price Waterhouse* dissent and later in the *Gross v. FBL Financial Services, Inc.* ADEA case.<sup>56</sup>

#### A. Facts and Procedural Posture

The plaintiff, Dr. Naiel Nassar, was a faculty member of middle-eastern descent at the University of Texas Southwestern Medical Center (UTSW) from 1995-2006 (except for a brief time when he pursued further education).<sup>57</sup> He was also a physician with Parkland Hospital due to an affiliation between the university and the hospital.<sup>58</sup> The affiliation required Parkland Hospital "to offer empty staff physician posts to the University's faculty members . . . and, accordingly, most of the staff physician positions at the [h]ospital [we]re filled by those faculty members."<sup>59</sup>

In 2004, UTSW hired Dr. Beth Levine who became Dr. Nassar's supervisor.<sup>60</sup> Witnesses claim Levine made racist comments, calling middle-easterners lazy, opposing the hiring of middle-easterners, and complaining when middle-easterners were hired.<sup>61</sup> Additionally, it was alleged that she

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51. *Id.*

52. *Id.* at 175-76.

53. *Id.* at 177.

54. 133 S. Ct. 2517, 2522-23 (2013).

55. *Id.* at 2534.

56. *Id.* at 2523.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 2523, 2536.

unduly scrutinized the work of Dr. Nassar.<sup>62</sup> Dr. Nassar filed complaints with Levine's supervisor, Dr. Gregory Fitz, but Dr. Fitz failed to take any action.<sup>63</sup>

After preliminary negotiations to stay on with Parkland Hospital, Dr. Nassar resigned from his position at UTSW and sent a letter to multiple recipients explaining his decision was based on the harassment from Levine.<sup>64</sup> In response to the letter, a witness heard Fitz state that it was publicly humiliating for Levine and that she should be "publicly exonerated."<sup>65</sup>

Fitz made it known he opposed Parkland Hospital's decision to hire Dr. Nassar, and soon after, Parkland Hospital withdrew from employment negotiations.<sup>66</sup> After the withdrawal, Dr. Nassar filed a Title VII suit in the U.S. District Court for the Northern District of Texas, alleging religious and racially-motivated harassment resulting in his constructive discharge.<sup>67</sup> He filed a second claim under § 2000e-3(a), alleging that the efforts to prevent his employment with the hospital were retaliatory actions in response to his complaints about harassment.<sup>68</sup>

Dr. Nassar prevailed in the District Court, which awarded \$400,000 in back-pay and \$300,000 in compensatory damages.<sup>69</sup> However, the Fifth Circuit Court of Appeals vacated the discrimination verdict and left the judgment for retaliatory discharge intact.<sup>70</sup> Certiorari was granted in order to determine the appropriate standard of causation for retaliation claims under Title VII.<sup>71</sup>

## B. Majority Opinion

There are four main points set out in the majority opinion. The first deals with the effect of 42 U.S.C. § 2000e-2(m).<sup>72</sup> The second argument equates the word "because" with "but-for" causation.<sup>73</sup> The third argument is an efficiency-based argument, stating that without but-for causation, it is too difficult to weed out frivolous claims at an early stage.<sup>74</sup> The fourth

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62. *Id.* at 2523.

63. *Id.*

64. *Id.* at 2523–24.

65. *Id.* at 2524.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2528–31.

73. *Id.* at 2526–27.

74. *Id.* at 2531–32.

argument simply explains why the Court should not give deference to the EEOC.<sup>75</sup>

The first argument of the majority opinion identifies the language of 42 U.S.C. § 2000e-2(m) as the source of a lessened burden of proof.<sup>76</sup> Congress added this section in response to the decision in *Price Waterhouse* to clarify its intention.<sup>77</sup> However, the placement and wording of the provision seemingly does not relate to retaliation, in the Court's opinion, because specific types of discrimination are listed after the identification of the lessened standard of proof, and retaliation claims are not included in the list.<sup>78</sup>

The second argument simply looks to precedent regarding the word "because."<sup>79</sup> The Court held that if something happens "because of" another thing, then that other thing is the "reason" for it.<sup>80</sup> Therefore, that other thing is the "but-for" cause.<sup>81</sup> This argument existed in the dissent of *Price Waterhouse*,<sup>82</sup> and reappeared in *Gross* (relating to the ADEA),<sup>83</sup> and the Court found it instructive in *Nassar*.<sup>84</sup>

