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The Power to Retaliate: How *Nassar* Strips Away the Protections of Title VII

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I. The Evolution of the Causation Standard in Title VII

The Civil Rights Act of 1964—commonly referred to simply as Title VII—protects individuals from discrimination in the workplace on the basis of race, color, religion, sex, or national origin.[1] The statute has achieved such prominence in American society that scholars often refer to Title VII as a super-statute:[2] "a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-

1. 2 U.S.C. § 2000e–2 (2012).

2. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1225 (2001) (noting that the Civil War produced some super-statutes, most notably the Civil Rights Acts of 1866 and 1871).

statute and its institutional or normative principles have a broad effect on the law."[3] Given its importance, it is not surprising that intense conflicts arise over the scope and application of Title VII.[4] One of the more recent battles centers on the distinction between the element of causation as applied to status-based discrimination versus retaliation claims.[5] In 2013, the Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar*,[6] in which the Court determined that while status-based discrimination only requires a motivating factor standard of causation, retaliation claims must be proved by the higher standard of but-for causation.[7] This Note will first examine the history surrounding the battle over causation in Title VII[8] and then attempt to break down the dominant interpretations of *Nassar* by the district courts and divided by their respective circuits.[9] Because all the circuits' interpretations vary, this Note will then suggest the various ways that judges can interpret *Nassar* and which methods are most faithful to the purpose of Title VII.[10]

A. Historical Precedent Leading to Nassar

1. A Brief Overview of Title VII

Title VII can be largely divided into two distinct sections: status-based discrimination[11] and retaliation-based

3. *Id.* at 1216.

4. *See id.* at 1237 ("Title VII's principle has been debated, honed, and strengthened through an ongoing give-and-take among the legislative, executive, and judicial branches.").

5. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (holding that status-based discrimination and retaliation must be proved by different standards of causation).

6. *Id.*

7. *See id.* ("[T]he Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m).").

8. *See infra* Part I.A (discussing history).

9. *See infra* Parts II–V (examining circuit splits).

10. *See infra* Part VI (providing recommendations).

11. *See* 42 U.S.C. § 2000e–2(a) (2012) (outlawing discrimination by an employer on the basis of race, color, religion, sex, or national origin).

discrimination.[12] The status-based section prohibits employers from acting adversely against employees based on their status in a protected class.[13] For example, an employer cannot mistreat or fire an employee simply because she happens to be female.[14] The retaliation section, on the other hand, protects employees from adverse action if they speak out against discrimination.[15] For example, if our female employee above is fired because she is female, and another employee accuses the employer of discrimination, then the employer cannot then fire the second employee in retaliation for opposing the first discriminatory action.[16] Essentially, the retaliation section encourages employees to speak out against discrimination without fear of retaliation.[17]

2. Price Waterhouse*: "Because of" Does Not Mean "But-for"*

The Supreme Court first tackled the causation standard of Title VII in *Price Waterhouse v. Hopkins*.[18] *Price Waterhouse* concerned a female employee, Ann Hopkins, in an accounting firm whose candidacy for partnership was put on hold.[19] The firm selected partners based on recommendations of other partners, who either voted to accept, put on hold, or deny the candidate.[20] While the vast majority of partners approved accepting Hopkins

12. *See* 42 U.S.C. § 2000e–3(a) (2012) (outlawing discrimination by an employer in retaliation to an employee's actions or statements).

13. *See* 42 U.S.C. § 2000e–2(a)(1) (2012) (listing the classes protected by the statute).

14. *See id.* (stating that an employer may not "discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.").

15. *See* 42 U.S.C. § 2000e–3(a) (2012) (stating that an employer may not discriminate against an employee "because [an employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

16. *Id.*

17. *See id.* (encouraging employees to oppose discrimination and to participate in enforcement proceedings for Title VII).

18. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e–2(m) (2012).

19. *Id.* at 231–32.

20. *Id.* at 232–33.

as a partner, a few voted to reject her because she was too abrasive and aggressive for a woman.[21] The Court had to decide whether employers could avoid liability by showing that, even though discrimination played a role in their decision, they would have made the same decision anyway.[22] The Court observed that the language of Section 2000e–2(a)(1) forbids discrimination "*because of* such individual's . . . sex" and ultimately found that applying a but-for standard of causation would be improper.[23] The Court concluded that the plaintiff needed to prove that her sex was a "substantial" or "motivating factor" in her employer's decision to take adverse action against her.[24]

However, Congress expressed disapproval of the Court's decision by enacting the Civil Rights Act of 1991,[25] which clarified that an employer has discriminated against an employee if "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[26] This means that in mixed motive cases employers could be held liable if discriminatory animus played *any* role in their decision making, but not necessarily a substantial role.[27] In short, Congress sent a strong message that any amount of discrimination in the workplace is too much and will not be tolerated.

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21. *Id.* at 233–35.

22. *See id.* at 237 (describing the question before the Court and the decisions of the district and circuit courts).

23. *See id.* at 240 (emphasis added) ("To construe the words 'because of" as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them" (quoting 42 U.S.C. § 2000e–2(a)(1), (2) (1964))).

24. *Id.* at 249–50.

25. 42 U.S.C. § 2000e–2(m) (2012).

26. *Id.*

27. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (applying § 2000e–2(m) and concluding that plaintiffs do not need to show direct evidence of discrimination, merely "present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice'" (quoting 42 U.S.C. § 2000e–2(m))).

3. Gross*: "Because of" Does Mean "But-for"*

After *Waterhouse Price*, the Court did not address the issue of causation again until *Gross v. FBL Financial Services, Inc.*,[28] which considered whether the Age Discrimination in Employment Act ("ADEA") authorized a mixed-motive standard for age discrimination claims.[29] *Gross* concerned a male employee, 54 years old, who worked for a financial firm which demoted and replaced him with a younger employee.[30] While the plaintiff claimed that his employer demoted him because of his age, the defendant claimed that the plaintiff was reassigned because of corporate restructuring and put in a "position [that] was better suited to his skills."[31] The Court had to consider whether the plaintiff could prevail by proving that age was a motivating factor in his demotion, even if it was not the sole factor.[32] The Court concluded that the fact that the ADEA makes it unlawful to discriminate "*because of* such individual's age"[33] suggests that a but-for standard of causation must be applied and, thus, the plaintiff had to show that age was the decisive factor, not just a motivating factor, in his demotion.[34] While the Court acknowledged that Congress had amended Title VII to clarify

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28. 557 U.S. 167 (2009).

29. *See id.* at 175–76 (discussing whether the text of the ADEA suggests a different causation standard than what Title VII mandates for status-based discrimination claims).

30. *Id.* at 170.

31. *Id.*

32. *See id.* at 173 (addressing the question of whether affirmative evidence must be presented in a mixed-motive discrimination case in order to get the jury instruction).

33. 29 U.S.C. § 623(a)(1) (2012) (emphasis added).

34. *See* Gross v. FBL Fin. Serv.'s, Inc., 557 U.S. 167, 176 (finding that the ADEA prohibits discrimination because of age, so the plaintiff, must use a but-for standard to show that age was the decisive factor in his demotion). The opinion stated:

> [T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.

Id. (internal citations omitted).

that "because of" meant a motivating factor standard of causation, it also concluded that failure to amend the ADEA demonstrated an absence of Congressional intent to adopt the same standard.[35] This reasoning set the stage for the Court's decision in *Nassar* just four years later.

B. Nassar *and the New Causation Standard for Title VII*

1. The Majority: Treating Retaliation Differently than Status-Based Discrimination

The Court finally addressed the issue of causation in the Title VII context again in *Nassar* and drew a line between status-based discrimination and retaliation-based discrimination.[36] *Nassar* concerned a doctor of Middle-Eastern descent who alleged that his superior had harassed him on racial and religious grounds.[37] He then complained about the harassment, and the hospital retaliated against him through constructive discharge.[38] Prior to the Court's decision in *Nassar*, many courts reasoned that the motivating factor standard of causation applicable to status-based discrimination should also apply to retaliation claims under Title VII.[39] The Supreme Court, however,

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35. *See id.* at 174 ("Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII.").

36. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013) (holding that retaliation claims require proof that the desire to retaliate is the but-for cause of the employment action).

37. *Id.* at 2523–24.

38. *Id.*; *see also* Pa. State Police v. Suders, 542 U.S. 129, 141 (2004) (defining constructive discharge as a situation in which a worker is coerced to quit or resign a position due to a hostile or intolerable work environment created by the employer).

39. *See* Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 454 (5th Cir. 2012), *rev'd*, 133 S. Ct. 2517 (2013) (showing that the Fifth Circuit did not believe there was any question what standard of causation should be applied to the retaliation claim in *Nassar*); *see also* Saridakis v. S. Broward Hosp. Dist., 468 F. App'x 926, 931 (11th Cir. 2012) (noting a circuit split on the issue between the Fifth and Seventh Circuits, but ultimately deciding that the motivating factor standard should apply because *Gross* does not control); Lore v. City of Syracuse, 670 F.3d 127, 167 (2d Cir. 2012) (commenting on how a jury's finding that the complaints of discrimination made by the plaintiff were a

determined that retaliation claims must be proved under the much higher but-for standard of causation.[40] Justice Kennedy, writing for the majority, stated that the rationale the Court used in *Gross* for ADEA claims was applicable to Title VII retaliation claims.[41] Declining to apply *Price Waterhouse* to *Nassar*, the majority determined that § 2000e–(2)(m) did not apply to retaliation claims because it falls under a different section in the Civil Rights Act than retaliation which appears in § 2000e–3.[42]

Some scholars believe that *Nassar* and *Gross* illustrate the belief, held by some members of the Court, that there are too many Title VII claims filed per year, and judges should have more tools to prohibit "frivolous" lawsuits from going to trial.[43] Empirical data from the Equal Employment and Opportunity Commission shows that retaliation claims have risen over the years,[44] while status-based discrimination claims have fluctuated over a 15 year period and shown either minimal growth or minimal decline.[45] Therefore, it is entirely possible that the Court's reasoning is rooted in these policy concerns and an attempt to decrease the number of Title VII cases filed per year.

