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RETALIATION DECISIONS FOLLOWING NASSAR AND SUGGESTIONS TO AVOID RETALIATION CLAIMS

Terry J. Smith
Smith O'Callaghan & White
33 North LaSalle Street
Suite 3800
Chicago, Illinois 60602
(312) 419-1000
terry.smith@socw.com
www.socw.com

I. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR

On June 24, 2013, the U. S. Supreme Court held, in a 5-4 decision, that the proper causation standard for a Title VII retaliation action is "but-for" causation, meaning that plaintiffs must show that but for their protected activity, the employer would not have taken an adverse employment action against them. University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2534 (2013). The Court vacated the U. S. Court of Appeals for the Fifth Circuit's decision because it had applied the more lenient "motivating factor" causation standard to the plaintiff's retaliation claim, which requires only that plaintiffs show that their protected activity contributed to the adverse employment action, even if other legitimate causal factors were also involved. The Court remanded with instructions to apply the heightened "but-for" causation standard.

The Court based its decision on the text, structure and history of Title VII. The status-based discrimination provisions of Title VII (race, color, religion, sex and national origin discrimination) appear in a different section of the statute than the provision relating to unlawful retaliation. The Civil Rights Act of 1991 amended Title VII to explicitly provide for mixed-motive causation – i.e., "motivating factor" causation – for the status-based discrimination provisions, stating 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." 42 U.S.C. §2000e-2(m) (emphasis added). In contrast, the 1991 Amendments did not alter the required causation in Title VII's retaliation provision, which 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." 42 U.S.C. §2000e-3(a) (emphasis added). The ordinary meaning of the word "because" supports the more burdensome standard of but-for causation, as the Court had previously decided in Gross v. FBL Financial Services, which held that discrimination claims brought under the Age Discrimination in Employment Act (also using the word "because") may not rely on mixed-motive causation.

A. COURTS WITHIN SEVENTH CIRCUIT APPLYING NASSAR

Nassar has not had a significant effect on cases within the Seventh Circuit because courts in this Circuit applied a "but-for" causation test to Title VII retaliation claims prior to the U.S. Supreme Court's ruling. Analyzing causation in retaliation claims is highly fact-specific and the retaliation cases within the Seventh Circuit that have come down since Nassar happen to feature fact patterns satisfying this heightened standard.

- **Hobgood v. Ill. Gaming Bd., 2013 U.S. App. LEXIS 14346, *13-14, 30-31 (7th Cir. July 16, 2013)** (reversing dismissal through summary judgment of Title VII retaliation claim because plaintiff's evidence showed that retaliation could have been the but-for cause of his 2007 termination under all of the evidence viewed as a whole where after the employer learned that plaintiff had assisted a co-worker in filing a charge of discrimination in 2006,

it became fixated on firing him and circumvented procedural safeguards in investigating allegations that plaintiff improperly tape recorded conversations; court disagreed with district court's holding that plaintiff failed to show causal link between protected activity and termination where employer argued it terminated plaintiff not because he had assisted in filing co-worker's discrimination charge but because of *how* he went about assisting, i.e., allegedly improperly tape recording others to obtain evidence: "As we view the case, a reasonable jury could agree with the district court's assessment of the defendants' motives, but a reasonable jury could also be convinced by the mosaic of evidence that the Gaming Board fired Hobgood because he had engaged in protected activity. Accordingly, we reverse and remand for trial.").

- **Donald v. Portillo's Hot Dogs, Inc., 2013 U.S. Dist. LEXIS 103667, *35 (N.D. Ill. July 24, 2013) (Leinenweber, J.)** (denying employer's motion for summary judgment on Title VII retaliation claim because plaintiff presented enough circumstantial evidence for a reasonable jury to find that employer decided to terminate plaintiff because of her various charges and complaints of race discrimination – "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action").

- **Welch v. Eli Lilly & Co., 2013 U.S. Dist. LEXIS 115343, *60-61 (S.D. Ind. Aug. 15, 2013) (McKinney, J.)** (denying employer's motion for summary judgment on Title VII and Section 1981 retaliation claims alleging that employer terminated employee in retaliation for her race discrimination complaint because plaintiff presented enough evidence for a reasonable jury to conclude that but for plaintiff's protected activity, she would not have been fired; plaintiff's evidence included that she was terminated shortly after she complained, a supervisor commented "We got your black a-s now," and a supervisor referred to plaintiff as "girlfriend" at her termination meeting – "Under these circumstances, even with the but-for causation standard in Nassar, Welch's retaliatory discharge claim survives.").

