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The Proof Is in the New Pudding: The Third Circuit Removes “But-For” Causation From the Prima Facie Case for Title VII Retaliation Claims in Carvalho-Grevious v. Delaware State University

Thallia Malespin*

“A wise man proportions his belief to the evidence.” 1

I. You Better Talk the Talk and Walk the Walk: An Introduction to Title VII Retaliation Claims

In one form or another, we have all been told to “prove it.” 2 From accusing a sibling of stealing your clothes to alleging corporate espionage by a Fortune 500 company, accusations are nothing of substance until they are proven. 3 For Title VII retaliation plaintiffs, problems arise in knowing

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* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; M.S.W., 2015, The Florida State University; B.S.W., 2013, University of Central Florida. This Casebrief is dedicated to my husband, Taylor Smith, who loved me before, during, and after the writing process, and who, even when he didn’t have to, liked me through it, too. I would also like to thank my parents, Rick and Ivette—who taught me to work hard for everything we want and have; my sisters, Katya and Iliana—who remind me how to throw myself wholly into my passions; my brother, Ricardo—who inspires me to take on challenges no one expects; and my pets, Boomer and Carrie—who never leave me without a cuddle in a time of need. Finally, to the members of the Villanova Law Review, I thank you for your help and support throughout the writing and editing process of this Casebrief.


3. See Tarana, Stop Trying to Boycott Snapchat, There’s No Proof that the CEO Called India Poor, The Timeliners (Apr. 17, 2017), http://www.thetimeliners.com/stop-trying-boycott-snapchat-there-s-no-proof-ceo-called-india-poor [Permalink unavailable] (“While these are ominous accusations, what they are until they’ve been proved or thrown out by the court is just that—accusations. Not facts.”); see also

(803)
exactly how to prove their employers retaliated against them. To succeed on a retaliation claim, Title VII requires plaintiffs to establish (1) they engaged in a protected activity—such as making a complaint about discrimination, (2) they suffered an adverse employment action, and (3) the presence of a causal connection between the protected activity and adverse action.

If one thing is certain, however, it is that a “smoking gun” of direct evidence establishing that causal connection is difficult to come by. Thus, employees typically proceed with circumstantial evidence when attempting to prove causation in Title VII retaliation claims and do so under a burden-shifting framework. First, employees must establish the three elements of their prima facie case, alleging retaliation for engaging in the protected activity as the cause for the adverse employment action; establishing this prima facie case creates a rebuttable presumption of retaliation. After an employee has established a prima facie case, the burden then shifts to the employer who has the opportunity to produce a nonretaliatory reason for the adverse employment action. In the final shift of the framework, the employee, in response to the nonretaliatory reason, may introduce evidence demonstrating the employer’s reasoning.

Nathan Bomey, Volkswagen CEO Martin Winterkorn Resigns Amid Scandal, USA TODAY (Sept. 23, 2015), https://www.usatoday.com/story/money/cars/2015/09/23/volkswagen-emissions-scandal-martin-winterkorn/72673028/ [https://perma.cc/PZM2-JNQN] (“To be sure, there’s no proof that Winterkorn himself knew about the [fraud]”). In Bomey’s article, he discusses the impact of Volkswagen’s CEO’s resignation despite there being no proof of any wrongdoing on his part. See id. The scandal led to his resignation despite the EPA’s announcement that it had no proof he knew of the fraudulent acts of the company. See id.

4. See Katherine Stark Todd, But-For Nassar, There Would Not Be a Causation Conundrum in Title VII Retaliation Litigation: How University of Texas Southwest Medical Center v. Nassar Makes it Harder for Employees to Prevail, 21 SUUFFOLK J. TRIAL & APP. ADVOC. 288, 290 (2016) (stating employee plaintiffs face confusion in proving causation for retaliation claims because the burden of proof differs from the burden in discrimination claims).


6. See Elizabeth Bloch, Meet the New Boss—Same as the Old Boss: A Look at Foster v. University of Maryland Eastern Shore and Title VII Retaliation Claims Post-Nassar, 43 S.U. L. REV. 217, 222 (2016) (indicating employees suing under Title VII typically do not have direct evidence of retaliatory intent and must prove causation otherwise).

7. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing burden-shifting framework requiring plaintiff to prove prima facie case, defendant’s rebuttal, and plaintiff’s ultimate burden of persuasion); Bloch, supra note 6, at 222 (noting employees without direct evidence proceed under burden-shifting framework).


9. See id. (asserting burden shifts to employer to provide legitimate, nonretaliatory motive for adverse employment action).
was merely pretextual to the adverse employment action—ultimately, if pretext is proven, the employer will be held liable at trial.\(^{10}\)

While the burden-shifting framework is used throughout the entire life of litigation, it is particularly relevant and helpful for employees in surviving defensive motions for summary judgment, where employers typically argue employees have failed to meet their burden of production.\(^{11}\) Employees initiate their prima facie case in the pleading stage of litigation and proceed to produce evidence to support their prima facie case throughout the discovery phase.\(^{12}\) Although employers can produce their own evidence to show nonretaliatory motive, employers often respond to an employee’s prima facie case by filing for a motion to dismiss or motion for summary judgment.\(^{13}\) In addressing these motions, causation is at the root of the issue in determining whether employees have sufficiently established their prima facie case, and whether they can proceed to trial to face their ultimate burden of persuasion.\(^{14}\)

Despite the importance in establishing causation in retaliation claims, neither the Title VII statutes nor the judicial burden-shifting framework address the standard of causation required in retaliation claims.\(^{15}\) Thus,

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10. See id. at 804 (stating plaintiff must be afforded the opportunity to rebut employer’s reasoning by providing evidence that employer’s reason was merely pretext).


12. See Steven R. Semler, Hijacking of Title VII Employment Discrimination Plaintiffs On the Way to the Jury, 32 Hofstra Lab. & Emp. L.J. 49, 60 (2014) (discussing burden-shifting framework and its flexibility in allowing employees to plead and then “create an evidentiary inference in favor of the plaintiff” with sufficient evidence up to the summary judgment stage).

13. See Todd, supra note 4, at 311 (noting that retaliation claims are determined at the summary judgment phase of litigation when employers attack employees’ causation in the prima facia case); Alix Valenti, University of Texas Southwestern Medical Center v. Nassar: Will Plaintiffs’ Claims of Retaliation Be More Difficult to Prove?, 16 Atlantic L.J. 95, 112–13 (2014) (discussing typical retaliation claim and noting employers typically file motions for summary judgment in response to employees’ prima facia case); see also, e.g., Carvalho-Grevious, 851 F.3d at 256 (noting employer-defendant filed for a motion for summary judgment in response to employee-plaintiff’s prima facie case).

14. See Todd, supra note 4, at 311 (“Retaliation cases in particular are usually won or lost at the summary judgment phase by plaintiff’s counsel demonstrating, or employer’s counsel attacking, causation.”). See generally Semler, supra note 12, at 58–78 (discussing Title VII claims and how summary judgment is used as a tool to prevent plaintiffs from reaching a factfinder).

in *University of Texas Southwestern Medical Center v. Nassar*, when the Supreme Court announced that Title VII retaliation claims require employees to meet a burden of “but-for” causation, the new standard threw a wrench in the burden-shifting framework. Ultimately, without clarification of how the “but-for” standard should be applied to the burden-shifting framework, the new standard led to a circuit split in the interpretation of the Court’s decision.

Some circuits have asserted that employees must prove but-for causation at the prima facie stage of the burden-shifting framework—impacting employees’ ability to survive summary judgment. Others have stated the “new” but-for causation standard does not change the burden-shifting framework at all, but rather, only addresses the plaintiff’s ultimate burden.

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17. See *Nassar*, 570 U.S. at 362 (“The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a *but-for* cause of the alleged adverse action by the employer.”) (emphasis added). See generally Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 250–51 n.10 (4th Cir. 2015) (discussing circuit split surrounding impact of *Nassar* on burden-shifting framework); Todd, supra note 4, at 304–12 (discussing aftermath of *Nassar* decision and confusion surrounding factual causation in employment retaliation cases).

18. See *Nassar*, 570 U.S. at 360 (concluding Title VII retaliation claims require proof that retaliation was the but-for cause of adverse employment action); Foster, 787 F.3d at 250–51 (stating circuit courts are split on implications of *Nassar* on prima facie case of burden-shifting framework); see also Bloch, supra note 6, at 242–43 (addressing circuit split regarding *Nassar*’s impact on burden-shifting framework and prima facie stage). The *Nassar* court failed to address the burden-shifting framework and announced the “but-for” causation standard without granting guidance to the effect on the framework. See *Nassar*, 570 U.S. at 360. The circuit split revolves around the placement of “but-for” causation in the burden-shifting framework. See Alec Chappell, *An Onerous Burden: The Impact of Nassar Upon McDonnell Douglas in the Eleventh Circuit*, 67 Mercer L. Rev. 997, 1018 (2016). Those who support placing the burden in the prima facie stage urge the importance of dismissing frivolous claims. See id. On the other side of the debate, proponents of placing the burden in the pretext stage argue plaintiffs with meritorious claims will be prevented from seeing a jury if they have too much of a burden early on and advocate for preserving the traditional burden-shifting framework. See id.

