THE CAUSATION STANDARD FOR RETALIATION CLAIMS UNDER EMPLOYMENT DISCRIMINATION STATUTES: AMBIGUITY OF "CENTRAL IMPORTANCE"

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The United States Supreme Court noted in a recent decision that the proper interpretation and implementation of statutory causation standards in retaliation suits is a matter of "central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[1] Nevertheless, both Delaware and federal law remain unclear on this vital issue. Unless Delaware's Discrimination in Employment Act (the "DDEA")[2] is either amended to resolve this ambiguity, or the Delaware Supreme Court resolves the ambiguity by judicial opinion, Delaware's statutory causation standards will remain subject to significantly different interpretations and potentially-inconsistent implementation. This article discusses retaliation claims, identifies ambiguities that make this issue of central importance unclear and ripe for legislative clarification, and proposes a resolution.

I. THE GROWTH AND POTENTIAL ABUSE OF RETALIATION CLAIMS

Generally speaking, a retaliation claim under employment discrimination statutes arises when an employer takes an adverse employment action against an employee because the employee has engaged in a protected activity.[3] Protected activity includes complaining internally to an employer about a perceived violation of the applicable statute (*i.e.,* opposition activity), complaining externally about such issues to an administrative agency such as the Delaware Department

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1. University of Tex. Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2531 (2013). The *Nassar* Court vacated and remanded the Fifth Circuit's affirmance of a damage award on Title VII retaliation claims following a jury trial. The Fifth Circuit thereafter (in a non-precedential opinion) vacated the district court's judgment in its entirety and remanded for further proceedings consistent with the opinion of the Supreme Court. *Nassar*, 537 F. App'x 525 (5th Cir. 2013).

2. Del. Code Ann. tit. 19 § 711 *et seq.*

3. Specifically, to establish a prima facie claim for retaliation under Title VII, a plaintiff must show that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) the protected activity and the adverse employment action were causally linked. Moore v. Phila., 461 F.3d 331, 340–41 (3d Cir. 2006) (explaining that "'opposition' to unlawful discrimination must not be 'equivocal' and that protected activity does not include objective reporting of existence of discrimination or attempting to serve as a neutral intermediary"); Wellman v. DuPont Dow Elastomers, L.L.C., 414 F. App'x 386, 389 (3d Cir. 2011) (granting summary judgment for employer and finding that even if a reasonable jury could conclude that plaintiff subjectively found work environment to be hostile and abusive, plaintiff's allegations failed to give rise to a claim when viewed objectively).

of Labor or Equal Employment Opportunity Commission, or certain involvement in such complaints (*i.e.,* participation activity). As a threshold matter, just as not all "harassment" or "hostile work environments" is unlawful, not all "retaliation" is unlawful.[4] For a claim of retaliation to be legally cognizable, the activity causing the adverse employment action must be protected, and a complaint is not cloaked with protected status merely by including the words "harassment" or "hostile work environment".[5] In the Third Circuit, whether activity is opposition activity or participation activity, an employee must hold an objectively reasonable belief, in good faith, that the activity at issue is unlawful under the operative statute.[6] Claims can be dismissed due to the absence of a protected activity.[7] Thus, the issue of "protected activity" should be considered carefully when analyzing a claim of retaliation. This article, however, assumes the existence of protected activity and an adverse employment action and focuses on the issue of causation.

While employers would be prudent to give all complaining employees the benefit of the doubt as to their good faith when addressing a complaint, it is common enough for employees to make an unfounded charge of racial, sexual or religious discrimination to forestall a sometimes lawful action (*e.g.,* being fired, given a lower pay grade, or transferred to a different assignment or location) and allege discrimination, that the United States Supreme Court identified that abuse of the laws.[8] The Supreme Court found it to be contrary to Congressional intent to allow an employee to prevent the undesired change in employment circumstances by vesting that employee with a cognizable legal claim simply through evidence upon which a jury might reasonably believe that retaliation was a motivating factor in the action.

The Court recognized that a lessened causation standard could contribute to the filing of frivolous claims, which in turn would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harass-

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4. Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130 (3d Cir. 2006); Stingley v. Den-Mar, Inc., 2008 WL 4185828, at *4 (N.D. Tex. Sept. 10, 2008) (granting summary judgment in favor of employer where complaint of "hostile environment" was not complaint of unlawful hostile environment but rather generally about "rude, aggressive tone" and other rude conduct); Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 484-85 (5th Cir. 2008) (no protected activity when complaint was about "petty slights, minor annoyances, and simple lack of good manners"); Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 348-49 (5th Cir. 2007) (email and statements to supervisor that failed to mention unlawful employment practice not protected activity); Harris-Childs v. Medco Health Solutions, Inc., 169 F. App'x 913, 916 (5th Cir. 2006) (complaint to employer of general harassment not protected activity); Evans v. Texas Dept. of Transp., 547 F.Supp.2d 626, 654-55 (E.D. Tex. 2007) (complaint of hostile work environment based on rude behavior of supervisor, with no mention of Title VII-protected characteristic, not protected activity).