- **Crowell v. State of Wis. Bd. of Regents, Univ. of Wis. Sys., 2013 U.S. Dist. LEXIS 97714, *2-3 (W.D. Wis. July 12, 2013) (Conley, J.)** (denying motion for reconsideration of denial of employer's motion for summary judgment on Title VII retaliation claim in light of Nassar because plaintiff's evidence could show that her protected activity was the but-for cause of her termination where plaintiff complained of race discrimination and shortly thereafter was disciplined and ultimately terminated for the same alleged misconduct she had engaged in for the past nine years without reprimand: "In Nassar, the Supreme Court made express what the Seventh Circuit and this court had surmised; that Title VII retaliation claims must be proved according to traditional principles of but-for causation, requiring proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer . . . The court originally denied summary judgment because genuine issues of material fact remained as to whether Crowell's complaints of race discrimination unfairly caused the Board to scrutinize Crowell's performance, discipline her and terminate her employment. That is still true.").

B. OTHER COURTS APPLYING NASSAR

Nassar has had a more significant effect on retaliation claims in courts that previously applied the more lenient motivating factor standard, including, for example, courts in the Second, Fifth and Sixth U. S. Circuit Courts of Appeals. Under the more arduous but-for causation standard, employers can more easily dispose of retaliation claims through summary judgment. Courts analyze causation at both the prima facie stage and pretext stage in Title VII retaliation claims. While many courts reason that the burden of establishing a causal link at the prima facie stage remains relatively low, the but-for causation standard significantly increases the plaintiff's burden at the pretext stage, often resulting in grants of employers' motions for summary judgment, as illustrated by the cases below:

For Employer

- **Mooney v. LaFayette County Sch. Dist., 2013 U.S. App. LEXIS 16471, *24, n. 11 (5th Cir. Aug. 8, 2013)** (affirming summary judgment in favor of employer on Title VII retaliation claim because plaintiff failed to show that her complaint of gender discrimination had any effect whatsoever on the termination of her contract – court commented on Nassar, which was decided after the lower court's dismissal in this case, saying: "Recently, the Supreme Court held that Title VII retaliation claims, under the language of the statute itself, must be proved according to traditional principles of but-for causation, not the lessened 'motivating factor' standard . . . This factor certainly makes it no easier for Mooney with respect to this claim.").

- **Campbell v. Hagel, 2013 U.S. App. LEXIS 16145, *2-3 (9th Cir. Aug. 5, 2013)** (affirming dismissal of Title VII retaliation claim through summary judgment because pro se plaintiff failed to raise a genuine issue of material fact as to whether her filing a complaint caused any adverse employment action: "[A]n employee must establish that his or her protected activity was a but-for cause of the alleged adverse employment action by the employer.").

- **Krzycki v. Healthone of Denver, Inc., 2013 U.S. Dist. LEXIS 105281, *11 (D. Colo. July 25, 2013) (Brimmer, J.)** (granting employer's motion for summary judgment on Title VII retaliation claim because plaintiff failed to show that her assistance in the investigation of a co-worker's sexual harassment complaint was the but-for cause of her termination; the court recognized that the but-for causation analysis overlapped at the prima facie stage and pretext stage but "[r]egardless of how a court characterizes the inquiry, if it correctly concludes that the evidence of discrimination/pretext fails as a matter of law, summary judgment for the defendant is the proper result;" beginning with the pretext analysis, the court found that plaintiff failed to overcome employer's asserted reason for her termination, that she was intimidating and unprofessional at work, because the fact that plaintiff's personnel file contained all positive evaluations and no prior written discipline was insufficient to show that her protected activity was the but-for cause of her termination).

- **Litchhult v. Ustrive2, Inc., 2013 U.S. Dist. LEXIS 98619, *25, n. 4 (E.D.N.Y. July 10, 2013) (Bianco, J.)** ("Subsequent to briefing in this case, the Supreme Court modified the standard for employment discrimination claims in [Nassar]. In this decision, the Supreme

Court set forth a higher standard for plaintiffs seeking to establish a retaliation claim under Title VII . . . Given that the Court concludes that plaintiff's retaliation claim fails under the former – and lower – causation test, the Court need not decide whether plaintiff's claim would have survived the Supreme Court's newer – and higher – but-for causation test. In other words . . . no rational jury could conclude that plaintiff's protected activity was a cause for her termination, no less a but-for cause.").

- **Thompson v. Donahoe, 2013 U.S. Dist. LEXIS 91403, *22-23 (N.D. Cal. June 27, 2013) (LaPorte, M.J.)** (granting employer's motion for summary judgment on Title VII retaliation claim because plaintiff failed to show that her EEOC charge was the but-for reason that she was denied training, issued letters of warning and refused her requested transfer; while causation at the prima facie stage "may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision," plaintiff's burden at the pretext stage is greater and requires "specific and significantly probative evidence" that the employer's proffered reasons are pretextual and the protected activity was the but-for cause of the termination; plaintiff failed to meet this heightened causation standard where conclusory statements that "things got worse for her after filing a charge" and the fact that the decision-maker knew about her EEOC charge did not effectively rebut each of the employer's legitimate reasons for the employment actions).