19. See, e.g., EEOC v. Ford Motor Co., 782 F.3d 753, 767 (Cir. 2015) (en banc) (addressing prima facie case of retaliation claim and finding plaintiff did not meet “but-for” causation).
of persuasion at trial.\textsuperscript{20} In \textit{Carvalho-Grevious v. Delaware State University},\textsuperscript{21} the Third Circuit held that at the prima facie stage—and to survive summary judgment—employees need only produce enough evidence to justify an inference that their protected activity was the “likely reason” for an adverse employment action.\textsuperscript{22} The Third Circuit continued and held that the Supreme Court’s “but-for” standard only applies to plaintiffs’ ultimate burden of persuasion, when plaintiffs must convince the factfinder that they are entitled to Title VII relief at trial.\textsuperscript{23}

This Casebrief discusses the Third Circuit’s holding in \textit{Carvalho-Grevious}, arguing the decision promotes the spirit of Title VII by providing a less onerous burden for plaintiffs in retaliation claims at the summary judgment stage of litigation, despite the uncertainty of how the Third Circuit’s new standard will be applied in later cases.\textsuperscript{24} Part II of this Casebrief reviews Title VII, the development of retaliation case law, and the growing circuit split surrounding “but-for” causation’s place in the burden-shifting framework.\textsuperscript{25} Part III focuses on the facts, procedural history, and holding in \textit{Carvalho-Grevious}.\textsuperscript{26} Part IV argues the Third Circuit’s holding is employee-friendly, provides for judicial efficiency, and promotes the core spirit of Title VII retaliation.\textsuperscript{27} Part IV also addresses the ambiguity and implications of the “likely reason” standard in future retaliation cases, offering advice to litigants on both sides of the aisle.\textsuperscript{28} Finally, Part V summarizes the impact of \textit{Carvalho-Grevious} on the changing tides of Title VII.\textsuperscript{29}

\textsuperscript{20} See, e.g., \textit{Foster}, 787 F.3d at 251 (concluding “but-for” causation is not required in prima facie stage and does not change the function of the burden-shifting framework).

\textsuperscript{21} 851 F.3d 249 (3d Cir. 2017).

\textsuperscript{22} See id. at 259 (establishing plaintiffs need to show protected activity was “likely reason” for adverse employment action); \textit{Francis}, supra note 11 (summarizing \textit{Carvalho-Grevious} case and key takeaways from new standard).

\textsuperscript{23} See \textit{Carvalho-Grevious}, 851 F.3d at 258–59 (discussing \textit{Nassar} as clarifying plaintiffs’ ultimate burden of persuasion).

\textsuperscript{24} For a discussion of why the removal of “but-for” at the prima facie stage is more favorable to employee-plaintiffs, see \textit{infra} notes 132–48 and accompanying text. For a discussion of the future implications of the “likely reason” standard, see \textit{infra} notes 149–56 and accompanying text.

\textsuperscript{25} For a discussion of the existing Title VII retaliation law, and judicial development of causation standards, see \textit{infra} notes 30–81 and accompanying text.

\textsuperscript{26} For a discussion of the facts, procedural history, and opinion in \textit{Carvalho-Grevious}, see \textit{infra} notes 82–127 and accompanying text.

\textsuperscript{27} For a discussion of the positive implications arising from the removal of “but-for” causation at the prima facie stage, see \textit{infra} notes 128–48 and accompanying text.

\textsuperscript{28} For a discussion of the implications of \textit{Carvalho-Grevious} on the prima facie case, summary judgment, and litigation in general, see \textit{infra} notes 149–86 and accompanying text.

\textsuperscript{29} For a further discussion of the impact of the Third Circuit’s holding, see \textit{infra} notes 187–94 and accompanying text.
II. EVERYONE HAS SOMETHING TO PROVE: A BACKGROUND OF TITLE VII RETALIATION CLAIMS AND THE DEVELOPMENT OF THE CAUSATION STANDARD

Employees face adverse employment actions all the time, but it is unlikely every adverse action is the result of unlawful retaliation. Thus, proof of causation is the key to retaliation claims. Nevertheless, the development of Title VII jurisprudence has been less than clear on how a plaintiff may prove causation. As a result, courts have accepted direct, indirect, and circumstantial evidence while also allowing plaintiffs to proceed under different frameworks to prove their claims. Even with the Supreme Court’s requirement of “but-for” causation, varying interpretations of the law have led to different standards throughout the lower courts. To illustrate the intricacies of proving causation, this section reviews the development of Title VII retaliation jurisprudence, the Supreme Court’s decision requiring “but-for” causation, and other relevant circuit court opinions interpreting that decision.

30. See generally Bureau of Labor Statistics, USDL-18-0377, News Release: Job Openings and Labor Turnover – December 2017, U.S. DEP’T OF LABOR (Feb. 6, 2018, 10:00 AM), https://www.bls.gov/news.release/pdf/jolts.pdf [https://perma.cc/VF5Q-YG8] (finding approximately 1.6 million people were laid off or discharged in December 2017). The statistics address all reasons for separations in employment but noted that a little over one percent of separations are due to layoffs and discharges. See id.

31. See 5 EMP. COORD. EMPLOYMENT PRACTICES, Proof of Causation § 10:35, (Westlaw 2018) (noting employees facing adverse employment action cannot survive summary judgment without some kind of causal link showing retaliation).

32. See Bloch, supra note 6, at 218 (describing different frameworks used to prove causation under retaliation provision of Title VII). Employees suing for retaliation may be able to proceed with direct or indirect evidence of retaliatory animus, known as the mixed-motive framework. See id. at 219. This includes showing that an employer acting in retaliation was at least a motivating factor in making the decision leading to the adverse employment action. See id. Typically, this is done with conduct or statements showing retaliation as a motive. See id. at 219–20. Some employees may also proceed under the “pretext theory,” by using the burden-shifting framework without direct evidence. See id. at 222–27. Even when the Supreme Court announced the requisite standard of causation, at least one critic has noted the decision led to more confusion regarding causation in Title VII retaliation claims. See Todd, supra note 4, at 304–11.

33. See Bloch, supra note 6, at 218 (summarizing mixed-motive framework where employees use direct and indirect evidence to prove causation and explaining burden-shifting framework that may be completed with circumstantial evidence or without any direct evidence at all).

34. See Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 257 (3d Cir. 2017) (stating circuit courts are split on how “but-for” causation standard should be applied to burden-shifting framework); see, e.g., Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 252 (4th Cir. 2015) (holding “but-for” causation does not apply to burden-shifting framework and using a “real reason” standard); EEOC v. Ford Motor Co., 782 F.3d 753, 770 (6th Cir. 2015) (holding plaintiffs must prove “but-for” causation at prima facie stage of burden-shifting framework).

35. For further discussion on the development of Title VII retaliation jurisprudence, the Supreme Court’s decision requiring “but-for” causation, and other relevant circuit court opinions, see infra notes 44–81 and accompanying text.
A. Causes and Consequences: An Overview of Title VII Requirements

The Civil Rights Acts of 1964—better known as Title VII—protects employees from discrimination based on race, religion, color, and other protected traits. In addition to that core provision, Title VII makes it unlawful for employers to discriminate against individuals who complain of, oppose, or participate in proceedings about prohibited discrimination—in other words, to retaliate. Retaliation protection is essential to allow employees to come forward and report incidents they believe are discrimination. By allowing effective reporting, the protection against retaliation is a “necessary part” of Title VII enforcement.

The statutory language of the retaliation provision prohibits employers from discriminating against any employee because that employee has opposed any practice made unlawful by Title VII. The cause of action that stems from this language requires plaintiffs to prove they engaged in protected activity and the employer discriminated against them because of their participation in that protected activity. While Title VII states the


38. See Henry L. Chambers, The Supreme Court Chipping Away at Title VII: Strengthening it or Killing it?, 74 LA. L. REV. 1161, 1180–81 (2014) (“Without retaliation protection, employees would have a difficult time protecting their own employment, and very few would engage in actions that might protect the employment rights of others.”).

39. See id. at 1180–81 (arguing retaliation protection is essential to enforcing Title VII); see also Nassar, 570 U.S. at 362 (Ginsburg, J., dissenting) (describing importance of Title VII retaliation protection and emphasizing that employees need protection for reporting discrimination).

40. See 42 U.S.C. § 2000e-3(a) (retaliation provision of Title VII). The retaliation provision states specifically: 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.

Id. (emphasis added).

41. See, e.g., Fuhr v. Hazel Park Sch. Dist., 710 F.3d 668, 674 (6th Cir. 2013) (describing retaliation claims and elements that plaintiff must establish). The retaliation prima facie case consists of four elements: (1) the plaintiff engaged in
prohibition on retaliation, the statute does not elaborate on what “because” means or what causation standard is appropriate. Nonetheless, without statutory guidance, the courts took the lead in providing frameworks for causation, describing acceptable means of evidence, and establishing appropriate burdens of proof.