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motivating factor in the defendant's act of retaliation, and therefore the plaintiff had proved causation); *see also* Woodson v. Scott Paper Co., 109 F.3d 913, 935 (3d Cir. 1997) (holding that § 2000e–2(m) does not apply to retaliation claims).

40. *See Nassar*, 133 S. Ct. at 2533 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m).").

41. *Id.* at 2521; *see also* Jeffrey M. Hirsch, *The Supreme Court's 2012–2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17 EMP. RTS. & EMP. POL'Y J. 157, 164 (2013) ("The Court ultimately held that the rationale of *Gross* was equally applicable to Title VII retaliation claims.").

42. *See Nassar*, 133 S. Ct. at 2529 ("When Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within § 2000e–2, which contains Title VII's ban on status-based discrimination, § 2000e–2(a) to (d)(l), and says nothing about retaliation.").

43. *See* Hirsch, *supra* note 41, at 167 (stating that the majority of justices on the Court express concerns over frivolous lawsuits).

44. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2015 http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sept. 14, 2016) (showing a steady growth in number of claims filed and a 2.2% increase in the number of retaliation claims filed from 2012 to 2013).

45. *See id.* (showing changes per status as 1.6% for race, -1.0% for sex, 0.5% for national origin, 0.2% for religion, and 0.7% for color).

2. The Dissent: Nassar *is Contrary to the Purpose of Title VII*

Justice Ginsburg led a four-member dissent in *Nassar* challenging the majority's reasoning as contrary to Congress's intent in adding § 2000e–2(m) to the statute.[46] The dissent also pointed out the practical complications of having two standards of causation for different Title VII claims, especially when status-based discrimination and retaliation claims are often alleged together.[47] Employing two different standards places a greater burden on trial judges who must instruct juries on causation—a complicated concept to convey even in the best of circumstances: "[a]sking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion."[48] Additionally, as the dissent points out, the retaliation provision in Title VII is vital to the purpose of the statute because retaliation is likely to be more coercive than status-based discrimination.[49] Justice Ginsburg ultimately encouraged Congress to correct the Court like it did in *Price Waterhouse* by issuing another Civil Rights Restoration Act.[50]

Because *Nassar* is still fairly recent, the full effect of a but-for standard of causation on retaliation claims is difficult to predict. It is entirely possible that "judges will generally come to the same result they would have under the motivating factor standard, while simply using different language."[51] However, as many district courts have noted, the new standard also makes it harder for plaintiffs to survive summary judgment.[52] As this Note

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46. *See Nassar*, 133 S. Ct. at 2541 (Ginsburg, J., dissenting) ("[T]he Court ascribes to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature's effort to fortify the protections of Title VII.").

47. *See id.* at 2546 (stating that while statutes may sometimes lead to confusion, the Court's decisions should not add to the confusion).

48. *Id.*

49. *See id.* at 2534–35 (explaining the importance of Title VII retaliation and stating that "'fear of retaliation is the leading reason why people stay silent' about the discrimination they have encountered or observed") (quoting Crawford v. Metro. Gov't of Nashville and Davidson Cty., 555 U.S. 271, 279 (2009))).

50. *See id.* at 2547 ("Today's misguided judgment . . . should prompt yet another Civil Rights Restoration Act.").

51. Hirsch, *supra* note 41, at 164.

52. *See, e.g.*, Castonguay v. Long Term Care Mgmt. Servs., L.L.C., No. 1:11CV682, 2014 WL 1757308, at 7 (M.D.N.C. Apr. 30, 2014) ("*Nassar* makes

will explain, district courts have already divided on how to apply *Nassar*, not only with respect to what plaintiffs must show to survive summary judgment, but also in regard to when judges should apply the new standard of causation.[53] It may be that the confusion that Justice Ginsburg warned would follow *Nassar*[54] will result in a new circuit split unless Congress amends the Civil Rights Act.

II. Summary Judgment and When the But-For Test is Applied in Relation to the McDonnell Douglas *Framework*

At the summary judgment stage of a Title VII case, courts use the *McDonnell Douglas*[55] framework to determine whether there is an issue of fact for a jury to decide if direct evidence of discrimination is lacking.[56] Under the framework, i) the plaintiff must show a prima facie case of retaliation, ii) the burden then shifts to the defendant to show legitimate, nondiscriminatory reasons for the adverse action, and iii) if the defendant offers legitimate reasons, then the burden shifts back to the plaintiff to show that those reasons are a pretext for unlawful discrimination.[57] *Nassar*, however, raises questions about how and when the but-for standard of causation should be applied within the framework; and the various circuits already disagree about the correct application of law.[58]

Castonguay's task more difficult in this case.").

53. *See infra* Parts II–V (examining interpretations of *Nassar*).

54. *See Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting) (warning that *Nassar* will lead to confusion).

55. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

56. *See e.g.*, Summa v. Hofstra Univ., 708 F.3d 115, 125 (2d Cir. 2013) ("The burden-shifting framework laid out in *McDonnell Douglas* . . . governs retaliation claims.").

57. *McDonnell Douglas*, 411 U.S. at 802–5; *see also* Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 844–46 (2d Cir. 2013) (applying the *McDonnell Douglas* framework and the heightened standard of causation).

58. *See* Foster v. Univ. of Md.E. Shore, 787 F.3d 243, 250–51 (4th Cir. 2015) (discussing the disagreement of *Nassar* amongst sister circuits).

A. Applying the Causation Standard in the Last Stage of the McDonnell Douglas *Framework*

While there is disagreement on when to apply the but-for standard of causation within the *McDonnell Douglas* framework, most in the Second Circuit have firmly and consistently applied it in the last stage of the framework.[59] In this version of the test, if the employer passes the second stage of the framework, then "the presumption of retaliation dissipates, and the plaintiff must show that, but-for the protected activity, he would not have been terminated."[60] As a consequence, the forgoing method has noticeable effects on a plaintiff's ability to survive summary judgment.[61]

In *Ellis v. Century 21 Department Stores*,[62] a female employee of a retail store alleged that she had been treated unfairly following her reporting of a potential sexual harassment issue involving her supervisor and a coworker.[63] The plaintiff then complained of mistreatment and alleged that she was terminated following her complaint.[64] The defendant argued instead that it fired the plaintiff for poor work performance.[65] While discussing the defendant's motion for summary judgment, the Eastern District of New York declined to apply a but-for standard of causation during the first step of the *McDonnell Douglas* framework.[66] Instead, the court relied on temporal proximity to establish the prima facie case, i.e., inferred a causal connection from the fact that only a short time elapsed between

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59. *See*, *e.g.*, Ellis v. Century 21 Dept. Stores, 975 F. Supp. 2d 244, 279 (E.D.N.Y. 2013) (introducing the method of applying *Nassar* during the last stage of the *McDonnell Douglas* framework); *see also* Brooks v. D.C. 9 Painters Union, No. 10 Civ. 7800(JPO), 2013 WL 3328044, at 4 (S.D.N.Y July 2, 2013) (stating the rule, but also finding that the plaintiff offered no evidence of causation at all).

60. *Id.* at 279.

61. *See id.* at 288 (denying summary judgment for the defendant and allowing claims to survive).

62. *Id.*

63. *Id.* at 255–56.

64. *Id.* at 264.

65. Ellis v. Century 21 Dept. Stores, 975 F. Supp. 2d 244, 264 (E.D.N.Y. 2013).

66. *Id.* at 284–85.

the protected activity and the adverse employment action.[67] Ultimately, the court determined that the plaintiff established a prima facie case and, as a result, an issue of fact existed as to whether the defendant had nondiscriminatory reasons for the adverse employment action.[68] However, the court never examined whether the plaintiff demonstrated that her complaints were the but-for cause of termination.[69] In the end, the court allowed the plaintiff to survive summary judgment based on temporal proximity, allowing that presumption to override the standard of causation.[70]

While the forgoing test might be encouraging to plaintiffs, it should also be noted that there is a perception among many courts that the *Nassar* standard eliminates such use of temporal proximity.[71] If this view gains widespread acceptance among the circuits, the Eastern District of New York's use of temporal proximity in the first stage of the framework may be rendered invalid.[72] It is also critical to note that while New York district courts are consistently utilizing this method, the Court of Appeals for the Second Circuit has not expressly adopted this method; but it has strongly indicated that it approves of applying *Nassar* primarily during the last stage of the framework.[73]

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67. *See id.* at 284 (establishing a prima facie case via temporal proximity (citing Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010))).

68. *See id.* at 288 (applying the first two stages of the framework and determining that there was an issue of fact).

69. *See id.* (examining the facts and holding that a reasonable jury *could* find that retaliation was a but-for cause of plaintiff's termination).

70. *See id.* at 285 ("Plaintiff has established that she was terminated less than four months after she complained to Thomas about a potential sexual harassment issue, and that alone is sufficient to raise an inference of causation.").

71. *See infra* Part III.

72. *See infra* Part III.