For Employer – Temporal Link Alone Insufficient to Show Causation

One of the most common types of evidence used to support retaliation claims is a temporal link between the plaintiff's protected activity and the adverse employment action. Interestingly, some courts have interpreted Nassar's but-for causation requirement to preclude retaliation claims premised only on temporal proximity. While a close temporal link, standing alone, may be sufficient to satisfy the causal link requirement of an employee's prima facie case, it is insufficient to satisfy the heightened but-for causation analysis at the pretext stage of a Title VII retaliation claim in the following cases since Nassar:

- **Nicholson v. City of Clarksville, Tennessee, 2013 U.S. App. LEXIS 14690, *39 (6th Cir. July 17, 2013)** (affirming district court's dismissal of Title VII retaliation claim through summary judgment because plaintiff's evidence was insufficient to establish pretext and satisfy but-for causation; two-month gap between plaintiff's filing of EEOC charge and adverse employment action, without more, was insufficient to discredit employer's reason for denying promotion, that plaintiff was argumentative and lacked the necessary skills of the position he sought).

- **Dall v. St. Catherine of Siena Medical Ctr., 2013 U.S. Dist. LEXIS 115090, *80-82 (E.D.N.Y. Aug. 14, 2013) (Brode, J.)** (granting employer's motion for summary judgment on Title VII retaliation claim because plaintiff failed to show that his complaint of sexual harassment was the but-for cause of his termination, even where plaintiff was terminated just two days after he filed the complaint; while temporal proximity was enough to show a causal link at the prima facie stage, it was insufficient to show but-for causation at the pretext stage where employer presented evidence that it was not disciplining the employee for filing a

complaint but rather *how* he went about filing the complaint, which included intimidating co-workers into signing supportive statements: "[A] reasonable jury could conclude that Plaintiff's termination was discriminatory since Defendant applied its Sexual Harassment Policy to Plaintiff differently than [a co-worker]. However, based on the evidence in the record, a reasonable jury could not conclude that had Plaintiff not filed a sexual harassment complaint against [co-worker], he would not have been terminated . . . summary judgment as to Plaintiff's retaliation claim is granted.").

- **Hubbard v. Georgia Farm Bureau Mutual Insurance Co., 2013 U.S. Dist. LEXIS 107520, *4 (M.D. Ga. July 31, 2013) (Royal, J.)** (granting in part and denying in part defendant's motion for reconsideration of prior order allowing plaintiff's two Title VII retaliation claims to survive summary judgment in light of recent Nassar decision: "Because this Court originally evaluated Plaintiff's prima facie case under the lessened motivating factor causation standard applicable to Title VII status-based discrimination claims, it must now re-assess Plaintiff's prima facie case in light of the heightened but-for causation standard now applicable to Title VII retaliation claims.").

  > This case provides a helpful illustration of the practical differences between motivating factor and but-for causation. While a three-month temporal link between plaintiff's complaint of sex discrimination and her termination satisfied the pre-Nassar motivating factor causation, it was now insufficient under the heightened but-for causation standard. Id. at 4-5.

- **Moore v. Kingsbrook Jewish Medical Center, 2013 U.S. Dist. LEXIS 107111, *71, n. 13 (E.D.N.Y. July 30, 2013) (Brodie, J.)** (granting employer's motion for summary judgment on Title VII retaliation claim because employee failed to show that his mother's questions regarding race discrimination at a training session were the but-for cause of his termination where the employer provided evidence that it terminated the employee because of missing equipment; temporal proximity of less than two months between protected activity and termination was enough to show a causal link at the prima facie stage but insufficient, standing alone, to show pretext: "Even under the motivating factor standard that was in use in the Second Circuit prior to the Supreme Court's recent decision in Nassar, temporal proximity – while enough to support a prima facie case – was insufficient to establish pretext.") (internal citations omitted).

Against Employer

However, Nassar does not always prevent retaliation claims from going to trial, as illustrated by the recent cases below:

- **Bishop v. Ohio Dep't of Rehabilitation and Corrections, 2013 U.S. App. LEXIS 13994, *28-29 (6th Cir. July 9, 2013)** (reversing lower court's grant of summary judgment dismissing Title VII retaliation claims because plaintiffs' evidence was sufficient to show that the employer's proffered reason for plaintiffs' terminations were pretextual and their

report of gender discrimination was the but-for cause of their terminations under a cat's paw theory where the supervisor accused of discrimination gave both plaintiffs a negative performance evaluation just 34 days after they filed their discrimination complaint, which the Warden then relied on in terminating the plaintiffs without performing an independent investigation).