5. Jacques-Scott v. Sears Holding Corp., 2013 WL 2897427, at *4 n.69, *9 (D. Del. June 13, 2013) (granting summary judgment for employer and explaining that complaint of "hostile work environment" is not necessarily protected); *Curay-Cramer*, 450 F.3d at 135 (affirming summary judgment for employer and stating, "[a] general complaint of unfair treatment is insufficient to establish protected activity under Title VII"); Barber v. CSX Distribution Servs., 68 F. 3d 694, 701-02 (3d Cir. 2006) (affirming judgment for employer on retaliation claim where letter to human resources department neither "explicitly or implicitly" alleged protected characteristic and, therefore, was unprotected as a matter of law).

6. Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006); Clark County v. Breeden, 532 U.S. 268, 271 (2001) (per curiam) (rejecting retaliation claim where "[n]o reasonable person could have believed that" the underlying incident complained about "violated Title VII's standard" for unlawful discrimination); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir.1996) (retaliation plaintiff must "act[ ] under a good faith, reasonable belief that a violation existed"); Rumanek v. Independent School Management, Inc., 2014 WL 104966, at *6 (D. Del. Jan. 10, 2014).

7. *Jacques-Scott,* 2013 WL 2897427, at *4 n.69, *9 (granting summary judgment for employer and explaining that complaint of "hostile work environment" is not necessarily protected); *Rumanek*, 2014 WL 104966, at *5 (granting partial summary judgment due to absence of protected activity). The claims surviving summary judgment in the *Rumanek* case (*i.e.,* a retaliation claim under Title VII and a retaliation claim under the DDEA) failed upon a unanimous jury verdict in favor of Independent School Management, Inc.

8. *Nassar*, 133 S. Ct. at 2532.

ment.[9] Moreover, as claims of retaliation are filed with ever-increasing frequency, the issue of causation takes the front stage in deciphering meritorious cases. Indeed, the number of retaliation claims filed with the EEOC nearly doubled, from just over 16,000 in 1997 to over 31,000 in 2012; and in 2013 it surpassed all other discrimination claims except race.[10] With this reality as a backdrop, the causation standard in retaliation claims has undergone a significant overhaul recently, favoring employers (or rather disfavoring what the Court determined to be unintended abuse of employment laws by employees).

Federal law includes two statutes that serve as the primary source of potential liability for private employers when it comes to age, race or color, national origin, and sex.[11] Age issues are addressed in the Age Discrimination in Employment Act of 1967 ("ADEA").[12] Most other protected classes are addressed in Title VII of the Civil Rights Act of 1964 ("Title VII").[13] Both the ADEA and Title VII prohibit retaliation; and give private causes of action for unlawful retaliation. Both statutes require proof (by a preponderance of the evidence) of causation. The question has emerged as to what level of causation is required – a motivating factor or a "but-for" factor; and, where a "but-for" factor, what exactly does that mean?

II. HEIGHTENED CAUSATION STANDARD FOR FEDERAL AGE DISCRIMINATION AND RETALIATION CLAIMS

The ADEA provides that "'[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.'"[14] In analyzing the meaning of "because of", the Supreme Court in *Gross* stated that the ordinary meaning of "'because of'" is "'by reason of'" or "'on account of.'"[15] Thus, the "requirement

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9. *Id.* at 2531-32.

10. *Id.* (citing EEOC, Charge Statistics FY 1997 Through FY 2012, http://www.eeoc. gov/eeoc/statistics/enforcement/charges.cfm).

11. For example, race claims can also be brought under federal law that prohibits race discrimination in contracting. 42 U.S.C. § 1981. Such claims can be brought by both employees and independent contractors. Brown v. J. Kaz, Inc., 581 F.3d 175 (3d Cir. 2009). Section 1981 encompasses retaliation claims. Solomon v. Philadelphia Newspapers, Inc., 2009 WL 215340, at *2 (3d Cir. Jan. 30, 2009) (citing CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1961 (2008)).

12. 29 U.S.C. § 621 *et seq.*

13. 42 U.S.C. § 2000e *et seq.* Other statutes also provide protection against actions that amount to retaliation – including the Americans with Disabilities Act. 42 U.S.C. § 12203(a). The Family and Medical Leave Act also prohibits "retaliation" (although the claim is styled as "discrimination" and there can be multiple types of "retaliation" – including a brand of claim called "interference"). 29 U.S.C. §2615(a)(2); Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005); Ross v. Continental Tire of Americas, LLC, 2013 WL 1628193, at *5 (E.D. Pa. Apr. 16, 2013) (granting employer's motion for summary judgment on FMLA claims and explaining that "retaliation" analysis – not "interference" analysis – applies when leave is granted and claim is that employer retaliated for having taken and returned from leave).

