

A photograph of two hands, each wearing a dark suit sleeve and a white shirt cuff, held palm-up against a dark background. The hands are positioned symmetrically, one on the left and one on the right. The text 'BECAUSE OF' is superimposed on the left hand, and 'BUT FOR' is superimposed on the right hand.

BECAUSE OF

BUT FOR

STANDARD OF CAUSATION FOR RETALIATION IN FEDERAL SECTOR TITLE VII CASES AFTER *NASSAR*

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Title VII protects employees from retaliation, but the nature of the causal connection between an adverse action taken by an employer and the participation of an employee in protected activity has long been the subject of debate. Until recently, the debate has centered on the interpretation of the word “because” as used in the statute. The anti-retaliation provision of Title VII declares that it is an:

unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹

“Because” could mean that something was “a” cause or “the” cause of a result. In the parlance of the anti-retaliation provision of Title VII, these two interpretations are referred to as a “motivating factor” or a “but-for” cause.

In 2013, the Supreme Court seemingly settled this question in *University of Texas Southwestern Medical Center v. Nassar*.² In

that case the Supreme Court determined that the “because” in this provision required the employer’s action to be the but-for cause of the adverse action. However, in the five years since *Nassar* was decided, the Equal Employment Opportunity Commission (EEOC) has developed a legal theory that allows the EEOC to continue applying motivating factor analysis to federal sector cases while applying but-for cause to private sector cases. The EEOC’s bifurcation of retaliation causation standards suffers from a variety of flaws and is ultimately inconsistent with Title VII and *Nassar*.

This article examines the history of but-for causation in federal antidiscrimination statutes, the Supreme Court’s decision in *Nassar*, and the EEOC’s response to the ruling. After examining the EEOC’s bifurcation of causation standards in response to *Nassar*, this article concludes that, because of the unique incentive structure in the EEOC, the only way to achieve an accurate and consistent interpretation of the law is to allow agencies to appeal EEOC interpretive determinations to federal court.

Title VII Introduction

On July 3, 1964, propelled by the death of President John F. Kennedy and the political strength of President Lyndon B. Johnson, the Civil Rights Act became law with the explicit purpose of preventing discrimination on the basis of race, color, religion, sex, or national origin.³ These protections were bolstered by the prohibition of retaliation against an employee for opposing an unlawful, discriminatory employment practices.⁴ In 1972, these protections were extended to federal employees.⁵

Antidiscrimination laws are enforced in federal sector employment through internal agency mechanisms, the Merit System Protection Board (MSPB), the EEOC, and federal district court. Although some federal employment discrimination cases do make it to federal district court, and the MSPB hears mixed cases involving discrimination, the great majority of federal employment discrimination cases are adjudicated by the EEOC.⁶

The EEOC's enforcement guidance is of particular significance to federal employers both because the vast majority of federal cases go through the EEOC and also because of the effective inability of federal agencies to seek review of EEOC determinations. Although employees and applicants for employment are given a cause of action in federal district court if they do not like the outcome of a final EEOC decision, Title VII contains no such provision for federal agencies.⁷ Thus, when the EEOC interprets a statute adverse to agency management of its workforce, there is no remedy for the federal employer.⁸ Such is the case in the current disagreement between the Supreme Court and the EEOC over what causation standard to apply to federal sector retaliation claims under Title VII.

Title VII But-For Causation History

But-for causation is a concept borrowed from tort law that considers liability to be established through cause in fact, meaning that the tortious action was necessary for the harm to occur.⁹ The default interpretation of a tort-like statute that uses "because of" causal language is that it requires but-for causation.¹⁰ The Civil Rights Act of 1964 originally used "because of" language in both § 703's prohibition of discrimination and § 704's protection of employees who alleged discrimination.¹¹ However, several Supreme Court decisions served as the catalyst for Congress to rework the language of § 703 in the Civil Rights Act of 1991.¹²

In *Price Waterhouse v. Hopkins*, the courts were faced with a plaintiff bringing a complaint under a mixed motives theory.¹³ The plaintiff alleged that her accounting firm considered her sex as a factor in determining not to make her a partner.¹⁴ At trial, the D.C. District Court found that although there were other reasons for not selecting the plaintiff for partner, Price Waterhouse had impermissibly considered the plaintiff's sex in making its decision.¹⁵ However, Price Waterhouse could avoid equitable relief by demonstrating through clear and convincing evidence that the plaintiff would still not have been selected even if sex had not been considered.¹⁶ On appeal, the D.C. Circuit Court upheld the decision of the lower court, except that it found that clear and convincing evidence that non-selection would still have occurred not only barred equitable relief, but prevented liability.¹⁷

When the case reached the Supreme Court, the issue was framed as whether the plaintiff bore the burden of proof to demonstrate that the prohibited consideration was the but-for cause of the adverse action or whether the plaintiff could simply demonstrate that it was a factor at all.¹⁸ The Court ended up somewhere in the middle, finding that but-for causation was not an initial burden on the plaintiff, but that the defendant could use the absence of but-for causation as an affirmative defense once discrimination was proven (not just alleged).¹⁹ Finally, the defendant only had to prove this defense by preponderance of the evidence.²⁰