- **Broach v. City of Cincinnati, 2013 U.S. Dist. LEXIS 115510, *3-4 (S.D. Ohio Aug. 15, 2013) (Bowman, J.)** (denying employer's motion for reconsideration in light of Nassar where court had previously relied on the motivating factor causation standard in denying employer's motion for summary judgment on Title VII retaliation claim because the same evidence also supported but-for causation; plaintiff provided evidence that he overheard a supervisor making retaliatory comments at a grocery store and that employer did not file charge of misconduct against him until eight days after the alleged misconduct occurred, during which time the employee had filed an EEOC claim alleging race discrimination).

C. NASSAR'S HOLDING EXTENDED TO OTHER RETALIATION CLAIMS

Several courts have extended Nassar's but-for requirement to retaliation claims arising under other statutes. The Supreme Court's holding in Nassar was based on the statutory interpretation of the word "because" in Title VII's anti-retaliation provision. For other anti-retaliation statutory provisions with language similar to Title VII, i.e., including the word "because," courts have applied Nassar's heightened causation requirement, where they had previously applied a lesser motivating-factor causation standard:

Americans with Disabilities Act

- **EEOC v. Evergreen Alliance Golf Ltd., 2013 U.S. Dist. LEXIS 118805, * 20-21 (D. Ariz. Aug. 21, 2013) (Teilborg, J.)** (finding for defendant following bench trial on ADA retaliation claim alleging that employer terminated plaintiff, designated him as ineligible for rehire and refused him severance because plaintiff failed to show that his complaint to Human Resources was the but-for cause of these adverse employment actions where employer showed that it had relied on documented performance problems: "Until recently in the Ninth Circuit, the plaintiff in an ADA retaliation claim could establish the causal element of a retaliation claim by merely showing that the protected activity was a motivating factor in the adverse employment action. However, following [Nassar] . . . Plaintiff must show that [the] complaint to HR . . . was the but-for cause of Evergreen's employment decisions.").

  > See, 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual **because** such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.") (emphasis added).

State Anti-Discrimination Laws

- **Dall v. St. Catherine of Siena Medical Ctr., 2013 U.S. Dist. LEXIS 115090, *68, n. 12 (E.D.N.Y. Aug. 14, 2013) (Brode, J.)** (granting employer's motion for summary judgment on state law retaliation claim because although a jury could conclude that plaintiff's termination was discriminatory, it could not conclude that plaintiff was terminated because he filed a complaint of sexual harassment; extending Nassar's but-for causation requirement to retaliation claim brought under state antidiscrimination statute, which previously applied the motivating-factor standard: "Since the NYSHRL statutory language is the same, and the New York Court of Appeals has consistently stated that federal Title VII standards are applied in interpreting the NYSHRL, this Court will continue to interpret the standard for retaliation under NYSHRL consistent with Title VII jurisprudence, as clarified by the Supreme Court in Nassar.").

  > See, NY CLS Exec § 296 (1) (e) ("[It shall be unlawful,] [f]or any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person **because** he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.") (emphasis added).

- **But see, Reiber v. City of Pullman, 2013 U.S. Dist. LEXIS 108516, *20, n. 3 (E.D. Wash. Aug. 1, 2013) (Rice, J.)** (declining to extend Nassar's but-for causation test to retaliation claim brought under state employment discrimination statute but noting that Washington courts will likely have to revisit the causation standard of WLAD in light of Nassar: "The Washington Supreme Court's adoption of this [motivating factor] standard . . . rested, in part, upon the Court's perception that federal courts had moved away from but-for causation in Title VII retaliation cases. In light of the U.S. Supreme Court's recent endorsement of the but-for standard in Nassar, however, Washington courts may be called upon to reconsider the appropriate standard under the WLAD.") (internal citations omitted).

  > See, Wash. Rev. Code § 49.60.210 ("It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person **because** he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.") (emphasis added).

False Claims Act

- **U.S. ex. rel. Schweizer v. Océ North America, Inc., 2013 U.S. Dist. LEXIS 101419, *32 (D.D.C. July 19, 2013) (Lamberth, J.)** (holding that plaintiff bringing retaliation claim under the False Claims Act must show that her report of fraud was the but-for cause of her termination following Nassar: "The combined lesson of Nassar and Gross is clear: where

Congress has given plaintiffs the right to sue employers for adverse actions taken against them by their employers because of X, plaintiffs may succeed only by showing that X was a but-for cause of the adverse action, not merely one of several motivating factors.").

> See, 31 U.S.C. § 3730(h) ("Any employee who is discharged . . . by . . . her employer **because** of lawful acts done by the employee . . . in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole.") (emphasis added).