73. *See* Kwan v. Andalex Grp. LLC, 737 F.3d 834, 844–46 (2d Cir. 2013) (addressing *Nassar* during the first stage of the framework, but only applying the but-for standard during the last stage).

B. Applying the Causation Standard Immediately or in the First Stage of the McDonnell Douglas *Framework*

Additionally, the New York method of applying *Nassar* in the last stage of the *McDonnell Douglas* framework seems to be in the minority.[74] The Court of Appeals in some circuits have determined that they should apply the but-for standard immediately and void the need for the framework by finding that the plaintiff cannot prove a prima facie case due to lack of causation.[75] In a similar method, other circuits have simply applied the but-for standard during the first step of the *McDonnell Douglas* framework.[76] Both methods seem functionally equivalent given that they apply but-for causation to the prima facie elements.[77] Applying the standard of causation before or during the first stage of the framework is the application used by the Third[78] and Seventh[79] Circuits, and while the Fifth Circuit has not expressly adopted any particular rule, dicta suggests that it may adopt the same standard.[80]

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74. *But see* Wesolowski v. Napolitano, 2 F. Supp. 3d 1318, 1344 (S.D. Ga. 2014) (applying the but-for standard of causation in the last stage of the framework and not during the establishment of the prima facie case).

75. *See, e.g.*, Verma v. Univ. of Penn., 533 F. App'x 115, 119 (3d Cir. 2013) ("[Plaintiff] has presented no evidence that suggests *any* causal connection between her allegations of discrimination and her termination, let alone evidence to suggest that such activity was the but-for cause of her termination.").

76. *See, e.g.*, Hobgood v. Ill. Gaming Bd., 731 F.3d 635, 642 (7th Cir. 2013) (analyzing the plaintiff's claims under the McDonnell Douglas framework and applying the but-for standard of causation during the prima facie case).

77. *Compare Verma*, 533 F. App'x at 119 (showing how the court could immediately apply *Nassar* to the elements of a prima facie case and eliminate the need to even discuss the *McDonnell Douglas* framework), *with Hobgood*, 731 F.3d at 642 (applying *Nassar* to the elements of a prima facie case during a discussion of the *McDonnell Douglas* framework).

78. *See*, *e.g.*, *Verma*, 533 F. App'x at 119 (applying *Nassar* in lieu of the *McDonnell Douglas* framework).

79. *See*, *e.g.*, *Hobgood*, 731 F.3d at 642 (applying *Nassar* in the first stage of the *McDonnell Douglas* framework).

80. *See, e.g.*, Finnie v. Lee Cty., 541 F. App'x 368, 371 (5th Cir. 2013) ("To meet the third prong [of a prima facie case], *Nassar* requires that Finnie provide sufficient evidence to allow a reasonable juror to conclude that her filing of an EEOC claim was the 'but-for' cause of her termination.").

Because three circuits have officially adopted the method of applying the standard of causation during the establishment of the prima facie case—rather than after the second stage of the *McDonnell Douglas* framework—plaintiffs should take extra care to strengthen their causation argument so that they can survive the immediate hurdle discussed above.

III. The Effect of Nassar *on Temporal Proximity to Prove a Prima Facie Case of Causation*

Many courts have long recognized the use of temporal proximity to create the presumption of a causal connection between the protected activity and adverse action.[81] The purpose of temporal proximity is to create a presumption of wrongdoing when an employer's adverse actions closely follow an individual's protected behavior.[82] The use of temporal proximity is both a useful and necessary tool for plaintiffs because "employers who discriminate are not likely to announce their discriminatory motive."[83] Years of litigation and social change have taught employers to never leave records that might point to discrimination or to openly voice their intentions.[84] As a result, most circuits allowed temporal proximity alone to satisfy the causal requirement of a prima facie retaliation claim, including the First, Second, Third, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits.[85] In contrast, the Sixth, Seventh, Eighth, and Ninth

81. *See* Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (discussing how some of the circuits accept temporal proximity as a means to establish causation); *see also* Patterson v. Johnson, 505 F.3d 1296, 1299 (D.C. Cir. 2007) (relying solely on temporal proximity to establish a causal connection during summary judgment).

82. *See* Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st Cir. 1998) ("[Temporal proximity] is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation.").

83. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 534 (1993) (Souter, J., dissenting).

84. *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488–89 (2005) (discussing how employment discrimination has become more subtle and how employers are "increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging.").

85. *See* Calero-Cerezo v. U.S. Dep't. of Justice, 355 F.3d 6, 25 (1st Cir. 2004) (finding a causal connection based solely on temporal proximity); *see also*

Circuits do not allow mere temporal proximity to establish a causal connection—it must be paired with other evidence.[86] In circuits that have allowed temporal proximity alone to establish causation, the main limitation is generally that the time that elapses between the protected activity and the adverse action must be "very close."[87]

It is clear that in circuits that frown upon temporal proximity, *Nassar* will continue to prevent plaintiffs from relying on suspicious timing to prove causation.[88] These courts reason

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El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010) (stating that temporal proximity may be used to establish a prima facie case, however, it cannot be used alone to show pretext); *see also* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 232 (3d Cir. 2007) (recognizing temporal proximity alone as a means to prove causation only were time between the protected activity and adverse action were very close); *see also* Perry v. Kappos, 489 F. App'x 637, 643 (4th Cir. 2012) (stating that temporal proximity may be used to show causation only if the time period was very close); *see also* McCoy v. City of Shreveport, 492 F.3d 551, 562 (5th Cir. 2007) (stating that while close timing may be enough to establish a prima facie element of causation, the presumption dissipates if the employer offers a legitimate non-retaliatory reason for adverse action); s*ee also* Barlow v. C.R. England, Inc., 703 F.3d 497, 509 (10th Cir. 2012) ("[W]e have recognized that close temporal proximity between the exercise of a right and an employee's discharge may alone constitute prima facie proof of causation."); *see also* Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007) ("The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action."); *see also* Hamilton v. Geithner, 666 F.3d 1344, 1357 (D.C. Cir. 2012) (noting that the circuit has long recognized mere temporal proximity as a means of establishing prima facie causation).

86. *See* Fuhr v. Hazel Park Sch. Dist., 710 F.3d 668, 675 (6th Cir. 2013) ("Temporal proximity alone cannot establish a causal connection."); *see also* Tomanovich v. City of Indianapolis, 457 F.3d 656, 665 (7th Cir. 2006) (stating that mere temporal proximity is not enough to establish causation, and must be accompanied by supporting evidence); *see* Wallace v. Sparks Health Sys., 415 F.3d 853, 859 (8th Cir. 2005) ("[M]ore than temporal proximity is needed to show a causal link between the discharge and the filing of the EEOC complaint."); *see* Coszalter v. City of Salem, 320 F.3d 968, 977–78 (9th Cir. 2003) ("A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic.").

87. *See* Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (citing with approval cases suggesting that a four month period is too long to establish temporal proximity).

88. *See*, *e.g.*, Williams v. Serra Chevrolet Auto. LLC, 4 F. Supp. 3d 865, 879 (E.D. Mich. 2014) ("Thus, applying the teachings of *Nassar* and *Gross* here, temporal proximity alone is not enough to allow a reasonable inference of 'but-for' causation.").

that a but-for standard of causation requires a more compelling connection than the presumption that mere temporal proximity creates.[89] What is less certain, however, is whether circuits that previously allowed temporal proximity will feel the need to abandon such analysis as a result of *Nassar*.

A. Abandoning Temporal Proximity

The circuit that seems most likely to abandon temporal proximity is the Fifth Circuit due to the fact that, in the past, the circuit expressed a reluctance to employ the doctrine of temporal proximity,[90] thus making it more likely that it will completely reject the doctrine after *Nassar*. While the Fifth Circuit has previously allowed the use of temporal proximity to establish prima facie cases, it also placed strict time limitations on that use.[91] In addition, the Fifth Circuit case law can be read as having simultaneously allowed and disallowed the use of temporal proximity, thus leading to a confusing body of case law.[92] In fact, the Fifth Circuit, where *Nassar* originated, expressed conflicting views on the causation standard for retaliation claims before 2013.[93] As a result, while the Fifth Circuit officially acknowledged temporal proximity, it is likely to

89. *See id.* ("Under the stricter 'but-for' causation standard, temporal proximity, standing alone, is not enough.").

90. *See* Strong v. Univ. Healthcare Sys., LLC, 482 F.3d 802, 808 (5th Cir. 2007) ("[T]emporal proximity alone is insufficient to prove but for causation.").

91. *Compare* Myers v. Crestone Int'l, LLP, 121 F. App'x 25, 28 (5th Cir. 2005) (finding even a three-month time elapse between protected activity and adverse action insufficient to meet temporal proximity), *with* Gorman-Bakos v. Cornell Co-op Extension, 252 F.3d 545, 553–54 (2d Cir. 2001) (declining to define how many months may pass before too much time has elapsed for use of temporal proximity).

92. *Compare* McCoy v. City of Shreveport, 492 F.3d 551, 562 (5th Cir. 2007) (recognizing that the Fifth Circuit allows use of temporal proximity), *with* Strong v. Univ. Healthcare Sys., LLC, 482 F.3d 802, 808 (5th Cir. 2007) ("[T]emporal proximity alone is insufficient to prove but for causation.").