In the aftermath of this decision, Congress determined that intentional discrimination on the basis of race, color, religion, sex, or national origin (i.e., status-based discrimination) deserved a stricter

standard for liability and passed the Civil Rights Act of 1991.²¹ Under the new standard, if a plaintiff could demonstrate that membership in protected class was a "motivating factor" then the employer would be liable for a prohibited personnel practice.²² However, this provision was not made applicable to § 704 of the civil rights act dealing with retaliation. That section was left unchanged with its "because" language intact.²³

In the wake of the Civil Rights Act of 1991, the circuits developed their own approaches to handling the "because" language in § 704, all determining that the failure of the 1991 amendments to address § 704 preserved the *Price Waterhouse* analysis in relation to that section.²⁴ It was not until 2009 in *Gross v. FBL Financial Services Inc.* that the Supreme Court addressed the question through the context of another antidiscrimination statute also modified by the Civil Rights Act of 1991.²⁵

The But-For Proxy War Over the ADEA

Understanding the court's analysis of the Age Discrimination in Employment Act of 1967 (ADEA) is important for two reasons. First, the ADEA was modeled on Title VII with nearly identical language and is thus instructive.²⁶ Second, the Supreme Court's analysis of the ADEA in *Gross* directly influenced the outcome of *Nassar*.²⁷ In effect, the court's discussion of the ADEA's "because of" language served as a proxy conversation for its analysis of "because of" language in Title VII left unchanged by the Civil Rights Act of 1991.

In *Gross v. FBL*, the Court addressed the "because" language in the ADEA and moved past simply allowing lack of but-for cause as an affirmative defense, determining that the plaintiff actually bore the burden of persuasion to demonstrate that retaliation was the but-for cause of the adverse action.²⁸ The Court distinguished the ADEA from Title VII in regard to *Price Waterhouse's* burden-shifting framework, but explicitly addressed the effect of the Civil Rights Act of 1991's changed standard for status-based discrimination on other non-addressed provisions.²⁹ The Court reasoned that if the Civil Rights Act of 1991 amended some portions of the ADEA and Title VII but not others, then that conscious decision should be respected and the changed standard for liability should not be read into other portions of the statute.³⁰ It is of importance to note that in addition to not judicially extending the Civil Rights Act of 1991, the Court also opined that the modifications to Title VII prevented the previous interpretations of that statute from controlling language identical to the pre-Civil Rights Act of 1991 language in other antidiscrimination statutes.³¹

The MSPB was the first administrative forum to apply the Court's rule in *Gross*, reversing an administrative judge who had failed to apply the rule.³² The case in which the MSPB applied *Gross* was appealed to the EEOC and the EEOC adopted the conclusion of the MSPB without addressing the question of whether it would abide by *Gross*.³³

The EEOC did not stay undecided for long. By December 2010 the EEOC published an opinion adopting some interesting reasoning from *Fuller v. Gates*, a federal district court case out of the Eastern District of Texas, to determine that *Gross* did not apply to federal employers.³⁴ In *Fuller*, Judge Charles Everingham IV reasoned that an action for relief for federal employees under the ADEA did not arise under the "because of" language of § 623 prohibiting retaliation but rather under the section added in 1974 (§ 633a), which extended age discrimination protection to federal employees.³⁵ That section

stated: “All personnel actions affecting [federal employees] shall be made free from any discrimination based on age.”³⁶ Judge Everingham suggests that the past precedent that applied the pre-*Gross* standard to both public and private retaliation claims was no longer applicable since *Gross* had changed the prima facie requirement for a retaliation case.³⁷ No explanation is given as to why modifying a specific standard would invalidate precedent concerning the applicability of the standard to federal employees. Under this dubious legal reasoning, private employees still had to meet *Gross*'s but-for standard, but public employees were allowed to proceed under the “motivating factor” standard. This analysis, adopted by the EEOC, allowed the EEOC to continue applying the “motivating factor” standard and *Gross* in relation to federal employees. In adopting this analysis the EEOC conveniently overlooked that it had used § 623 as the basis for how § 633a was to be effectuated in thousands of cases since the law was adopted.³⁸

Outside of the EEOC, the *Fuller* approach was largely rejected by other trial courts.³⁹ However, some of the cases that rejected the motivating factor as the appropriate standard still accepted that a federal employee brought a claim under § 633a and not § 623.⁴⁰ Most of the appeals courts found a creative way to not answer the question of whether *Gross*'s but-for cause requirement applied to federal employees.⁴¹ The D.C. Circuit was the only appeals court to fully adopt the position that even post *Gross*, but-for cause was not required to establish liability. In the majority opinion in *Ford v. Mabus*, the court provides a lengthy analysis to support its conclusion and works hard to distinguish *Gross* from applying to federal employment.⁴²

