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## Casebriefs

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.”<sup>1</sup>

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.”<sup>2</sup> 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.<sup>3</sup> 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.

1. See DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 116 (Open Court Pub. Co., 1912).

2. See Lauren Rinere, *It is not Enough to Say Someone is Wrong—Prove It!*, THOUGHT CATALOG (Mar. 5, 2015), <https://thoughtcatalog.com/lauren-rinere/2015/03/it-is-not-enough-to-say-someone-is-wrong-prove-it/> [<https://perma.cc/D8S3-5DXP>] (stating disagreement is not enough and encouraging merited positions based on proof); see also *Prove – Idioms by the Free Dictionary*, FREE DICTIONARY, <https://idioms.thefreedictionary.com/prove> [<https://perma.cc/PLK6-CKZC>] (last visited Nov. 15, 2018) (explaining meaning of “fend and prove” idiom); *Proof is in the Pudding*, 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” to mean looking at evidence to determine facts). To “fend and prove” means “to argue and defend a point or opinion.” *Id.*

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-theres-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

exactly how to prove their employers retaliated against them.<sup>4</sup> 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.<sup>5</sup>

If one thing is certain, however, it is that a “smoking gun” of direct evidence establishing that causal connection is difficult to come by.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> In the final shift of the framework, the employee, in response to the nonretaliatory reason, may introduce evidence demonstrating the employer’s reasoning

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Nathan Bomey, *Volkswagon 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 SUFFOLK 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).

5. *See* Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 257 (3d Cir. 2017) (listing elements for plaintiffs to prove retaliation at prima facie stage of case). *See generally* Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3 (2018) (anti-retaliation provision).

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).

8. *See* McDonnell Douglas Corp., 411 U.S. at 802 (describing framework and beginning with prima facie stage with burden on employee-plaintiff).

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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).

11. *See, e.g.,* *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 262 (3d Cir. 2017) (denying employer-defendant's motion for summary judgment because employee-plaintiff had sufficiently established prima facie case in burden-shifting framework); *see also* Simone R. D. Francis, *Third Circuit Substitutes "Likely Reason" for "But For" at Summary Judgment Stage of Retaliation Case*, OGLETREE DEAKINS: OUR INSIGHTS (Apr. 7, 2017), <https://ogletree.com/shared-content/content/blog/2017/april/third-circuit-substitutes-likely-reason-for-but-for-at-summary-judgment-stage-of-retaliation-case> [<https://perma.cc/4MHF-S8KL>] (noting that a lower causation standard would make it easier for employees to survive motions for summary judgment)

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 facie 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 facie 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).

15. *See* 42 U.S.C. § 2000e-3 (2018); *see also* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351–57 (2013) (addressing statutory interpretation of Title VII's

in *University of Texas Southwestern Medical Center v. Nassar*,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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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phrase “because of” in retaliation statute). *But see* 42 U.S.C. § 2000e-2(m) (2018) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). The discrimination provision of Title VII provides what is known as the “motivating factor” causation standard. *See Nassar*, 570 U.S. at 352. Nonetheless, because the provision does not state retaliation as a potential motivating factor, the Supreme Court determined the “motivating factor” standard does not apply to retaliation claims under Title VII. *See id.*

16. 570 U.S. 338 (2013).

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.<sup>20</sup> In *Carvalho-Grevious v. Delaware State University*,<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

This Casebrief discusses the Third Circuit’s holding in *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.<sup>24</sup> 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.<sup>25</sup> Part III focuses on the facts, procedural history, and holding in *Carvalho-Grevious*.<sup>26</sup> Part IV argues the Third Circuit’s holding is employee-friendly, provides for judicial efficiency, and promotes the core spirit of Title VII retaliation.<sup>27</sup> 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.<sup>28</sup> Finally, Part V summarizes the impact of *Carvalho-Grevious* on the changing tides of Title VII.<sup>29</sup>

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20. See, e.g., *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).

21. 851 F.3d 249 (3d Cir. 2017).