14. 557 U.S. at 176 (quoting § 623(a)(1); emphasis in original).

15. Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176 (2009) (citing 1 Webster's Third New International Dictionary 194 (1966); 1 Oxford English Dictionary 746 (1933); The Random House Dictionary of the English Language 132 (1966)) (emphasis in original).

that an employer took adverse action 'because of' age [meant] that age was the 'reason' that the employer decided to act," or, in other words, that "age was the 'but-for' cause of the employer's adverse decision."[16]

In reaching this decision, the Supreme Court noted that in 1991, Title VII was amended[17] to add a lessened causation standard to claims of discrimination under Title VII, through § 2000e-2(m), which states, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[18] Noting in *Gross* that the ADEA was not amended to add this lessened causation standard, the Court stated that regardless of whether a claim is for age discrimination or for retaliation based on some age-based protected activity, there must be proof that the prohibited criterion was "the but-for cause" of the employer's prohibited conduct.[19] "The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[20] The Court reaffirmed this view in its June 2013 decision in *Nassar*.[21]

This but-for causation standard can be juxtaposed with the causation standard applicable to non-age discrimination claims, in which causation can be established when the complaining party demonstrates protected status was a "motivating factor for any employment practice, even though other factors also motivated the practice."[22] As the Supreme Court stated, "[t]his, of course, is a lessened causation standard."[23]

III. HEIGHTENED CAUSATION STANDARD FOR TITLE VII RETALIATION CLAIMS

Even though the "motivating factor" standard governs Title VII claims based on race, color, religion, sex, or national origin discrimination, the Supreme Court in *Nassar* adopted the higher, but-for standard for Title VII retaliation claims, holding, "[g]iven the lack of any meaningful textual difference between [the Title VII retaliation provision] and [the ADEA discrimination/retaliation provision], the proper conclusion is that Title VII retaliation claims require

16. 557 U.S. at 176. *See also* Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 63–64 & n.14 (2007) (noting that "because of" means "based on" and that " 'based on' indicates a but-for causal relationship"); Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265–266 (1992) (equating "by reason of" with " 'but for' cause").

17. 105 Stat. 1071.

18. 42 U.S.C.A. §2000e-2(m) (emphasis added). Even under this lessened causation standard, if an employee meets the burden of showing that race, color, religion, sex, or nationality was "a motivating factor in the employment action", an employer who can prove that it would still have taken the same employment action will be saved from monetary damages and a reinstatement order. *See Nassar,* 133 S.Ct. at 2526.

19. *Gross*, 557 U.S. at 167-68.

20. *Gross*, 557 U.S. at 180.

21. *Nassar, 1*33 S.Ct. at 2523.

22. 42 U.S.C. §2000e-2(m).

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

proof that the desire to retaliate was the but-for cause of the challenged employment action."[24] Stated differently, a Title VII retaliation claim requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.[25] As noted in the *Nassar* case, this standard may not be met even where the employer expresses consternation in response to the protected activity.[26] But if the adverse employment action would not have been taken in the absence of the protected activity, the standard is met.

On January 27, 2014, the United States Supreme Court, citing *Nassar* and *Gross*, further analyzed the meaning of "because of" and clarified that "but-for causality" means both more than "contributing" and more than "substantial"; and that it was insufficient to establish a "material element and a substantial factor in bringing" about the conduct.[27] The Court stated, however, that where retaliatory animus is the "straw that broke the camel's back", but-for causation exists.[28] Using a sports analogy, the Court described the but-for causation standard as follows:

> Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.[29]

Underscoring that the causation issue is no small point and is intended to be significant in litigation, the Supreme Court expressed concern that a "lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage," which would be "inconsistent with the structure and operation of Title VII."[30]

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24 *Id.* at 2521. Although the *Nassar* Court repeatedly used the word "the" in articulating "the but-for" standard, the *Nassar* Court also referred to the standard as "a but-for cause" of the alleged adverse action by the employer. *Id.* at 2534. Thus, too much should not be read into the use of the word "the" (versus "a").

25. *Id.*

26. *Id.* at 2524 (despite vacating and remanding employee verdict, noting that employee's supervisor "expressed consternation" at employee's complaints about alleged harassment). The *Nassar* Court rejected that application of the but-for standard entitled the employer to judgment as a matter of law. The Court concluded that the issue was "better suited to resolution by courts closer to the facts of this case."

27. Burrage v. United States, 2014 WL 273243, ____U.S. ____ (Jan. 27, 2014). The *Burrage* case is not an ADEA or Title VII case even though the *Gross* and *Nassar* cases and the but-for standard articulated in those cases was discussed. The concurrence in *Burrage* (like the dissent in *Nassar*) understood (or at least characterized) the Court's reading of "because" to amount to "solely because of."

28. *Burrage*, 2014 WL 273243, ____U.S. ____. The *Burrage* Court repeatedly referred to the standard as "a but-for cause" (not "the" but-for cause).