Section 1981

- **Welch v. Eli Lilly & Co., 2013 U.S. Dist. LEXIS 115343, *56-57 (S.D. Ind. Aug. 15, 2013) (McKinney, J.)** (rejecting plaintiff's argument that her Section 1981 claim survives under a motivating-factor causation analysis and holding that in light of Nassar, plaintiff is required to satisfy a but-for causation standard for her retaliation claims arising under both Title VII and Section 1981 because according to Nassar, "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law.").

In contrast, other courts have declined to extend Nassar's but-for causation requirement to anti-retaliation provisions in other statutes, limiting Nassar's application to the Title VII context. Notably, the retaliation provisions at issue in these cases do not contain the word "because." The cases below apply a lesser causation standard to retaliation claims, despite the Supreme Court's recent holding in Nassar:

Section 1983 – First Amendment Protection

- **Mooney v. LaFayette County Sch. Dist., 2013 U.S. App. LEXIS 16471, *13, n. 4 (5th Cir. Aug. 8, 2013)** (vacating summary judgment on First Amendment retaliation claim under Section 1983 because plaintiff provided enough evidence to show that her support of a political candidate was a motivating factor in the elimination of her assistant principal position and "[t]he holding in Nassar . . . does not apply to the First Amendment causation standard, which requires only that protected speech be a substantial or motivating factor in the adverse employment action suffered by the plaintiff.").

- **Burruss v. Cook County Sheriff's Office, 2013 U.S. Dist. LEXIS 98860, *18, n. 5 (N.D. Ill. July 15, 2013) (Pallmeyer, J.)** (declining to extend Nassar's but-for causation standard to Section 1983 First Amendment retaliation claims, which continue to be governed by the motivating factor causation standard in the Mt. Healthy test).

Family and Medical Leave Act

- **Chaney v. Eberspaecher North America, 2013 U.S. Dist. LEXIS 94534, *1, n. 1 (E.D. Mich. July 8, 2013) (Edmunds, J.)** (granting employer's motion for summary judgment on plaintiff's FMLA discrimination claim – akin to a retaliation claim – because plaintiff failed

to show that her exercise of FMLA rights was a motivating factor in her termination because employer terminated plaintiff based on mistaken belief that she had used all of her FMLA leave and not because of plaintiff's attempt to exercise her FMLA rights: "While this motion was pending, the Supreme Court ruled on [Nassar] . . . This case was brought under the FMLA, not Title VII, and as such, the Nassar decision, while informative, did not change any applicable standards.").

> See, 29 U.S.C. § 2615 (a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.").

D. NASSAR'S EFFECT ON JURY INSTRUCTIONS AND VERDICTS

For Title VII retaliation claims that survive summary judgment, Nassar's heightened, but-for causation requirement may prevent verdicts in favor of plaintiffs at trial, as the cases below illustrate:

- **Rose, III v. Plastikon Industries, Inc., 2013 U.S. App. LEXIS 16954, *3, n. 1 (9th Cir. Aug. 15, 2013)** (affirming district court's denial of reconsideration of judgment on verdict against plaintiff's Title VII retaliation claim where jury found that plaintiff failed to show that his harassment and discrimination complaint was a motivating factor in his termination, which employer insisted was based only on plaintiff's insubordinate and threatening behavior: "We note that the Supreme Court recently held that the proper causation test for Title VII retaliation claims is 'but-for causation,' rather than motivating-factor causation. Because we uphold the jury's verdict determining that Rose did not prove a sufficient causal link even under the lesser motivating-factor test, Nassar does not affect our analysis.").

- **Cassotto v. Potter, 2013 U.S. Dist. LEXIS 111752, *2 (D. Conn. Aug. 8, 2013) (Fitzsimmons, J.)** (granting defendant's motion for a new trial and setting aside jury's verdict in favor of plaintiff on Title VII retaliation claim because jury instructions applied the substantial or motivating factor test; trial took place prior to the Supreme Court's ruling in Nassar, which came down while defendant's post-trial motion was pending and justified setting aside jury verdict that was premised on incorrect causation standard: "[T]he newly issued Nassar decision, heightening the causation standard, applies retroactively.").

- **Reiber v. City of Pullman, 2013 U.S. Dist. LEXIS 108516, *59 (E.D. Wash. Aug. 1, 2013) (Rice, J.)** (granting employer's renewed motion for judgment as a matter of law following an eight-day jury trial taking place just months prior to Nassar ruling, which rendered a verdict awarding plaintiffs $1,000,800 on Title VII and state law retaliation claims: "Defendants are entitled to judgment as a matter of law on the causation elements of the Plaintiffs' claims" where plaintiffs did not present enough evidence to show that but for plaintiffs' involvement in alleged protected activity, the employer would not have investigated reports of their own misconduct and subsequently disciplined them).