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

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

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

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

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

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

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

29. For a further discussion of the impact of the Third Circuit’s holding, see *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.<sup>30</sup> Thus, proof of causation is the key to retaliation claims.<sup>31</sup> Nevertheless, the development of Title VII jurisprudence has been less than clear on how a plaintiff may prove causation.<sup>32</sup> As a result, courts have accepted direct, indirect, and circumstantial evidence while also allowing plaintiffs to proceed under different frameworks to prove their claims.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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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-JYG8>] (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.<sup>36</sup> 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.<sup>37</sup> Retaliation protection is essential to allow employees to come forward and report incidents they believe are discrimination.<sup>38</sup> By allowing effective reporting, the protection against retaliation is a “necessary part” of Title VII enforcement.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> While Title VII states the

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36. See generally 42 U.S.C. § 2000e-2 (2018). See also Tracy Bateman Farrell, et al., *Generally*, 45A AM. JUR. 2d *Job Discrimination* § 1 (2017) (providing overview of Title VII provisions).

37. See generally 42 U.S.C. § 2000e-3 (2018). See also Frederick T. Golder & David R. Golder, *Title VII of the Civil Rights Act of the 1964—Retaliation*, LABOR & EMPLOYMENT LAW: COMPLIANCE AND LITIGATION § 4.20 (3d ed. 2017) (summarizing retaliation provision of Title VII). This protection against retaliation is an essential function in securing a workplace free from discrimination. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 363 (2013) (Ginsburg, J., dissenting) (explaining fear of retaliation is why people who experience discrimination stay silent and protection from retaliation is essential to reach goals of Title VII).

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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> This difficulty stems from the inability to obtain direct evidence of retaliatory motive.<sup>45</sup> Considering most employers who retaliate do not state

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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. 2d *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. 3, 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.<sup>46</sup> Thus, the Supreme Court created a burden-shifting framework to provide aggrieved employees with another avenue to succeed.<sup>47</sup>

In *McDonnell Douglas v. Green*,<sup>48</sup> the Supreme Court established a three-step burden-shifting framework.<sup>49</sup> 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.<sup>50</sup> Regardless of how and when the evidence is presented, the ultimate burden of persuasion always lies with the plaintiff.<sup>51</sup>

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-

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46. See Timothy A. Ogden, *Shifting Burdens and the Americans with Disabilities Act: Why McDonnell Douglas Should Apply to the ADA*, 29 IND. L. REV. 179, 186-87 (1995) (noting most employees will lack insight into discriminatory or retaliatory motives of employer in implementing adverse employment action); Lawrence D. Rosenthal, *Timing Isn't Everything: Establishing a Title VII Retaliation Prima Facie Case After University of Texas Southwestern Medical Center v. Nassar*, 69 SMU L. REV. 143, 152 (2016) (focusing on plaintiffs' burden in proving causation and noting most will use temporal proximity between protected activity and adverse employment action to create inference of retaliation).

47. See Ogden, *supra* note 46, at 186-87 (discussing purposes of *McDonnell Douglas's* burden-shifting framework including allowing plaintiffs to prevail without providing evidence of retaliatory animus); see also Semler, *supra* note 12, at 60 (reasoning Supreme Court recognized absence of direct evidence in retaliation claims and created burden-shifting framework to establish an inference of discrimination or retaliation); Spiggle, *supra* note 44 (noting most plaintiffs fail to have direct evidence of retaliation). In addition to providing another avenue for relief, *McDonnell Douglas's* burden-shifting framework is effective for requiring plaintiffs to eliminate nondiscriminatory reasons for the adverse employment action and because it provides efficiency by allowing employers to avoid trial and litigation by filing for summary judgment or motion to dismiss when the plaintiff fails to make a prima facie case. See Ogden, *supra* note 46, at 186-87.

48. 411 U.S. 792 (1973).