In *Ford*, the lower court applied the mixed-motive burden-shifting analysis of *Price Waterhouse* to the plaintiff's ADEA claim.⁴³ The parties cross appealed, with the employee challenging the lower court's standard of what constituted a motivating factor and the employer claiming that but-for should have been the standard in light of *Gross*.⁴⁴ The D.C. Circuit creatively adopted the Supreme Court's determination in *Gross* that Title VII precedent did not constrain ADEA interpretation in order to avoid *Price Waterhouse*'s analysis of “because of” and then found that *Gross* did not apply since federal employees were protected by the “exceedingly broad” conclusory language in § 633a that affirmed federal employees should “be free from discrimination based on age.”⁴⁵ Finding that federal employees were protected by this broad language instead of § 623 effectively freed the D.C. Circuit to announce whatever standard suited its fancy, and it chose to apply the motivating factor analysis that the Civil Rights Act of 1991 had codified for status-based discrimination in Title VII.⁴⁶

Key to the D.C. Circuit's analysis of a cause of action arising under § 633a was the exclusion of the federal government from the definition of employer used in § 623.⁴⁷ Although the creation of an entirely different regulatory scheme under the conclusory language of § 633a is an uncomfortable position, it was at least plausible in light of the Supreme Court's decision in *Gomez-Perez v. Potter* that (1) § 633a is the provision under which federal employees had to bring a claim and (2) that the provision was broad enough to include a prohibition of retaliation.⁴⁸ However, as Judge Karen LeCraft Henderson's concurring opinion in *Ford* points out, setting up an entirely different standard under § 633a goes beyond the court's reasoning in *Gomez* and seems to unnecessarily fracture the statute.⁴⁹

Regardless of the minority position of *Ford* and *Fuller* and in deference to the EEOC's position on discrimination law, the MSPB

reversed its decision in *Bowman* and adopted the motivating factor analysis for federal-sector cases arising under § 633a.⁵⁰ With the EEOC and the MSPB adopting this rule, the battle was effectively lost for federal employers arguing for but-for causation under the ADEA.

Extending *Gross* and its Progeny to Title VII

In 2013, the Supreme Court finally addressed the but-for language in Title VII's anti-retaliation provision. In *Nassar*, the court addressed a mixed motive retaliation claim under 42 U.S.C. § 2000e-3 based on the alleged retaliatory application of a hospital's hiring policy.⁵¹ The question of relevance that reached the Supreme Court was what standard of proof was required by the “because of” language in Title VII's retaliation provision (§ 2000e-3), language identical to the provisions in the ADEA addressed by *Gross*.⁵² In light of that similarity and the cross applicability, Justice Anthony Kennedy, delivering the majority opinion, found *Gross* instructive in determining the standard for Title VII's retaliation provision.^{53,54}

In his opinion, Justice Kennedy begins by establishing that the default interpretation of causation for a tort-like personal injury claim is one of but-for causation.⁵⁵ Referencing common law, the Restatement of Torts, and scholars, Kennedy urges that in the absence of contrary statutory indications, this default rule must be applied.⁵⁶

Kennedy next provides a *Gross*-like analysis of the progression from *Price-Waterhouse* to the Civil Rights Act of 1991 and the implication by omission of that statute not extending the motivating factor standard of liability to Title VII's retaliation provision.⁵⁷ Kennedy heavily relies on *Gross* and finds the conclusions of the Court on the meaning of the “because of” language in the ADEA and implication of the structure of the statute particularly persuasive in the interpretation of Title VII.⁵⁸

Kennedy gives particular attention to countering the argument offered by the respondent that the “motivating factor” standard applied to status-based discrimination should apply to retaliation cases because retaliation is included by implication in the section of the statute prohibiting status-based discrimination.⁵⁹ The respondent's argument was that since the federal employer provisions of Title VII and the ADEA prohibiting status-based discrimination have been read to include a tacit prohibition of retaliation, then the specific section prohibiting status-based discrimination should likewise be read to include retaliation and thus retaliation should be analyzed under the “motivating factor” standard.⁶⁰

Not only is this inconsistent with the statute choosing specifically to apply the “motivating factor” standard to only the provision prohibiting status-based discrimination, Kennedy points out that case law cited by the respondent to bolster this argument concerns statutory provisions that are not subject to the structural subdivision that Title VII contains.⁶¹ It is in this portion of Kennedy's analysis that *Nassar* provides a hint as to whether the federal employment section of Title VII should be treated as incorporating the same regulatory scheme as the private sector provisions. Kennedy holds up the ADEA's federal provision as broad language that was interpreted as its own regulatory scheme in *Gomez*, but fails to apply that analysis to the federal provision of Title VII.⁶² Possible reasons for this omission are addressed below.

