Mercer Law Review

Volume 67
Number 4 *Eleventh Circuit Survey*

Article 14

7-2016

An Onerous Burden: The Impact of *Nassar* Upon *McDonnell Douglas* in the Eleventh Circuit

Alec Chappell

Comment

An Onerous Burden: The Impact of *Nassar* Upon *McDonnell Douglas* in the Eleventh Circuit†

I. INTRODUCTION

Following a flood of employment discrimination and retaliation cases, the United States Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*[1] announced that an employee alleging retaliation must prove that the employer's motive to retaliate constituted a "but for" cause of the actions adverse to the employee.[2] In addition to creating an awkward and unprecedented union of employment law and traditional tort principles of causation,[3] this decision upended the conventional application of the framework set forth in *McDonnell Douglas Corp. v. Green*[4] and left the lower courts to pick up the pieces.

---

†. The Author wishes to express his gratitude to Professor McMurtry-Chubb, whose invaluable advice improved this Comment immeasurably.

1. 133 S. Ct. 2517 (2013).

2. *Id.* at 2534.

3. *See* William R. Corbett, *What is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027 (2014).

4. 411 U.S. 792 (1973).

Pursuant to the *McDonnell Douglas* framework, a retaliation claim requires the plaintiff-employee who lacks direct evidence of retaliation to establish that: she engaged in a protected activity, the defendant-employer took an action adverse to her, such as termination of her employment, and that a causal connection existed between the protected activity and the adverse action.[5] After the plaintiff establishes these three elements of her prima facie case, the defendant is afforded an opportunity to offer a legitimate reason for its adverse action against the plaintiff, at which point the burden again shifts to the plaintiff to show that the adverse action was merely pretextual and that the defendant's retaliatory motive was the real reason for the action.[6] However, because the Supreme Court in *Nassar* did not explain the impact of its holding upon the *McDonnell Douglas* framework, a circuit split has developed as to whether the plaintiff must prove "but for" causation as part of the prima facie stage or, ultimately, in the pretext stage.[7]

This Comment explores the responses to *Nassar* by the federal courts. After a brief survey of the holdings of the circuit courts of appeal, this Comment traces a development peculiar to the United States Court of Appeals for the Eleventh Circuit, which initially indicated that the burden properly belongs in the pretext stage. Subsequently, the Eleventh Circuit inexplicably reversed itself and now uniformly places the burden in the prima facie stage. Moreover, this pattern has almost exclusively unfolded in unpublished opinions, as federal courts, with a few exceptions, have demonstrated a curious reluctance to address the reasoning behind their decisions on this issue. After examining the best arguments put forward for each position, this Comment investigates the policy considerations underlying the debate and concludes that the Supreme Court should ultimately resolve the circuit split by requiring proof of causation in the pretext stage to effect the original purpose of *McDonnell Douglas*.

II. LEGAL BACKGROUND

A. McDonnell Douglas Framework

Title VII of the Civil Rights Act of 1964[8] prohibits employers from discriminating against their employees on the bases of race, color,

---

5. Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009).

6. *Id.* at 1308.

7. Askins v. Starting Point, No. 4:12-cv-3547-RBH, 2014 U.S. Dist. LEXIS 112737, at *5 (D.S.C. Aug. 14, 2014).

8. Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2012)).

religion, sex, or national origin.[9] Likewise, Title VII forbids employer discrimination against employees who oppose practices made unlawful by Subchapter VI or for making or participating in a charge or proceeding under the subchapter.[10]

When alleging retaliation in violation of Section 2000-e(3)(a), a plaintiff may proceed either by providing direct evidence of the employer's retaliatory motive or by following the analytical framework set forth in *McDonnell Douglas Corp. v. Green*[11] and modified in *Texas Department of Community Affairs v. Burdine*.[12] Under the *McDonnell Douglas* framework, a plaintiff must establish a prima facie case of retaliation by showing that "(1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) he established a causal link between the protected activity and the adverse action."[13] If the plaintiff successfully establishes the elements of the prima facie case, the defendant bears the burden of producing evidence sufficient to "articulat[e] a legitimate, non-discriminatory reason for the adverse employment action."[14] If the defendant meets that burden, thereby rebutting the plaintiff's prima facie case, the burden shifts back to the plaintiff to show "that the defendant's proffered reason was merely a pretext to mask discriminatory actions."[15]

Pursuant to the *McDonnell Douglas* framework, a plaintiff may prove her prima facie case and show the pretextuality of the employer's proffered reason by putting on different kinds of evidence. In the Eleventh Circuit, for example, the plaintiff may rely on close temporal proximity between the protected activity and the subsequent adverse action to demonstrate causation at the prima facie stage.[16] Although the Eleventh Circuit has not defined the precise contours of "close temporal proximity," it has held that the two events must be very close in sequence; while a two-month gap between the protected activity and the adverse action may be sufficient, a three-month gap is not because the events are too attenuated in time.[17] However, where the temporal gap is too large for the plaintiff to demonstrate proximity in time, the plaintiff may nevertheless overcome the deficiency by showing that the

9. 42 U.S.C. § 2000e-2(a)(1) (2012).
10. 42 U.S.C. § 2000e-3(a) (2012).
11. 411 U.S. 792 (1973)
12. 450 U.S. 248 (1981)
13. *Bryant*, 575 F.3d at 1307-08.
14. *Id.* at 1308.
15. *Id.*
16. Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004).
17. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1337 (11th Cir. 1999).

employer retaliated at the earliest available opportunity.[18] Likewise, the plaintiff may also surmount a significant temporal gap by providing evidence of a "pattern of antagonism" on the part of the employer.[19]

At the pretext stage, the plaintiff must rebut each of the defendant's proffered legitimate reasons for its adverse action.[20] To do so, the plaintiff must show that each ostensibly legitimate reason was, in fact, pretextual and the defendant's retaliatory animus constituted the real reason for the adverse action.[21] At the pretext stage, the plaintiff may no longer rely on temporal proximity alone to rebut the defendant's proffered reasons.[22] However, temporal proximity may constitute some evidence of pretext.[23] Additionally, a plaintiff may demonstrate pretext by pointing to the "employer's failure to articulate clearly and consistently the reason for [the] employee's discharge."[24] Likewise, the "employer's deviation from its own standard procedures" may indicate that its putative reason was merely a post-hoc ruse adopted solely for purposes of litigation, allowing the plaintiff to carry her burden at the pretext stage.[25]

Although federal courts had addressed the kinds of evidence sufficient for the plaintiff to present a prima facie case and to establish that the defendant's proffered reason was pretextual, no uniform standard of causation governed retaliation cases. To prove causation in a status-based discrimination claim pursuant to Section 2000-e(2)(a), a plaintiff need only establish that one of the employer's motives was discriminatory; this rule is referred to as the "motivating factor" test.[26] Although the *McDonnell Douglas* framework similarly requires that the plaintiff in a retaliation claim establish the element of causation, *McDonnell Douglas* and its progeny left unclear whether the plaintiff must merely prove "motivating-factor" causation or meet some higher standard of causation. In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court of the United States announced that the plaintiff in a Title VII retaliation case must prove causation according to traditional tort principles of "but for" causation.[27]

---

18. Jones v. Suburban Propane, Inc., 577 F. App'x 951, 955 (11th Cir. 2014).
19. *Id.*
20. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).
21. *Id.*
22. Wascura v. City of S. Miami, 257 F.3d 1238, 1247 (11th Cir. 2001).
23. Hurlbert v. St. Mary's Health Care Sys., Inc., 439 F.3d 1286, 1298 (11th Cir. 2006).
24. *Id.*
25. *Id.* at 1299.
26. *Nassar*, 133 S. Ct. at 2523.
27. *Id.* at 2534.