> Unchallenged jury instructions regarding the causation requirement for the plaintiffs' Title VII retaliation claims did not explicitly provide for either motivating factor or but-for

> causation. Rather it mimicked the language of Title VII and instructed, "Each plaintiff asserting [a Title VII retaliation claim] must prove each of the following elements by a preponderance of the evidence . . . That he was subjected to the adverse employment action **because** of his good faith opposition to and/or good faith participation in the sexual harassment investigation." Case No. 2:11-cv-00129, Doc. 164, "Final Jury Instructions," p. 10 (E.D. Wash, 04/02/2013) (emphasis added).

- **Maron v. Virginia Polytechnic Inst. & State Univ., 2013 U.S. Dist. LEXIS 105241, *5 (W.D. Va. July 26, 2013) (Turk, J.)** (granting employer's motion for a new trial following a $61,000 jury verdict in favor of plaintiff's Title VII retaliation claim because the clear weight of the evidence did not show that counseling plaintiff for poor judgment was in retaliation for her report of discrimination where employer provided non-rebutted evidence that supervisors counseled plaintiff because she sent emails to donors and spoke on behalf of the University in the wake of the mass shooting on the University's campus; court agreed with defendant's argument that the verdict cannot stand because it "does not comply with the but for causation standard recently announced in [Nassar].").

- **But see, EEOC v. New Breed Logistics, 2013 U.S. Dist. LEXIS 120106, *23, 52-55 (W.D. Tenn. Aug. 23, 2013) (Anderson, J.)** (denying employer's motion for a new trial or judgment as a matter of law in light of Nassar following jury verdict in favor of plaintiff's Title VII retaliation claim alleging that plaintiffs were terminated shortly after acting as witnesses in sexual harassment case because "Nassar did not affect the ability of the jury to draw an inference of causal connection from temporal proximity between a protected action and an adverse action" and because the jury instructions did not mention "motivating factor" causation but rather contained the word "because," which supports "but for" causation).

> The court upheld a "Causal Connection" jury instruction that read, "close timing between the Claimant's protected activity and an adverse action against Claimant may provide the causal connection needed to make out a prima facie case." Id. at *23. The Court upheld the "Retaliation" instruction, which mimicked Title VII's actual language and stated, "Remember, at all times, that the ultimate question in a retaliation claim is whether or not the Defendant took an adverse employment action against [plaintiffs] **because** they engaged in a protected activity." Id. at *53 (emphasis in original).

- **But see, Bennett v. Riceland Foods, Inc., 2013 U.S. App. LEXIS 14633, *10-12 (8th Cir. July 19, 2013)** (affirming jury verdict awarding plaintiffs backpay and $300,000 in damages for emotional distress for Title VII retaliation claim where evidence was sufficient for jury to find that plaintiffs' report of racially derogatory comments in the workplace was the but-for cause of the elimination of their positions through the cat's paw theory; supervisor with retaliatory animus suggested to his superior that plaintiffs' positions be eliminated, which the superior approved).

II. HOW EMPLOYERS MAY REDUCE RISK OF RETALIATION CLAIMS

Here are some suggestions on how employers can avoid retaliation claims by current or former employees:

- **Implement a policy prohibiting unlawful retaliation.** This policy should encourage employees to come forward with complaints of unlawful conduct without fear of reprisal and should provide a clear process for employees to follow when reporting acts of retaliation. A confirmation affirming that each employee received and reviewed this policy should be placed in each employee's personnel file.

- **Provide training.** Supervisors should be trained both on what constitutes protected activity and what constitutes retaliation. Training should be documented.

- **Apply all company policies and rules consistently.** If an employer allows a policy violation to slide for some employees while disciplining others, a door is opened for a claim of disparate treatment that could support a retaliation claim.

- **Regularly address and document performance issues.** Employers should evaluate employees on at least an annual basis. Performance and behavioral problems should be documented as they arise. Do not ignore problems or inflate performance scores. Negative evaluations or written reprimands that predate the complainant's protected activity may be used to show that the protected activity was not the but-for cause of the adverse employment action.

- **Follow up with complainant after they report discrimination or harassment.** Employers should keep communication open with complainants after they report discrimination or harassment, following up with complainants over the next several months to ensure they have not experienced any retaliation or other problems following their protected activity. It may be especially helpful to collect a written statement from complainants confirming that they have not experienced any form of retaliation.

- **Effectively manage investigations of discrimination or harassment.** Treat all complaints of discrimination or harassment seriously by promptly and thoroughly investigating each. Failure to adequately investigate underlying complaints can incite complainants and encourage litigation, including potential retaliation claims. Remind all involved employees of the employer's anti-retaliation policy, including the accused, witnesses and managers involved.