93. *Compare* Nassar v. Univ. of Tex. S.W. Med. Ctr., 674 F.3d 448, 454 (5th Cir. 2012), *rev'd*, 133 S. Ct. 2517 (2013) (applying a motivating factor standard to the causation question), *with* Strong v. Univ. Healthcare Sys., LLC, 482 F.3d 802, 808 (5th Cir. 2007) ("[T]emporal proximity alone is insufficient to prove but for causation.").

reject the doctrine following *Nassar* due to its long-standing animosity towards the doctrine.[94]

B. Keeping Temporal Proximity

On the other hand, the district courts in the Second Circuit—and many others—seem unaffected, applying temporal proximity as they did pre-*Nassar*.[95] Specifically, because the Second Circuit allows mere temporal proximity to establish the prima facie case, but does not allow it to prove pretext (a rule which has always been in place), the district courts appear to reach the same conclusions they did before *Nassar*.[96] The Second Circuit is not alone and is joined by other district courts, including several in the Fourth Circuit.[97]

While forgoing examples derive from district courts in which the relevant Courts of Appeals have not yet spoken on the issue, other circuits have taken a position. In *Adams v. City of Montgomery*,[98] the Eleventh Circuit saw no conflict between *Nassar* and allowing temporal proximity to establish a prima facie case.[99] *Adams* explicitly states that *Nassar* requires a showing of but-for causation, and that this "burden of causation can be met by showing close temporal proximity between the

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94. *See* Jones v. FJC Sec. Serv.s, Inc., 40 F. Supp. 3d 840, 854 (S.D. Tex. 2014) (collecting cases that express disapproval of temporal proximity, following a discussion of *Nassar*).

95. *See*, *e.g.*, Joseph v. Owens & Minor Distrib., Inc., 5 F. Supp. 3d 295, 320 (E.D.N.Y. 2014) (finding sufficient temporal proximity to establish a prima facie case, but that same evidence insufficient to establish pretext).

96. *See*, *e.g.*, *id.*; *see* Bowen-Hooks v. City of New York, 13 F. Supp. 3d 179, 230–31 (E.D.N.Y. 2014) (stating that even if the plaintiff could prove temporal proximity to establish a prima facie case, the plaintiff cannot then prove pretext).

97. *See, e.g.*, Taylor v. Republic Serv.s, Inc., 968 F. Supp. 2d 768, 797–98 (E.D. Va. 2013) (stating that Nassar requires but-for causation and that this standard can be met through temporal proximity); *see also* Sumter v. Blue Cross Blue Shield, Civil Action No. 3:11–03485–JFA, 2014 WL 4826150, at *8 (D.S.C. Sept. 24, 2014) (applying temporal proximity post-*Nassar*).

98. Adams v. City of Montgomery, 569 F. App'x 769 (11th Cir. 2014).

99. *See id.* at 774 (stating that the plaintiff had failed to establish a causal connection through temporal proximity because the time elapsed was not "very close.").

statutorily protected activity and the adverse action."[100] In fact, the Eleventh Circuit never indicated any concern over the applicability of temporal proximity post-*Nassar*.[101] Similarly, the Third Circuit in both *Blakney v. City of Philadelphia*[102] and *Verma v. University of Pennsylvania*[103] validated the continued use of the temporal proximity doctrine after *Nassar*.[104]

C. Confusion Over the Contradiction Between Temporal Proximity and But-For Causation

However, at least one district expressed confusion on how to keep temporal proximity while also meeting the but-for standard of causation.[105] The United States District Court for the District of Columbia stated that temporal proximity is allowed to prove causality while also suggesting that it cannot alone meet the but-for standard required by *Nassar*.[106] The District Court of D.C. appears acutely aware of the inherent conflict between but-for causation and the use of temporal proximity to create an inference of causation.[107] The above confusion will ultimately have to be remedied by the Court of Appeals.

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100. *See id.* at 772–73 (citing Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007)).

101. *See id.* (showing that the court cited both *Nassar* and *Thomas* as binding authority).

102. Blakney v. City of Phila., 559 F. App'x 183 (3d Cir. 2014).

103. Verma v. Univ. of Pa., 533 F. App'x 115 (3d Cir. 2013).

104. *See* Blakney, 559 F. App'x at 185–86 (utilizing temporal proximity post-*Nassar); see Verma,* 533 F. App'x at 119 (noting that, in a Title VII retaliation case under *Nassar's* causation standard, temporal proximity between the protected activity and retaliatory action may satisfy causation).

105. *See, e.g.*, Gray v. Foxx, 74 F. Supp. 3d 55, 73 (D.D.C. 2014) (noting that the D.C. Circuit has yet to speak on how *Nassar* affects temporal proximity).

106. *Compare* Lane v. Vasquez, 961 F. Supp. 2d 55, 67–68 (D.D.C. 2013) (stating that a plaintiff may rely on temporal proximity, but going no further in analysis because the court found no temporal proximity), *with* Francis v. Perez, 970 F. Supp. 2d 48, 68 (D.D.C 2013) ("Given that plaintiff offers no other evidence beyond temporality of a causal connection, much less a but-for causal connection between her alleged protected activity and the challenged actions, the Court concludes that no reasonable jury could infer retaliation . . . .") (internal citations omitted).

107. *See Gray*, 74 F. Supp. 3d at 73 (noting that the D.C. Circuit has yet to speak on how *Nassar* affects temporal proximity).

So far, most circuits that previously allowed use of temporal proximity to establish prima facie causation appear reluctant to abandon the doctrine. Judges are probably hesitant to scrap long established case law and doctrine concerning employment discrimination, despite the apparent contradiction between the old rules and *Nassar*. That being said, it is still early to predict the full effects of the decision on the doctrine of temporal proximity.

IV. Interpretations of the Nassar *Standard and the Effects on Plaintiffs' Abilities to Survive Summary Judgment and Motions to Dismiss*

A. The Stricter Interpretation of the Nassar *Standard*

Some judges have specifically noted that *Nassar* heavily influenced the outcome of their decisions.[108] In *Shumate v. Selma City Board of Education*,[109] the Southern District of Alabama (Eleventh Circuit) explicitly stated that had *Nassar* not required but-for causation, the plaintiff's claims would have survived:

> Under the old standard, Shumate didn't have to prove that she would have gotten the job if the interview panel hadn't considered her lawsuit . . . . But post-*Nassar,* Shumate has to meet a higher standard. In order to prove that she suffered unlawful retaliation, she has to convince a jury that she would have gotten the job if the interview panel hadn't discussed her other lawsuit. The evidence does not support that conclusion.[110]

Shumate, a school cafeteria worker, applied to become a manager in the cafeteria.[111] She filed an EEOC complaint alleging

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108. *See*, *e.g.*, Shumate v. Selma City Bd. of Educ. (*Shumate II*), Civil No. 11–00078–CG–M, 2013 WL 5758699, at 1–2 (S.D. Ala. Oct. 24, 2013) (reconsidering its denial of summary judgment prior to *Nassar*, and granting summary judgment after *Nassar*), *aff'd*, 581 Fed. App'x 740, 743 (11th Cir. 2014).

109. *Shumate II*, Civil No. 11–00078–CG–M, 2013 WL 5758699, at 1 (S.D. Ala. Oct. 24, 2013).

110. *Id.* at 2.

111. Shumate v. Selma City Bd. of Educ. (*Shumate I*), 928 F. Supp. 2d 1302, 1310 (S.D. Ala. 2013).

discrimination after she was passed over for the job.[112] Then, three more management positions opened up at various schools, and while she was considered for all three, she was selected for none.[113] Shumate alleged that she had not been selected in retaliation for filing her EEOC complaint.[114] In March, 2013, the Southern District of Alabama denied the school board's motion for summary judgment on Shumate's retaliation claim.[115] However, the Supreme Court decided *Nassar* in June of the same year and the defendant asked the district court to reconsider summary judgment under the new standard of causation.[116] As a result of the changed standard of causation, the court granted summary judgment for the defendant.[117]

In *Rattigan v. Holder*,[118] the District Court for the District of Columbia determined that but-for causation means that if an employer can put forth at least one legitimate reason for an employee's termination, even if the employee's race or ethnicity did play some role in the employer's decision, then a plaintiff cannot survive summary judgment.[119] This could be especially problematic where a string of events leads to an employee's termination. For example, in *Hubbard v. Georgia Farm Bureau Mutual Insurance Company*,[120] the Middle District of Georgia (Eleventh Circuit) reconsidered a motion for summary judgment following *Nassar*.[121] In *Hubbard*, the plaintiff claimed that she

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112. *Id.* at 1311.

113. *Id.*

114. *Id.*

115. *Id.* at 1318.

116. *Shumate II*, Civil No. 11–00078–CG–M, 2013 WL 5758699, at *1 (S.D. Ala. Oct. 24, 2013), *aff'd*, 581 F. App'x 740, 743 (11th Cir. Aug. 28, 2014).

117. *Id.* at *2.

118. Rattigan v. Holder, 982 F. Supp. 2d 69, 69 (D.D.C. 2013).

119. *See id.* at 82–83 ("[U]nder the Supreme Court's recent ruling in *Nassar*, it is now clear that a Title VII retaliation claim cannot rely on a mixed motive theory.").

120. *See* Hubbard v. Georgia Farm Bureau Mut. Ins. Co., No. 5:11–CV–290 (CAR), 2013 WL 3964908, at *1 (M.D. Ga. July 31, 2013) (denying a plaintiff's retaliation claim on reconsideration because, even though the plaintiff had originally satisfied the "motivating factor" causation standard, the plaintiff could not satisfy the heightened "but-for" causation standard established in *Nassar*).