B. A Lost Cause: The Development of Causation in Title VII Retaliation Claims

Although the elements of a Title VII retaliation claim seem simple enough, many employees face difficulty in proving their cases at trial. This difficulty stems from the inability to obtain direct evidence of retaliatory motive. Considering most employers who retaliate do not state activity protected under Title VII; (2) plaintiff’s exercise of her protected rights was known to defendant; (3) an adverse employment action was subsequently taken against the employee or the employee was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. See Moore v. Philadelphia, 461 F.3d 331, 340–41 (3d Cir. 2006). Before filing a claim, a plaintiff must have exhausted administrative remedies with the Equal Employment Opportunity Commission (EEOC). See Tracy Bateman Farrell, et al., 45C AM. JUR.2 D JOB DISCRIMINATION § 2009 (2017). Typically, plaintiffs must exhaust administrative remedies for each individual discriminatory or retaliatory act. See id. These administrative remedies include timely filing of a charge with the EEOC and the receipt of a right-to-sue letter from the agency. See id.

42. See 42 U.S.C. § 2000e-3 (prohibiting retaliation for engaging in protected activities); see also Nassar, 570 U.S. at 350 (addressing definition of “because” in retaliation statute and comparing it to language in discrimination provision and Age Discrimination in Employment Act (ADEA)).

43. See Alan Rupe, Jason Stitt & Mark Kanaga, U.S. Supreme Court Clarifies the Burden of Proof in Title VII Retaliation Actions, 83-Jan J. KAN. B.A. 24, 26–28 (2014) (summarizing history of Title VII retaliation and development of causation through statutory language and court decisions). For further discussion of the history of Title VII retaliation causation, see infra notes 44-69 and accompanying text.

44. See Kimberly A. Pathman, Protecting Title VII’s Antiretaliation Provision in the Wake of University of Texas Southwestern Medical Center v. Nassar, 109 NW. U. L. REV. 475, 483–84 (2015) (describing rise of burden-shifting framework to help plaintiffs having problems proving covert discrimination or retaliation); Tom Spiggle, New Summary Judgment Standard for Retaliation Cases, SPIGGLE LAW: EMPLOYMENT BLOG, http://www.spigglelaw.com/employment-blog/new-summary-judgment-standard-retaliation-cases/# [https://perma.cc/YX4J-KJHM] (last visited Nov. 15, 2018) (noting plaintiffs rarely have direct evidence of retaliation and burden-shifting framework’s purpose without direct evidence). But see David S. Sherwyn & Zev J. Eigen, Experimental Evidence that Retaliation Claims Are Unlike Other Employment Discrimination Claims, 16 CORNELL HOSPITALITY REP. 5, 12 (2016) (arguing once retaliation claim comes before jury, finding in favor of plaintiff is more likely). According to Sherman, jurors are more likely to infer retaliation when presented with evidence because most people can relate to a desire to retaliate against someone who has wronged them. See id. Sherman conducted a study amongst jurors and found that in retaliation cases, jurors are more likely to rule in favor of the plaintiff by fifty-nine percent. See id.

45. See Bloch, supra note 6, at 222 (noting employees without direct evidence usually proceed through burden-shifting framework).
their retaliatory intention in implementing an adverse employment action, most employees proceeding to court will only have circumstantial evidence to support their claim. Thus, the Supreme Court created a burden-shifting framework to provide aggrieved employees with another avenue to succeed.

In *McDonnell Douglas v. Green*, the Supreme Court established a three-step burden-shifting framework. The framework first places the burden on the plaintiff to establish a prima facie case, then shifts the burden to the employer to establish a legitimate, nonretaliatory reason for the adverse employment action, and finally places the burden back on the plaintiff to establish the employer’s reasoning is merely pretext. Regardless of how and when the evidence is presented, the ultimate burden of persuasion always lies with the plaintiff.

The burden-shifting framework has become an essential part of Title VII retaliation jurisprudence, with most plaintiffs using it as a vehicle to present evidence in an organized manner to reach the ultimate conclu-
sion of retaliation.52 The framework is typically viewed as favorable to employees although plaintiffs must still meet the ultimate burden of persuasion by providing evidence of pretext at trial.53 Because most retaliation plaintiffs rely on the burden-shifting framework, it is essential to understand the burden of persuasion and standard of causation a plaintiff must establish when operating under that framework.54

C. Less Isn’t Always More: The Supreme Court Requires “But-For” Causation

Without a clear standard of causation provided within the Title VII retaliation provision, the Supreme Court took to statutory interpretation and addressed the causation issue in University of Texas Southwestern Medical Center v. Nassar.55 Despite the retaliation provision’s failure to address causation, the discrimination provision of Title VII provided guidance to courts in retaliation cases prior to Nassar.56 The discrimination provision prohibits conduct in which “race, color, religion, sex, or national origin was a motivating factor for any employment practice”—a lower causation standard.57 Considering this provision, and without law implying otherwise, courts regularly applied this “lower” causation standard in retaliation cases.58

Despite this regular practice, the Court determined that the discrimination provision’s causation standard did not apply to retaliation claims

52. See id. (describing how burden-shifting framework presents evidence in orderly fashion and is not meant to be rigid).
53. See, e.g., Semler, supra note 12, at 60 (noting usual circumstance of plaintiffs not having access to direct evidence of discrimination and thus proceeding under burden-shifting framework as an additional avenue to relief); see also Ogden, supra note 46, at 187 (discussing common circumstance of employees lacking direct eyewitness testimony of retaliation or discrimination and benefit of burden-shifting framework to provide another avenue for relief).
54. See Semler, supra note 12, at 59 (stating most cases lack direct evidence and burden-shifting framework’s use in those cases). For a discussion of how courts have interpreted a strict “but-for” causation standard and its effect on the burden-shifting framework see infra notes 70–81 and accompanying text.
57. See § 2000e-2(m) (providing motivating factor standard); see also Nassar, 570 U.S. at 348–49 (addressing causation standard in discrimination cases and stating that it is “of course, a lessened causation standard”).
because of the construction of the discrimination provision. Specifically, the discrimination provision, which provides the lesser motivating-factor standard, only addresses unlawful employment practices in five prohibited categories—those that are based on race, color, religion, sex, and national origin. More importantly, the discrimination provision explicitly excludes any language referring to retaliation. Thus, the Court determined, despite Title VII’s inclusion of retaliation as an “unlawful employment action,” it could not “conclude that what Congress omitted from the statute is nevertheless within its scope.”

Moreover, because the Title VII retaliation provision’s causation language is identical to the language in the Age Discrimination in Employment Act (ADEA), the Court relied on its precedent in Gross v. FBL Financial Services, Inc., where it interpreted the phrase “because of” in the relevant ADEA provision. Thus, looking only to the retaliation provision’s language and its precedent in Gross, the Court held the causation standard for retaliation claims must be analyzed under traditional tort principles and a plaintiff has the onerous burden of proving “but-for” causation. Meaning, the plaintiff must prove that had the plaintiff not en-
gaged in the protected activity, the employer would not have engaged in the adverse employment action.66

Although the decision seemed to provide a standard that could be consistently applied, the Court’s holding failed to address one issue: the predominant burden-shifting framework used by most retaliation plaintiffs.67 The Court likely did not address the burden-shifting framework because the plaintiff in Nassar proceeded to trial with direct evidence of retaliation.68 Thus, the plaintiff’s use of a different framework caused ambiguity regarding the decision’s effect on the unaddressed—yet, widely used—burden-shifting framework.69

D. But-For Nassar, There’d Be No Circuit Split: Applying “But-For” to the Burden-Shifting Framework

With the lack of harmonization between Nassar and the burden-shifting framework, lower courts have scrambled to put the pieces together.70 Several circuit courts have addressed whether the “but-for” standard changes any element of the burden-shifting framework.71 A majority of

[66. See Nassar, 570 U.S. at 364 (Ginsburg, J., dissenting) (stating complainant must now prove “that the employer would not have taken the adverse employment action but for a design to retaliate”).

67. See id. (Ginsburg, J., dissenting) (addressing plaintiff’s claim based on direct evidence of retaliation and not addressing burden-shifting framework).

68. See Bloch, supra note 6, at 239 (explaining Nassar required “but-for” causation because case involved direct evidence in “mixed-motive” case); see also Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 249–50 (4th Cir. 2015) (“Clearly, Nassar significantly altered the causation standard for claims based on direct evidence of retaliatory animus by rejecting the ‘mixed motive’ theory of liability for retaliation claims.”).

69. See generally Bloch, supra note 6, at 242 (explaining disagreement amongst circuit courts on Nassar standard implications for burden-shifting framework).