B. Nassar

In *Nassar*, the plaintiff, a physician of Middle Eastern descent, worked at the University of Texas Southwestern Medical Center and Parkland Memorial Hospital. He alleged that his supervisor displayed her bias against his religion and ethnicity through such comments as "Middle Easterners are lazy."[28] The plaintiff eventually resigned from his position at the University due to the alleged harassment, and he informed the Chair of Internal Medicine of his supervisor's behavior in a letter. Subsequently, the Chair told the Hospital to withdraw its offer of a staff physician job to the plaintiff, resulting in plaintiff's suit for discrimination and retaliation in violation of Title VII.[29] After the jury found for the plaintiff on both claims, the United States Court of Appeals for the Fifth Circuit affirmed the retaliation award, holding that claims of retaliation require the plaintiff to prove only "motivating factor" causation.[30]

Noting that traditional tort principles of causation require the plaintiff to establish that the harm would not have taken place "but for" the defendant's actions, the Supreme Court observed that these rules must be assumed to have been incorporated into Title VII by Congress.[31] The Court then discussed its prior decision in *Price Waterhouse v. Hopkins*,[32] wherein a plurality held that a plaintiff in a status-discrimination Title VII case must show that her status was a motivating or substantial factor in the adverse employment action, while the employer could defeat the claim by demonstrating that its discriminatory motive was not a "but for" cause of its action against the employee.[33]

Subsequent to *Price Waterhouse*, the Court in *Gross v. FBL Financial Services, Inc.*,[34] interpreted the phrase "because of . . . age" in the Age Discrimination in Employment Act (ADEA)[35] to require "but for" causation.[36] Given the similar language in Title VII's anti-retaliation provision, the Court concluded that the motive to retaliate must be a "but for" cause of the adverse employment action in a Title VII

28. *Id.* at 2523.
29. *Id.* at 2523-24.
30. *Id.* at 2524.
31. *Id.* at 2525.
32. 490 U.S. 228 (1989).
33. *Nassar*, 133 S. Ct. at 2525-26 (citing *Price Waterhouse*, 490 U.S. at 258 (plurality opinion)). *Price Waterhouse* was codified in part by the 1991 Amendments to Title VII. *Nassar*, 133 S. Ct. at 2526.
34. 557 U.S. 167 (2009).
35. 29 U.S.C. § 623(a) (2012).
36. *Nassar*, 133 S. Ct. at 2527.

retaliation case.[37] Both the plaintiff and the United States, as amicus curiae, opposed this reading of the statute on the basis that retaliation is defined by the statute as unlawful employment conduct and that such conduct is prohibited by Section 2000e–2(m),[38] which requires the plaintiff to meet only the "motivating factor" test.[39] However, the Court noted that § 2000e–2(m) applied the "motivating factor" test only to status-based discrimination based on the plaintiff's race, color, religion, sex, or national origin, not to retaliation.[40] Because Congress could have applied the "motivating factor" standard of causation to all unlawful practices but failed to do so, the Court interpreted the statute in accordance with its ordinary meaning, a necessity given the precision and complexity of the Title VII statutory scheme.[41]

Critically, the Court justified its reading of the statute on the basis of judicial economy, noting that a lesser causation standard would incentivize employees to file frivolous claims against their employers.[42] Citing the increasing frequency of Title VII retaliation claims in recent years, the Court offered a hypothetical involving an employee who, anticipating termination or a similar adverse employment action, makes a preemptive, baseless claim of discrimination to lay the groundwork for a later retaliation charge when the adverse action finally occurs.[43] Although the employer in such a case might succeed at trial, according to the Court, use of the lessened "motivating factor" causation standard would prevent such a case from being dismissed on summary judgment, as the mere fact that the plaintiff had raised an earlier discrimination claim might be sufficient to constitute a motivating factor for the subsequent adverse action.[44] To increase the employer's costs of litigation and the risk of damage to the employer's reputation "would be inconsistent with the structure and operation of Title VII," the Court averred.[45] In other words, the heightened "but for" causation standard serves the interests of the judicial system and employers by preventing frivolous litigation from proceeding to trial.

Writing in dissent, Justice Ginsburg argued that the "symbiotic" relationship between the antidiscrimination and antiretaliation provisions of Title VII requires plaintiffs to meet the same burdens of

37. *Id.* at 2528.
38. 42 U.S.C. § 2000e-2(m) (2014).
39. *Nassar*, 133 S. Ct. at 2528.
40. *Id.*
41. *Id.* at 2529.
42. *Id.* at 2531-32.
43. *Id.* at 2532.
44. *Id.*
45. *Id.*

proof in both types of cases.[46] By including the antidiscrimination provisions, Congress sought to create a workplace environment in which all employees would be treated equally, regardless of race, ethnicity, religion, or sex.[47] However, Title VII's prohibition on discrimination would be rendered meaningless if employees refused to file grievances and Equal Employment Opportunity Commission (EEOC) complaints out of fear of retaliation.[48] Because retaliation is "an intentional response to the nature of the complaint," it constitutes a form of discrimination.[49] By ruling that a retaliation claim requires proof of "but for" causation, Justice Ginsburg averred, the Court has undermined the will of Congress by separating retaliation claims from discrimination claims, which require only a "motivating factor" standard of causation.[50]

In addition to her textual argument against the Court's reading of Title VII, Justice Ginsburg countered the majority's judicial economy argument. Noting that plaintiffs often bring discrimination claims and retaliation claims in a single action and that "[c]ausation is a complicated concept to convey to juries in the best of circumstances," she asserted that requiring jurors to sort out liability based on multiple standards of causation "is virtually certain to sow confusion."[51] Absent a statutory mandate for double standards of causation, the added practical difficulties imposed on the district courts and juries in Title VII cases militate against the majority's requirement of proving "but for" causation in retaliation claims.[52]

Moreover, although the "but for" causation standard makes sense in tort cases involving physical forces and their consequences, such a standard requires the jurors to determine which one of the employer's multiple motives actually prompted that the adverse action against the employee.[53] Such an inquiry may be practically impossible, given that the employer rarely will act based on a single motive.[54] In light of these unnecessary burdens on district courts and juries, Justice Ginsburg accused the majority of being "driven by a zeal to reduce the number of retaliation claims filed against employers" rather than being guided by precedent or the intent of Congress.[55]

---

46. *Id.* at 2537.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 2539-40.
51. *Id.* at 2546.
52. *Id.*
53. *Id.* at 2547.
54. *Id.*
55. *Id.*

Although the Court held that a Title VII retaliation claim requires the plaintiff to prove that the defendant's retaliatory motive constituted a "but for" cause of the adverse employment action, the Court did not elucidate the relationship between this causation standard and the *McDonnell Douglas* framework in cases lacking direct evidence of the defendant's motive. Under the *McDonnell Douglas* framework, the plaintiff bears the burden of proof in the prima facie and pretext stages of the case, and the Court left the federal district and appellate courts to determine at which of the two stages the plaintiff must prove "but for" causation.

C. The Eleventh Circuit Places the Burden in the Pretext Stage

Due to the Supreme Court's unwillingness to harmonize *Nassar* with the *McDonnell Douglas* analysis, the federal appellate courts have gradually begun to reach contrary decisions as to whether the plaintiff's burden of proving "but for" causation properly belongs in the prima facie stage or the pretext stage of *McDonnell Douglas*, resulting in a circuit split that persists at the time of the writing of this Comment. Excluding the Eleventh Circuit Court of Appeals—the jurisprudence of which has been severely muddled on this issue—most circuit courts appear to have placed the burden in the prima facie stage of the framework, while a minority place it in the pretext stage.

Of the circuit courts that have held that a plaintiff in a retaliation case under *McDonnell Douglas* must prove "but for" causation in the prima facie stage, the United States Court of Appeals for the Ninth Circuit has announced its holding in the most explicit language, concluding that the "employee 'must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.'"[56] However, this statement came in the context of an unpublished memorandum opinion that has not gained a significant following, and the Ninth Circuit has yet to address the issue in any subsequent opinions.