The third argument discusses the inefficiency that would arise out of a lessened burden of proof for retaliation charges.<sup>85</sup> The Court found that retaliation charges filed with the EEOC have the second highest discrimination claim rate after those based on race.<sup>86</sup> The Court stated that ensuring a higher burden of proof would help the court system free up resources and dismiss frivolous claims earlier in the litigation process.<sup>87</sup>

The final argument identifies the EEOC guidelines as undeserving of deference.<sup>88</sup> The standard set out in *Skidmore v. Swift* states deference to an agency depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."<sup>89</sup> In the end, the criticism is that the agency failed to address specific details and the agency's discussion is far too generic to provide any forceful persuasion.<sup>90</sup>

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75. *Id.* at 2533–34.

76. *Id.* at 2526.

77. *Id.*

78. *Id.* at 2528.

79. *Id.* at 2527.

80. *Id.*

81. *Id.*

82. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 281–82 (1989).

83. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176–77 (2009).

84. *Nassar*, 133 S. Ct. at 2523.

85. *Id.* at 2531.

86. *Id.*

87. *Id.* at 2531–32.

88. *Id.* at 2533.

89. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

90. *Id.*

### C. Dissenting Opinion

The dissent addressed each of the majority's arguments in turn. In regard to the majority's argument about legislative intent and the placement of § 2000e-2(m), the dissent pointed out the majority's willful disregard for the House Report for 42 U.S.C. § 2000e-2(m).<sup>91</sup> Congress's intent was to lessen the burden of proof and to ensure the recognition of discrimination as unlawful, even in a case in which it is only one of the motivating factors in an adverse employment action.<sup>92</sup> Congress was trying to strengthen the law against discrimination, and it would make little sense if its action was interpreted to be limited only to specific acts, while weakening the law in regard to retaliation.<sup>93</sup>

The dissent also argued that retaliation is in fact a type of discrimination that is listed in the affected parts of 42 U.S.C. § 2000e-2(m).<sup>94</sup> Although it may not be listed specifically, when someone is retaliated against after filing a complaint for racial discrimination, any retaliation on that individual is a manifestation of racial discrimination.<sup>95</sup>

Additionally, the dissent identified the EEOC's immediate reference to the provisions of 42 U.S.C. § 2000e-2(m).<sup>96</sup> The fact that retaliation was not specifically listed as being subject to the lessened burden of proof did not change the way that retaliation claims had always been handled.<sup>97</sup> The failure to list retaliation in the provision would not mean that a type of discrimination would go unpunished.<sup>98</sup>

The dissent also identified the meaning of "because" in the context of a mixed-motive decision, just as the majority held in *Price Waterhouse*.<sup>99</sup>

### III. ANALYSIS

The majority decision in *Nassar*, allowing mixed-motives in retaliatory employment actions, was inappropriate. Part A of this Section discusses why *Nassar* should have been decided differently, based on precedent, legislative history, policy, and statutory provisions. Part B discusses the implications of the *Nassar* decision in creating inconsistencies and an impractical framework for Title VII claims.

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91. *Id.* at 2537 (Ginsburg, J., dissenting).

92. *Id.*

93. *Id.*

94. *Id.* at 2539.

95. *Id.*

96. *Id.* at 2540.

97. *Id.*

98. *Id.*

99. *Id.* at 2546.

#### A. The Decision in *Nassar* Was Inappropriate Because It Ignored Title VII History

*Price Waterhouse* controlled status-based Title VII discrimination and retaliation claims in the time between the Court's decision in that case and *Nassar*,<sup>100</sup> and prior to *Gross*, the *Price Waterhouse* framework was even extended to discrimination claims under other statutory schemes.<sup>101</sup> The Civil Rights Act of 1991 codified the ruling in *Price Waterhouse* by expressly restricting status-based adverse employment practices.<sup>102</sup> The *Price Waterhouse* decision's major contribution to discrimination suits was the causation analysis it provided.