In addition, Kennedy specifically addressed the EEOC's Compliance Manual and declined to extend *Skidmore* or *Chevron* deference to the EEOC's interpretations, finding that the two arguments

offered justifying the EEOC's application of the motivating factor standard for status-based discrimination "lack the persuasive force that is a necessary precondition to deference under *Skidmore*."^{63, 64} The EEOC manual in question applied to retaliation by federal and nonfederal employers and established uniform guidance on the burden of proof for both.⁶⁵ This is important since there was no reason for Kennedy to distinguish between retaliation as related to federal employment or private sector employment since both were subject to the same EEOC guidance and were treated indistinguishably by the EEOC in regard to retaliation.⁶⁶

The EEOC and MSPB Reaction to *Nassar*

After declining to reach the question of whether *Nassar's* analysis applied to the federal sector in a couple of cases,⁶⁷ the EEOC dismissed the applicability of *Nassar* in a footnote of a July 2014 decision.⁶⁸ The footnote summarily stated that since the language of the ADEA and Title VII provision contained a broad summary statement and did not employ "because of" language, the but-for standard of *Gross* and *Nassar* was not applicable to federal sector employees.⁶⁹ This footnote quickly became the touchstone of EEOC "analysis" of *Nassar*.⁷⁰ For their part, the MSPB again began by applying *Nassar* to federal sector cases,⁷¹ but in *Savage v. Department of the Army*, it again reversed course in deference to the EEOC.⁷² In one simple footnote, the EEOC created a separate regulatory system for federal employees.

Creating Two Classes of Retaliation Is Not Consistent With the Letter or Intent of the Law

A Separate Federal Scheme Is Not Required by *Gomez*

Although never directly addressed by the EEOC, the first problem with the EEOC's decision to set up separate standards for retaliation under the public and private sector provisions of Title VII was that it ran contrary to long-standing EEOC precedent. In fact, the EEOC's silence on the issue creates a considerable amount of confusion. Up until 2015, Office of Federal Operations (OFO) opinions on federal sector cases routinely cited 42 U.S.C. § 2000e-3 as the statutory justification for the prohibition of federal sector retaliation.⁷³ In fact, one of the OFO's favorite bludgeons, the proposition that Title VII's protection against retaliation is "exceptionally broad," comes from a case analyzing the protection provided by § 2000e-3 to federal employees.⁷⁴ Enforcement Guidance failed to distinguish between the private and federal sector employment.⁷⁵ One could thus be forgiven for being confused by the EEOC's about-face in arguing that § 2000e-3 no longer applies to federal employment.

Thankfully, when the MSPB decided to adopt the EEOC determination on the applicability of *Nassar* to federal employees, the board addressed the elephant in the room.⁷⁶ In *Savage*, although the MSPB acknowledged that § 2000e-16 was long presumed to incorporate § 2000e-3, the MSPB clarified that the Supreme Court in *Gomez* determined that § 2000e-16 does not in fact incorporate § 2000e-3.⁷⁷ Thus, *Nassar* did not apply, and the EEOC was free to adopt a rule inconsistent with *Nassar* in its application of § 2000e-16.⁷⁸ Unfortunately, this narrative is a misinterpretation of dicta in *Gomez* and not supported by a more thorough analysis of the holding in that case.

The question in *Gomez* was whether § 633a, the federal sector provision of the ADEA, included an unstated prohibition against retaliation.⁷⁹ The question of whether § 2000e-16 incorporated § 2000e-3 was explicitly not before the court.⁸⁰ In addition to being

dicta, the statement in *Gomez* that § 2000e-16 "does not incorporate the provision prohibiting retaliation" was being used by the Court to illustrate how a broad provision such as the federal sector provision of Title VII and the ADEA could be seen to include an unstated prohibition of retaliation.⁸¹ This was of particular importance in the context of the ADEA since the federal employee provision explicitly stated that it "shall not be subject to, or affected by, any provision of this chapter"⁸² In the ADEA, the Court was faced with a dilemma: either find that the federal protection provision incorporated the rest of the statutes protection by extension, find that federal employees are not protected by the ADEA from retaliation, or find that the broad language of the federal section created a completely independent set of protections. The first option being statutorily foreclosed and the second unpalatable, the Court elected to find that the status-based language of § 633a actually included by implication a prohibition of retaliation.

In Title VII, the Court was not faced with this dilemma. This express exclusion of the applicability is nowhere to be found in Title VII's federal employee section.⁸³ Although it does not specifically incorporate those provisions, for 35 years courts have defined the specific employment practices prohibited by § 2000e-16 through the lens of § 2000e et seq. Possibly this difference in construction of the two sections is why the Court in *Nassar* failed to hold up Title VII's federal employee provision as an example of a provision creating its own regulatory scheme while affirming that was the case with the ADEA.⁸⁴ To use dicta intended to affirm the extension of § 2000e-16 to retaliation cases to sever that section from the previous three decades of explication and application seems suspect at best, especially when such an action requires the creation of a separate regulatory scheme for federal employees.