Other circuits have been more ambiguous. For example, the United States Court of Appeals for the Third Circuit, after enumerating the elements of the plaintiff's prima facie case, explained that the Supreme Court in *Nassar* clarified that, as to the causation prong, the plaintiff must establish "but for" causation.[57] Overall, the First, Third, Seventh, Eighth, Ninth, and Tenth Circuits appear to have concluded that the

---

56. Campbell v. Hagel, 536 F. App'x 733, 734 (9th Cir. 2013) (quoting *Nassar*, 133 S. Ct. at 2534).

57. Verma v. Univ. of Pennsylvania, 533 F. App'x 115, 119 (3d Cir. 2013) (quoting *Nassar*, 133 S. Ct. at 2534).

burden belongs in the prima facie stage, although none of those circuits has provided any sustained argument on behalf of the position.[58]

The same pattern has developed among those circuit courts of appeal that have placed the burden in the pretext stage, with one notable exception. A representative example comes from the analysis of the United States Court of Appeals for the Second Circuit in *Kwan v. Andalex Group, LLC*,[59] wherein the court described the stages of *McDonnell Douglas* before reciting the holding of *Nassar*, implying by juxtaposition that *Nassar* only impacts the burden at the pretext stage.[60] Similar conclusory language and implications can be found in the opinions of other circuits adopting the pretext stage as the proper location, such as that of the Fifth Circuit, which announced that a plaintiff demonstrates pretext "by showing that the adverse action would not have occurred 'but for' the employer's retaliatory motive."[61] To date, the Second, Fourth, Fifth, and Sixth Circuits all appear to have placed the burden in the pretext stage of *McDonnell Douglas*.[62] Unique among these circuits is the United States Court of Appeals for the Fourth

---

58. *See* Sklyarsky v. Means-Knaus Partners, L.P., 777 F.3d 892, 898 (7th Cir. 2015) (noting that the plaintiff "proceeded under the direct method, which required him to produce evidence that he engaged in statutorily protected activity, that he suffered a materially adverse action, and that [the employer's] desire to retaliate was the but-for cause of the adverse action"); Musolf v. J.C. Penney Co., 773 F.3d 916, 919 (8th Cir. 2014) (noting that "[t]he burden to show a *prima facie* case is not difficult, but one must show some causation" and that "[t]he Supreme Court recently held retaliation claims brought under Title VII must be proved according to traditional principles of but-for causation"); Davis v. Unified Sch. Dist. 500, 750 F.3d 1168, 1170 (10th Cir. 2014) (noting that the plaintiff must show "a causal connection between his protected activity and the adverse employment action" and that "[t]he Supreme Court has recently clarified the causation standard" to require a showing of but for causation); Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 24 (1st Cir. 2014) (noting that the prima facie case requires a plaintiff to show "that a 'causal nexus exists between the protected [conduct] and the adverse action'") (quoting Ponte v. Steelcase, Inc., 741 F.3d 310, 321 (1st Cir. 2014)); *Verma*, 533 F. App'x at 119 (noting that "as to the third prong [of the prima facie case, i.e. causation], a plaintiff . . . 'must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer'") (quoting *Nassar*, 133 S. Ct. at 2534); *Campbell*, 536 F. App'x at 734 (noting that "to establish a prima facie retaliation claim under Title VII, an employee 'must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer'") (quoting *Nassar*, 133 S. Ct. at 2534).

59. 737 F.3d 834 (2d Cir. 2013).

60. *Id.* at 845. The court also explicitly stated, "However, the but-for causation standard does not alter the plaintiff's ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity." *Id.*

61. Feist v. Louisiana, 730 F.3d 450, 454 (5th Cir. 2013).

62. Foster v. Univ. of Maryland-E. Shore, 787 F.3d 243, 252 (4th Cir. 2015); Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 504 (6th Cir. 2014); *Feist*, 730 F.3d at 454; *Kwan*, 737 F.3d at 845.

Circuit, which provided a detailed argument in favor of its position, as discussed in subsection E, infra.[63]

In *Ramirez v. Bausch & Lomb, Inc.*,[64] the Eleventh Circuit received its first opportunity to apply the holding in *Nassar* to a retaliation claim involving only circumstantial evidence. Beginning what would later become a trend, the court failed to squarely address *Nassar*'s impact, instead punting that question to the district courts. In *Ramirez*, the plaintiff, a quality control inspector for the defendant company, reported perceived violations of the company's standard operating procedures and federal regulations.[65] His subsequent refusal to perform prompted his termination for insubordination,[66] resulting in his lawsuit brought pursuant to the Florida Whistleblower Act,[67] claims under which receive the same analytical framework as Title VII retaliation claims due to the lack of controlling state law.[68]

The district court granted summary judgment for the defendant in a per curiam opinion, finding that the plaintiff failed to prove a causal connection between his protected activity and termination.[69] On appeal, the Eleventh Circuit vacated and remanded the case, holding that the district court failed to consider certain evidence that might have established causation.[70] In a footnote, the Eleventh Circuit first addressed the applicability of *Nassar* to a Title VII retaliation claim based on circumstantial evidence, noting that "the [Supreme] Court did not clarify the role of 'but for' causation in a plaintiff's prima facie case," with the result that "when considering the expanded group of allegedly protected activity on remand, the district court may need to consider whether Ramirez has sufficiently satisfied 'but for' causation in this case."[71] Accordingly, the Eleventh Circuit followed the Supreme Court's lead by declining to clarify at which stage of the proceeding the plaintiff must prove "but for" causation, leaving the district courts to fill the void.

In its next pronouncement on the question, the Eleventh Circuit appeared to finally take a position, indicating that the plaintiff must establish "but for" causation in the pretext stage of the *McDonnell Douglas* framework. In *Mealing v. Georgia Department of Juvenile*

63. *Foster*, 787 F.3d 243.
64. 546 F. App'x 829 (11th Cir. 2013).
65. *Id.* at 830.
66. *Id.*
67. FLA. STAT. ANN. § 448.102 (West 2013).
68. *Ramirez*, 546 F. App'x at 830, 831.
69. *Id.* at 832.
70. *Id.* at 833.
71. *Id.* at 833 n.2.

Justice,[72] the plaintiff, a juvenile correctional officer, engaged in a sexual relationship with a supervisor who utilized her authority to pressure him to do so. The plaintiff filed unsuccessful EEOC complaints and, after various disciplinary infractions, filed internal grievances and sent letters to his superiors. The plaintiff ultimately received a termination letter from the Georgia Department of Juvenile Justice.[73]

The district court granted summary judgment to the Department because the plaintiff failed to establish pretext.[74] In another per curiam opinion, the Eleventh Circuit affirmed the dismissal, holding that the plaintiff failed to provide any evidence of any alleged fabrication of his disciplinary record.[75] Moreover, in discussing the *McDonnell Douglas* framework, the court stated that when the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate reason for the adverse action, which, if carried, shifts the burden again to the plaintiff to "show that the legitimate reasons offered by the employer for taking the adverse action were pretexts for unlawful retaliation . . . and that the plaintiff's protected activity was the 'but-for' cause of the adverse action."[76] Applying that standard, the court held that the plaintiff failed to establish "but for" causation because he offered no evidence that he would not have been terminated but for his grievances and letters.[77] Therefore, for the first time, the Eleventh Circuit appeared to have decisively located the plaintiff's burden of proving "but for" causation at the pretext stage of the *McDonnell Douglas* framework. However, subsequent decisions cast doubt upon that placement, and the court eventually performed a complete about-face, as a series of later unpublished opinions consistently located the burden in the plaintiff's prima facie case.