121. *Id.*

had filed a report of sex discrimination as well as a report of sexual harassment.[122] The report of sex discrimination happened three months prior to her termination and the report of sexual harassment occurred three weeks prior to her termination.[123] Before *Nassar*, both claims survived summary judgment, but afterwards the court determined that only the second report passed the but-for standard of causation.[124] The Middle District of Georgia explained that after the first report of sex discrimination another incident, in which the plaintiff was accused of acting unprofessionally, took place.[125] Because this incident took place between the first report and the plaintiff's termination, it broke the causal chain and prevented a finding of but-for causation.[126] On the other hand, nothing happened in-between the second report and the plaintiff's termination.[127] Therefore, the second report could be the but-for cause of her termination.[128]

The troubling result of this kind of reasoning, however, is that directly linking protected activity to adverse action will be more difficult in more complex situations.[129] Savvy employers could ensure that other incidents or conflicts with the employee take place in-between the protected activity and the employee's eventual termination. It is not hard to imagine that an employer could file any number of false accusations against an employee in an attempt to break the causal chain between the employee's protected activity and the employer's act of retaliation.

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122. *Id.*

123. *Id.* at *1–2.

124. *Id.* at *1.

125. *Id.*

126. *See* Hubbard v. Georgia Farm Bureau Mut. Ins. Co., No. 5:11–CV–290 (CAR), 2013 WL 3964908, at *1 (M.D. Ga. July 31, 2013 (identifying the complaint of unprofessionalism as the fact that defeats the plaintiff's argument of causation).

127. *Id.* at *2.

128. *Id.*

129. *See id.* (finding that when there is any break in the causal chain, there cannot be but-for cause for the original incident).

B. The Foster *Saga: Illustrating the Power of Interpretation*

Interpreting *Nassar* and its effects on the already established jurisprudence of Title VII is both tricky and contentious. The decision of whether to embrace *Nassar* or rebel against it can have dramatic effects on summary judgment. Consider the complex issues presented in the case of *Foster v. University of Maryland Eastern Shore*.[130] In *Foster*, the District of Maryland (Fourth Circuit) reconsidered a denied motion for summary judgment in light of *Nassar*, which was decided shortly after the initial denial of summary judgment.[131] The plaintiff, Ms. Foster, worked as a campus police officer at the University of Maryland Eastern Shore, starting on a six-month probationary period.[132] Soon after she began working at the university, a male colleague made sexual remarks to her and harassed her.[133] The plaintiff complained to two different supervisors and the university conducted an investigation, finding that her claims of sexual harassment had merit.[134] The university disciplined and reassigned the male employee to another location, but did not fire him.[135] Then, when Foster's probationary period was set to end, the university extended the period by another six months.[136] After an injury, the university placed Foster on light duty and denied her request to attend a training session.[137] At the end of the probationary period, the university decided to terminate Foster's employment, stating "that it 'had some concerns about [Ms. Foster's] work performance,' her use of 'almost all of her

130. *See* Foster v. Univ. of Md, E. Shore, 908 F. Supp. 2d 686, 708 (D. Md. 2012) [hereinafter *Foster I*] (denying summary judgment against a plaintiff's retaliation claim where the plaintiff produced sufficient evidence to establish a question of fact as to the issue of causation).

131. *See* Foster v. Univ. of Md. E. Shore, Civil No. TJS–10–1933, 2013 WL 5487813, at *1 (D. Md. Sept. 27, 2013) [hereinafter *Foster II*] (granting summary judgment against the plaintiff's retaliation claim on reconsideration because the plaintiff failed to produce sufficient evidence to satisfy the heightened "but-for" causation standard under *Nassar*).

132. *Id.* at *1.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Foster II,* Civil No. TJS–10–1933, 2013 WL 5487813 at *1.

accrued sick leave and personal leave' and her inflexibility with regard to scheduling."[138] Foster then brought several claims against the university, including a Title VII retaliation claim.[139]

On the issue of causation, the district court originally determined that "while perhaps Plaintiff does not make the strongest claim of retaliation, and although the jury ultimately may reject her claim, these incidents provide sufficient evidence of 'retaliatory animus' to generate a jury question."[140] The court also found evidence of pretext, which cast doubt on the university's proffered legitimate reasons for terminating Foster.[141] The defendant claimed that it had fired Foster because of her inflexibility in regards to scheduling and also dissatisfaction with her work performance.[142] The defendant, however, failed to provide documentation to support this claim and one of Foster's supervisors directly denied both allegations.[143] The conflicting evidence raised a jury question that allowed Foster to survive summary judgment.[144]

Upon reconsideration, the court found this same evidence insufficient to meet the heightened standard of causation after *Nassar*.[145] The court acknowledged the weakness of the defendant's reasons for terminating the plaintiff, and even expressed confusion on how *Nassar* could be applied to pretextual evidence: "It is difficult to understand how *Nassar*'s heightened standard of causation could apply at the pretext stage of the *McDonnell–Douglas* analysis."[146] However, the court decided that the pretextual evidence—which was strongly in Foster's favor—could not be used to establish but-for causation because "[a] reasonable jury might disbelieve UMES's stated reasons for

138. *Id.* (internal citation omitted).

139. *Id.*

140. *Foster I*, 908 F. Supp. 2d 686, 708 (D. Md. 2012).

141. *Id.* at 711.

142. *Id.* at 709.

143. *Id.*

144. *Id.* at 711.

145. *Foster II*, Civil No. TJS–10–1933, 2013 WL 5487813, at *7 (D. Md. Sept. 27, 2013).

146. *Id.* at *6 n.6.

terminating her, but no reasonable jury could believe that but-for Ms. Foster's complaint, she would not have been terminated."[147]

However, Foster's saga did not end there. When the Fourth Circuit weighed in on the issues presented by *Nassar* in 2015, the Court of Appeals reversed the district court and found that its reasoning pre-*Nassar* had been correct.[148] In fact, the Fourth Circuit took the opportunity to strongly indicate that it has no intention of altering its Title VII jurisprudence in light of *Nassar*.[149]

> *Nassar's* but-for causation standard is not the "heightened causation standard" described by the district court, and does not demand anything beyond what is already required by the *McDonnell Douglas* "real reason" standard. A plaintiff who can show that retaliation "was the real reason for the [adverse employment action]," will necessarily be able "to show that the harm would not have occurred in the absence of-that is, but for-the defendant's conduct[.]" . . . . We conclude, therefore, that the *McDonnell Douglas* framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action. *Nassar* does not alter the legal standard for adjudicating a *McDonnell Douglas* retaliation claim.[150]

The *Foster* cases illustrate that *Nassar* can have a dramatic effect on a plaintiff's ability to survive summary judgment. How a district or circuit interprets the meaning of "but-for" causation can alter the result of summary judgment even when the facts do not change.

C. Effects on Motions to Dismiss

Additionally, a strict approach to applying *Nassar* opens up attacks from defendants not only at the summary judgment

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147. *Id.* at *6.

148. *See* Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 252 (4th Cir. 2015) [hereinafter *Foster III*] (reversing the district court's grant of summary judgment against the plaintiff in *Foster II* and restoring the district court's original denial of summary judgment against the plaintiff in *Foster I*).

149. *See id.* (commenting that *Nassar* did not have an effect on the outcome of Foster's case).

150. *Id.* (internal citations omitted).

stage, but also the motion to dismiss stage. Traditionally, "[a] plaintiff alleging retaliation faces a low hurdle at the motion to dismiss stage."[151] "[W]hile a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, . . . '[f]actual allegations must be enough to raise a right to relief above the speculative level[.]'"[152] The protection of a low bar, however, can be weakened by a strict application of Nassar.[153] For example, in *Lance v. Betty Shabazz International Charter School*,[154] the Northern District of Illinois (Seventh Circuit) determined that the plaintiff had not pled but-for causation because there were other legitimate reasons why he might have been fired besides retaliation.[155] The plaintiff alleged that he had filed a complaint because he believed that his four-year-old son was being discriminated against by the kindergarten teacher because of his age (only five-year-olds were supposed to be in the class but the child was four) and his race.[156] However, the plaintiff was also a teacher at the school, and a memo from the principal accused the plaintiff of starting an altercation with another teacher over school supplies, using inappropriate language in front of students, and missing four staff meetings.[157] The plaintiff maintained that these allegations were false and sent to threaten him after he filed the complaint against the school.[158] Also, while he admitted to being involved in a physical altercation, he insisted that he had not been the aggressor.[159]

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151. *See* Teliska v. Napolitano, 826 F. Supp. 2d 94, 100 (D.D.C. 2011) (collecting cases).

152. *See* Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–15 (2002); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

153. *See* Lance v. Betty Shabazz Int'l Charter Sch., No. 12 CV 4116, 2014 WL 340092, at *8–9 (N.D. Ill. Jan. 29, 2014) (granting defendant's motion to dismiss because of a lack of but-for causation).

154. *Id.* at *1 (N.D. Ill. Jan. 29, 2014).

155. *See id.* at *9 ("Given the quantity and severity of the alternative reasons for Lance's termination, the Court concludes that Lance has not alleged facts sufficient to support a claim that the filing of his . . . complaint with the Department of Education was a but-for cause of the school's decision to fire him.").

156. *Id.* at *2–3.

157. *Id.* at *3.