70. See Chappell, supra note 18, at 1005 (discussing aftermath of Nassar and circuit courts’ differing interpretations). Compare Ward v. Jewell, 772 F.3d 1199, 1203 (10th Cir. 2014) (stating Supreme Court established burden as “but-for” causation in prima facie stage of burden-shifting framework), with Feist v. La., Dept. of Justice, Office of the Attorney Gen., 730 F.3d 450, 454 (5th Cir. 2013) (stating plaintiff proves pretext “by showing that the adverse action would not have occurred ‘but-for’ the employer’s retaliatory motive”). With a circuit split in place, it is possible that the Supreme Court will take up the issue in the future. See Doug Lederman, Court Sides with Professor on Retaliation Claim Against Delaware State, Inside Higher Ed (Mar. 22, 2017), https://www.insidehighered.com/quicktakes/2017/03/22/court-sides-professor-retaliation-claim-against-delaware-state [https://perma.cc/7YM6-V5PX] (discussing circuit split may lead to Supreme Court review issue in future).

71. See Foster, 787 F.3d at 251 (summarizing and listing circuit courts addressing whether Nassar affects burden-shifting framework and summarizing disagreement in decisions). The Fourth Circuit described the case law amongst the circuit courts as “muddled” and even listed contradictory opinions from the same circuit court. See id. at 251 n.10.]
courts have held *Nassar* requires plaintiffs to prove “but-for” causation in the prima facie stage of the framework. On the other hand, a minority of courts have held the burden of “but-for” causation belongs in the pre-text stage of the framework.

The Sixth, Tenth, and Eleventh Circuits place the “but-for” causation standard at the prima facie stage of the burden-shifting framework. These courts have assuredly placed a more onerous burden on the plaintiff before trial. When faced with the issue, the Second and Fifth Circuits ruled *Nassar* does not place the new burden on the plaintiff until the

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72. See, e.g., EEOC v. Ford Motor Co., 782 F.3d 753, 770 (6th Cir. 2015) (addressing prima facie case of retaliation claim and finding plaintiff did not meet “but-for” causation).

73. See Kwan v. Andalex Group LLC, 737 F.3d 834, 845 (2d Cir. 2013) (“However, the but-for causation standard does not alter the plaintiff’s ability to demonstrate causation at the prima facie stage . . . .”).

74. See Ford, 782 F.3d at 770 (addressing retaliation claim under ADA and finding *Nassar* required “but-for” in prima facie stage of burden-shifting framework); Ward, 772 F.3d at 1203 (stating Supreme Court heightened standard at prima facie stage to “but-for” causation); Butterworth v. Lab. Corp. of Am. Holdings, 581 Fed. App’x. 813, 817 (11th Cir. 2014) (finding plaintiff failed to prove prima facie case without showing of “but-for” causation).

75. See, e.g., Ward, 772 F.3d at 1203 (addressing causal connection of prima facie case and merely stating “Supreme Court has likened this burden to a showing of ‘but-for’ causation”). The circuit courts placing the burden in the prima facie stage simply state the elements of the prima facie stage and then state the *Nassar* standard as the appropriate standard. See id. Additionally, these courts have not addressed the fact that the *Nassar* Court did not speak to the burden-shifting framework. See id. Although these courts have not provided too much reasoning in placing the burden in the prima facie phase, most proponents of doing so advocate the need to dispose of frivolous claims prior to trial to save resources on the judicial system and accused employers. See Chappell, supra note 18, at 1018–19 (discussing reasons courts believe “but-for” causation belongs in prima facie stage). However, under the Federal Rules of Civil Procedure (FRCP), attorneys are required to certify their representations to the court and essentially assert their filing of claims is not frivolous or without merit. See Fed. R. Civ. P. 11(b). FRCP 11 states:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Id.
Specifically, when establishing pretext, the plaintiff shows retaliation is the “but-for” cause by placing doubt on the legitimate reason proffered by the employer.77

Finally, the Fourth Circuit addressed the issue and held Nassar did not affect the burden-shifting framework at all.78 Specifically, the Fourth Circuit reasoned the burden-shifting framework brings the “real reason” for an adverse employment action to light.79 Relying on this “real reason” standard, the Fourth Circuit stated the “but-for” standard is the “functional[ ] equivalent” of what is already required under the burden-shifting framework.80 In Carvalho-Grevious, the Third Circuit favored the Fourth Circuit’s reasoning in determining Nassar’s effect on the burden-shifting framework.81

III. PUT IT TO THE TEST: THE THIRD CIRCUIT ADDRESSES CAUSATION FOR TITLE VII RETALIATION CLAIMS IN CARVALHO-GREVIOUS V. DELAWARE STATE UNIVERSITY

In Carvalho-Grevious,82 the Third Circuit relied on the Fourth Circuit’s reasoning and adopted a new standard for a plaintiff’s prima facie

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76. See Feist v. La., Dep’t. of Justice, Office of the Attorney Gen., 730 F.3d 450, 454 (5th Cir. 2013) (stating plaintiff proves pretext “by showing that the adverse action would not have occurred but for the employer’s retaliatory motive”); Kwan, 737 F.3d at 845 (2d Cir. 2013) (“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.”).

77. See Feist, 730 F.3d at 454 (stating plaintiff establishes pretext in burden-shifting framework by proving adverse action would not have occurred but for employer’s retaliatory motive); Kwan, 737 F.3d at 846 (stating plaintiff proves “but-for” causation by placing doubt on employer’s articulated legitimate reason for adverse employment action).

78. See Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 251 (4th Cir. 2015) (equivocating “but-for” causation to “real reason” standard already applied to burden-shifting framework claims); see also Bloch, supra note 6, at 245 (summarizing Fourth Circuit’s decision reasoning Nassar did not affect burden-shifting framework).

79. See Foster, 787 F.3d at 252 (stating burden-shifting framework requires pretext to reveal employer’s real reason for engaging in adverse employment action).

80. See id. (noting phrasing may be different but meaning of “but-for” and “real reason” are equivalent standards).

81. See Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 259 (refusing to heighten plaintiff’s burden at prima facie stage in agreement with Fourth Circuit). The Third Circuit also clarified that Nassar’s “but-for” causation standard is a burden of persuasion whereas the prima facie case is merely a burden of production. See id.; see also Patrick Dorrian, Justices May Need to Clarify Causation Test for Retaliation Claims, Bloomberg BNA: Daily Labor Report (Mar. 21, 2017, 7:54 PM), https://convergeceapi.bna.com/uis/content/articleStandalone/2466076560000000008/388272?itemGuid=DC067DB2-20C6-49D2-BB5E-7E2852289B6A [https://perma.cc/S9DL-JJSC] (discussing court’s distinction between burdens of production and persuasion).

82. See Carvalho-Grevious, 851 F.3d at 258 (explaining Nassar addressed plaintiff’s ultimate burden and determining whether prima facie case changed as result).
At the prima facie stage, the new standard requires the plaintiff to show the protected activity was the “likely reason” for the adverse employment action. Ultimately, if proven, the plaintiff survives the defendants’ motion for summary judgment and sees the light of a trial.

A. Cause for Concern: Facts and Procedure in Carvalho-Grevious

Dr. Millicent Carvalho-Grevious was an associate professor and chairperson of the Department of Social Work at Delaware State University. When she was hired in August 2010, her main duties included leading the social work program’s reaccreditation effort. As part of her contract, her employment ended on June 30, 2011—although she could be reappointed. As chairperson, Dr. Grevious reported directly to Dean Austin, who reported to University Provost Thompson.

From the outset of her employment, Dr. Grevious faced difficulty implementing the reaccreditation process. Additionally, she experienced difficulties with others in the department, leading her to make personnel changes. In particular, Dr. Grevious’s relationship with Dean Austin de-
teriorated, and as a result, she complained of his leadership to Provost
Thompson.92 Later, at a meeting with Provost Thompson, Dr. Grevious
alleged Dean Austin made racially discriminatory statements and engaged
in sexist behavior towards her.93 After Dean Austin denied making any
discriminatory remarks, he submitted a formal evaluation of Dr. Grevious
that was largely unfavorable.94

In the midst of her struggles with Dean Austin, Dr. Grevious faced a
faculty vote to determine if she would be reappointed as chairperson for
an additional term.95 Dr. Grevious believed Dean Austin wished to inter-
fere with the faculty vote and his unfavorable review was in retaliation of
her complaint of discrimination to Provost Thompson.96 Nevertheless, at
the vote, the faculty voted to appoint a new chairperson.97 Subsequently,
Dr. Grevious filed a formal complaint against Dean Austin for discrimina-
tion and retaliation for the negative performance evaluation.98

After Dr. Grevious was replaced as chairperson for the following year,
Provost Thompson recommended and issued her a renewable contract.99

Due to pressure in the department’s reaccreditation process, Provost
cause she degraded and belittled them. See id. Despite these negative claims,
Dr. Grevious also received some positive feedback from students and senior faculty
as part of her formal evaluation. See id.