In *Gross*, the Court avoided applying the same causation to ADEA claims as *Price Waterhouse*, because ADEA claims and Title VII claims are governed by different statutory schemes.<sup>103</sup> However, the Court's opinion in *Nassar*, authored and joined by the same Justices as in *Gross*, avoided the causation framework from *Price Waterhouse* and instead compared the "because" language in Title VII to the "because" language in the ADEA.<sup>104</sup>

In the first instance, the Court refused to compare similar language because of different statutory schemes,<sup>105</sup> while in the second instance the Court refused to differentiate statutory schemes because of similar language.<sup>106</sup> One would generally call similar methods of justification circular, but circularity is, in the very least, redeemable through its internal logical consistency. In this case, the Court is only consistent in its selective adoption of contradictory arguments to achieve a discernible goal.

When the Court ruled in *Price Waterhouse*, there was relative clarity regarding the meaning of "because" in Title VII.<sup>107</sup> The legislature subsequently codified restrictions against mixed-motive employment actions,<sup>108</sup> but the Court in *Nassar* held that the placement of the provisions and the wording indicated that the restriction did not apply to Title VII retaliation claims.<sup>109</sup> However, to accept that the definition of "because" found in other sections of Title VII somehow lacks a clear definition after *Price Waterhouse* would be to limit the effect of a Supreme Court ruling to the narrowest scope. If the definition ascribed to "because" in *Price Waterhouse* was so limited to the point that it was inapplicable even to other

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100. *Id.* at 2545.

101. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 172 (2009).

102. *Nassar*, 133 S. Ct. at 2526.

103. *Gross*, 557 U.S. at 174.

104. *Nassar*, 133 S. Ct. at 2528.

105. *Gross*, 557 U.S. at 174.

106. *Nassar*, 133 S. Ct. at 2528.

107. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–42 (1989).

108. *Nassar*, 133 S. Ct. at 2526.

109. *Id.* at 2528.

appearances in the same statutory scheme, then the power of the Supreme Court, and its ability to provide meaningful guidance to lower courts, is diminished. Furthermore, if the *Nassar* Court adopted this understanding of the applicability of the *Price Waterhouse* Court's ruling, it would have simultaneously accepted such a neutered force and effect of its own ruling.

On the other hand, if the *Nassar* Court accepted the applicability of the *Price Waterhouse* Court's definition, at least extending it to other appearances in the same statutory scheme, then the *Nassar* Court was overturning the previous decision in its ruling by expressly substituting a new causation framework. The Court attempted to sidestep the issue of overruling *Price Waterhouse* by noting that the codification of *Price Waterhouse* in the Civil Rights Act of 1991 was a deliberate action that meant to exclude all sections apart from the status-based discrimination section.<sup>110</sup>

It seems the Court was trying to indicate that the legislature was impliedly limiting the effect of *Price Waterhouse* to these status-based claims, but the Court also identified those legislative actions as "reject[ing] it to a substantial degree."<sup>111</sup> The conclusion the Court comes to in this instance is counterintuitive once again, because if the Court accepted the applicability of the *Price Waterhouse* Court's definition in the very least across the same statute, then the Court should have necessarily viewed the legislature's action as reinforcing the causation framework without restriction in other areas of the same statutory scheme.

If the legislature only *limited* aspects of the *Price Waterhouse* ruling in its codification, under the same legislative intent analysis advocated by the *Nassar* Court, it would imply that the legislature intentionally remained silent only in *limiting* the causation framework in the remainder of the statutory scheme.

Clearly, the *Price Waterhouse* decision controlled questions of causation under Title VII after the decision.<sup>112</sup> If the legislature passed laws that expressly codified the *Price Waterhouse* causation framework for status-based discrimination under Title VII, but did not expressly extend that framework to other areas of Title VII, then the silence on those other areas should not constitute a legislative reversal of a Supreme Court ruling. However, if the legislature codified certain aspects of the *Price Waterhouse* ruling and expressly limited aspects of it in relation to status-based discrimination under Title VII, but remained silent regarding these limitations for other adverse employment actions under Title VII, then the silence on those other areas should constitute an intention to maintain the unfettered applicability of the *Price Waterhouse* ruling for those other areas.

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110. *Id.* at 2529.

111. *Id.* at 2526.

112. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 172 (2009).

So it appears the *Nassar* Court must accept either the limited scope of the force and effect behind its own decision or it must recognize that its decision overturned the ruling in *Price Waterhouse*, which the legislature expressly approved in relation to status-based claims and impliedly in relation to all other Title VII claims, in the Civil Rights Act of 1991.