The EEOC's Scheme Violates the Intent of the Statute and *Nassar*

Although it may be difficult to attribute to Congress the foresight of structuring Title VII to protect civil rights and enable the effective management of employees, Justice Kennedy argues in his majority opinion in *Nassar* that reading Title VII's causation standards as written does pursue these goals.⁸⁵

First, Kennedy highlighted the growing number of frivolous retaliation claims inundating the judicial and administrative system.⁸⁶ Kennedy's concern stemmed from the fact that between 1997-2012 the number of retaliation claims had nearly doubled and outpaced all other claims but race-based discrimination.⁸⁷ However, these numbers are even starker when looking at the federal sector data. According to the latest federal sector report covering fiscal 2014, 48 percent of complaints filed in federal sector employment discrimination alleged reprisal.⁸⁸

This is of importance because of the number of frivolous complaints. Comparing the percentage increase in retaliation complaints and the minimal increase in the number of cases where discrimination was found, the increase in retaliation cases largely represents an increase in frivolous allegations.⁸⁹

Justice Kennedy was particularly concerned that since retaliation could be claimed at any time with little factual predicate other than a previous complaint, there would be an incentive for employees to allege retaliation as leverage to fight employers managing their workforce.⁹⁰ Although the agency might win at trial, the lower causation standard advocated by *Nassar* would create a significant risk of wasting employer resources defending against these frivolous allegations.⁹¹

In addition to wasting resources, giving retaliation the same motivating factor analysis as is applied to status-based discrimination could make it difficult to get rid of employees that should be terminated for others reasons.⁹² If this is a concern in the private sector, it is more of a concern for federal employers who are often unwilling to invest the requisite resources or unable to get rid of the malefactors.⁹³

Thus, according to Kennedy, reading Title VII to allow for motivating factor analysis in retaliation cases would be clearly “inconsistent with both the text and purpose of Title VII.”⁹⁴

Recommendation

The basic reason for the different treatment of retaliation under § 2000e-3 and § 2000e-16 is that two different courts are setting the rules. Because federal agencies are unable to appeal adverse rulings from the EEOC, the EEOC is free to construct the secondary regulatory scheme described above. The easiest way to solve this problem is by amending Title VII to allow federal agencies to appeal cases to federal court in much the same way as employees, giving the Supreme Court the opportunity to provide consistency across the private and public sectors.⁹⁵

Federal court oversight of EEOC interpretation of the Civil Rights Act is particularly important because the agency’s interpretive rules are not subject to Administrative Procedure Act (APA) requirements.⁹⁶ Although the actual regulations published at 29 C.F.R. § 1614 are subject to notice and comment procedures, interpretive rules contained in enforcement guidance and management directives are not subject to such review.⁹⁷ These lessened requirements are justified as interpretive rules that do not have the weight of law.⁹⁸ However, since federal agencies cannot appeal adverse EEOC decisions, EEOC interpretive rules practically have the weight of law for federal agencies. This situation was less intolerable when the standards for private employers and federal agencies were the same because there was at least one interested group (private employers) who could take the EEOC to task in federal court. Bifurcating the two contexts without giving agencies the ability to appeal adverse decisions isolates federal-specific EEOC interpretations from accountability, which is arguably the antithesis of the intent of the APA.

The EEOC, along with the MSPB, is also unique in that its regulations are directly relevant for the management of the civil service, in which agencies have a vital interest. EEOC interests are by design single-focused on eliminating discrimination. However, in order to achieve the tension to balance interests, agencies should be allowed to challenge EEOC determinations to an uninterested, neutral forum where the correct balance between protecting federal employees and the efficiency of the civil service can be achieved.

Conclusion

Allowing agencies to appeal adverse EEOC decisions to federal court is the only way to achieve the predictability and uniformity necessary for a well-functioning legal system. The EEOC serves a needed and important role, but to allow the EEOC to be judge, jury, and executioner in federal employment cases without the option of appeal is to invite inequity and abuse. Justice Kennedy should not be the only one concerned with the frivolous abuse of process that can occur in the EEOC. Requiring that retaliation be proven to the but-for cause standard is both true to the statute and consistent with its purpose. Allowing agencies to appeal to federal court is the only way to sort

out the mess of the current bifurcated approach in the EEOC and could prevent future divergence further undermining the efficiency of the civil service. ☉



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Endnotes

- ¹42 U.S.C. § 2000e-3(a) (2012) (emphasis added).
- ²*University of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).
- ³Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 257; President Lyndon Johnson, Address to Congress (Nov. 27, 1963), <http://www.liblib.utexas.edu/johnson/kennedy/Joint%20Congress%20Speech/speech.htm> (“no memorial oration or eulogy could more eloquently honor President Kennedy’s memory than the earliest possible passage of the civil rights bill for which he fought so long”).
- ⁴§ 704, 78 Stat. 257.
- ⁵§ 717, 78 Stat. 257, as added Pub.L. 92-261, § 11, 86 Stat. 111 (1972).
- ⁶A survey of Westlaw identified 240 employment discrimination cases in which the U.S. Attorney’s Office served as counsel during fiscal 2015. In comparison, there were 15,490 formal complaints filed through the agency EEOC process in the same period. See EQUAL EMP’T OPPORTUNITY COMM’N, ANNUAL REPORT ON THE FEDERAL WORKFORCE (2015), <https://www.eeoc.gov/federal/reports/fsp2015>.
- ⁷42 U.S.C. § 2000e-16 (2012).
- ⁸*Nassar*, 570 U.S. at 357. (requiring but-for causation for retaliation claims); *Nita H. v. Dep’t of the Interior*, EEOC Appeal No. 0320110050 (July 16, 2014) (footnote 6 distinguishes *Nassar* from federal cases).
- ⁹RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 (2010).
- ¹⁰*Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 176 (2009).
- ¹¹§§ 703-704, 78 Stat. 257.
- ¹²For a more thorough discussion of the motivation for the Civil Rights Act of 1991 see Major Steven M. Ranieri, “If at First You Don’t Succeed . . .”: An Argument Giving Federal Agencies The Ability to Challenge Adverse Equal Employment Opportunity Commission’s Decisions in Federal Court, *ARMY LAW*, 23, 29 (Sept. 2008).
- ¹³*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
- ¹⁴*Id.* at 232.
- ¹⁵*Id.* at 236.
- ¹⁶*Id.* at 237.
- ¹⁷*Id.*
- ¹⁸*Id.* at 237-238.
- ¹⁹*Id.* at 246.
- ²⁰*Id.* at 253.
- ²¹Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat 1071.
- ²²*Id.*
- ²³42 U.S.C. § 2000e-3 (2012).
- ²⁴See, e.g., *Woodson v. Scott Paper Co.*, 109 F.3d 913, 932 (3d