29. *Id.*

30. *Id*. at 2532.

IV. CONTINUING AMBIGUITY ABOUT CAUSATION STANDARD UNDER FEDERAL LAW

Both before and after *Nassar,* courts within the Third Circuit have analyzed retaliation claims under a three-step burden-shifting framework known as the "*McDonnell Douglas* framework."[31] Under this analysis, if an employee establishes a *prima facie* case of retaliation, the employer has the burden to articulate some legitimate, nondiscriminatory reason for its challenged action. The burden then shifts back to the employee to establish pretext.[32] Discrimination claims can proceed differently where there is direct evidence; but courts within the Third Circuit have held that direct evidence does not alter retaliation analysis after the holding in *Nassar*.[33]

At the *prima facie* level of analysis, even prior to *Nassar,* the issue of the employer's proffered reason for its actions should be irrelevant; only becoming relevant if and after the employee meets the standard at the *prima facie* level, because the burden of production does not shift until the employee first meets the burdens at the *prima facie* level.[34] The Third Circuit has stated that the *Nassar* standard applies at the *prima facie* level of a plaintiff's case, at the third of three elements – *i.e.,* the causation prong.[35] Similarly, in January 2014, the United States District Court for the District of Delaware stated that a plaintiff alleging Title VII retaliation must establish that "protected activity must be the 'but-for' cause of the [employer's] alleged retaliatory action under the causation prong of the *prima facie* case."[36]

At the pretext level, prior to *Nassar,* a plaintiff could meet the requisite burden by submitting evidence sufficient to cause a jury either (a) to disbelieve the employer's articulated legitimate reasons or (b) to believe that the allegedly-unlawful reason was more likely than not a "motivating or determinative cause" of the employer's action.[37] Under the first alternative, courts prior to *Nassar* held that pretext could be established through the demonstration of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence."[38] Following *Nassar*, most district

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31. *Rumanek*, 2014 WL 104966, at *4.

32. *Id.*

33. *Id.* at *4 n.4. *See also* Davis v. Pittsburgh Public Schools, 930 F. Supp. 2d 570, 598-99 (W.D. Pa. 2013); Mensah v. Cambridge Sec., SVS, 2014 WL 197898, at *4 (D.N.J. Jan. 14, 2014).

34. *See generally* Hubbell v. World Kitchen, LLC, 688 F. Supp. 2d 401, 434 n.14 (W.D. Pa. 2010) (noting "burden of production does not shift to the defendant … unless the plaintiff is able to establish a prima facie case").

35. Verma v. University of Pennsylvania, 533 F. App'x 115, 119 (3d Cir. Aug. 7, 2013). *See also* Stone v. New Jersey Admin. Off. of the Courts, 2014 WL 260291, at * 2 (3d Cir. Jan. 24, 2014) (applying but-for standard under ADA); Bush v. Donahoe, 2013 WL 4045785, at *18 (W.D. Pa. Aug. 8, 2013) (stating, "under the third prong of the prima facie case, Plaintiff's protected activity must be the "but-for" cause of Defendant's alleged retaliatory action"); Muldowney v. K-Mart Corp., 2013 WL 6061563, at *10 (M.D. Pa. Nov. 18, 2013); Crawford v. George & Lynch, Inc., 2013 WL 6504635, at *12 (D. Del. Dec. 9, 2013) (stating, "protected activity must be the 'but-for' cause of [employer's] alleged retaliatory action under the causation prong of the *prima facie* case").

36. *Rumanek*, 2014 WL 104966, at *5. *See also* Taylor v. Harrisburg Area Comm. College, 2014 WL 347036, at *15 (M.D. Pa. Jan. 30, 2014).

37. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

38. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997).

courts have stated that the second alternative for establishing pretext has been modified such that employees now must establish that but-for the employer's retaliatory bias, the employer would not have taken the adverse employment action.[39]

There appears to be less agreement about application of *Nassar* at the *prima facie* level than at the pretext level. Unlike the Third Circuit, the Second Circuit has recently rejected application of *Nassar* at the *prima facie* level of analysis and placed it only in the pretext level.[40] Thus, the circuits are now split. Differing views on whether *Nassar* applies at the *prima facie* level of analysis will result in differing outcomes in cases on various important issues. For example, pre-*Nassar*, courts appeared generally to agree that timing (especially "unusually suggestive" timing) can be sufficient to establish causation at the *prima facie* level of analysis. Predictably, courts that appear to not apply *Nassar* at the *prima facie* level but only at the pretext level have already found that a *prima facie* case can still be made where there is "close temporal proximity" but that it is insufficient to establish pretext.[41] However, at least one court has *sua sponte* (in context of FMLA claims) raised without answer the question of whether, after *Nassar*, *prima facie* causation can still be established where timing between protected activity and adverse employment action is "unusually suggestive".[42] For the same reasons why close temporal proximity is insufficient to establish pretext where but-for causation must be shown (*i.e.,* because establishing but-for causation requires more than the creation of an inference, which is all that temporal proximity shows), it would seem that close temporal proximity should be insufficient to establish causation at the *prima facie* level if but-for causation must be shown. Because rulings on issues like this may vary between jurisdictions that apply *Nassar* differently under the *McDonnell Douglas* framework, practitioners should exercise great care in applying cases that make sense under one approach (*e.g.,* where *Nassar* does not apply at the *prima facie* level) but which arguably no longer make sense under the other approach (*e.g.,* where *Nassar* does apply at the *prima facie* level).