92. See id. (describing Dr. Grevious’s complaints to Provost Thompson). Dr.
Grevious complained to Provost Thompson because she felt that Dean Austin was
hindering the reaccreditation process and advocating to remove her from the de-
partment chair position. See id.

93. See id. (summarizing Dr. Grevious’s first complaint of discrimination). Al-
though Dr. Grevious had previously complained of Dean Austin’s management
and leadership skills, she first complained of discrimination in January 2011. See
id. (stating Dean Austin was overtly sexist and his management style was meant to
stop “back biting among women, especially Black women”).

94. See id. (summarizing Dean Austin’s meeting with Provost Thompson at
which time he denied making any discriminatory statements). The evaluation
stated that Dr. Grevious’s leadership style was a major problem for the department
and rated her as one out of five stars. See id. Dr. Grevious contested the evaluation
and Dean Austin revised it but only to award her two out of five stars in the leader-
ship category. See id.

95. See id. at 255 (detailing faculty vote against Dr. Grevious). The Depart-
ment scheduled the vote to take place in February 2011. See id.

96. See id. at 254–55 (describing email sent from Dr. Grevious complaining of
Dean Austin on morning of election). Dr. Grevious asked Provost Thompson to
insulate the election from any interference from Dean Austin. See id. at 255. Be-
cause Dr. Grevious could not produce evidence of Dean Austin’s interference,
Provost Thompson allowed the election to go forward. See id.

97. See id. at 255 (noting that including Dr. Grevious, the faculty voted five to
four in favor of appointing a new department chair).

98. See id. (recounting Dr. Grevious’s formal complaint to Office of Provost).
No further action was taken regarding these complaints as Provost found no evi-
dence of any violations. See id. Later, Dr. Grevious filed another complaint with
University Human Resources Department. See id.

99. See id. (summarizing timeline of events leading to Dr. Grevious’s com-
plaints including the renewable contract employed Dr. Grevious as an associate
professor for the 2011-12 academic year).
Thompson removed Dr. Grevious from her position as chairperson before the end of her contract, while still affording her chairperson compensation for the remainder of her contract. As a result, Dr. Grevious filed her first charge with the EEOC—alleging the early removal was unlawful retaliation for her complaints against Dean Austin.

One month later, Provost Thompson changed his recommendation on Dr. Grevious, revoked her renewable contract, and issued her a terminal contract to expire in 2012. The contract revision led Dr. Grevious to file her second EEOC charge, alleging the terminal contract was issued in retaliation for filing her initial EEOC charge. Specifically, Dr. Grevious stated Provost Thompson explicitly admitted his decision to issue the terminal contract was based on her EEOC charge. Upon expiration of the terminal contract, Provost Thompson did not recommend Dr. Grevious for reappointment for the 2012–13 academic year. Following this decision, Dr. Grevious filed her final EEOC charge, alleging her ultimate termination was an act of retaliation for her first two EEOC charges.

Dr. Grevious filed suit in the District of Delaware against the University, the Dean, and the Provost alleging retaliation in violation of Title VII. All three defendants moved for summary judgment claiming Dr. Grevious failed to establish causation in her retaliation claims.
district Court relied on *Nassar* and stated the plaintiff must prove the retaliation was the “but-for” cause of the adverse employment action. The court granted the defendants’ motions for summary judgment, concluding no reasonable jury could find that, but for Dr. Grevious’s complaints and EEOC charges, Dr. Grevious would have retained her position or renewable contract. On appeal, the Third Circuit reversed the district court because its application of “but-for” causation was misplaced.

**B. Causing a Stir: Third Circuit Upholds Burden-Shifting and Creates a New Causation Standard**

The Third Circuit in *Carvalho-Grevious* reversed the district court’s decision in part, with disagreement focused on the appropriate causation standard. Because Dr. Grevious relied on indirect evidence to prove her case, the court referenced the widely-used burden-shifting framework. Considering the *Nassar* decision, the court addressed how the plaintiff’s prima facie case could survive summary judgment.

The court began by analyzing a plaintiff’s ultimate burden of persuasion in a Title VII retaliation claim and then worked backwards to decide what standard applies to the prima facie case. The court discussed its precedent in using the burden-shifting framework and noted that it typically requires plaintiffs, upon proving pretext, to prove retaliation was the

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109. See id. (explaining district court’s reasoning); see also *Carvalho-Grevious*, 2015 WL 5768940, at *4 (declaring *Nassar*’s “but-for” standard should be applied in prima facie stage).

110. See *Carvalho-Grevious*, 2015 WL 5768940, at *5 (“As a matter of law, Grevious cannot show that her harassment complaints were the but-for cause of the Defendants’ actions.”).

111. See *Carvalho-Grevious*, 851 F.3d at 255 (reversing district court regarding contract revision claim). Although the Third Circuit reversed the district court’s placement of “but-for” causation, it only reversed summary judgment on Dr. Grevious’s contract revision claim. See *id.*. The court affirmed summary judgment for the University on Dr. Grevious’s chairperson claim noting that, because she received notice of her termination as chairperson on the same day she filed a formal complaint with human resources, the termination was not suggestive of retaliatory motive. See *id.* at 260.

112. See *id.* at 256, 259 (discussing district court’s reasoning and concluding plaintiff’s prima facie case should not be onerous).

113. See *id.* at 257 (“A plaintiff seeking to prove her case through indirect evidence, as Dr. Grevious seeks to here, may do so by applying the familiar . . . burden-shifting framework.” (citing Daniels v. School Dist. of Philadelphia, 776 F.3d 181, 198–99 (3d. Cir. 2015))).

114. See *id.* (“The question before us is what a plaintiff must bring as part of her prima facie case of retaliation to survive a motion for summary judgment in the wake of the Supreme Court’s decision in *Nassar*, which held that ‘Title VII retaliation claims must be proven according to traditional principles of but-for causation.’”).

115. See *id.* at 258 (summarizing Third Circuit precedent regarding plaintiffs’ ultimate burden of persuasion in retaliation claims using burden-shifting framework).
“real reason” for the adverse employment action. Despite differing terms, the court stated that its “real reason” standard and **Nassar**’s “but-for” standard were “functionally the same.” Therefore, because **Nassar** did not change a plaintiff’s ultimate burden, the court discussed whether the ultimate burden differed from the burden at the prima facie stage.

The court reasoned if plaintiffs could meet their ultimate burden in the prima facie phase, then there would be no need to move to the pretext phase—wholly eliminating the burden-shifting framework. The court noted that if the Supreme Court in **Nassar** intended to essentially eliminate the burden-shifting framework rooted in forty years of precedent, then it would have stated its intention explicitly. Thus, the Third Circuit relied on its own precedent in reasoning that a plaintiff has a lesser causal burden at the prima facie stage, which does not include proving “but-for” causation. In refusing to implement a more onerous burden at the prima facie stage, the court stated plaintiffs need only produce evidence “sufficient to raise the inference that [their] protected activity was the likely reason for the adverse [employment] action.”

In applying the lower standard to Dr. Grevious’s claims, the court held she had produced enough evidence to meet the likely reason standard on her contract revision claim. The court found Dr. Grevious was

116. See id. (stating causal burden under pretext theory is where plaintiff must convince factfinder employer’s legitimate explanation was false and retaliatory animus was “real reason” for adverse employment action). The court also noted it had previously required a plaintiff to prove that an employer’s retaliatory intent had a “determinative effect” on the employer’s decision to subject the employee to an adverse employment action. See id. (citing Woodson v. Scott Paper Co., 109 F.3d 913, 932 (3d Cir. 1997)). To prove determinative effect, the plaintiff must prove “by a preponderance of the evidence that there is a ‘but-for’ causal connection” between the adverse employment action and the retaliatory animus. See id. (quoting Miller v. CIGNA Corp., 47 F.3d 586, 595–96 (3d Cir. 1995)).

117. See id. (“Although this Court’s . . . ‘real reason’ causation standard and the Supreme Court’s ‘but-for’ causation standard differ in terminology, they are functionally the same.”). The Third Circuit notes the terminology differences but nonetheless makes clear that the Supreme Court has articulated “but-for” causation as the appropriate standard. See id. (highlighting similarities between Third Circuit’s and Supreme Court’s standards that make clear “but-for” causation is appropriate standard).

118. See id. (“Understanding the retaliation plaintiff’s ultimate burden, we turn to the question of whether that burden differs at the prima facie stage of the case. We hold that it does.”).

119. See id. at 259 (describing effect of requiring but-for causation at prima facie stage of case and agreeing with Fourth Circuit’s reasoning in Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 251 (4th Cir. 2015)).

120. See id. (noting burden-shifting framework is tantamount in retaliation cases and Supreme Court did not explicitly denounce its use in **Nassar**).

121. See id. (“Consistent with our precedent, a plaintiff alleging retaliation has a lesser causal burden at the prima facie stage.”).