D. The Eleventh Circuit's About-Face

Despite the clarity of the holding in *Mealing*, the Eleventh Circuit almost immediately muddied the waters in *Smith v. City of Fort Pierce*,[78] another per curiam opinion decided one week later. In *Smith*, a city employee testified in two discrimination cases against the City on behalf of coworkers, causing the relationship with her supervisor to disintegrate. Thereafter, the City placed her under investigation for

72. 564 F. App'x 421 (11th Cir. 2014).
73. *Id.* at 422-26.
74. *Id.* at 426.
75. *Id.* at 428, 429.
76. *Id.* at 427.
77. *Id.* at 429.
78. 565 F. App'x 774 (11th Cir. 2014).

attempting to bribe a City commissioner, resulting in her termination and her Title VII retaliation suit against the City, wherein the court granted summary judgment for the City.[79]

In discussing the element of causation as part of the plaintiff's prima facie case under the *McDonnell Douglas* framework, the Eleventh Circuit initially noted that the plaintiff must prove the employer knew of the protected activity and that the adverse action was "not wholly unrelated" to that activity.[80] However, the court then cited *Nassar*, noting that the plaintiff must also prove "but for" causation.[81] Citing *Ramirez*, the court then observed the uncertainty as to the relationship between the holding of *Nassar* and the plaintiff's prima facie case, ultimately suggesting that the plaintiff "always" bears the burden of persuasion on "but for" causation.[82]

By holding that the plaintiff failed to establish a causal connection as part of her prima facie case due to the lack of temporal proximity between her testimony in the discrimination cases and her termination, the court added to the confusion over *Nassar*.[83] Even if the plaintiff had succeeded in establishing her prima facie case, the court averred, she could not establish "but for" causation because her alleged attempt to bribe the City commissioner severed the causal chain between her testimony in the other cases and her termination.[84] By separating the burden of proving "but for" causation from the prima facie case, the court could be understood to be placing that burden in the pretext stage of the *McDonnell Douglas* framework, consistent with the holding in *Mealing*. Far from resolving the issue, however, *Smith* represented the final case in which the court would locate the burden in the pretext stage.

Shortly after *Smith*, the court began to employ language appearing to place the burden of proving "but for" causation in the plaintiff's prima facie case. For example, in a per curiam opinion in *Adams v. City of Montgomery*,[85] the court enumerated the three elements of the prima facie case—a protected activity, an adverse employment action, and a causal connection—and immediately thereafter explained that, pursuant to the holding of *Nassar*, Title VII retaliation claims require proof that the motive to retaliate was a "but for" cause of the action, impliedly

79. *Id.* at 775-76.

80. *Id.* at 778 (quoting Shannon v. BellSouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002)).

81. *Id.* (quoting *Nassar*, 133 S. Ct. at 2533).

82. *Id.* at 778-79 (quoting Sims v. MVM, Inc., 704 F.3d 1327, 1332 (11th Cir. 2013)).

83. *Id.* at 779.

84. *Id.*

85. 569 F. App'x 769 (11th Cir. 2014).

locating the burden in the prima facie stage.[86] Likewise, in *Jones v. Suburban Propane, Inc.*,[87] another unpublished opinion, the court cited the three elements and stated, "To establish a causal connection, a plaintiff must demonstrate that the employer's desire to retaliate was a but-for cause of the materially adverse action."[88] By providing this explanation directly following a list of the elements comprising the prima facie case, the court again intimated that the plaintiff must carry the burden at the prima facie stage.

In *Jackson v. United Parcel Service, Inc.*,[89] the Eleventh Circuit employed language nearly identical to that in *Jones*, although the context in which it appeared leaves considerable ambiguity as to the court's intent.[90] After listing the elements of the prima facie case, the court described the *McDonnell Douglas* burden-shifting process, wherein the plaintiff's establishing of the prima facie case requires the defendant to articulate a legitimate reason for the adverse action, whereupon the plaintiff bears the ultimate burden of proving retaliation and pretext.[91] In the next paragraph, the court clarified that establishing causation requires the plaintiff to prove "but for" causation.[92] Because the court noted the *Nassar* requirement immediately after explaining that the *McDonnell Douglas* framework requires a showing of causation, a reader reasonably could conclude that the burden must be borne at either of the two stages. Further adding to the uncertainty, the case was decided solely on the basis of a lack of causation evidence, leaving open the possibility that the court was merely elucidating the only element of the prima facie case relevant to the case at hand.[93]

After leaving the matter unclear in *Adams* and *Jackson*, the Eleventh Circuit finally utilized unambiguous language to locate the burden within the prima facie stage of the case, albeit in an unpublished decision regarding retaliatory harassment rather than "pure" retaliation. In *Swindle v. Jefferson County Commission*,[94] the court addressed the matter of a sheriff's office laborer who allegedly experienced certain acts of retaliatory harassment after filing a personnel complaint and an

86. *Id.* at 772-73.
87. 577 F. App'x 951 (11th Cir. 2014).
88. *Id.* at 954-55.
89. 593 F. App'x 871 (11th Cir. 2014).
90. *Id.* at 877 (noting that "[t]o establish a causal connection, a plaintiff must demonstrate that the motive to retaliate was the 'but-for' cause of the adverse employment action").
91. *Id.*
92. *Id.*
93. *Id.* at 878.
94. 593 F. App'x 919 (11th Cir. 2014).

EEOC charge based upon sexual harassment by two supervisors.[95] After the district court granted summary judgment to the defendant—partially on the basis that the plaintiff failed to establish her prima facie case because the supposedly adverse actions were not materially adverse—the plaintiff appealed to the Eleventh Circuit.[96]

Acknowledging the existence of a cause of action for retaliatory hostile work environment, the court explained that the plaintiff must demonstrate that the harassment was so severe or pervasive as to alter the terms of employment or to generate an abusive environment in the workplace.[97] In a footnote, the court clarified that a plaintiff seeking to establish a prima facie case of retaliatory harassment must prove that:

> (1) she engaged in protected activity; (2) after doing so, she was subjected to unwelcome harassment; (3) her protected activity was a "but for" cause of the harassment; (4) the harassment was sufficiently severe or pervasive to alter the terms or conditions of her employment; and (5) a basis exists for holding her employer liable either directly or vicariously.[98]

Because Title VII retaliatory harassment claims receive the same *McDonnell Douglas* analysis as retaliation claims, the court in *Swindle* explicitly interpreted *Nassar*'s "but for" requirement as impacting a plaintiff's prima facie case for retaliation.[99] In subsequent unpublished cases, the Eleventh Circuit would continue this trend.

Shortly after the decision in *Swindle*, the court again affirmed that the plaintiff's prima facie case is the stage in which the plaintiff must prove "but for" causation. In *Torres-Skair v. Medco Health Solutions, Inc.*,[100] after listing the elements of the prima facie case, the court stated that "[w]hile this action was pending in the district court, the Supreme Court clarified the standard for causation in retaliation cases: the plaintiff must show that the adverse action would not have occurred but-for the protected activity."[101] Likewise, in *Rives v. Lahood*,[102] the court's juxtaposition of the elements of a prima facie case and the "but for" standard announced in *Nassar* implies that the plaintiff must carry the burden at the prima facie stage of the proceedings.[103] Even more

---

95. *Id.* at 921-22.
96. *Id.* at 922.
97. *Id.* at 928.
98. *Id.* at 929 n.10.
99. *Id.* at 929.
100. 595 F. App'x 847 (11th Cir. 2014).
101. *Id.* at 857.
102. 605 F. App'x 815 (11th Cir. 2015).
103. *Id.* at 818-19.

explicitly, in *Clark v. South Broward Hospital District*,[104] addressing another retaliatory hostile work environment claim, the Eleventh Circuit affirmed the district court's holding that the plaintiff "failed to prove but-for causation required to establish a prima facie case."[105] Despite some early uncertainty in the wake of *Nassar*—and a contrary holding in *Smith v. City of Fort Pierce*—the court has begun to develop an unmistakable pattern of locating the burden in the prima facie stage rather than the pretext stage.

The Eleventh Circuit has remained on the same trajectory as of the time of publication of this Comment. In *Roula v. Secretary, Department of Veterans Affairs*,[106] the court again utilized explicit language to locate the burden in the prima facie stage, unequivocally stating that the prima facie causation requirement necessitates a showing that the adverse action would not have taken place but for the plaintiff's protected activity.[107] Likewise, in *Hawkins v. BBVA Compass Bancshares, Inc.*,[108] the court listed the elements of the plaintiff's prima facie case before explaining that *Nassar* requires the plaintiff to prove "but for" causation.[109] Immediately thereafter, the court stated that "[o]nce a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant," implying that the Supreme Court in *Nassar* imposed the burden of proving "but for" causation on the plaintiff in the prima facie stage of the case.[110]

Throughout the preceding line of cases involving Title VII retaliation claims, the Eleventh Circuit Court of Appeals displayed a curious reticence to address the holding of the Supreme Court in *Nassar* in any direct fashion, just as the Supreme Court failed to detail precisely how its holding would work in practice. In its initial foray into the question in *Ramirez*, the Eleventh Circuit explicitly left to the district courts the determination of whether the "but for" causation requirement impacts the plaintiff's prima facie case or the pretext stage. After holdings in *Mealing* and *Smith* implied that the burden rested in the pretext stage, the court reversed course and began locating the burden in the prima facie stage, as it appears to have done in every subsequent decision.