- **Keep discrimination or harassment complaints/investigations confidential.** Aside from witnesses and other necessary participants, information relating to complaints and investigations should be disclosed on a need-to-know basis only. If the decision-maker of the adverse employment action did not know about complainant's protected activity, complainant will have a difficult time showing a causal connection between the protected activity and adverse employment action.

- **Consider restructuring complainant's work environment to reduce risk of retaliation.** Employer may consider separating the complainant from the accused. Employer may also consider changing who the complainant reports to or receives evaluations from if the original supervisor is implicated in the discrimination or harassment complaint. Make sure the new decision-maker is acting independently of the "tainted" supervisor to dispel any inference of retaliation. Finally, ensure that the complainant "signs off" on any restructuring so it is not viewed as a retaliatory act in and of itself.

- **Review any employment actions taken against complainant before-hand.** The Human Resources Department or legal counsel should review any employment actions affecting an employee who recently reported discrimination or harassment to ensure the employment action cannot be construed as retaliation. Ensure that objective evidence supports the legitimate, non-retaliatory reason for the adverse employment action and that the reason is not contradicted by any documentation pertaining to employee's work performance or work history. This review should also consider the timing between the report of discrimination or harassment and the adverse employment action, as temporal proximity is often used as evidence to show a causal link in a retaliation claim and, at a minimum, encourages litigation and suspicion.

- **Consider that review of employment action include someone unaware of prior protected activity.** Consideration should be given to an independent review of employment actions by someone who would not be in a position to know that the complainant had engaged in protected activity. It will be more difficult for complainant to show that protected activity caused the adverse employment action if the decision-maker was unaware that complainant had engaged in protected activity.

- **Be honest to complainant about the reason for the adverse action.** For example, if the complainant is being terminated for poor performance, do not tell the complainant that his position is being eliminated. Complainant may then use evidence that the position was subsequently filled to show that the employer's stated reason for termination was pretextual.

- **Reconsider and fix bad decisions.** For example, prompt rescission of a prior employment action may shield an employer from liability.

- **Consider offering a severance package to terminated complainant.** Consider offering the complainant a severance package with additional benefits conditioned upon signing a release of all employment-related claims.

- **Do not give a negative job reference about departed complainant.** A common basis for retaliation claims is that a former employer has given an unjustly negative job reference to a prospective employer. As a uniform policy, it may be safest to release only neutral information to prospective employers by opting only to verify dates of employment, final salary and positions held.

APPENDIX

SAMPLE JURY INSTRUCTIONS AND VERDICT FORMS UNDER "BUT-FOR" AND "MOTIVATING FACTOR" CAUSATION STANDARDS

"BUT-FOR" CAUSATION STANDARD

- **Federal Civil Jury Instructions of the Seventh Circuit, 3.02**

> Plaintiff claims that he was [*adverse action*] by Defendant because of [*protected activity*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant [*adverse action*] him because of his [*protected activity*]. To determine that Plaintiff was [*adverse action*] because of his [*protected activity*], you must decide that Defendant would not have [*taken adverse action against*] Plaintiff if he had [*not engaged in protected activity*] but everything else had been the same.
>
> If you find that Plaintiff has proved this by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

- **Retaliation Claim Jury Instruction in Watson v. Abt Electronics, Inc., Case No. 06-cv-1815 (N.D. Ill. 2007) (Holderman, J.)** (an illustration of "but for" jury instructions given in representative civil jury trial)

> In her claim of retaliation, Ms. Watson claims that she was terminated by Abt because she complained about sexual harassment in the form of telling one of her supervisors, Gregory Meinholzs, to stop harassing her. To succeed on this claim, Ms. Watson must prove by a preponderance of the evidence each of the following:
>
> 1. Ms. Watson had a reasonable, good faith belief that Gregory Meinholz was sexually harassing her. This does not, however, require Ms. Watson to show that what she believed was correct;
> 2. Ms. Watson told Gregory Meinholz to stop; and
> 3. Abt would not have terminated Ms. Watson when it did if she had not told Meinholz to stop, but everything else had been the same.
>
> If you find that Ms. Watson has proved each of these three elements by a preponderance of the evidence , then you must find for her. However, if you find that Ms. Watson did not prove any one of these elements by a preponderance of the evidence, then you must find for Abt.

When I say a particular party must prove something by a preponderance of the evidence or when I use the expression "if you find," or "if you decide," this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

- **Retaliation Claim Jury Verdict Form in Watson v. Abt Electronics, Inc., Case No. 06-cv-1815 (N.D. Ill. 2007) (Holderman, J.)** ("but-for" retaliation standard verdict form)

QUESTION NO. 1: Has Jillian Watson proven by a preponderance of the evidence that she had a reasonable, good faith belief that Gregory Meinholz was sexually harassing her? (This does not, however, require her to show that what she believed was correct).