49. See *id.* at 802 (establishing burden-shifting framework).

50. See *id.* (describing burden-shifting process under pretext theory). It is unclear how *McDonnell-Douglas* became the dominant avenue for retaliation in the federal circuit courts, as the original case was a discrimination case. See *id.* Over time, the framework was used in every kind of Title VII case and many courts and scholars have reasoned this is because of the "kind" of evidence that the plaintiff may come forward with. See generally Ogden, *supra* note 46, at 183-87 (explaining purposes of burden-shifting framework).

51. See Tracy Bateman Farrell, et al., 45C AM. JUR. 2D *Three-Part Proof Scheme; "McDonnell Douglas" Framework* § 2403 (2017) (summarizing burden-shifting framework and its role from motion to dismiss to trial). Once at trial, the burden-shifting framework is no longer considered, and the ultimate question is whether the plaintiff has produced enough evidence to convince a jury he or she suffered from retaliation. See *id.*

sion of retaliation.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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*.<sup>55</sup> 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*.<sup>56</sup> 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.<sup>57</sup> Considering this provision, and without law implying otherwise, courts regularly applied this "lower" causation standard in retaliation cases.<sup>58</sup>

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

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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.

55. 570 U.S. 338 (2013).

56. *See* 42 U.S.C. § 2000e-2(m) (2018); *see also* Rupe, *supra* note 43, at 27 (noting courts applied motivating factor causation standard to retaliation and discriminations after amendment to Title VII). Prior to reaching the Supreme Court, the Fifth Circuit held that the appropriate causation standard is the motivating factor standard used for discrimination cases and codified in section 2000e-2(m). *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 (5th Cir. 2012), *rev'd sub nom.* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

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").

58. *See Pathman, supra* note 44, at 487 (discussing history of burden-shifting framework and application of causation standard in light of discrimination standard in Title VII).

because of the construction of the discrimination provision.<sup>59</sup> 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.<sup>60</sup> More importantly, the discrimination provision explicitly excludes any language referring to retaliation.<sup>61</sup> 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.”<sup>62</sup>

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.*,<sup>63</sup> where it interpreted the phrase “because of” in the relevant ADEA provision.<sup>64</sup> 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.<sup>65</sup> Meaning, the plaintiff must prove that had the plaintiff not en-

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59. See *Nassar*, 570 U.S. at 351–54 (reasoning retaliation provision is separate from discrimination provision and causation standard cannot transcend to affect retaliation requirements).

60. See § 2000e-2(m); see also *Nassar*, 570 U.S. at 353 (noting that motivating-factor provision “begins by referring to ‘unlawful employment practices’” but subsequently addresses only “five of the seven prohibited discriminatory actions”). The Court also noted that the first five prohibited discriminatory actions are based on “personal characteristics.” See *Nassar*, 570 U.S. at 347. Whereas, the last two prohibited discriminatory actions “are not wrongs based on personal traits but rather types of protected employee conduct.” See *id.* The Court implied that these different categories of prohibited discriminatory actions lead to the difference in causation provisions and the different standards of causation within each. See *id.* at 348.

61. See § 2000e-2(m) (omitting two categories of prohibited discriminatory actions based on protected employee conduct); see also *Nassar*, 570 U.S. at 353 (“The text of § 2000e-2(m) says nothing about retaliation claims.”). The Court stated that this omission “indicates Congress’ intent to confine [the discrimination provision’s] coverage to only those types of employment practices [based on the five personal characteristics].” See *Nassar*, 570 U.S. at 353.

62. See *Nassar*, 570 U.S. at 353 (citing *Gardner v. Collins*, 7 L. Ed. 347 (1829)) (“What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words.”).

63. 557 U.S. 167 (2009).