Cir. 1997) (distinguishing between status-based and retaliation cases in the abrogation of *Price Waterhouse* after the Civil Rights Act of 1991); *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996) (considering and rejecting the applicability of the motivating factor language from the Civil Rights Act of 1991 and adopting the *Price Waterhouse* analysis for mixed motive retaliation claims); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 (4th Cir. 1999) (addressing the Civil Rights Act of 1991 and determining that status-based discrimination was treated differently than retaliation). *But* the Fourth Circuit stumbled to this position over a few years. *Beinlich v. Curry Dev. Inc.*, 54 F.3d 772 (4th Cir. 1995) (extending the motivating factor language in 2000e-2(m) to the “because of” language in 2000e-3); *Hill v. Lockheed Martin Logistics Mgmt. Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (describing the progression in the Fourth Circuit’s treatment).

²⁵*Gross*, 557 U.S. at 180.

²⁶*Ford v. Mabus*, 629 F.3d 198, 204 (D.C. Cir. 2010).

²⁷*Nassar*, 570 U.S. at 395.

²⁸*Gross*, 557 U.S. at 180.

²⁹*Id.* at 174.

³⁰*Id.*

³¹*Id.* at 175 (affirming the curious interpretive position that precedent interpreting a statute identical to a second statute was no longer instructive after the first statute had been modified, reasoning that was later leveraged to justify the EEOC’s rejection of certain precedent).

³²*Bowman v. Dep’t of Agric.*, No. PH-0432-09-0111-I-1, 2010 WL 323188 (M.S.P.B. Jan. 28, 2010), *Board decision concurred with sub nom. Bowman v. Dep’t of Agric.*, EEOC Appeal No. 0320100023, 2010 WL 1937004 (May 7, 2010) *overruled by Wingate v. U.S. Postal Serv.*, No. SF-0752-10-0714-I-2, 2012 WL 4465512 (M.S.P.B. Sept. 27, 2012).

³³*Bowman v. Dep’t of Agric.*, EEOC Appeal No. 0320100023, 2010 WL 1937004, at *2 (May 7, 2010).

³⁴*Henry v. Dep’t of the Army*, EEOC Appeal No. 0120103221, 2010 WL 5551957, at *4 (Dec. 23, 2010).

³⁵*Fuller v. Gates*, No. 5:06-CV-091, 2010 WL 774965, at *1 (E.D. Tex. Mar. 1, 2010).

³⁶29 U.S.C. § 633a (2012).

³⁷*Fuller*, 2010 WL 774965 at *2.

³⁸*See e.g., ad nauseam Endt v. Smithsonian Inst.*, EEOC Appeal No. 01A12356, 2002 WL 1590068, at *1 (June 19, 2002); *Boyd v. Dep’t of Transp.*, Appeal No. 01955276, 1997 WL 654451, at *3 (Oct. 10, 1997); *Jones, v. Dep’t of the Air Force*, Appeal No. 01892357, 1989 WL 1005936, at *1 (Sept. 6, 1989); *Campo v. U. S. Postal Serv.*, Petition No. 03A20012, 2002 WL 31094095, at *4 (Aug. 27, 2002).

³⁹*See e.g. Reynolds v. Dep’t of Army*, No. CIV.08-2944 (FLW), 2010 WL 2674045, at *10 (D.N.J. June 30, 2010), *aff’d*, 439 F. App’x 150 (3d Cir. 2011) (refusing to adopt *Fuller* analysis); *see Murthy v. Shinseki*, No. 08-CV-2015, 2010 WL 2178559, at *5 (C.D. Ill. May 28, 2010); *Torres v. McHugh*, 701 F. Supp. 2d 1215, 1222 (D.N.M. 2010) (citing *Lujan v. Walters*, 813 F.2d 1051, 1057 (10th Cir. 1987) to clarify that although adopting the idea that federal employees are treated under § 633 a but-for standard still applies); *see also Frankel v. Peake*, Civ. No. 07-3539 (WJM), 2009 WL 3417448, at *4 (D. N.J. Oct. 20, 2009) (coming to a different outcome than *Fuller* without explicitly addressing *Fuller*); *Shelley v. Geren*, Civ. No.08-5045- RHW, 2009 WL 3783159, at *3-4 (E.D. Wash. Nov. 6,