122. See id. (quoting Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997)).

123. See id. at 260–61 (addressing Dr. Grevious’s claims and only finding sufficient evidence to support contract revision claim).
issued a renewable contract and Provost Thompson recommended a terminable contract, despite nothing changing except her filing the EEOC charge.\textsuperscript{124} Additionally, the court found the allegations that Provost Thompson admitted to retaliating against Dr. Grevious supported the inference that retaliation was the \textit{likely reason} the contract revision occurred.\textsuperscript{125} Because Dr. Grevious met her burden on the contract revision claim, the court reversed the district court’s grant of summary judgment against the University and Provost Thompson.\textsuperscript{126} Notwithstanding this decision, because Dr. Grevious was unable to produce enough evidence that retaliation was the likely reason for her early removal as chairperson, the Third Circuit affirmed summary judgment on Dr. Grevious’s chairperson claim and her claims against Dean Austin.\textsuperscript{127}

IV. \textsc{Put Your Money Where Your Mouth Is: Critical Analysis and Implications for the Future of Retaliation Claims in the Third Circuit}

The Third Circuit’s holding in \textit{Carvalho-Grevious} places a lesser causal burden on plaintiffs at the prima facie stage and makes clear that “but-for” causation is the \textit{ultimate} burden.\textsuperscript{128} The decision is favorable to employees who, under the Third Circuit’s decision, do not have the onerous burden of proving “but-for” causation before proceeding to trial.\textsuperscript{129} Although this

\begin{itemize}
\item \textsuperscript{124} See id. at 261 (summarizing facts and timing of issued terminable contract to raise inference of retaliatory motive). The court noted that complaints against Dr. Grevious existed long before she filed an EEOC charge and despite these complaints, Provost Thompson still recommended a renewable contract. \textit{See id.} Thus, when Dr. Grevious made her EEOC charge and Provost Thompson reissued her contract, the court found the timing sufficient to create inference of retaliation. \textit{See id.}
\item \textsuperscript{125} See id. at 262 (noting district court’s dismissal of Dr. Grevious’s statements alleging Provost Thompson admitted to retaliation was in error). The court stated that the credibility of statements is for the factfinder alone and should not be engaged in at the summary judgment stage. \textit{See id.}
\item \textsuperscript{126} See id. at 263 (reasoning evidence supported factual issue regarding employer’s motivation in issuing terminal contract to Dr. Grevious).
\item \textsuperscript{127} See id. at 260, 263 (addressing chairperson claim and claims against Dean Austin and finding insufficient evidence to conclude retaliation was likely reason for early removal as chairperson and that Dean Austin had any impact on contract revision).
\item \textsuperscript{128} See id. at 259 (establishing lesser causal burden at prima facie stage and stating \textit{Nassar} clarified plaintiffs’ \textit{ultimate} burden).
\item \textsuperscript{129} See Chappell, \textit{supra} note 18, at 1022 (highlighting impact of \textit{Nassar} on burden-shifting framework and arguing “but-for” standard at prima facie stage is onerous burden for employees). Arguably, once a plaintiff establishes a prima facie case and the employer articulates a legitimate business reason for the adverse action, courts will rely largely on the same evidence from the prima facie case to see if plaintiff has placed enough doubt on the employer’s reasoning. \textit{See Carvalho-Grevious}, 851 F.3d at 262 (relying on evidence from prima facie case because there is nothing in “but-for” standard that requires using different evidence at different stages). Once the plaintiff has surpassed the prima facie case, there is arguably always going to be an issue of fact regarding the cause of the adverse employment
\end{itemize}
part of the court’s decision is clear, the future application of the court’s “likely reason” standard remains uncertain because it is unique from other circuit court standards. Nonetheless, on its face, the “likely reason” standard seems favorable to employees and provides some guidance to both employees and employers in Title VII retaliation litigation.

A. A Cause in the Chaos: Critical Analysis of Removing “But-For” at Prima Facie Stage

After Nassar placed a more onerous burden on plaintiffs, the Third Circuit’s holding in Carvalho-Grevious takes a different turn in Title VII retaliation claims and provides a victory for plaintiffs. By holding plaintiffs need not prove “but-for” causation prior to trial, the Third Circuit has made it easier for plaintiffs to survive motions for summary judgment. While plaintiffs must still meet the ultimate burden with “but-for” causation, they will be able to do so at trial, with a factfinder, rather than having their cases dismissed prematurely, without an inquiry into material issues of fact.

The court’s decision largely advances the spirit of Title VII to protect employees from discrimination and retaliation in the workplace. Title VII aims to encourage individuals to come forward when they believe em-

action. Cf. id. (stating that, once employer explains legitimate reason for actions, employee has to demonstrate weaknesses in employer’s reason from which reasonable jury could infer that employer did not act because of stated reason). In Carvalho-Grevious, the court relied on the same evidence used in the prima facie stage. See id. Thus, establishing the prima facie case seems to be the biggest hurdle because once that is done and an employer articulates a legitimate business reason, there is a question of fact that must be submitted to the jury. Cf. id. (noting plaintiff must produce evidence that convinces reasonable jury defendant’s nonretaliatory reason for adverse employment action is not genuine).

130. Compare Bloch, supra note 6, at 242–46 (highlighting other circuit courts’ approaches to standard), with Francis, supra note 11 (noting that it is too soon to conclude how “likely reason” standard will affect retaliation claims).

131. See Carvalho-Grevious, 851 F.3d at 259 (refusing to impose heavier burden on plaintiff in light of Nassar decision requiring “but-for” causation); see also Chappell, supra note 18, at 1015 (describing Nassar as placing onerous burden on plaintiffs in prima facie stage and stating other standards are more favorable to plaintiffs).

132. See Francis, supra note 11 (asserting Carvalho-Grevious decision makes it easier for plaintiffs to survive summary judgment in Third Circuit).

133. See id. (listing possible implications of lesser causal standard).

134. See id. (noting judgment will be difficult to obtain prior to trial); see also Semler, supra note 12, at 64–65 (discussing employers’ tactical advantages to having cases dismissed prior to reaching trial).

135. See Nassar, 570 U.S. at 371–74 (Ginsburg, J., dissenting) (describing core of Title VII to be employee-friendly to encourage employees to come forward without fear of retaliation); cf. Francis, supra note 11 (stating Carvalho-Grevious decision is employee-friendly).
ployment practices are discriminatory without fear of retaliation.136 Because plaintiffs with weaker, yet still meritorious claims will be able to make it to trial, the decision promotes retaliation protection embedded in Title VII.137 Although plaintiffs still face “but-for” causation at bench or jury trial, the factfinder is in the best position to find whether plaintiffs’ claims have merit.138 Thus, by providing a lesser causal burden for retaliation plaintiffs at the prima facie stage—and particularly relevant at the summary judgment stage—the Third Circuit breathes life into the protection of the retaliation provision.139

Moreover, in determining that Nassar’s standard is “functionally the same” as proving pretext in the burden-shifting framework, the Third Circuit’s decision will lead to clarity and efficiency in future retaliation claims.140 Although Nassar established “but-for” causation as the ultimate burden for retaliation claims, it nonetheless failed to address the burden-shifting framework or define the standard for future cases.141 Because the Third Circuit did not implement this new standard in the prima facie stage, judges and attorneys will not need to grapple with what evidence establishes “but-for” causation or its impact on the burden-shifting framework.142 Thus, judges and attorneys in the Third Circuit will be able to proceed under the same framework rooted in more than forty years of

136. See Chambers, supra note 38, at 1180–81 (commenting on importance of retaliation provision in Title VII to provide protections for individuals who choose to engage in actions to protect their own and others’ employment).

137. See Spiggle, supra note 44 (noting lower standard may lead to more cases making it to trial); see also Nassar, 570 U.S. at 371, 385 (Ginsburg, J., dissenting) (arguing onerous burden on retaliation plaintiffs contradicts protective nature of Title VII).

138. See Semler, supra note 12, at 62–64 (describing onerous burdens in burden-shifting framework turn factual questions regarding intent of discrimination into legal questions at summary judgment). Semler asserts plaintiffs benefit from reaching the jury because it may persuade them that the employer’s actual reason for implementing the adverse employment action was for retaliation. See id. at 62.

139. See Nassar, 570 U.S. at 364 (Ginsburg, J., dissenting) (describing importance of Title VII retaliation and how an onerous burden would remove protections from those who report discrimination). Justice Ginsburg argued that the Nassar causation standard substantially removes protections for retaliation claims despite Congress’ attempt to strengthen Title VII. See id. at 384–85 (highlighting prior case law and statutory amendments that showed Congress’s intention to broaden causation standard).

140. See Bloch, supra note 6, at 247–48 (stating that if Nassar does not affect burden-shifting framework, then litigants and judges do not need to change their approach to retaliation claims and can continue to use “real reason” standard while still promoting clarity and efficiency).

141. See Todd, supra note 4, at 315 (arguing Nassar’s “but-for” standard created confusion and Court failed to clarify standard).