At the same time, every single decision on the matter has come in an unpublished per curiam opinion, lacking the controlling authority of a

---

104. 601 F. App'x 886 (11th Cir. 2015).
105. *Id.* at 899.
106. 616 F. App'x 899 (11th Cir. 2015).
107. *Id.* at 902.
108. 613 F. App'x 831 (11th Cir. 2015).
109. *Id.* at 838 (quoting *Nassar*, 133 S. Ct. at 2534).
110. *Id.* at 839.

published opinion and raising questions as to why the court has been reluctant to clear up the uncertainty. Ultimately, given that the district courts possess more firsthand experience with the practical implications of changes to the *McDonnell Douglas* framework at the summary judgment and trial stages of Title VII cases, the Eleventh Circuit may have elected to allow the district courts to weigh in on the issue before adopting a binding, circuit-wide position. Indeed, some district courts have accepted the Eleventh Circuit's challenge and have explicitly debated the merits of placing the burden in the prima facie or pretext stage of a retaliation case.

E. District Courts Fill the Void

After the Eleventh Circuit's initial, inconclusive foray into the impact of *Nassar* in *Ramirez*, a majority of district courts appear to have settled on the prima facie stage as the proper position for the plaintiff's burden to prove "but for" causation, perhaps explaining the corresponding trend by the Eleventh Circuit Court of Appeals. District courts in the Northern District of Alabama, the Northern District of Georgia, the Middle District of Georgia, the Southern District of Georgia, and the Middle District of Florida have all explicitly placed the burden in the prima facie stage.[111] In contrast, district courts in the Middle District of Alabama, the Southern District of Alabama, and the Northern District

111. *See* Montgomery v. Bd. of Trustees of the Univ. of Alabama, No. 2:12-CV-2148-WMA, 2015 U.S. Dist. LEXIS 54484, at *10 (N.D. Ala. Apr. 27, 2015) (holding that plaintiff "must establish that her protected activity was the 'but-for' cause . . . both ultimately and at the prima facie stage"); Mathis v. City of St. Augustine Beach, No. 3:13-cv-1015-J-34JRK, 2015 U.S. Dist. LEXIS 41649, at *70 (M.D. Fla. March 31, 2015) (noting that "[t]o satisfy the causal connection requirement of a *prima facie* case, the Supreme Court recently clarified that a Title VII plaintiff must demonstrate 'but-for' causation to sustain a retaliation claim"); Kittles v. Healthcare Staffing, Inc., No. CV 213-138, 2015 U.S. Dist. LEXIS 33414, at *20 (S.D. Ga. March 18, 2015) (observing that "the 'causal relation' prong of the plaintiff's *prima facie* case requires the plaintiff to show that the statutorily protected activity was the 'but-for' cause of the adverse employment action"); Stacey-Suggs v. Bd. of Regents of Univ. Sys. of Ga., 44 F. Supp. 3d 1262, 1287 (N.D. Ga. 2014) (noting that plaintiff "would be required to establish the final *prima facie* element: a causal connection" wherein plaintiff "must prove that 'the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer'") (quoting Taylor v. Cardiovascular Specialists, P.C., 4 F. Supp. 3d 1374, 1383 (N.D. Ga. 2014)); Hubbard v. Ga. Farm Bureau Mut. Ins. Co., No. 5:11-CV-290 (CAR), 2013 U.S. Dist. LEXIS 107520, at *2 (M.D. Ga. July 31, 2013) (noting that the court "must now re-assess [p]laintiff's prima facie case in light of the heightened 'but-for' causation standard now applicable to Title VII retaliation claims").

of Florida have held that the burden properly belongs in the pretext stage.[112]

The closest equivalent to a comprehensive argument in favor of locating the burden in the prima facie stage comes from the Northern District of Alabama. In *Montgomery v. Board of Trustees of the University of Alabama*,[113] the district court addressed a magistrate judge's report and recommendation that summary judgment be granted on behalf of the defendant, the Board of Trustees of the University of Alabama, on a claim arising out of the plaintiff's discharge two weeks after complaining of discrimination.[114] In a lengthy discourse on the effects of *Nassar*, the court noted that it had predicted the Supreme Court's holding in that case, noting that prior to *Nassar*, the Eleventh Circuit's standard for the element of causation merely required the plaintiff to establish that the protected activity and the adverse action were not wholly unrelated.[115]

Even prior to *Nassar*, the court observed, some circuits had already adopted the "but for" causation test for Title VII retaliation cases under the *McDonnell Douglas* framework.[116] For example, the Fifth Circuit allowed the plaintiff to demonstrate "motivating factor" causation in the prima facie stage before imposing the more stringent requirement of meeting the heightened "but for" causation standard in the pretext stage.[117] In other words, the plaintiff must prove that her protected activity was a motivating reason for the employer's decision at the prima facie stage but need not show that it constituted the sole reason until the pretext stage.[118] Going even further, the United States Court of Appeals for the Seventh Circuit required plaintiffs to prove "but for"

---

112. *See* English v. Bd. of Sch. Comm'rs of Mobile Cnty., 83 F. Supp. 3d 1271, 1281 (S.D. Ala. 2015) (noting that in the pretext stage, "the burden shifts to [plaintiffs] to demonstrate that [defendant's] proffered legitimate reasons for taking the adverse action were a pretext for retaliation and that [plaintiffs'] protected activity was the 'but-for' cause of the adverse action"); Terry v. Laurel Oaks Behavioral Health Ctr., Inc., 1 F. Supp. 3d 1250, 1277 (M.D. Ala. 2014) (noting that defendant "cites no authority that *Nassar* changed the analysis with respect to the third element of the *McDonnell Douglas* prima facie case"); Turner v. Fla., No. 4:12cv510-WS, 2014 U.S. Dist. LEXIS 49672, at *10 (N.D. Fla. Apr. 10, 2014) (noting that plaintiff "bears the ultimate burden of proving her retaliation claim 'according to traditional principles of but-for causation'") (quoting *Nassar*, 133 S. Ct. at 2533).

113. No. 2:12-CV-2148-WMA, 2015 U.S. Dist. LEXIS 54484 (N.D. Ala. Apr. 27, 2015).

114. *Id.* at *1, *9.

115. *Id.* at *4.

116. *Id.* at *4-5.

117. *Id.* at *5 (citing Evans v. City of Houston, 246 F.3d 344, 354 (5th Cir. 2001)). *See also* Strong v. Univ. Healthcare Sys., L.L.C., 482 F.3d 802, 806 (5th Cir. 2007).