2009); *Guerrero v. Preston*, Civ. No. H-08-2412, 2009 WL 2581568, at *3-5 (S.D. Tex. Aug. 18, 2009); *Glenn v. Bair*, 643 F. Supp. 2d 23, 28-29 (D.D.C. 2009); *Wagner v. Geren*, No. 8: 08-cv-208, 2009 WL 2105680, at *4-5 (D. Neb. July 9, 2009). *But see Logan v. Holder*, No. CIV.A. 13-0900, 2014 WL 4216781, at *3 (W.D. La. Aug. 25, 2014); *Leal v. McHugh*, No. 2:11-CV-249, 2014 WL 5460577, at *4 (S.D. Tex. Oct. 27, 2014); *Ford*, 629 F.3d at 204.

⁴⁰*Torres*, 701 F. Supp. 2d at 1222.

⁴¹*See Logan v. Sessions*, 690 Fed. Appx. 176, 179 (5th Cir. 2017); *see Leal v. McHugh*, 731 F.3d 405, 412 (5th Cir. 2013) (sidestepping the issue by determining that when a federal employees chose to bring suit under the § 623 instead of § 633a, the but-for analysis would be applied); *Reynolds v. Tangherlini*, 737 F.3d 1093, 1096 (7th Cir. 2013) (avoiding the question by determining that neither standard was reached); *Palmquist v. Shinseki*, 689 F.3d 66, 76 (1st Cir. 2012) (distinguishing *Ford* and refusing to comment on whether § 633a should use a different standard).

⁴²*Ford*, 629 F.3d at 204-209.

⁴³*Id.* at 204.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.* at 206.

⁴⁷*Id.* at 205.

⁴⁸*Gomez-Perez v. Potter*, 553 U.S. 474, 476 (2008) (finding that § 633a included a prohibition against retaliation, a necessary conclusion since the court would not apply § 623 and wished to avoid finding retaliation was not prohibited by the ADEA in regard to federal employees).

⁴⁹*Ford*, 629 F.3d at 208.

⁵⁰*Wingate v. U.S. Postal Serv.*, No. SF-0752-10-0714-I-2, 2012 WL 4465512 (M.S.P.B. Sept. 27, 2012).

⁵¹*Nassar*, 570 U.S. at 345.

⁵²*Id.*

⁵³*Id.* at 344.

⁵⁴42 U.S.C. § 2000e-3(a) (2012). “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

⁵⁵*Nassar*, 570 U.S. at 346.

⁵⁶*Id.*

⁵⁷*Id.* at 347.

⁵⁸*Id.* at 348.

⁵⁹*Id.* at 398-53.

⁶⁰*Id.* at 348.

⁶¹*Id.* at 349-50.

⁶²*Id.*

⁶³*Id.* at 353; *see also Southerland v. Dep’t of Def.*, No. SF-0752-09-0864-A-1, 2014 WL 7236070 (M.S.P.B. Dec. 18, 2014) (clarifying that the Supreme Court has consistently refused to give the EEOC’s interpretive guidelines the force of law or apply *Chevron* deference).

⁶⁴For the arguments referenced by Kennedy as being unpersuasive, see Equal Employment Opportunity Commission, COMPLIANCE MANUAL (May 1998), § 8, n.45, <https://www.eeoc.gov/policy/docs/retal.html>.

⁶⁵*Id.* at nn. 5 & 6.

⁶⁶See *Savage v. Dep't of Army*, No. AT-0752-11-0634-I-2, 2015 WL 5158744 (M.S.P.B. Sept. 3, 2015) (discussing how traditionally 42 U.S.C. § 2000e-16 was seen as incorporating the retaliation provision contained at § 2000e-3).

⁶⁷* * * *v. Dep't of Health & Hum. Servs.*, EEOC Appeal No. 0120101466, 2013 WL 6623027, at *10 (Dec. 2, 2013); * * * *v. Office of Pers. Mgmt.*, EEOC Appeal No. 0120120901, 2013 WL 6623020, at *30 (Dec. 2, 2013).

⁶⁸See *Nita H. v. Dep't of the Interior*, EEOC Appeal No. 0320110050, 2014 WL 3788011, at *13 (July 16, 2014).