#### B. The Decision in *Nassar* Created an Impractical Framework for Title VII Claims

In *Gross*, the Court characterized the causation and burden-shifting framework from *Price Waterhouse* as difficult to apply.<sup>113</sup> But, in adopting a different causation framework for Title VII retaliation claims, while the statutorily mandated burden-shifting framework for status-based claims remains in effect, the resultant guidance for lower courts is now anything but practical.<sup>114</sup> The consequences are even more visible in the context of a mixed claim under Title VII, which includes both a status based claim and a retaliation claim.<sup>115</sup> Furthermore, the different causation frameworks effectively create a caveat for the protections provided under Title VII, and a disincentive now exists for participating in any of the actions protected from retaliation.

In *Gross*, the Court discussed the difficulty in providing clear instructions to juries in the context of a burden-shifting framework.<sup>116</sup> The difficulties have often led to judgments notwithstanding the verdict when the jury did not apply the framework properly.<sup>117</sup> In that case, the Court chose to go a different route in order to avoid the identified problems in ADEA claims.<sup>118</sup>

However, in *Nassar*, the Court's decision to avoid the burden-shifting framework for one type of claim under Title VII, while it remains applicable to status-based claims under the same statutory scheme, "is a complicated concept to convey to juries" and it "is virtually certain to sow confusion."<sup>119</sup> This is most clear in the context of a Title VII claim consisting of both status-based discrimination claims and retaliation claims.<sup>120</sup>

On the status-based portion of a combined Title VII claim, the plaintiff would need to show direct evidence of discrimination, and then the employer would need to demonstrate by a preponderance of the evidence that the employment decision would have been made regardless of improper

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113. *Id.* at 179.

114. *Nassar*, 133 S. Ct. at 2546.

115. *Id.*

116. *Gross*, 557 U.S. at 179.

117. *Id.*

118. *Id.*

119. *Nassar*, 133 S. Ct. at 2546.

120. *Id.*

motives.<sup>121</sup> But on the retaliation portion of the claim, the plaintiff would need to demonstrate that the adverse action would not have happened at all in the absence of improper motives stemming from the plaintiff's protected actions.<sup>122</sup>

Once again, the majority in *Gross* based its decision on a policy argument,<sup>123</sup> and the majority in *Nassar*, consisting of the same Justices, contradicted the previously adopted policy in its decision.<sup>124</sup> Favoring uniform applications across a statutory scheme is either appropriate or not. However, the inconsistent behavior of the Court in promoting this concept in an erratic fashion is certainly inappropriate.

The interdependence of anti-discrimination statutes and anti-retaliation statutes is a fundamental relationship that is inherently necessary in order to effectuate the underlying purpose of promoting equality.<sup>125</sup> Enforcement of anti-discrimination laws is only possible if individuals are free to participate in the actions that bring discrimination to light, without the threat of retaliation looming overhead.<sup>126</sup> And additionally, the two claims are frequently brought in the same action.<sup>127</sup>

The difference in causation frameworks causes a lack of protection for employees in certain circumstances, and it also creates an uncertainty and disincentive for involvement in the protected actions under the anti-retaliation provisions.

With a higher burden of proof for plaintiffs in retaliation claims under Title VII, it is conceivable that an individual may prevail, at least in part, on a status-based claim and fail on a retaliation claim, even when both actions are based on the same discrimination-based motivations. Additionally, other employees, possessing knowledge of relevant details, may be dissuaded from assisting in coworkers' claims, understanding *Nassar* diminished their protection.

Without the same level of protection for retaliation claims, participants in status-based discrimination claims or investigations could be subjected to adverse actions, and those participants would have a higher burden of proof in establishing a claim than the original plaintiff, whom they attempted to assist. In this way, an employee's recourse would be restricted in multiple ways. It would be restricted by the increased burden of proof in that employee's own Title VII retaliation claim, and by the dissuasion of other coworkers to participate in Title VII claims for fear of retaliation.

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121. *Gross*, 557 U.S. at 172.

122. *Nassar*, 133 S. Ct. at 2534.

123. *See Gross*, 557 U.S. at 179.

124. *Nassar*, 133 S. Ct. at 2534.

125. *Id.* at 2537 (Ginsburg, J., dissenting).

126. *Id.*

127. *Id.* at 2535.