It seems that the decision to apply *Nassar* at the *prima facie* level of analysis has the potential to alter dramatically the entire burden-shifting paradigm in retaliation cases – although not even those courts purporting to apply *Nassar* at the *prima facie* level have made that ruling yet. In sum, where the *Nassar* but-for standard is applied at both the third element of the *prima facie* case and the second alternative of the pretext standard, it is difficult to see how any case surviving analysis of the third prong of the *prima facie* case could ever fail at the pretext level; or why a pretext analysis would even be necessary (or appropriate). Simply put, an employee who establishes the *Nassar* but-for causation as part of the *prima facie* case will necessarily be able to establish pretext, because *Nassar* but-for causation is one of the two ways of establishing pretext (the other, traditionally, being by submitting evidence sufficient to cause a jury to disbelieve the employer's articulated legitimate reasons). On the other hand, an employee who cannot establish the *Nassar* but-for causation as part of the *prima facie* case will never (or should never) reach the question of pretext because the burden would not (or should not) shift – thus making irrelevant the question of whether there is evidence sufficient to cause a jury to disbelieve the employer's articulated legitimate reasons. Therefore, in those courts where the *Nassar* but-for standard applies at the *prima facie* level of analysis, an argument exists that it is unnecessary to explore pretext at all – including especially the

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39. *Rumanek*, 2014 WL 104966, at *5; Lasalle v. Port Authority of New York & New Jersey, 2013 WL 6094339, at *6 n.7 (D.N.J. Nov. 19, 2013).

40. Zahn Kwan v. Andalex Group, LLC, 737 F.3d 834, 846 n.5 (2d Cir. 2013) (explaining Second Circuit's application of *Nassar* at the pretext phase rather than the *prima facie* phase). The dissent in the *Zahn Kwan* decision further illuminates the Second Circuit's application of *Nassar* at the pretext level. *Id.* at 849-50.

41. *See e.g.*, E.E.O.C. v. New Breed Logistics, 2013 WL 4495114, at *16-17 (W.D. Tenn. Aug. 23, 2013); Moore v. Kingsbrook Jewish Medical Center, 2013 WL 3968748, at *19-20, n.32, 33 (E.D.N.Y. July 30, 2013).

42. Clark v. Jackson Hospital & Clinic, Inc., 2013 WL 5347450, at *5 n.3 (M.D. Ala. Sept. 23, 2013).

first alternative of the pretext standard, which involves the question of whether the employee can show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them 'unworthy of credence'".[43]

In *Rumanek v. Independent School Management, Inc.,* the District of Delaware recently held that the *Nassar* standard applies at both the *prima facie* and pretext levels of analysis in permitting two retaliation claims to survive a motion for summary judgment.[44] The court stated:

> [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 actions. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason."[45]

However, this analysis falls squarely in the post-*Nassar* first alternative of the pretext standard — essentially melding the two alternative approaches to establishing pretext and skipping the application of *Nassar* at the *prima facie* level. Indeed, although the court began its causation analysis as if analyzing the *prima facie* case, the analysis of the claims permitted to go forward dealt only with pretext issues, which perhaps is understood best by the fact that the court's causation analysis on the claims surviving summary judgment is premised on recent Second Circuit law.[46]

As discussed above, unlike the Third Circuit, the Second Circuit rejects application of the *Nassar* standard at the *prima facie* level – making it much more likely (and more analytically logical – although not necessarily more desirable or consistent with Congressional intent) that pretext will become an issue.[47] The Second Circuit also interprets *Nassar* to mean that "a plaintiff's injury can have multiple 'but-for' causes, each one of which may be sufficient to support liability."[48] Under the Second Circuit's standard, where the parties have put forward several alleged causes of the plaintiff's

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43. Landmesser v. Hazleton Area School Dist., 2013 WL 6002171, at *10 (M.D. Pa. Nov. 12, 2013) (citing *Fuentes, 32 F.3d 759, 765 (3d Cir. 1994).*

44. *Rumanek*, 2014 WL 104966, at *12. The case was resolved in favor of the employer after a jury trial.

45. *Rumanek*, 2014 WL 104966, at *7 (quoting Zann Kwan v. Andalex Group LLC, 737 F. 3d 834, 846 (2d Cir. 2013) (internal citations omitted)). The *Zann Kwan* Court relied exclusively on Second Circuit precedent predating both *Gross* and *Nassar* for that proposition.