118. *Evans*, 246 F.3d at 354.

causation in the prima facie stage on the basis that *post hoc ergo propter hoc* is a logical fallacy rather than a warrant to infer a causal connection.[119] Indeed, as the Seventh Circuit had noted, under the lessened causation standard, "every employee would file a charge just to get a little unemployment insurance," requiring the heightened "but for" standard to weed out frivolous claims.[120]

Citing *Ramirez*, in which the Eleventh Circuit challenged the district courts to determine the proper role of "but for" causation in retaliation cases, as well as a selection of the subsequent unpublished opinions on the issue, the court in *Montgomery* observed "that any reluctance by the Eleventh Circuit to fully to embrace *Nassar* has dissipated" and that the district court in this case would be "willing to perform what the Eleventh Circuit's non-binding opinion in *Ramirez* asked the trial court" by expressly placing the burden of proving "but for" causation in the prima facie portion of the plaintiff's case.[121] Consequently, the court held that a mere fourteen-day interval between the plaintiff's protected activity and the defendant's adverse employment action did not suffice to meet the heightened causation requirement because temporal proximity alone, while sufficient to meet the "motivating factor" test, could not establish "but for" causation as part of her prima facie case.[122]

Among the district courts within the Eleventh Circuit that have expressly placed the burden of showing "but for" causation in the pretext stage, none have cited policy arguments in favor of that position. For example, in *Terry v. Laurel Oaks Behavioral Health Center, Inc.*,[123] the District Court for the Middle District of Alabama rebuked the defendant for "cit[ing] no authority that *Nassar* changed the analysis with respect to the third element of the *McDonnell Douglas* prima facie case."[124] The court then cited the Second Circuit's holding in *Kwan* for the proposition that the plaintiff's prima facie burden of proving causation

---

119. *Montgomery*, 2015 U.S. Dist. LEXIS 54484, at *6-7. *See also* Perrywatson v. United Airlines, Inc., 762 F. Supp. 2d 1107, 1124 (N.D. Ill. 2011) (noting that "*post hoc ergo propter hoc*" is a logical fallacy); Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1179 (7th Cir. 1998); Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1146 (7th Cir. 1997).

120. *Montgomery*, 2015 U.S. Dist. LEXIS 54484, at *6 (quoting *Bermudez*, 138 F.3d at 1179).

121. *Id.* at *8.

122. *Id.* at *9. The view of the court in *Montgomery* that a two-week gap cannot establish temporal proximity appears to be an extreme case of lawmaking by a district court. The Eleventh Circuit has repeatedly affirmed that two months is the maximum length of time within which temporal proximity may be sufficient to establish causation, with any longer period making the protected activity and the adverse action too attenuated. *See, e.g.*, Robinson v. LaFarge N. Am., Inc., 240 F. App'x 824, 829 (11th Cir. 2007).

123. 1 F. Supp. 3d 1250 (M.D. Ala. 2014).

124. *Id.* at 1277.

remains unaffected by *Nassar*.[125] Likewise, the District Court for the Southern District of Alabama in *English v. Board of School Commissioners*[126] simply affirmed that if the defendant proffers a legitimate reason for the adverse employment action against the plaintiff, the plaintiff then bears the burden of proving that the defendant's justification is pretextual and that the adverse action would not have occurred but for the plaintiff's protected activity.[127] At least one other district court, following the Eleventh Circuit's lead in *Smith*, has held that the plaintiff "bears the ultimate burden of proving her retaliation claim 'according to traditional principles of but-for causation,'" implicitly locating that burden in the pretext stage.[128] Beyond these conclusory statements, Eleventh Circuit district courts have been reluctant to examine the merits of the arguments on this issue. To date, the only in-depth argument on behalf of placing the burden in the pretext stage has come from the Fourth Circuit.

F. The Fourth Circuit's Reasoning

Despite the reluctance of Eleventh Circuit district courts to justify applying the burden of proving "but for" causation to the pretext stage, the Fourth Circuit has provided the most extensive analysis of the issue from a court favoring the pretext stage. In *Foster v. University of Maryland-Eastern Shore*,[129] the plaintiff, a female campus police officer, reported inappropriate sexual comments and unwanted touching by a male coworker. Although her supervisors disciplined the coworker, the plaintiff alleged that they concurrently retaliated against her by extending her probationary period, during which she was an at-will employee, as well as by abruptly altering her schedule, withholding her tuition reduction, disallowing light duty after an injury, and preventing her from taking part in training. After the plaintiff complained about the perceived retaliation, she received a notice of termination, prompting her Title VII retaliation suit.[130]

Although the district court granted summary judgment for the defendant on the plaintiff's discriminatory termination and hostile work environment claims, it nevertheless held that a jury reasonably could find that the defendant's retaliatory motive was causally connected to

125. *Id.* at 1277-78.
126. 83 F. Supp. 3d 1271 (S.D. Ala. 2015).
127. *Id.* at 1281.
128. *Turner*, 2014 U.S. Dist. LEXIS 49672, at *10 (quoting *Nassar*, 133 S. Ct. at 2533).
129. 787 F.3d 243 (4th Cir. 2015).
130. *Id.* at 246-48.

the plaintiff's termination.[131] Because the Supreme Court issued its decision in *Nassar* in the interim, the defendant moved for reconsideration. The district court granted reconsideration, along with summary judgment, on the basis that the plaintiff could not meet the burden of proving "but for" causation, which the district court asserted was necessary to establish a prima facie case of retaliation.[132]

On appeal, the Fourth Circuit began by noting that a plaintiff making a retaliation claim essentially must prove causation at both the prima facie and pretext stages, given that the latter requires establishing that "the employer's undisclosed retaliatory animus was the actual cause of her termination."[133] Next, the court observed that the burden of proving causation at the prima facie stage is necessarily less difficult than at the pretext stage.[134] Applying the heavier "but for" causation burden at the prima facie stage, the court reasoned, would effectively do away with the *McDonnell Douglas* framework by rendering the pretext stage superfluous.[135] As the court pointed out, a plaintiff who puts on sufficient evidence of "but for" causation at the prima facie stage would have no need to go through the pretext stage.[136] Given that the pretext stage essentially requires proving that the employer's animus actually caused the termination, proving "but for" causation in the prima facie stage would seemingly be dispositive of the issue without the necessity of ever proceeding to the legitimate reason and pretext stages of the analysis.

Although placing the burden of proving "but for" causation in the prima facie stage would remove the need for plaintiffs with the strongest cases to apply the *McDonnell Douglas* burden shifting for the subsequent stages of the analysis, plaintiffs with weaker cases would be impaired by that placement. As the court reasoned, if the burden lies in the prima facie stage, a plaintiff who must rely on pretext evidence to show causation would never be able to proceed beyond the prima facie stage.[137] Consequently, to hold that the plaintiff must prove "but for" causation at the prima facie stage would be to reverse decades of precedent involving the *McDonnell Douglas* framework. Analogizing the situation to the Supreme Court's holding in *Bell Atlantic Corp. v.*

131. *Id.* at 248.
132. *Id.*
133. *Id.* at 250.
134. *Id.* at 251.
135. *Id.*
136. *Id.*
137. *Id.*

Twombly,[138] wherein the Court explicitly retired the traditional pleading standard,[139] the Fourth Circuit concluded that had the Court intended *Nassar* to make more onerous the plaintiff's burden in the prima facie stage of *McDonnell Douglas*, it would have said so using clear language.[140] The Court's non-utilization of such language necessitates the holding that a plaintiff in a Title VII retaliation case need not prove "but for" causation in the prima facie stage of *McDonnell Douglas*.[141]

Ultimately, the Fourth Circuit concluded that the Supreme Court's decision in *Nassar* impacts the plaintiff's causation burden at neither the prima facie nor the pretext stage of the *McDonnell Douglas* framework.[142] After holding that a plaintiff may rely on "motivating factor" causation at the prima facie stage rather than being forced to prove "but for" causation, the court turned its attention to the effect of *Nassar* at the pretext stage.[143] As Fourth Circuit precedent established, once the defendant proffers a legitimate, nondiscriminatory reason for the adverse action, the plaintiff bears the burden of showing both that the defendant's reason was false and that the retaliatory animus was the "real reason" for the adverse action.[144] Indeed, in the years shortly after the advent of *McDonnell Douglas*, the Fourth Circuit had already interpreted the framework to require a showing of "but for" causation in the pretext stage.[145]

In effect, the standard set forth in *Nassar* has no effect on the pretext stage, because "but for" causation is simply another label for "real reason" causation; that is, a plaintiff who has sufficient evidence to prove that the employer's retaliatory animus was the real reason for the adverse action will always be able to show that the adverse action would not have occurred but for the plaintiff's protected activity that spawned the employer's animus.[146] Because the "real reason" and "but for" causation standards are "functionally equivalent," the Fourth Circuit held that the Supreme Court's decision in *Nassar* had no effect on either the prima facie stage or the pretext stage of a Title VII retaliation claim in which the plaintiff chooses to proceed under the *McDonnell Douglas*