158. *Id.*

159. Lance v. Betty Shabazz Int'l Charter Sch., No. 12 CV 4116, 2014 WL

As stated above, the court relied heavily on *Nassar* to find a lack of causation between the filing of the complaint against the school and the plaintiff's termination.[160] Because the school might have fired the plaintiff because of his fighting with another teacher, his inappropriate behavior, or his failure to attend certain staff meetings, his complaint could not have been the but-for cause.[161] However, as the First Circuit has noted, assessing the plausibility of any alternative explanations for an employer's behavior is a task better left for the summary judgment stage.[162]

> [I]t is not for the district court or us to weigh now the merits of these explanations [by the defendant] against the merits of the explanations alleged by [the plaintiff]. Rather, [the plaintiff] may proceed to discovery because she has alleged sufficient facts to make the non-innocent explanation of these facts plausible.[163]

While the plaintiff in *Lance* alleged a scenario where the school had both legitimate and non-legitimate reasons to fire him, "the issue presented by a motion to dismiss is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[164]

Taking *Lance* in its entirety, it is likely that the judge used *Nassar* to grant the motion to dismiss because he distrusted the plaintiff.[165] The judge expressed frustration that the plaintiff took the opportunity to amend his complaint in order to delete facts that the judge had previously identified as fatal to his case, and to allege new and contradictory facts.[166] However, the judge also

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340092, at *3 (N.D. Ill. Jan. 29, 2014)

160. *See id.* at *8–9 (granting defendant's motion to dismiss because of a lack of but-for causation).

161. *See id.* at *9 (stating that when the court views the complaint on the whole, it sees a teacher involved in several various conflicts at school).

162. *See* Rodriguez-Vives v. P.R. Firefighters Corps, 743 F.3d 278, 286 (1st Cir. 2014) (admonishing the district court for considering other possible motives by the defendant at the motion to dismiss stage).

163. *Id.*

164. Rochon v. Gonzales, 438 F.3d 1211, 1216 (D.C. Cir. 2006).

165. *See Lance*, No. 12 CV 4116, 2014 WL 340092, at *1 ("[T]he Court has some skepticism regarding the wholesale deletion of a number of previously-key incidents that are missing from this new version of events, particularly since the Court identified them as fatal to Plaintiff's claims in the first instance.").

166. *Id.*

acknowledged that he could not officially consider the alterations made between the original complaint and the amended complaint.[167] *Lance* illustrates that one of the goals of the majority in *Nassar*—that judges have more tools to dismiss cases they believe to be frivolous—is achieved through a heightened causation standard for Title VII retaliation. [168]

V. Escape Hatches to Circumvent Nassar

A. The Convincing Mosaic Test

As mentioned above, one of the primary causes of concern about a but-for standard of causation for Title VII retaliation is that employers generally do not provide direct evidence of their intent to discriminate.[169] The Seventh Circuit has an evidentiary standard that allows judges who are resistant to adhering to *Nassar* strictly—generally where they suspect that an employer has discriminated, but the employer was also savvy enough to produce little evidence of their intent—to circumvent the restrictions of *Nassar* through the "convincing mosaic" standard.[170] A common, but not exhaustive, list of what types of evidence might be considered under the convincing mosaic test includes:

> (1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive better

167. *See id.* ("[T]he Court may consider only the first amended complaint") (citing Scott v. Chuhak & Tecson, P.C., 725 F.3d 772, 782–83 (7th Cir. 2013))).

168. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531 (2013) ("[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by . . . [the] courts to combat workplace harassment.").

169. *See supra* Part III (discussing courts' use of the temporal proximity factor in light of the general absence of direct evidence of discriminatory intent).

170. *See* Hobgood v. Ill. Gaming Bd., 731 F.3d 635, 643 (7th Cir. 2013) (defining a convincing mosaic as a collection of "evidence from which an inference of retaliatory intent could be drawn.").

> treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action.[171]

Given the general lack of "smoking gun" evidence left by employers,[172] the convincing mosaic standard is an important tool for plaintiffs to survive summary judgment. Plaintiffs that adopt this approach, however, should be aware that alleging only one type of suspicious evidence would generally not be enough to convince a court that she has met the standard.[173] In this instance, quantity, in addition to quality, of the evidence is important because courts look at the case as a whole; the more suspicious evidence a plaintiff can point to in order to bolster her argument, the better. [174]

While the Seventh Circuit developed the convincing mosaic standard, the test has not yet been adopted by most circuits, with the exception of both the First and Eleventh Circuits.[175] The test, which is credited to Judge Posner, predates *Nassar*.[176] Over time, Seventh Circuit judges who expressed frustration with the rigidity of the *McDonnell Douglas* framework began to utilize the test in order to circumvent that framework.[177] The convincing mosaic standard is considered a direct method of establishing a prima facie case and therefore allows a plaintiff to bypass the

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171. *Id.* at 643–44.

172. *See id.* at 643 ("Such admissions of illegal discrimination and retaliation are rare, so it is not surprising that Hobgood has not presented a 'smoking gun' confession by [the defendant].").

173. *See id.* at 644 (stating that cases that point to only one piece in the mosaic are "legion" and often fail to meet the convincing mosaic standard).

174. *See id.* at 644–46 (examining the evidence and stating that while some of the evidence is ambiguous, there is also *ample* evidence for a jury to infer wrongdoing by the defendant).

175. *See* Ahmed v. Johnson, 752 F.3d 490, 497–98 (1st Cir. 2014) (adopting the convincing mosaic standard for status-based discrimination claims); *see also* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (adopting the convincing mosaic standard from the Seventh Circuit for status-based discrimination claims).

176. *See* Troupe v. May Dept. Stores Co., 20 F.3d 734, 737 (7th Cir. 1994) (showing the first instance of the term "convincing mosaic" in an opinion written by Judge Posner).

177. *See* Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) ("The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside.").

McDonnell Douglas test.[178] In Judge Wood's unusual concurrence in *Coleman v. Donahoe*[179]—unusual in that the three judge panel signed both a unanimous majority opinion and a unanimous concurrence—she wrote "separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike."[180] As Judge Hamilton—who also signed the concurrence—later added in an address at the 2013 Annual Meeting of the American Association of Law Schools, the purpose of the concurrence was to call attention to common misuse of the *McDonnell Douglas* framework in order to keep plaintiffs from reaching juries.[181] Judge Hamilton explained that, while it serves a legitimate function, it is important to remember that the *McDonnell Douglas* framework is "not the actual legal standard that a plaintiff must satisfy."[182] As a result, he argued that judges should not be constrained by the framework and should deal with employment discrimination cases in a manner similar to negligence or criminal cases by taking the evidence on the whole, rather than checking for a set list of circumstances that count as discrimination.[183]

While the convincing mosaic standard shows great promise for plaintiffs seeking to survive summary judgment, it is also unlikely that this method will prevail in courts that apply *Nassar* strictly. For example, in *Foster II*,[184] the United States Court for the District of Maryland examined the plaintiff's argument that

178. *See id.* at 862 (explaining that the plaintiff used the indirect method to prove her status-based claims, thus requiring the *McDonnell Douglas* framework, while using the direct method for her retaliation claims did not).

179. *Id.* at 862–63 (Wood, J., concurring).

180. *Id.* at 863.

181. *See* David F. Hamilton, Judge for the United States Court of Appeals for the Seventh Circuit, *Toward More Flexible Methods of Proof in Employment Discrimination*, Address to the Association of American Law Schools, Section on Employment Discrimination Law (2013), *in* 17 EMP. RTS. & EMP. POL'Y J. 195, 202 ("I hope that this opinion for the court in *Coleman* will be helpful in limiting misuse of the *McDonnell Douglas* test, especially at the summary judgment stage, and will also provide some useful points on critical issues where McDonnell Douglas is often misapplied.").

182. *Id.* at 203.

183. *See id.* at 203–04 (discussing the meaning of the *Coleman* concurrence and the reason for the convincing mosaic standard).

184. *Supra* Part IV.

she presented a convincing mosaic and found it insufficient to meet the but-for standard.[185] The court decided that while the plaintiff's evidence might have established a "causal link" between her protected activated and her employer's adverse actions, a causal link is not enough.[186] Therefore, the convincing mosaic standard serves as a viable alternative only when district judges are concerned that strict application of *Nassar* would result in a false negative.[187]

B. The Second Circuit's Rephrasing of the But-For Burden Under Kwan

In *Nassar*, the Supreme Court defined the but-for standard of causation as one which "requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct."[188] As discussed above,[189] some courts interpret this to mean that if an employer proffers just one legitimate reason for taking action against the employee, the employer wins summary judgment.[190] However, the Second Circuit determined that *Nassar* does not mean that a motivating factor standard is entirely inconsistent with the principles of but-

185. *See id.* (discussing the *Foster* saga).

186. *See Foster II,* Civil No. TJS–10–1933, 2013 WL 5487813, at *5 ("While the evidence may have been sufficient to allow a reasonable jury to find a 'causal link' between her complaint and her termination, it is wholly insufficient to allow a reasonable jury to find that her protected activity was the determinative reason for her termination under *Nassar*.").

187. *Cf.* Hamilton, *supra* note 181, at 197 (expressing the view that judges who use the *McDonnell Douglas* framework too rigidly often grant summary judgment to employers when it is not justified and place an undue burden on plaintiffs).

188. *See* Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013) (quoting RESTATEMENT (FIRST) OF TORTS § 431 cmt. a (1934)).

189. *Supra* Part IV.