46. The *Rumanek* Court found that "inconsistent explanations" for the employee's termination "must be resolved by the finder of fact before a determination can be made as to whether [allegedly-protected activity] was a but-for cause of her termination." *Id.*

47. *Zann Kwan*, 737 F. 3d at 846 n.5, 849-50.

48. *Id.* at 846 (citing 4 *Fowler V. Harper et al., Harper, James and Gray on Torts* § 20.2, at 100–101 (3d ed. 2007) ("Probably it cannot be said of any event that it has a single causal antecedent ….") (collecting cases); W. Page Keeton et al., *Prosser and Keeton on Torts* § 41, at 264–66 (5th ed. 1984)). The Second Circuit stated that, "[r]equiring 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." *Id.* (*citing Fagan v. U.S. Carpet Installation, Inc.,* 770 F. Supp. 2d 490, 496 (E.D.N.Y. 2011) (explaining that under the Age Discrimination in Employment Act "[t]he condition that a plaintiff's age must be the 'but for' cause of the adverse employment action is not equivalent to a requirement that age was the employer's *only* consideration, but rather that the adverse employment actions would not have occurred without it.") (citation omitted)). Although the *Nassar* Court did not state that there could be only one but-for cause, disagreeing about Congressional intent, the dissent stated that it was "lost on the Court" that Congress had "considered and rejected an amendment that would have

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termination (*e.g.,* retaliation, unsuitability of skills, poor performance, and inappropriate behavior), the determination of whether retaliation was a "but-for" cause will likely be found "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" and the task put to a jury to "determine whether the plaintiff has proved by a preponderance of the evidence that she did in fact complain about discrimination and that she would not have been terminated if she had not complained about discrimination."[49] Under the Second Circuit's approach, it appears much more likely that cases will survive summary judgment than when *Nassar* is applied at the *prima facie* level.

It remains to be seen if the Third Circuit will find that application of the Second Circuit's standard amounts to a "lessened causation standard" that makes it "far more difficult to dismiss dubious claims at the summary judgment stage," which (as the United States Supreme Court stated in *Nassar*) would be "inconsistent with the structure and operation of Title VII." If so, the Third Circuit might reject application of the Second Circuit's standard. If not, it remains to be seen how the Third Circuit will modify Second Circuit law so that it makes sense at the *prima facie* level of analysis. Perhaps the Third Circuit will retreat from its holding that *Nassar* applies at the *prima facie* level of analysis and join the Second Circuit to find that *Nassar* applies only at the pretext level. Perhaps the Supreme Court will weigh in on this circuit split. For now, the causation standard under federal law remains unclear.

V. THE CAUSATION STANDARD FOR DISCRIMINATION AND RETALIATION CLAIMS UNDER THE DELAWARE DISCRIMINATION IN EMPLOYMENT ACT

The DDEA is the Delaware law most closely paralleling matters raised in the ADEA and Title VII.[50] Unlike federal law, which has a separate statute for age only, the DDEA addresses age together with the other categories addressed in Title VII.[51] DDEA also covers a number of categories not addressed under the ADEA or Title VII, including marital

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placed the word 'solely'" before protected classes in the discrimination provision; and that a prime sponsor of Title VII commented that a "sole cause" standard would render the Act "totally nugatory." *Nassar*, 133 S. Ct. at 2547. At least one Court in the Third Circuit has interpreted *Nassar* to mean "the sole basis", although other courts have disagreed. Burton v. Pennsylvania State Police, 2014 WL 29009, at *22 (M.D. Pa. Jan. 2, 2014) ("the mere fact that Plaintiff is asserting both discrimination and retaliation claims as to the Supervisor's Notation is fatal to his retaliation claim as the prima facie case of retaliation requires the plaintiff to show that the desire to retaliate was the *sole* basis, or the but-for cause, of the challenged employment action"). *See also* Sparks v. Sunshine Mills, Inc., 2013 WL 4760964, at *17 n.4 (N.D. Ala. Sept. 4, 2013) ("the plain meaning of the word 'because' means that the employee's action was the **sole** reason, or but-for cause, of the employer's discrimination") (emphasis added). *But see* Little v. Technical Specialty Products LLC, 2013 WL 5755333, at *5 (E.D. Tex. Oct. 23, 2013) ("*Nassar* did not hold that 'but-for' causation requires that a plaintiff prove that retaliation was the sole reason for the adverse action, and Defendants cite no case law indicating that 'but-for' causation means "sole reason"); Shumate v. Selma City Bd. of Educ., 2013 WL 5758699, at *3 (S.D. Ala. Oct. 24, 2013) (calling it an "axiomatic premise" that the but-for standard adopted by the Court in *Nassar* is not the "sole cause" standard).

49. *Id.*

50. DDEA covers more entities than ADEA or Title VII, because it applies to those employing four or more employees rather than 20 and 15 for ADEA and Title VII respectively. Del. Code Ann. tit. 19 § 710(6).