138. 550 U.S. 544 (2007).
139. *Foster*, 787 F.3d at 251.
140. *Id.*
141. *Id.*
142. *Id.* at 250-51, 252.
143. *Id.* at 251, 252.
144. *Id.* at 252.
145. *Id.* at 252 n.14.
146. *Id.* at 252.

framework.[147] Accordingly, because the plaintiff provided sufficient evidence that the real reason for her termination was the employer's desire to retaliate against her following her complaint, the court reversed the grant of summary judgment and remanded for further proceedings.[148]

III. THE REAL REASON FOR THE DEBATE

Although federal courts have been reticent in the extreme to provide any detailed reasoning as to the impact of *Nassar* upon the *McDonnell Douglas* framework, a survey of the cases provides some enlightenment as to the policy considerations lying behind the debate. On one hand, proponents of the prima facie stage evince deep concerns about judicial efficiency and the need to eliminate frivolous claims. On the other, advocates of the pretext stage emphasize the dangers of overburdening the plaintiff at the pretext stage and the need to preserve the traditional *McDonnell Douglas* framework. Although the issue ultimately may appear to be merely academic, it may have some importance in exceptional cases, and as the debate continues, the Supreme Court may be called upon to resolve the question of *Nassar*'s impact upon *McDonnell Douglas*.

As the opinions locating the burden in the prima facie stage suggest, the trend among district courts within the Eleventh Circuit may not be a coincidence. By citing Fifth Circuit and Seventh Circuit precedent requiring the plaintiff to prove "but for" causation even prior to *Nassar*, the district court in *Montgomery v. Board of Trustees*[149] drew attention to the judicial motivations underlying the debate as to the stage in which the burden properly belongs. On the surface, the court in *Montgomery* adopted the reasoning provided by the Seventh Circuit, asserting that the mere fact that an employer takes an action adverse to an employee after the employee engages in a protected activity does not warrant the conclusion that a retaliatory causal connection existed between the protected activity and the adverse action.[150]

More revealing, however, is the court's reliance on the Seventh Circuit's reasoning on the basis of judicial efficiency; as previously noted, the Seventh Circuit explicitly adopted the position that the plaintiff always bears the burden in the prima facie stage on the grounds that locating the burden in the pretext stage would result in the prolonging

147. *Id.*
148. *Id.* at 253.
149. No. 2:12-CV-2148-WMA, 2015 U.S. Dist. LEXIS 54484 (N.D. Ala. Apr. 27, 2015).
150. *Id.* at *6-7.

of frivolous retaliation claims.[151] Consequently, one reasonably may infer that courts that position the burden in the prima facie stage seek to weed out trivial and fraudulent claims as early in the proceedings as possible. If a plaintiff proves unable to demonstrate "but for" causation in the prima facie stage, that failure disposes of the case without the necessity of applying *McDonnell Douglas* burden-shifting—the defendant need not offer any legitimate reason for the termination because the plaintiff will have already failed to establish the elements of a prima facie case. From this perspective, because the holding of *Nassar* will require the plaintiff to prove at some stage in the *McDonnell Douglas* framework that the defendant's retaliatory animus actually caused the adverse actions, a plaintiff who cannot make a prima facie case of retaliation could never establish that the defendant's proffered reason was a mere pretext. Accordingly, the district courts would be empowered to dismiss more Title VII retaliation claims at the summary judgment stage without advancing to trial.

If the district courts that advocate for the prima facie position do so on the basis of practical considerations such as judicial efficiency and the need to eliminate fraudulent claims, their arguments, although perhaps not based on the most erudite legal reasoning, at least have the virtue of comporting with the Supreme Court's explicit pronouncements in *Nassar*. Indeed, there the Court admitted in no uncertain terms that its decision had "central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[152] As the Court noted, the number of EEOC claims based on retaliation had increased from 16,000 in 1997 to 31,000 in 2012, exceeding the frequency of all other EEOC charges with the exception of those for race-based discrimination.[153] Likewise, the Court's hypothetical scenario, wherein an employee files a baseless discrimination charge with the EEOC prior to an anticipated termination, reflects a profound fear that district courts are wasting time and expenses on fraudulent claims.[154]

Although the Court couched its concern in terms of the inequitable costs to employers of defending such frivolous suits, the same argument applies with equal force to the district courts tasked with overseeing retaliation cases from inception through the discovery process until summary judgment, a significant investment of time and expense. As a result, the pattern of support among district courts for placing the

151. *Bermudez*, 138 F.3d at 1176, 1179.

152. *Nassar*, 133 S. Ct. at 2531.

153. *Id. See also* EEOC, *Charge Statistics FY 1997 Through FY 2012*, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Oct. 24, 2015).

154. *Nassar*, 133 S. Ct. at 2531-32.

burden of proving "but for" causation in the prima facie stage represents a logical extension of the Court's reasoning in *Nassar*, and, in the wake of *Mealing* and *Smith*, the Eleventh Circuit appears to have accepted this argument, as the district court in *Montgomery* expected.

In contrast, proponents of the pretext stage appear to be less concerned with judicial efficiency, instead prioritizing a light burden in the prima facie stage so that a plaintiff may proceed to the legitimate reason and pretext stages of the analysis. Since the inception of the *McDonnell Douglas* framework, courts have emphasized that the prima facie stage does not impose a heavy burden on the plaintiff. In oft-quoted language from *Burdine*, the Supreme Court remarked of the application of *McDonnell Douglas* to discriminatory treatment cases that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous," noting that the prima facie stage simply functions to remove the most frequent nondiscriminatory reasons for the adverse action taken against the plaintiff.[155] Federal courts have applied the same reasoning to the utilization of *McDonnell Douglas* in retaliation cases.[156] For the Fourth Circuit in *Foster*, and presumably to the various other courts that have located the burden in the pretext stage, to require the plaintiff to prove "but for" causation in the prima facie stage would be to contravene the Supreme Court's declaration that the prima facie burden must not be onerous.

Moreover, as the court in *Foster* asserted, the pretext stage itself appears to be simply another label for "but for" causation. Once a plaintiff establishes the elements of the prima facie case, the defendant has the opportunity to provide a legitimate reason for its action adverse to the plaintiff, at which point the burden shifts to the plaintiff to show that the proffered reason is merely pretextual and that the adverse action was, in truth, motivated by the defendant's retaliatory animus based on the plaintiff's protected activity. In effect, the pretext stage already required the plaintiff to meet the causation standard required by *Nassar*, and the court in *Foster* correctly concluded that applying the holding of *Nassar* to a prima facie case of retaliation would upend decades of *McDonnell Douglas* jurisprudence by imposing a heavy burden on the plaintiff's initial case, preventing many meritorious claims from ever reaching the pretext stage, and rendering the pretext stage redundant for those plaintiffs with the best evidence.

---

155. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

156. *See, e.g.*, Taylor v. Cardiovascular Specialists, P.C., 4 F. Supp. 3d 1374, 1380 (N.D. Ga. 2014); Bryson v. Regis Corp., 498 F.3d 561, 571 (6th Cir. 2007); Eckman v. Superior Indus. Intern., Inc., No. 05-2318-DJW, 2007 U.S. Dist. LEXIS 48011, at *17 n.24 (D. Kan. July 2, 2007).

Although the Fourth Circuit in *Foster* presented a convincing case for placing the burden in the pretext stage, the court did not address a significant counterargument. A Title VII retaliation claim may be dismissed at the summary judgment stage not on the basis of any failure to prove a prima facie case, but due to insufficient evidence to prove that the defendant's proffered reason was pretextual.[157] Indeed, at summary judgment, the district court will consider the parties' arguments as to all three stages of the *McDonnell Douglas* framework, and frequently the court will assume arguendo that the plaintiff has met her burden of proving the prima facie case, only to grant summary judgment based on insufficient evidence of pretext. That is, even if the plaintiff has established the prima facie elements—a protected activity, an adverse action, and a causal connection between the two—as a matter of law the plaintiff cannot meet the burden of proving pretext.[158] Contrary to the Fourth Circuit's concern that some plaintiffs with meritorious cases would never be able to proceed past the prima facie stage to reach the pretext stage, that distinction may be merely academic if the case is ultimately dismissed on the basis of the plaintiff's failure to meet her burden at the pretext stage. In either scenario, a plaintiff who cannot prove "but for" causation will lose the case at summary judgment.