190. *See* Rattigan v. Holder, 982 F. Supp. 2d 69, 82–83 (D.D.C. 2013) ("Prior to *Nassar* . . . it might have been possible for a jury to find liability for decisions based on a mixture of legitimate and illegitimate considerations because this mixture would show that retaliatory animus was a motivating factor."); *see also* Hubbard v. Ga. Farm Bureau Mut. Ins. Co., Civil No. No. 5:11–CV–290 (CAR), 2013 WL 3964908, at *1 (M.D. Ga. July 31, 2013) (deeming that a single intervening event that *might* have been legitimate grounds for firing the employee was enough to break the causal chain under *Nassar*).

for causation.[191] Specifically, in *Kwan v. Andalex Group LLC*,[192] the Second Circuit stated that:

> The Supreme Court recently held that a plaintiff alleging retaliation in violation of Title VII must show that retaliation was a "but-for" cause of the adverse action, and not simply a "substantial" or "motivating" factor in the employer's decision. However, "but-for" causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive.[193]

This interpretation permits the court to conclude that many events might have led to the adverse action against the employee, but if the driving force behind the chain of events or ultimate decision was retaliation, the plaintiff survives summary judgment.[194] The Second Circuit in *Kwan* also expressed concern that "[t]he determination of whether retaliation was a 'but-for' cause, rather than just a motivating factor, is particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact."[195] Based on the forgoing, the court in *Kwan* appeared to rebel against the restrictiveness of the *Nassar* standard and, as a result, any court

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191. *See* Kwan v. Andalex Grp. LLC, 737 F.3d 834, 844–46 (2d Cir. 2013) ("A plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action.").

192. *See id.* at 834 (finding summary judgment improper on a retaliation claim because the employee's complaint to a company's officer portrayed her concerns to the company as a whole and the time period from the employee's complaint to her termination was sufficiently short to make a prima facie case for causation).

193. *Id.* at 845–46 (internal citations omitted).

194. *See id.* at 846 n.5 ("Requiring proof that a prohibited consideration was a "but-for" cause of an adverse action does not equate to a burden to show that such consideration was the "sole" cause."); *see also* Chan v. Donahoe, Civil No. 13–CV–2599, 2014 WL 6844943, at *25–26 (E.D.N.Y Dec. 4, 2014) (applying *Kwan* and finding that the plaintiff had established a chain of events that could lead a reasonable jury to believe that his employer built a disciplinary record against him motivated by discriminatory animus).

195. *Id*. at 846 n.5.

that is persuaded or bound by *Kwan* is more likely to deny summary judgment.[196]

Of course, district courts within circuits that more strictly adhere to *Nassar* have criticized *Kwan* for its liberal and divergent interpretation of but-for causation.[197] For example, the Northern District of Alabama (Eleventh Circuit) has openly rejected *Kwan*, and stated that *Nassar* requires retaliation to be the sole cause of an employee's termination.[198] The court criticized *Kwan* and other like-minded courts for openly combatting the Supreme Court of the United States' interpretation of Title VII: "While some courts have continued to label their post-*Gross*, *Nassar*, and *Burrage* causation standard as 'but-for,' in reality they are requiring nothing more than a 'positive incremental contribution,' since without each contribution, who can say that the result being examined would have been reached. This is no more than what was required by the now-rejected 'motivating factor' standard."[199] In the growing circuit split over *Nassar*, whether a court cites *Kwan* approvingly or disapprovingly is a good indication of whether that district is rebelling against or strictly adhering to *Nassar*.[200]

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196. *See* Timothy M. Holly, *The Causation Standard for Retaliation Claims Under Employment Discrimination Statutes: Ambiguity of "Central Importance,"* 15 DEL. L. REV. 71, 78–79 (comparing the Second Circuit approach with the Third Circuit's approach and concluding that plaintiffs are more likely to survive summary judgment in the former).

197. *See, e.g.*, Hendon v. Kamtek, Inc., No. 2:14–CV–2255, 2015 WL 4507990, at *5–6 (N.D. Ala. July 24, 2015) (considering the plaintiff's argument under *Kwan* and rejecting it as contrary to *Nassar*).

198. Hendon v. Kamtek, Inc., No. 2:14–CV–2255, 2015 WL 4507990, at *5–6 (N.D. Ala. July 24, 2015).

199. *Id.*

200. *Compare id.* (rejecting *Kwan* and granting motion to dismiss), *with* Young v. CareAlliance Health Serv.s, No. 2:12–2337, 2014 WL 4955225, at *13 (D.S.C. Sept. 29, 2014) (referencing *Kwan* as the standard for but-for causation post-*Nassar* and denying summary judgment).

VI. Recommendations Concerning the Consequences of Nassar *and the Correct Application of the New Standard*

A. Congressional Intent and Another Amendment to Title VII

One question that any reader of *Nassar* should immediately ask herself is: did Congress actually intend for Title VII retaliation claims to be treated differently from status-based claims? As Justice Ginsburg noted in her dissent, the answer is almost certainly no.[201] When Congress passed the Civil Rights Act of 1991, it reaffirmed our nation's commitment to deterring discrimination in the workplace.[202] Congress expressed deep concerns that the Supreme Court of the United States was inappropriately cutting back on the protections that Congress intended to give to employees.[203] In *Price Waterhouse*, the Court interpreted the words "because of" in Section 2000e–2(a)(2) to require that an employer's discriminatory intent be a substantial motivating factor behind its adverse action.[204] Congress responded that even adding the word "substantial" to the motivating factor test was a misreading and misunderstanding of Title VII by the Court.[205] Employment decisions often involve multiple considerations and motivations, and Congress made clear that if even one of those considerations is based on discriminatory reasons, that is one too many.[206] It is remarkable—especially in light of *Nassar*—how much of a

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201. *See* Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2535 (2013) (Ginsburg, J., dissenting) ("[T]he Court has seized on a provision, § 2000e–2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation.").

202. *See* H.R. Rep. No. 102-40, pt. 2, at 17 (1991) (stating that *Price Waterhouse* threatened to "undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination.").

203. *See id.* at 2 ("The bill responds to a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of these important federal laws.").

204. Price Waterhouse v. Hopkins, 490 U.S. 228, 249–50 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e–2(m) (1991).

205. *See* H.R. Rep. No. 102-40, pt. 2, at 17 (discussing why the Civil Rights Act of 1991 would overturn *Price Waterhouse*).

206. *See id.* at 18 (expressing strong disapproval of the Court's interpretation because it does not hold employer's liable for discrimination).

reaction a single word, "substantial," sparked from Congress; particularly when *Price Waterhouse* did not raise the standard of causation as high as the Court would later do in *Nassar*.[207] The Court in *Price Waterhouse* explicitly stated that to "construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."[208] Yet, twenty-four years later the Court in *Nassar* did just that, taking "because of" to mean "but-for causation."[209] If Congress felt that the Court grossly misunderstood the words "because of" when it required a substantial motivating factor test be applied to status-based claims, then Congress should now feel that the Court's interchanging of "because of" to mean "but-for causation" is an even more egregious misreading of Title VII.

While the majority in *Nassar* tried to explain away the disregard of Congressional intent by pointing out that status-based discrimination claims and retaliation claims appear in separate sections of Title VII,[210] this argument does not hold water. As Justice Ginsburg stated, "the Court ascribes to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature's effort to fortify the protections of Title VII."[211] In fact, when Congress passed the Civil Rights Act of 1991, it acknowledged that the changes to certain provisions of Title VII were not to be limited solely to those provisions.[212] Congress stated that the clarifications it made to the legal standards of Title VII should be applied to any similar claims based on

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207. *Compare Price Waterhouse*, 490 U.S. at 249–50 (stating that the causation standard should be substantial motivating factor), *with* Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013) (stating that the causation standard should be "but-for.").

208. *See Price Waterhouse*, 490 U.S. at 240 (quoting 42 U.S.C. § 2000e–2(a)(1), (2) (1964)).

209. *See* Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013) (stating that "because of" means "but-for.").

210. *See id.* at 2529 ("When Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within § 2000e–2, which contains Title VII's ban on status-based discrimination, § 2000e–2(a) to (d), (*l*), and says nothing about retaliation.").

211. *Id.* at 2541 (Ginsburg, J., dissenting).

212. *See* H.R. Rep. No. 102-40, pt. 2, at 4 (1991) (discussing the relationship between the amendments in the Civil Rights Act of 1991 and other similar laws).

discrimination, such as the Americans with Disabilities Act (ADA) and the ADEA.[213] It is unlikely that Congress would intend for its amendments to apply with equal force to other statutes, but not apply consistently throughout the subsections of a single statute.

The most straightforward way to resolve the conflict between the Congressional intent of the Civil Rights Act and the ruling in *Nassar* is obviously another amendment to the statute, clarifying that Section 2000e–(2)(m) applies to retaliation. Justice Ginsburg even called on Congress to correct the Court.[214] However, when Congress passed the Civil Rights Act of 1991, it intended to correct a long string of misrulings by the Court, not just *Price Waterhouse*.[215] While the Court decided another case, *Vance v. Ball State University*,[216] around the same time as *Nassar*, and which also narrowed the application of Title VII,[217] two cases may not be enough to prompt Congressional action.

B. The "Correct" Application of Nassar

Regardless of whether Congress decides to amend Title VII in the future, judges must currently decide how to deal with *Nassar* and its effects on pre-trial motions. If one ignores policy concerns and cares only about strict adherence to the ruling in *Nassar*, then the interpretations given by the Fifth and Eleventh Circuits are the closest in line with that thinking.[218] As discussed above, both circuits have case law indicating that their outcomes will be heavily influenced by *Nassar*.[219] District courts in both

213. *See id.* ("The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act.").

214. *See Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) ("Today's misguided judgment . . . should prompt yet another Civil Rights Restoration Act.").