51. Del. Code Ann. tit. 19 § 711 *et seq.* Delaware does not have a statute like the FMLA. However, like federal law, Delaware does have a separate statute addressing disability claims. Del. Code Ann. tit. 19 § 720 *et seq*. Although still often referred to as the "Handicapped Persons Employment Protections Act" (perhaps because it is listed that way on Delaware Code Online), the short title is "Persons With Disabilities Employment Protections Act" (the "DPDEPA"); and words and phrases using the word "handicap"

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status and genetic information. In recent years new protected classes have been added including sexual orientation and gender identity.[52] In September 2013, DDEA added "volunteer emergency responders", which means a volunteer firefighter, a member of a ladies' auxiliary of a volunteer fire company, volunteer emergency medical technician, and/or a volunteer fire police officer.[53]

Like the ADEA and Title VII, the DDEA has both anti-discrimination and anti-retaliation provisions. As to discrimination, the DDEA makes it an unlawful employment practice for an employer to "[f]ail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, or national origin."[54] As to retaliation, the DDEA makes it an unlawful employment practice for any employer (or various other defined groups) to, "discharge, refuse to hire or otherwise discriminate against any individual or applicant for employment or membership on the basis of such person's race, marital status, color, age, religion, sex, sexual orientation, gender identity, or national origin, because such person has opposed any practice prohibited by this subchapter or because such person has testified, assisted or participated in any manner in an investigation, proceeding, or hearing to enforce the provisions of this subchapter."[55] Thus, unlike federal law, the Delaware causation language is not different for age and other protected classes on the issue of discrimination; and the causation language for retaliation claims is not materially different from the language applicable to discrimination claims.

In light of the decisions in *Gross* and *Nassar,* and the tendency of Delaware courts to apply the DDEA in ways consistent with federal employment statutes, several important questions arise as to the application of the DDEA's "because of" standard for claims of discrimination and retaliation: (1) what standard applies to age discrimination claims under the DDEA — the heightened "determinative factor"/"but-for factor" standard or the lessened "motivating factor" standard;[56] (2) what standard should apply for non-age-based discrimination claims under the DDEA; (3) what should be the standard for retaliation claims; and (4) if different causation standards are to apply to these different claims despite the statutory language providing no basis for the different treatment, what is the justification?

The statutory textual reasons that the United States Supreme Court identified for treating retaliation claims and age discrimination claims differently from other protected status discrimination claims arguably do not apply to the DDEA. Legislative action by Congress may well be telling of what Congress intended through subsequent legislation inaction

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were amended in August 2011 in favor of the word "disability". The DPDEPA has a separate "retaliation prohibited" provision that states, "It shall be an unlawful employment practice for any employer to discharge, refuse to hire or otherwise discriminate against any person or applicant for employment, or any employment agency to discriminate against any person or any labor organization to discriminate against any member or applicant for membership because such person has opposed any practice prohibited by this subchapter or because such person has testified, assisted or participated in any manner in proceedings to enforce the provisions of this subchapter." *Id.* (emphasis added).

52. Del. Code Ann. tit. 19 § 711.

53. Del. Code Ann. tit. 19 § 719A.

54. Del. Code Ann. tit. 19 § 711(a)(1) (emphasis added).

55. Del. Code Ann. tit. 19 § 711(f) (emphasis added).

56. This issue arose in at least one case. *See* Huey v. Walgreen Co., 2010 WL 3825676, at *9 (D. Del. Sept. 23, 2010). However, the *Huey* Court determined that it need not reach the issue of whether the "but-for" analysis applied to age discrimination claims under the DDEA. *Id.*

regarding similar laws or provisions of the same law. However, the action/inaction of Congress is far less indicative of the General Assembly's intent. Indeed, the General Assembly could have incorporated into the DDEA a "motivating factor" standard during its post-*Nassar* amendments if it had desired for it to apply to any discrimination claims to (as Congress did with Title VII). The language of the DDEA more closely resembles that of the ADEA than it does that of Title VII's discrimination provisions. Therefore, arguably Delaware law should be read to apply the heightened but-for cause test to all discrimination and retaliation claims. On the other hand, the Delaware Supreme Court and other courts have applied federal law to Delaware's analog statute for more than 30 years; and the General Assembly has never sought to amend the causation standard in the DDEA to deviate from federal law.[57] It is unclear, however, why different causation standards would apply to different claims under the DDEA despite the causation standard being worded the same.