64. See *Nassar*, 570 U.S. at 350 (detailing Court’s reasoning in *Gross* defining “because of”).

65. See *Nassar*, 570 U.S. at 352 (“Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.”); Valenti, *supra* note 13, at 106–07 (summarizing *Nassar* decision and implications resulting from “but-for” causation standard); Gregory Keating, Greg Coulter, Meredith Kaufman & Catherine Pearson, *Too Little, Too Late: The Supreme Court Adopts But-For Causation for Title VII Retaliation Claims*, LITTLER INSIGHT: IN-DEPTH DISCUSSION (June 25, 2013), <https://www.littler.com/publication-press/publication/too>

gaged in the protected activity, the employer would not have engaged in the adverse employment action.<sup>66</sup>

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.<sup>67</sup> The Court likely did not address the burden-shifting framework because the plaintiff in *Nassar* proceeded to trial with direct evidence of retaliation.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> Several circuit courts have addressed whether the "but-for" standard changes any element of the burden-shifting framework.<sup>71</sup> A majority of

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little-too-late-supreme-court-adopts-causation-title-vii [https://perma.cc/A8TA-TB58] (noting "but-for" causation is exacting standard for plaintiffs but will not deter plaintiffs from suing employers for retaliation).

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.<sup>72</sup> 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.<sup>73</sup>

The Sixth, Tenth, and Eleventh Circuits place the “but-for” causation standard at the prima facie stage of the burden-shifting framework.<sup>74</sup> These courts have assuredly placed a more onerous burden on the plaintiff before trial.<sup>75</sup> 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.*

pretext stage.<sup>76</sup> Specifically, when establishing pretext, the plaintiff shows retaliation is the “but-for” cause by placing doubt on the legitimate reason proffered by the employer.<sup>77</sup>

Finally, the Fourth Circuit addressed the issue and held *Nassar* did not affect the burden-shifting framework at all.<sup>78</sup> Specifically, the Fourth Circuit reasoned the burden-shifting framework brings the “real reason” for an adverse employment action to light.<sup>79</sup> 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.<sup>80</sup> In *Carvalho-Grevious*, the Third Circuit favored the Fourth Circuit’s reasoning in determining *Nassar*’s effect on the burden-shifting framework.<sup>81</sup>

### 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*,<sup>82</sup> 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://convergenceapi.bna.com/ui/content/articleStandalone/24660765600000008/388272?itemGuid=DC067DB2-20C6-49D2-BB5E-7E2852289BCA> [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).

case.<sup>83</sup> 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.<sup>84</sup> Ultimately, if proven, the plaintiff survives the defendants’ motion for summary judgment and sees the light of a trial.<sup>85</sup>

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.<sup>86</sup> When she was hired in August 2010, her main duties included leading the social work program’s reaccreditation effort.<sup>87</sup> As part of her contract, her employment ended on June 30, 2011—although she could be reappointed.<sup>88</sup> As chairperson, Dr. Grevious reported directly to Dean Austin, who reported to University Provost Thompson.<sup>89</sup>

From the outset of her employment, Dr. Grevious faced difficulty implementing the reaccreditation process.<sup>90</sup> Additionally, she experienced difficulties with others in the department, leading her to make personnel changes.<sup>91</sup> In particular, Dr. Grevious’s relationship with Dean Austin de-

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83. *See id.* at 259 (“We decline now to heighten the plaintiff’s prima facie burden to meet her ultimate burden of persuasion. That is because we agree with the Fourth Circuit . . .”). The Third Circuit also concluded that at the prima facie stage, a plaintiff need only “produce evidence ‘sufficient to raise the inference that her protected activity was the *likely reason* for the adverse [employment] action.’” *See id.*

84. *See id.* (establishing new “likely reason” standard).

85. *See id.* at 263 (finding plaintiff produced enough evidence to meet new standard and survive summary judgment). Despite the court’s holding on the contract issuance retaliation claim, the plaintiff’s other claims of retaliation did not meet the likely reason standard and were affirmed by the court. *See id.*

86. *See id.* at 253 (summarizing terms of employment agreement and timeline of Dr. Grevious’s hiring).