215. *See* H.R. REP. NO. 102-40, pt. 2, at 2 (noting that the Act will correct several Supreme Court cases).

216. Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

217. *See id.* at 2454 (holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.").

218. *See supra* Part IV (discussing a strict application of *Nassar*).

219. *Supra* Part IV.

circuits were willing to reconsider motions for summary judgment after *Nassar*, and decide that claims that had previously survived summary judgment beforehand were no longer sufficient to go to trial.[220] In these cases, the new but-for standard of causation created a hurdle that the plaintiffs simply could not overcome.[221] This result seems more in line with the goals of the majority in *Nassar*: to reduce the number of "frivolous" lawsuits filed by plaintiffs.[222] Yet, while the majority may have been correct that the number of retaliation claims filed by plaintiffs has risen over the years,[223] it also ignores that empirical evidence suggests that discrimination is still alive and well in the workplace.[224]

Additionally, the practice of applying the causation standard during the first stage of the *McDonnell Douglas* framework is also probably more in line with the majority's intent. The case law indicates that when a plaintiff bears the burden of proving but-for causation during the establishment of the prima facie case, she is less likely to survive summary judgment.[225] This second method, which has been adopted by the Third and Seventh Circuits, and most likely the Fifth as well, will require plaintiffs to identify particularly obvious evidence of discrimination because the courts will be less inclined to draw inferences in the plaintiff's favor.[226] This can be especially difficult for plaintiffs, however, because employers rarely leave

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220. *Id.*

221. *Id.*

222. *See* Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531 (2013) (expressing concern over the number of retaliation claims being filed annually).

223. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2015 http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sept. 14, 2016) (showing a steady growth in number of claims filed and a 2.2% increase in the number of retaliation claims filed from 2012 to 2013).

224. *See, e.g.*, MAJORITY STAFF OF JOINT ECON. COMM., 111TH CONG., WOMEN AND THE ECONOMY 2010: 25 YEARS OF PROGRESS BUT CHALLENGES REMAIN 1 (2010) (noting that in 2009 the weekly wage for a woman was, on average, eighty percent of a comparable man's wages).

225. *See supra* Part II (discussing the effect of *Nassar* on summary judgment); *see also Holly*, *supra* note 196, at 78 ("[U]nlike the Third Circuit, the Second Circuit rejects application of the *Nassar* standard at the *prima facie* level - making it much more likely . . . that pretext will become an issue.").

226. *See supra* Part II (discussing summary judgment).

obvious evidence of their discriminatory intent.[227] If the goal of *Nassar* is to limit a plaintiff's ability to reach the jury, then forcing plaintiffs to prove but-for causation during the establishment of her prima facie case during summary judgment advances this goal.[228]

Finally, as to the issue of temporal proximity, a strict reading of *Nassar* is inconsistent with the continued use of the doctrine. As the D.C. Circuit has noted, the mere presumption that temporal proximity creates is not enough to establish but-for causation.[229] The purpose of temporal proximity is to help combat an employer's ability to hide its intent to discriminate by creating a presumption in the plaintiff's favor when there is suspicious timing of events.[230] However, a presumption does not meet the standard of the sole reason behind an employer's decision that *Nassar* requires.[231] Therefore, a judge who strictly adheres to *Nassar* would most likely be forced to conclude that mere temporal proximity cannot establish a prima facie case of retaliation.

C. The Better Application of Nassar

While a strict application of *Nassar* may be more in line with the intent of the majority in *Nassar*, it is not in line with the intent of the Civil Rights Act.[232] Therefore, this Note encourages

227. *See* Hobgood v. Ill. Gaming Bd., 731 F.3d 635, 643 (7th Cir. 2013) (stating that employers rarely leave "smoking gun" evidence in discrimination cases).

228. *See supra* Part II (showing that establishing causation during the prima facie case often results in summary judgment being granted).

229. *See* Francis v. Perez, 970 F. Supp. 2d 48, 68 (D.D.C 2013) ("Given that plaintiff offers no other evidence beyond temporality of a causal connection, much less a *but-for* causal connection between her alleged protected activity and the challenged actions, the Court concludes that no reasonable jury could infer retaliation") (citations omitted).

230. *See* Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st Cir. 1998) ("[Temporal proximity] is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation.").

231. *See* Williams v. Serra Chevrolet Auto. LLC, 4 F. Supp. 3d 865, 879 (E.D. Mich. 2014) ("Thus, applying the teachings of *Nassar* and *Gross* here, temporal proximity alone is not enough to allow a reasonable inference of 'but-for' causation.").

232. *See supra* Part VI.A (discussing congressional intent).

judges to consider the larger policy concerns behind restricting a plaintiff's access to trial, and instead adopt an approach that allows for some flexibility. The Second Circuit, especially, has put forth several methods for circumventing *Nassar*, including its rephrasing of the rule under *Kwan*.[233] *Kwan*'s phrasing of the rule makes it clear that while an employer might put forth both discriminatory and nondiscriminatory reasons for its adverse actions, the nondiscriminatory reasons do not preclude an employee from bringing suit.[234] This interpretation is consistent with Congressional intent because when amending Title VII Congress stated that "any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability" and "the presence of a contributing discriminatory factor would still establish a Title VII violation[.]"[235]

The Second Circuit is also unique for applying the standard of causation in the last stage of the *McDonnell Douglas* framework.[236] When a court applies the but-for standard of causation during the last stage of the framework in relation to pretext, the case law shows that a plaintiff has an easier time of showing both a prima facie case and pretext.[237] This method appears to limit the role of but-for causation as a gate keeper during summary judgment proceedings because it turns causation into a tie-breaker consideration rather than an immediate hurdle for plaintiffs to cross.[238]

Finally, the Second Circuit also ignores any contradiction between the use of temporal proximity and a but-for standard of causation.[239] Temporal proximity may still establish a prima facie case in the first step of the *McDonnell Douglas* framework, and the issue of causation will not come into play until the last stage

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233. *See supra* Part V.B (examining *Kwan*).

234. *See supra* Part V.B (examining the language of *Kwan*).

235. H.R. REP. NO. 102-40, pt. 2, at 19.

236. *See supra* Part II (discussing summary judgment).

237. *See supra* Part II (showing greater success depending on how courts interpret *Nassar*).

238. *See supra* Part II (illustrating differences).

239. *See supra* Part III (examining the Second Circuit's continued use of temporal proximity).

of the framework.[240] Additionally, the Second Circuit is far from alone in seeing no conflict between these two rules.[241] The Third, Fourth, and Eleventh Circuits have all indicated that they intend to preserve the doctrine of temporal proximity.[242]

All three of the above approaches to *Nassar* illustrate policy concerns regarding the creation of false negatives with a heightened causation standard for retaliation claims. In addition to these interpretations, judges may also want to consider adopting the convincing mosaic test from the Seventh Circuit. This test helps combat savvy employers, who are adept at hiding discrimination, by taking in the totality of the circumstances, not just looking for a single causal link between discrimination and adverse action.[243] As Nancy Gertner, Harvard Law professor and former United States District Judge for the District of Maryland, pointed out, there is a fundamental contradiction when discrimination cases, which revolve around the intent of the employer, are often disposed of at the summary judgment stage.[244] Other cases that center on intent, such as contract or tort, require disputes over intent to be settled by juries, while more often in discrimination cases judges are making that determination themselves.[245] Supreme Court cases like *Nassar* give judges tools to ignore context or implicit biases, and as a result a "complex social phenomenon—discrimination—is disaggregated, or 'sliced and diced,' into unrecognizable and sometimes unintelligible boxes, determined by the judge, not the jury, with predictable results."[246]

At the very least, the convincing mosaic test helps combat this problem by forcing a judge to look at context and treat

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240. *See supra* Part III (discussing the method used by the Second Circuit).

241. *See supra* Part III (comparing other circuits).

242. *See supra* Part III (comparing other circuits).

243. *See supra* Part V.A (discussing difficulties confronting plaintiffs).

244. *See* Nancy Gertner, *Loser's Rules*, 122 YALE L.J. ONLINE 109, 112 (2012) ("Employment discrimination cases, in contrast, are typically resolved on summary judgment, although discriminatory intent may be more difficult to identify on a cold record than is the intent of a contract's drafters or a putative tortfeasor's state of mind.").

245. *See id.* (explaining that there is a discrepancy between how intent is treated in tort or contract compared to discrimination cases).

246. *Id.* at 123.

discrimination claims similarly to tort or contract claims. It should also make it harder for employers to "game" the system because an employee may point to multiple indicators of discrimination and not just a "smoking gun."

VII. Conclusion

Nassar was decided contrary to the Congressional intent behind the Civil Rights Act. Discrimination in the workplace is often subtle, with savvy employers building pretextual cases against employees with the intention of justifying discriminatory behavior. The ruling of the Supreme Court makes it easier for this subtlety to go by unchecked. While I agree with Justice Ginsburg that the easiest solution is for Congress to amend the Civil Rights Act again, I am doubtful that Congress will be spurred to action by anything less than a litany of cases involving Title VII. Therefore, it is up to judges to circumvent the dangers of *Nassar*, and the fundamental unfairness of reducing a complex issue such as discrimination into a rigid checklist of items to be ticked off. While judges should always have the tools to dispense with obviously frivolous claims, the approaches to retaliation taken by the Second and Seventh Circuits show a deeper understanding of the need for flexibility. I would encourage judges to adopt and to continue developing these methods in an effort to realize the spirit of the Civil Rights Act and to ensure a fair system where employees can stand up to discrimination without fear of retaliation.