142. See Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 259 (3d Cir. 2017) (establishing “likely reason” standard at prima facie stage); see also Todd, supra note 4, at 312 (arguing “but-for” causation is not simple in employment context and urging Supreme Court to clarify causation standard as it applies strictly to Title VII and burden-shifting framework).
While critics may note the decision will lead to “frivolous” claims ending up at trial, thus wasting judicial resources, the Third Circuit reasoned that sanctions and certification requirements under Federal Rule of Civil Procedure 11 will prevent attorneys from filing meritless claims.144

In addition to promoting use of the established burden-shifting framework, the Third Circuit’s decision promotes fairness.145 Considering the difficulty plaintiffs have in finding direct evidence of retaliation, the purpose of the burden-shifting framework is to give plaintiffs an opportunity to fairly present their claims beyond a motion for summary judgement.146 If plaintiffs were required to prove “but-for” causation at the outset, the functionality and fairness promoted by the burden-shifting framework would diminish because, without direct evidence, plaintiffs likely cannot meet such an onerous burden.147 As a result, in harmonizing the burden-shifting framework with Nassar’s “but for” causation, the court ensures that plaintiffs lacking a “smoking gun” will continue to have a fair opportunity to prove their cases with indirect evidence.148

143. See Carvalho-Grevious, 851 F.3d at 259 (reasoning burden-shifting framework should not be retired after forty years of use in Title VII litigation); see also Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 249–50 (4th Cir. 2015) (reasoning Supreme Court did not retire framework and its familiarity is essential to Title VII retaliation cases); Bloch, supra note 6, at 247 (arguing that if “but-for” makes no impact on burden-shifting framework, litigants may proceed under familiar framework in retaliation claims).

144. Compare Nassar, 570 U.S. at 358–59 (arguing lower causal burden will induce frivolous claims and take away resources from EEOC, employer, and courts to address retaliation claims), and Chappell, supra note 18, at 1019 (arguing Supreme Court required higher causal burden to dismiss meritless claims in wake of rising numbers of retaliation claims filed), with Carvalho-Grevious, 851 F.3d at 259 (arguing FRCP 11’s certification requirement will deter attorneys from filing claims they know do not establish “but-for” causation). See generally Fed. R. Civ. P. 11(b)–(c) (stating requirements in making representations to court and providing sanctions when rule is violated).

145. See Bloch, supra note 6, at 248 (noting lower threshold of prima facie case is fair to employee-plaintiffs in retaliation cases).

146. See Ogden, supra note 46, at 186–87 (emphasizing purpose of burden-shifting framework is to allow plaintiffs to prevail without providing direct evidence of retaliatory animus); see also Semler, supra note 12, at 59–60 (discussing purpose of burden-shifting framework as providing plaintiffs with opportunity to “mount an inference of discriminatory motivation”).

147. See Bloch, supra note 6, at 248 (summarizing importance of upholding burden-shifting framework to promote fairness).

148. See Carvalho-Grevious, 851 F.3d at 258 (refusing to eliminate burden-shifting framework and reasoning “but-for” causation is established by requirement at pretext stage); cf. Ogden, supra note 46, at 187 (noting burden-shifting framework is used by plaintiffs without direct evidence of retaliation); Semler, supra note 12, at 59–60 (noting most cases involve circumstantial rather than direct evidence of retaliation thus requiring courts to evaluate claim under burden-shifting framework).
B. Testing the Water: Future Applications of the “ Likely Reason” Standard and Advice to Practitioners

Along with holding “but-for” causation is not required at the prima facie stage, the Third Circuit held, at the prima facie stage, plaintiffs need only produce evidence that retaliation was the “likely reason” for the adverse employment action.149 However, no other circuit court uses this standard and the Third Circuit failed to define it, making its application within the burden-shifting framework difficult to predict.150 Also, the Third Circuit did not give guidance on what would establish a causal connection that is the “likely reason” for the adverse employment action.”151

The uncertainty of the new “likely reason” standard is emphasized through the Third Circuit’s own application in Carvalho-Grevious.152 In Carvalho-Grevious, the standard appeared to be favorable to Dr. Grevious, but nevertheless, the standard did not guarantee summary judgment survival on all of her retaliation claims.153 Specifically, although the court determined the contract revision claim met the likely reason standard, the court also found the early removal as chairperson claim did not and, thus, dismissed the claim.154 Moreover, the first district court to apply the standard still granted summary judgment for the defendant-employers.155 While uncertainty is on the horizon, practitioners can still prepare themselves for potential implications that may result from the Third Circuit’s decision.156

149. See Carvalho-Grevious, 851 F.3d at 259 (establishing new standard required at prima facie stage of burden-shifting framework).

150. See generally Bloch, supra note 6, at 242–45 (summarizing standards used by other circuit courts and how courts have addressed burden-shifting framework post-Nassar).

151. See Carvalho-Grevious, 851 F.3d at 259 (establishing standard without discussing its application or meaning).

152. See id. at 260-62 (applying standard to Dr. Grevious’s claims of retaliation).

153. See id. at 261 (affirming summary judgment for defendants on Dr. Grevious’s chairperson claim).

154. See id. (reasoning Dr. Grevious failed to produce evidence that she was removed as chairperson because she reported Dean Austin for discrimination).


156. For further discussion of practitioner advice, see infra notes 157–86 and accompanying text.
The Third Circuit’s decision lowered the burden on plaintiffs at the prima facie stage; nevertheless, employees suing employers for retaliation must remember that the prima facie stage is a burden of production—not persuasion.157 Accordingly, while plaintiffs may be able to survive summary judgment, the onerous burden of “but-for” causation awaits at trial.158 In many cases, courts have even interpreted “but-for” causation to mean the protected activity was the sole cause of the adverse employment action.159

In order to meet the high burden of persuasion, plaintiffs’ attorneys should be mindful of the evidence that is available to make the case.160 Specifically, evidence that may establish the “likely reason” standard, such as close temporal proximity between the protected activity and adverse employment action, may not be sufficient to establish “but-for” causation.161 Thus, to meet the most pro-employer view of “but-for” causation, employee-plaintiffs should collect evidence in addition to close temporal proximity, such as a pattern of retaliation incidents similar to the plaintiff’s or documentation of other issues that were present before the protected activity occurred but did not lead to any adverse employment action.162

157. See Dorrian, supra note 81 (asserting prima facie stage burden is one of production and burden of persuasion is required at pretext stage of burden-shifting framework or at trial).

158. See Chappell, supra note 18, at 1021 (arguing plaintiffs with less onerous burden at prima facie stage may still find trouble meeting burden at pretext stage or trial); see also Dorrian, supra note 81 (arguing, despite “but-for” causation’s role in burden-shifting framework, plaintiffs must at some point establish “but-for” causation to succeed on retaliation claim); Rosenthal, supra note 46, at 181 (noting employers are adequately protected from frivolous claims because plaintiffs must still prove “but-for” causation to succeed at trial).

159. Cf. Todd, supra note 4, at 312 (discussing interpretation of “but-for” causation as “sole” cause is inappropriate for employment retaliation claims).

160. See Rosenthal, supra note 46, at 170 (arguing since Nassar, courts have not taken pro-employee stance regarding evidence to prove “but-for” causation and some courts use Nassar to prevent use of temporal proximity between activity and employment action).

161. See id. at 157 (discussing difficulty in proving “but-for” causation with temporal proximity).

162. See id. at 157–61 (summarizing cases using “but-for” causation and leading to pro-employer decisions); see also Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 263 (3d Cir. 2017) (noting issues with Dr. Grevious University relied upon in issuing terminal contract were present before protected activity and still led to issuance and recommendation of renewable contract). The Third Circuit stated that Dr. Grevious’s personnel problems from the beginning of her tenure at the University and the Provost’s continued recommendation to issue a renewable contract only until Dr. Grevious made complaints of discrimination raised the factual issue surrounding the real cause of the adverse employment action. See id. at 262–63.
Another consideration for plaintiffs’ attorneys is the definition of the “likely reason” standard. Without much definition surrounding the “likely reason” standard, employees should argue it is a relatively low threshold in order to survive summary judgment. Plaintiffs can reference the Carvalho-Grevious opinion in making this argument because the court makes clear the burden at the prima facie stage is not meant to be onerous. Additionally, many courts—including the Supreme Court—have established that making a prima facie case is not meant to be a difficult task. Although it is clear the “likely reason” standard is less onerous than “but-for” causation, plaintiffs should urge courts to interpret the standard in the least onerous way to survive summary judgment.

2. Believe It, When You See It: Advice to Practitioners Representing Employers

The lesser causal burden for plaintiffs certainly leads to the possibility that employers will find it more challenging to secure judgment prior to trial. As a result, employers are exposed to having litigation extended to trial in the event a plaintiff has a weaker—yet still meritorious—claim. In the event a case goes to trial, employers must then place their

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163. See Francis, supra note 11 (stating Third Circuit replaced “but-for” with new “likely reason” standard and may have implications for future litigants).