The General Assembly could address many of these issues by, for example, separating age from the other protected classes in the DDEA or by creating a new law just for age that mirrors the ADEA except, perhaps (like the DDEA) defining "employer" to cover employers having fewer employees than required by the ADEA. Further, the General Assembly could improve upon the ADEA by including a "burden of proof" provision (perhaps similar to the Delaware Whistleblowers' Protection Act) that makes clearer the desired causation standard.[58] Whether or not age is kept in the DDEA, the General Assembly could include a "burden of proof" provision in its law(s) and, with respect to the DDEA, include one subsection stating the causation standard for status-based discrimination claims (perhaps distinguishing between classes if a different standard is meant to apply, for example, to age claims) and another subsection stating the causation standard for retaliation claims (if the standards are intended to be different). The General Assembly could go even further by statutorily clarifying how claims of various types should be analyzed (*e.g.,* assuming the General Assembly intends for but-for causation to apply to retaliation claims, by explaining whether but-for causation should be analyzed as part of a *prima facie* case and, if so, how that impacts any burden shifting). Clarification of the DDEA would likely be welcome news to one group but unwelcome to another (*i.e.,* employers/employees), because it would make claims either harder or

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57. Giles v. Family Court, 411 A.2d 599, 601 (Del. 1980). The *Giles* Court applied federal law to a DDEA claim based on its finding that "the language of the Delaware statute is substantially the same as the Title VII language defining an unlawful employment practice." *Id.* at 602. The *Giles* case, however, obviously predates the 1991 amendment to Title VII. Cases subsequent to 1991 also have applied federal law to DDEA national origin/race claims. *See* Shah v. Bank of Am., 598 F. Supp. 2d 596, 602 n.6 (D. Del. 2009). Although the *Shah* case is from the same year as the *Gross* decision, it predates the *Gross* decision. Even since the *Gross* decision, courts have held that "[g]enerally, the same evidence required to prevail on a claim under the ADEA is required to prevail on a claim of age discrimination brought under the DDEA." Alred v. Eli Lilly and Co., 771 F. Supp. 2d 356, 266 (D. Del. 2011) (involving DDEA age discrimination and retaliation theories). However, in the *Alred* case, the court found that the employee's evidence was sufficient to meet the ADEA standard and thus was enough to meet the DDEA standard. Therefore, the question was not raised as to whether if the ADEA standard could not be met whether the DDEA standard nonetheless could be met. The *Alred* case is further significant because it reversed prior Delaware law that prohibited employees from bringing ADEA and DDEA claims together in a single forum. *Id.* at 368.

58. Del. Code Ann. tit. 19 § 1708. The Delaware Whistleblowers' Protection Act ("DWPA") states, "The burden of proof in any action brought under this chapter shall be upon the employee to show that the primary basis for the discharge, threats, or discrimination alleged to be in violation of this chapter was that the employee undertook an act protected pursuant to § 1703 of this title." *Id.* (emphasis added). Even this "the primary basis" standard is subject to debate. While it seems clear that there can be only one "primary basis", there could be debate about how determinative the basis must be (*e.g.,* arguably the basis could be less than 51% of the reason and still the "primary" basis if there were at least two other reasons that also were bases). The DWPA has other undesirable ambiguity too (*e.g.,* the definition of "violation" is unclear). *Id.* at 1702(6). The definition of "public body" might be unclear too, in that the term includes "an elected official of a county, city, or school district or employee of them" but "city" is not defined; and at least one municipality has argued that it is not covered because it is not a "city". *See* Schaffer v. Topping, 2012 WL 4148692, at *1 (Del. Super. Ct. Sept. 14, 2012). That issue is likely to be resolved (at least by the Superior Court) near the time this article is published.

easier to prove depending on the substance of the clarification. Such amendment, however, would do much to promote a fundamental principle of good law – clarity.[59]

VI. CONCLUSION

A question of central importance under federal law remains unclear — at what point in the established framework for analyzing retaliation claims should the *Nassar* but-for standard apply and how should that impact the remainder of the analytical framework and methods of establishing the causation element(s) of the applicable framework? Those same questions and more apply to Delaware law – including to which, if any, DDEA claims the *Gross/Nassar* standard applies? Will Delaware law break away from federal law as these questions are considered? Perhaps the General Assembly will amend the DDEA to resolve these ambiguities. Perhaps federal law will continue to evolve – to codify or abrogate *Gross* and *Nassar*.[60] What is clear is that much is unclear about discrimination and retaliation law (under both Federal and Delaware law); and the law is likely to get more confusing before it gets any clearer as litigants and their counsel (and thus the courts) consider these issues.

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59. If a but-for causation standard was made to apply to status-based discrimination claims (in addition to age discrimination claims) under the DDEA, an employee litigant would have good reason to choose to file claims under federal law rather than Delaware law because the claims would be easier to prove under federal law. If a motivating factor standard was made to apply to age discrimination or retaliation claims under the DDEA, an employee litigant would have good reason to choose to file claims under Delaware law rather than federal law because the claims would be easier to prove under Delaware law.

60. The dissent in *Nassar* disagreed with the majority's conclusions about what Congress intended, stating, "Congress had no such goal in mind" and stated that the decision "should prompt yet another Civil Rights Restoration Act." *Nassar*, 133 S. Ct. at 2547.