Another undesirable consequence is found in the case at hand. Dr. Nassar complained of discrimination, and instead of filing a claim, he opted to remove himself from the situation.<sup>128</sup> When the defendant responded through retaliatory actions, Dr. Nassar filed a claim.<sup>129</sup> Prior to the decision in *Nassar*, Dr. Nassar would have been equally protected, with the same burden of proof in filing a claim for status-based discrimination or retaliation.<sup>130</sup> In the aftermath, a plaintiff loses protection upon making a complaint and removing himself from a hostile environment.<sup>131</sup>

The Court argued that a heightened burden of proof could minimize frivolous lawsuits based on workplace harassment.<sup>132</sup> But, the case at hand indicates a different incentive structure. The Court's decision does not promote peaceable separation in situations of workplace discrimination. Instead, an employee is better off filing a status-based discrimination claim under Title VII with a lessened burden of proof than leaving the place of employment, crossing his fingers, and hoping adverse actions will not follow him.

Incentivizing status-based claims in comparison to retaliation claims should prove to provide contradictory results to the predictions of the Court.<sup>133</sup> Fewer people will leave hostile environments peaceably without seeking legal protection. Knowing the *Nassar* decision minimizes retaliation protections, the victims of discrimination will be more likely to file timely claims, before adverse retaliation actions stemming from workplace discrimination complaints cloud the issues. Alternatively, and equally undesirable, is the possibility employees will remain in hostile environments without complaining of discrimination, waiting for the discrimination to manifest in an adverse employment action.

The resultant statutory scheme under *Nassar* indicates a caveat of protection exists. An employer is restricted from taking adverse employment actions involving a combination of legitimate motives and illegitimate status-based discriminatory motives, unless the employer can show the action would have occurred in the absence of the illegitimate motives.<sup>134</sup> However, an employer is restricted from taking retaliatory adverse employment actions only in situations where the employer has no other motivations for the adverse action.<sup>135</sup> This means discriminatory motives may play a major role in a retaliatory, adverse employment action, as long as there are other

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128. *Id.* at 2523–24 (majority opinion).

129. *Id.* at 2524.

130. *Id.* at 2534.

131. *Id.*

132. *Id.* at 2531–32.

133. *Id.* at 2532.

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

135. *Nassar*, 133 S. Ct. at 2534.

motivations involved.<sup>136</sup> Or, in other words, if multiple forces exist, each being sufficient to cause a result, one cannot identify a but-for cause.<sup>137</sup>

However as the scenario is characterized, it does not sit well to formulate potential situations in which *Nassar's* resultant framework will affect victims of discrimination. Where the line is cloudy between legitimate and illegitimate motives, it is inappropriate to demand a victim reach into the mind of his tormentor, and weigh the effect of an intangible factor to which he does not have unfettered access.

At the point when a plaintiff has demonstrated an evidentiary basis for a Title VII claim, that plaintiff “ha[s] taken [the] proof as far as it could go.”<sup>138</sup> To allow a defendant to defeat that proof by merely presenting a facially valid, potential alternative motivation would be equivalent to denying the very purpose of Title VII.<sup>139</sup> This is especially true in situations where the other party has substantially disproportionate access to the facts.<sup>140</sup>

In essence, the Court’s decision in *Nassar* serves to complicate the resolution of Title VII claims containing both status-based and retaliation claims. It also diminishes the protections provided by Title VII, and in so doing, the decision is likely to result in more *status-based* discrimination claims under Title VII, as any employee experiencing discrimination is better served filing a claim prior to retaliatory actions, because peaceable separations effectively expose employees to vulnerabilities.

#### IV. CONCLUSION

When the Court decided *Nassar*, it applied the reasoning from *Gross*, and it did so according to an analysis it rejected in *Gross*. The Court also relied on faulty logic in its interpretation of the legislative intent behind the Civil Rights Act of 1991. The resulting causation framework it decided to apply to retaliation claims under Title VII undermines the fundamental purpose of protecting employees from discrimination. Even in a vacuum, the decision would have compromised protections from discrimination, but considering the precedent, the existing statutory framework for status-based discrimination claims under Title VII, and the inevitable confusion the decision will produce in mixed-claim jury instructions, the decision was inappropriate.

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136. *Id.*

137. *Price Waterhouse*, 490 U.S. at 241.

138. *Id.* at 272 (O’Connor, J., concurring).

139. *Id.* at 273.

140. *Id.*