164. See Carvalho-Grevious, 851 F.3d at 259 (establishing “likely reason” standard without providing guidance in its application); see also Rosenthal, supra note 46, at 156–70 (describing split amongst courts in evidence establishing “but-for” causation). With the new standard announced, it is likely that courts will have to spend time figuring out what evidence will actually meet the standard. See generally Rosenthal, supra note 46, at 156–70 (explaining inconsistency amongst courts to highlight that courts need to determine what the new standard requires). Nonetheless, the guidance from the Third Circuit suggests that it is a relatively low threshold to meet. See Carvalho-Grevious, 851 F.3d at 259 (emphasizing prima facie case should not be burdensome).

165. See Carvalho-Grevious, 851 F.3d at 259 (stating prima facie case should not be burdensome). The Third Circuit stated, “[c]onsistent with our precedent, a plaintiff alleging retaliation has a lesser causal burden at the prima facie stage.” Id. Thus, the court found it relevant that its precedent holds the burden lower than the “but-for” causation announced in Nassar. See id.

166. See, e.g., Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (“The burden of establishing a prima facie case of disparate treatment is not onerous.”); see also Rosenthal, supra note 46, at 171–72 (discussing Supreme Court’s and circuit courts’ resonating theme that prima facie burden is not difficult to meet).

167. See Carvalho-Grevious, 851 F.3d at 259 (stating “but-for” is higher standard than is required at prima facie stage); cf. Todd, supra note 4, at 312–15 (discussing various interpretations of “but for” causation standard after court failed to give guidance in Nassar).

168. See Francis, supra note 11 (noting possibility Carvalho-Grevious decision will lead to more plaintiffs surviving summary judgment and proceeding to trial).

169. See id. (emphasizing employers may have difficulty securing judgment prior to trial and should be prepared with defense).
fates in the hands of a jury—which can be risky when employers face allegations of discrimination and retaliation.170

With a chance that more cases will proceed to trial, employers should take steps to protect themselves from juries that may favor injured plaintiffs.171 Employers’ attorneys should emphasize the importance of adhering to existing procedures when deciding to terminate employees or alter employees’ positions in a material way.172 Moreover, attorneys should focus on compliance with internal protocols and provide documentation of performance-based reasons leading to employment decisions.173 These protocols are strengthened with timely work evaluations and substantive, fair investigations of employees’ behaviors.174 Although the burden is still “but-for” at trial, it is important that employers not rely on the onerous burden and dispel any possibility of retaliatory intent with preemptive policies and procedures.175

Additionally, while the burden on the plaintiff during summary judgment is low, the Third Circuit has shown that not all retaliation claims will meet that standard.176 Thus, employers can take steps to ensure summary judgment even in light of the “likely reason” standard.177 Employers can argue, with the lack of clarity surrounding the standard, the “likely reason” is a higher burden than the plaintiff has met in any given case.178 In particular, even Dr. Grevious failed to meet the “likely reason” standard on her chairperson claim alleging retaliation by Dean Austin.179 Rather than seeing Carvalho-Grevious as negative authority, employers’ attorneys should

170. See Sherwyn, supra note 44, at 16 (summarizing results from experiment with juries in employment discrimination and retaliation claims and finding juries are more likely to rule in favor of plaintiff at trial).

171. See Francis, supra note 11 (advocating for employer precautions in light of Carvalho-Grevious); see also Keating, supra note 65 (detailing practical steps employers should take despite Nassar placing higher burden on plaintiffs).

172. See Francis, supra note 11 (listing key takeaways from Carvalho-Grevious for employers).

173. See id. (providing recommendations for employers in complying with policies to avoid retaliation claims).

174. See id. (highlighting importance of employee evaluations and properly conducted investigations); see also Keating, supra note 65 (detailing practical steps for employers in defending retaliation claims).

175. See Keating, supra note 65 (urging employers to stay vigilant in upholding antiretaliations policies despite favorable decision in Nassar).

176. See, e.g., Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 260 (3d Cir. 2017) (finding Dr. Grevious’s chairperson claim did not meet “likely reason” standard).

177. Cf. id. (finding in favor of employer on chairperson claim under “likely reason” standard because of extensive documentation showing Dr. Grevious did not perform well as chairperson).

178. See id. at 259 (establishing “likely reason” standard without providing guidance in its application); see also Rosenthal, supra note 46, at 156–70 (describing split amongst courts in evidence establishing “but-for” causation).

179. See Carvalho-Grevious, 851 F.3d at 260 (affirming summary judgment on chairperson claim).
distinguish their cases from the contract revision claim and compare their cases to the chairperson claim. Moreover, the first court to apply the likely reason standard granted summary judgment in favor of the employer, reasoning the plaintiff failed to reach the low threshold. Thus, in moving forward, employers’ attorneys can use the uncertainty of the “likely reason” standard to create a pro-employer interpretation.

At this point, it is unclear how the “likely reason” standard will play out in lower courts. This includes how the standard will be met, how frequently employees will survive summary judgment, or how plaintiffs will fare at trial. Nonetheless, on its face, the Third Circuit’s decision appears pro-employee, and employers should be prepared to face trial more frequently. Even so, employers can rest easy knowing, ultimately, plaintiffs will still need to overcome the “but-for” causation hurdle—only a little later.

V. Cause and Effect: Summing Up the Future of Title VII Retaliation in the Third Circuit

The Third Circuit’s holding in Carvalho-Grevious established that “but-for” causation is a plaintiff’s ultimate burden of persuasion. In making this decision, the court also established that, to form a prima facie case, plaintiffs need only produce enough evidence to show retaliation was the “likely reason” for an adverse employment action. Since the Supreme Court’s decision in Nassar, many critics have noted that Title VII has

182. Rosenthal, supra note 46, at 156–70 (describing different interpretations of standard).

183. See Francis, supra note 11 (noting uncertainty to come from Carvalho-Grevious decision).

184. See id. (stating frequency of cases surviving summary judgment is unknown in light of new “likely reason” standard).

185. See id. (stating possibility employers may face trial more frequently with lesser causal burden at prima facie stage and summary judgment).

186. See Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 258 (3d Cir. 2017) (discussing plaintiff’s ultimate burden in retaliation claim is “but-for” causation); see also Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (establishing causation standard in Title VII claims as “but-for” causation); Rosenthal, supra note 46, at 175 (arguing Nassar established plaintiff’s ultimate burden rather than burden at prima facie stage).

187. See Carvalho-Grevious, 851 F.3d at 257 (noting ultimate burden of persuasion is “but-for” causation announced in Nassar).

188. See id. at 259 (holding causation standard is whether plaintiff shows retaliation was “likely reason” for adverse employment action).
swayed towards a pro-employer scheme. The Third Circuit’s decision swings the pendulum back to plaintiff-employees providing a lesser causal burden at the prima facie stage, before reaching trial.

Even with a pro-employee decision, the application of the new “likely reason” standard remains uncertain. As practitioners face Title VII retaliation claims in the future, they must prepare for some ambiguity but argue for an application that best favors their clients. Additionally, in lending another interpretation of Nassar’s effect on the burden-shifting framework, the Third Circuit may just cause the Supreme Court to grant certiorari to a retaliation claim based on the burden-shifting framework and clarify the appropriate standard. But, for now, practitioners in the Third Circuit may need to take a taste of the new “likely reason” pudding to figure out just what proof is needed for a successful retaliation case.

189. See Nassar, 570 U.S. at 364, 385–86 (Ginsburg, J., dissenting) (stating majority’s decision takes force out of the protections in Title VII and will reduce number of retaliation claims filed against employers); see also Chambers, supra note 38, at 1186–87 (describing Supreme Court’s opportunity to broaden Title VII but choosing to narrow protection for plaintiffs); Rosenthal, supra note 46, at 145 (stating Nassar made establishing prima facie case more difficult for plaintiffs); Valenti, supra note 13, at 120 (noting Nassar signaled changed from Title VII’s employee-friendly scheme).

190. See Francis, supra note 11 (noting Third Circuit’s decision establishes lesser causal burden makes it easier for plaintiffs to survive summary judgment); see also Carvalho-Grevious, 851 F.3d at 259 (refusing to impose higher causal burden on plaintiffs in retaliation claims).


192. For a discussion of practitioner advice in interpreting “likely reason” standard, see supra notes 157–86 and accompanying text.

193. See Lederman, supra note 70 (noting circuit split and Third Circuit’s contribution may increase chance Supreme Court will review issue in future); see also Bloch, supra note 6, at 242 (discussing differing standards applying Nassar to burden-shifting framework from circuit courts); Todd, supra note 4, at 312 (noting causation “conundrum” in Title VII retaliation claims since Nassar).

194. See Proof is in the Pudding, THE FREE DICTIONARY, https://idioms.thefreedictionary.com/proof+is+in+the+pudding [https://perma.cc/WM8Q-BDCC] (last visited Nov. 15, 2018) (explaining meaning of “proof is in the pudding”). The “proof is in the pudding” means to wait and review the results of your efforts before finding success. See id. For further discussion of how practitioners can argue favorable interpretations of the Third Circuit’s new “likely reason” standard, see supra notes 157–86 and accompanying text.