However, as the Fourth Circuit asserted in *Foster*, a plaintiff who lacks evidence sufficient to prove "but for" causation may nevertheless have the ability to show that the defendant's proffered reason for its adverse action was pretextual.[159] Although the Fourth Circuit did not elaborate on this argument, based on the kinds of evidence by which a plaintiff may prove retaliation, the plaintiff may effectively succeed under the *McDonnell Douglas* framework without providing evidence of "but for" causation until trial. For example, the plaintiff, relying on circumstantial evidence such as the temporal proximity between her protected activity and the adverse action against her, may be able to show in the prima facie stage that the defendant's retaliatory animus constituted a motivating factor for the adverse action against her. If the defendant then proffers a legitimate reason for the adverse action, the plaintiff has the opportunity to show that the defendant's reason was merely a ruse. Such evidence of pretext may include the defendant's

---

157. *See, e.g.*, Hall v. Franklin Cnty., No. 3:13-CV-137 (CAR), 2015 U.S. Dist. LEXIS 132195, at *28-29 (M.D. Ga. Sept. 30, 2015) (holding that "even assuming arguendo that the Court was to find Plaintiff established causation to prove her prima facie case, Plaintiff's claim would still fail because she cannot rebut Defendant's legitimate non-retaliatory reasons as pretext").

158. *Id.*

159. *Foster*, 787 F.3d at 251.

shifting explanations of the reason for the action, as well as a failure to follow internal policies in taking the action.[160] On the basis of such evidence, a jury reasonably could conclude that the defendant's reason was pretextual and that the desire to retaliate against the plaintiff constituted the real reason for the defendant's adverse action.

In this scenario, even at the pretext stage, the plaintiff has not, strictly speaking, put on evidence proving that the adverse action would not have occurred but for the defendant's animus. However, based on the pretext evidence of the defendant's failure to consistently articulate the reason for its actions or to follow its own policies, a jury could infer that the plaintiff has carried her ultimate burden of showing "but for" causation. By placing that burden in the prima facie stage, as the Eleventh Circuit has repeatedly done in unpublished opinions, the plaintiff in such a scenario probably would not be allowed to proceed beyond the summary judgment stage due to a lack of prima facie evidence of "but for" causation. Indeed, only the plaintiff's pretext evidence would allow an inference that the adverse action would not have occurred but for the defendant's desire to retaliate against the plaintiff. As a result, a potentially meritorious claim would be disposed of in summary judgment based on the plaintiff's inability to meet the prima facie standard of "but for" causation.

To be sure, such a scenario may rarely occur. If the plaintiff lacks any evidence from which "but for" causation may be inferred by the finder of fact, the case may appropriately be dismissed at summary judgment. Perhaps, as the Supreme Court worried in *Nassar*, the vast majority of retaliation cases are frivolous. However, the desire to close the floodgates of Title VII retaliation cases by placing the burden in the prima facie stage likely will preclude some meritorious cases from going to trial, and judicial efficiency may be cold comfort to an employee who complains about a legitimate instance of discrimination, files a retaliation claim, and learns that she will not have the opportunity to be heard by a jury.[161]

IV. CONCLUSION

Whatever the merits—or lack thereof—of the Supreme Court's holding in *Nassar*, the circuit courts of appeals must face the reality that the plaintiff in a Title VII retaliation case must prove "but for" causation at

160. Hurlbert v. St. Mary's Health Care Sys., Inc., 439 F.3d 1286, 1298.

161. Due to the inherent difficulties in utilizing the "floodgates" argument to decide cases and fashion law, courts that rely on it should attempt to provide more persuasive justifications for their decisions. *See* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377 (2003).

some stage of the *McDonnell Douglas* framework. At present, the Eleventh Circuit, which initially appeared to favor placing the burden in the pretext stage, appears to have settled on the prima facie stage in a fairly consistent line of cases following *Mealing* and *Smith*. Nevertheless, the Eleventh Circuit has yet to rule on the issue in a binding opinion, preferring to utilize unpublished opinions to address cases in which *Nassar*'s impact on *McDonnell Douglas* is implicated. Although the reasons for the Eleventh Circuit's curious reticence to resolve the issue head-on remain unclear, the court may have elected, pursuant to its remarks in *Ramirez*, to delay so that the debate may play out in the district courts. Because the district courts must deal with the situation on the ground—the practical difficulties of administering the complexities of the *McDonnell Douglas* framework at both the summary judgment and trial stages of litigation—the Eleventh Circuit may have chosen to defer to the lower courts' expertise on the matter.

In light of the Eleventh Circuit's deference, the current state of affairs probably reflects the inclinations of district courts, most of which have joined the court of appeals in locating the burden of proving "but for" causation in the prima facie stage. Much as the Supreme Court based its reasoning in *Nassar* at least in part on the flood of Title VII retaliation suits in recent years, a majority of district courts within the Eleventh Circuit appear to have agreed with the reasoning in *Montgomery* that placement of the burden in the prima facie stage is necessary to dispose of dubious claims at summary judgment, thereby saving the district courts from having to administer lengthy and expensive trials.

While the current trend in the Eleventh Circuit reflects the valid concerns of the district courts, their unwillingness to actually argue on behalf of their positions indicates that the Eleventh Circuit's deference has been less fruitful than it perhaps anticipated. The debate over *Nassar*'s impact on *McDonnell Douglas* can only proceed if the advocates of each position actually put forth and respond to arguments. Thus far, however, only a single district court in the Eleventh Circuit—the court in *Montgomery*—has even come close to elucidating the legal reasoning behind its decision to locate the burden in the prima facie stage. Similarly, no Eleventh Circuit district court favoring the pretext position has provided any reasoning on the question, despite the availability of defensible arguments in the Fourth Circuit's opinion in *Foster*. While advocates of the prima facie stage may be motivated by a desire to avoid exposing their reliance on a crude argument such as judicial efficiency, proponents of the pretext stage have no such excuse, indicating that the ultimate blame may lie with either the Eleventh Circuit for its lack of guidance or with the United States Supreme Court for departing from

decades of Title VII jurisprudence in the first place, leaving the lower courts to sort out the confusion.

Although the Eleventh Circuit Court of Appeals and most of the district courts within the Eleventh Circuit have chosen to place the burden in the prima facie stage of the analysis, on balance, the Fourth Circuit has most persuasively argued that the burden properly belongs in the pretext stage. To the extent that the pretext stage of *McDonnell Douglas* already requires plaintiffs to show that the defendant's proffered legitimate reasons were merely ruses and that the animus to retaliate constituted the real reason for the adverse action, the pretext stage already encompasses the "but for" causation requirement. Consequently, requiring such a showing at the prima facie stage would obviate any need for the pretext stage for plaintiffs with strong cases, while plaintiffs with weaker, but still meritorious, cases would be less likely to survive summary judgment.

Although the district courts understandably may wish to lighten their own loads by ensuring that few retaliation claims proceed to trial, requiring the plaintiff to prove "but for" causation in the prima facie stage forces the plaintiff to shoulder too onerous a burden, contrary to the original purposes of *McDonnell Douglas*. Should the Supreme Court elect to resolve the existing circuit split as to whether *Nassar* impacts the prima facie stage or the pretext stage of *McDonnell Douglas*, it should reject the reasoning of the Eleventh Circuit and adopt that of the Fourth Circuit. Given, however, that the Court explicitly based its holding in *Nassar* on the need to restrict a flood of supposedly frivolous retaliation claims, proponents of the pretext stage as the proper home for the burden are likely to be disappointed.

ALEC CHAPPELL