⁶⁹*Id.*

⁷⁰*Hannah C. v. Dep't of Justice*, EEOC Appeal No. 0720150004, 2016 WL 1085157, at *9 (Mar. 10, 2016); *Hayden R. v. Dep't of Homeland Sec.*, EEOC Appeal No. 0520160043, 2016 WL 556080, at *1 (Feb. 5, 2016); *Jeremy R. v. Dep't of Justice*, EEOC Appeal No. 0120132089, 2015 WL 9997262, at *12 (Nov. 19, 2015); * * * *v. Dep't of Homeland Sec.*, EEOC Appeal No. 0720130035, 2015 WL 6690019, at *4 (Oct. 20, 2015); * * * *v. Dep't of Homeland Sec.*, EEOC Appeal No. 0120133118, 2015 WL 5769924, at *8 (Sept. 22, 2015) (reversing the AJ's application of the but-for standard in *Nassar*); * * * *v. Dep't of Justice*, EEOC Appeal No. 0720140036, 2015 WL 5769917, at *6 (Sept. 22, 2015); * * * *v. Dep't of Homeland Sec.*, EEOC Appeal No. 0520140014, 2015 WL 5530295, at *7 (Sept. 9, 2015); * * * *v. Dep't of Homeland Sec.*, EEOC Appeal No. 0720140014, 2015 WL 5042782, at *6 (Aug. 19, 2015); * * * *v. Dep't of Homeland Sec.*, EEOC Appeal No. 0720140037, 2015 WL 3542586, at *4 (May 29, 2015); *Miquel G. v. U.S. Postal Serv.*, EEOC Appeal No. 0720120041, 2015 WL 1635932, at *7 (Mar. 12, 2015).

⁷¹*Seay v. Dep't of Navy*, No. SF-0752-14-0091-I-1, 2014 WL 5410848, at *2 (M.S.P.B. Sept. 5, 2014).

⁷²*Savage*, 2015 WL 5158744 at ¶ 36.

⁷³A search of OFO decisions dating back to the 1970s finds a plethora of citations to 42 U.S.C. § 2000e-3 (§ 704 of the Civil Rights Act) as statutory authority applicable to the federal sector. See e.g., *ad nauseum* * * * *v. Dep't of the Army*, EEOC Appeal No. 0120132597, 2015 WL 5317120, at *2 (Sept. 3, 2015); *Brenton O. v. Dep't of the Air Force*, EEOC Appeal No. 0120130166, 2014 WL 1999368, at *6 (May 7, 2014); *Marcellus M. v. Dep't of Justice*, EEOC Appeal No. 0120123111, 2014 WL 1340668, at *4 (Mar. 27, 2014); *Stevens v. Dep't of Justice*, EEOC Appeal No. 0120123074, 2013 WL 393695, at *2 (Jan. 7, 2013); *Bradshaw v. Dep't of Agric.*, EEOC Appeal No. 0120122727, 2012 WL 6605896, at *1 (Dec. 5, 2012); *Stolberg v. U.S. Postal Serv.*, EEOC Appeal No. 0120100630, 2010 WL 1937055, at *1 (May 3, 2010).

⁷⁴*Whipple v. Dep't of Veterans Affairs*, EEOC Appeal No. 05910784, 1992 WL 1374312, at *5 (Feb. 21, 1992). Interestingly, this is a precedent that the commission no longer cites, possibly in a moment of self-awareness, recognizing the absurdity of citing to interpretation of statutory provisions of which the commission now denies the applicability.

⁷⁵*Supra* note 64, at 13.

⁷⁶*Savage*, WL 5158744 at ¶ 36.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Gomez-Perez*, 553 U.S. at 486.

⁸⁰*Id.* at 488 n.4.

⁸¹*Id.* at 488.

⁸²29 U.S.C. § 633a(f) (2012).

⁸³42 U.S.C. § 2000e-16 (2012).

⁸⁴*Nassar*, 133 S. Ct. at 2529-30.

⁸⁵*Id.* at 2531.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸See EQUAL EMP'T OPPORTUNITY COMM'N, ANNUAL REPORT ON THE FEDERAL WORKFORCE FY2015 (2018), Table 7, <https://www.eeoc.gov/federal/reports/fsp2015>.

⁸⁹See EQUAL EMP'T OPPORTUNITY COMM'N, RETALIATION-BASED CHARGES FY 1997-FY 2015 (2016), <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> (finding that in less than 3 percent of the complaints of retaliation filed with the EEOC retaliation was found).

⁹⁰*Nassar*, 570 U.S. at 359.

⁹¹*Id.*

⁹²*Id.*

⁹³*Red Tape Keeps Some Bad Gov't Workers From Being Fired*, CBS NEWS (Mar. 2, 2015), <http://www.cbsnews.com/news/civil-servant-protection-system-could-keep-problematic-government-employees-from-being-fired> (examining how employees undeniably guilty of gross and sometimes even criminal misconduct are still employed because of the burden placed on federal agencies by civil service protection and antidiscrimination laws).

⁹⁴*Nassar*, 570 U.S. at 359.

⁹⁵42 U.S.C. § 2000e-16(c) (2012).

⁹⁶Jamie A. Yavelberg, *Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. ARAMCO*, 42 DUKE L.J. 166, 200 (1992).

⁹⁷The EEOC publishes extensive interpretive rules in its Compliance Manual and Enforcement Guidances, as well as in Management Directive 110, last updated August 2015. See *EEOC Subregulatory Guidance*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/guidance/index.cfm>.

⁹⁸5 U.S.C. § 553(b)(A). See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (explaining the difference between interpretive and legislative rules).