Yes _____ No _____

QUESTION NO. 2: Has Jillian Watson proven by a preponderance of the evidence that she asked Mr. Meinholz to stop?

Yes _____ No _____

QUESTION NO. 3: Has Jillian Watson proven by a preponderance of the evidence that she would not have been terminated when she was terminated if she had not told Mr. Meinholz to stop, but everything else had been the same?

Yes _____ No _____

If you answered "No" to any of the above questions, then your verdict form must be for Abt, and you are not to award Ms. Watson any damages for her claim and you are not to answer any further questions. If you answered "Yes" to all of the above questions, you may award Ms. Watson compensatory damages only for injuries that Ms. Watson has proved by a preponderance of the evidence were caused by Abt's wrongful conduct, as explained in the Jury Instructions. Please determine the amount, if any, of compensatory damages to award her and write down the amount:

Compensatory Damages: $_____

"MOTIVATING-FACTOR" CAUSATION STANDARD

- **Federal Civil Jury Instructions of the Seventh Circuit, 3.01, cmt. c**

> Plaintiff must prove by a preponderance of the evidence that his [*protected class*] was a motivating factor in Defendant's decision to [*adverse employment action*]. A motivating factor is something that contributed to Defendant's decision.
>
> If you find that Plaintiff has proved that his [*protected class*] contributed to Defendant's decision to [*adverse employment action*] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [*adverse employment action*] him even if Plaintiff was not [*protected class*]. If so, you must enter a verdict for the Plaintiff but you may not award him damages.

- **Title VII Discrimination Claim Jury Instructions in Pawell v. Metropolitan Pier and Exposition Authority, Case No. 03-cv-3158 (N.D. Ill. 2004) (Holderman, J.)** (an illustration of "motivating factor" jury instructions given in representative civil jury trial)

> In order for Mrs. Pawell to establish that MPEA is liable for discrimination, Mrs. Pawell must prove each of the following elements by a preponderance of the evidence:
>
> First, that MPEA placed Mrs. Pawell on light duty contrary to her desire during her 2001 pregnancy.
>
> Second, that Mrs. Pawell's sex or pregnancy, and not merely the restrictions in the doctor's note MPEA required, was a substantial or motivating factor that prompted MPEA to place Mrs. Pawell on light duty contrary to her desire during her 2001 pregnancy.
>
> Mrs. Pawell's sex or pregnancy was a substantial or motivating factor if her sex or pregnancy, and not merely the restrictions in the doctor's note, played a part in MPEA's decision to place her on light duty contrary to her desire. However, Mrs. Pawell's sex or pregnancy need not have been the only reason for MPEA's decision to place her on light duty contrary to her desire. You may find that Mrs. Pawell's sex or pregnancy was a substantial or motivating factor in MPEA's decision to place her on light duty if Mrs. Pawell has proven by a preponderance of the evidence that MPEA's stated reason for its decision–the restrictions in the doctor's note–is not the true reason but is a pretext to hide sex discrimination.

If you find that Mrs. Pawell has proven each of these elements by a preponderance of the evidence, then you must find for Mrs. Pawell on her discrimination claim.

If, on the other hand, you find that Mrs. Pawell has failed to prove either of these elements by a preponderance of the evidence, then you must find for MPEA on Mrs. Pawell's discrimination claim.

- **Title VII Discrimination Claim Verdict Form in Pawell v. Metropolitan Pier and Exposition Authority, Case No. 03-cv-3158 (N.D. Ill. 2004) (Holderman, J.)** (pre-Nassar illustration of standard verdict form)

1. Did Mrs. Pawell prove by a preponderance of the evidence that MPEA placed her on light duty contrary to her desire during her 2001 pregnancy?

   Yes _____ No _____

If your answer to question number 1 is "yes," then answer question number 2.

If your answer to question number 1 is "no," then your verdict is in favor of MPEA and against Mrs. Pawell on Mrs. Pawell's discrimination claim. Do not answer question number 2.

2. Did Mrs. Pawell prove by a preponderance of the evidence that her sex or pregnancy, and not merely the restrictions in the doctor's note MPEA required, was a substantial or motivating factor that prompted MPEA to place Mrs. Pawell on light duty contrary to her desire during her 2001 pregnancy?

   Yes _____ No _____

If your answer to question number 2 is "yes," then your verdict is in favor of Mrs. Pawell and against MPEA on Mrs. Pawell's discrimination claim.

If your answer to question number 2 is "no," then your verdict is in favor of MPEA and against Mrs. Pawell on Mrs. Pawell's discrimination claim.