87. *See id.* (describing Dr. Grevious’s duties). Dr. Grevious was responsible for nine department employees and her reaccreditation duties required her to submit comprehensive studies and other supporting documentation to the Office of Social Work Accreditation (OSWA) by August 1, 2011. *See id.* Although Dr. Grevious worked on the accreditation process, Provost Thompson was primarily responsible for the Department’s reaccreditation. *See id.*

88. *See id.* Dr. Grevious’s employment contract is the subject of her retaliation complaint. *See id.* At one point she was offered a renewable contract and after making EEOC charges, she was issued a nonrenewable contract. *See id.* at 255. For further discussion of Dr. Grevious’s retaliation claim, see *infra* notes 102–06 and accompanying text.

89. *See Carvalho-Grevious*, 851 F.3d at 253 (detailing reporting hierarchy regarding Dr. Grevious’s position).

90. *See id.* at 253–54 (describing department’s lack of structure adding difficulty to accreditation process). Dr. Grevious stated the department was in “complete disarray.” *See id.*

91. *See id.* at 254 (listing personal difficulties with several professors and staff members in department). Dr. Grevious recommended nonrenewal of two professors, replaced two of her administrative staff, and terminated a department consultant. *See id.* Three of these employees complained to Dean Austin that Dr. Grevious held “personal grudges” and stated her actions were unprofessional be-



teriorated, and as a result, she complained of his leadership to Provost Thompson.<sup>92</sup> Later, at a meeting with Provost Thompson, Dr. Grevious alleged Dean Austin made racially discriminatory statements and engaged in sexist behavior towards her.<sup>93</sup> After Dean Austin denied making any discriminatory remarks, he submitted a formal evaluation of Dr. Grevious that was largely unfavorable.<sup>94</sup>

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.<sup>95</sup> Dr. Grevious believed Dean Austin wished to interfere with the faculty vote and his unfavorable review was in retaliation of her complaint of discrimination to Provost Thompson.<sup>96</sup> Nevertheless, at the vote, the faculty voted to appoint a new chairperson.<sup>97</sup> Subsequently, Dr. Grevious filed a formal complaint against Dean Austin for discrimination and retaliation for the negative performance evaluation.<sup>98</sup>

After Dr. Grevious was replaced as chairperson for the following year, Provost Thompson recommended and issued her a renewable contract.<sup>99</sup> Due to pressure in the department's reaccreditation process, Provost

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cause she degraded and belittled them. *See id.* Despite these negative complaints, 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 department chair position. *See id.*

93. *See id.* (summarizing Dr. Grevious's first complaint of discrimination). Although 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 leadership category. *See id.*

95. *See id.* at 255 (detailing faculty vote against Dr. Grevious). The Department 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. Because 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 evidence 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 complaints 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.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup> 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.<sup>103</sup> Specifically, Dr. Grevious stated Provost Thompson explicitly admitted his decision to issue the terminal contract was based on her EEOC charge.<sup>104</sup> Upon expiration of the terminal contract, Provost Thompson did not recommend Dr. Grevious for reappointment for the 2012–13 academic year.<sup>105</sup> 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.<sup>106</sup>

Dr. Grevious filed suit in the District of Delaware against the University, the Dean, and the Provost alleging retaliation in violation of Title VII.<sup>107</sup> All three defendants moved for summary judgment claiming Dr. Grevious failed to establish causation in her retaliation claims.<sup>108</sup> The Dis-

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100. *See id.* (stating university social work department deadline for accreditation was impending). Provost Thompson requested an extension of the reaccreditation deadline because of the transition between Dr. Grevious and her successor. *See id.* The Office of Social Work Accreditation (OSWA) ultimately denied the request, placing pressure on Provost Thompson to place the new chairperson in charge and remove Dr. Grevious. *See id.* (noting how, soon after the OSWA's denial, Dr. Grevious was dismissed as chairperson).

101. *See id.* (discussing Dr. Grevious's EEOC charge).

102. *See id.* at 255 (stating university made its decision to not rehire Dr. Grevious based on Provost Thompson's recommendation).

103. *See id.* at 256 (commenting on Dr. Grevious's second EEOC charge of retaliation).

104. *See id.* at 255–56 (recounting Dr. Grevious's allegations against Provost Thompson). Specifically, Dr. Grevious alleged she met with Provost Thompson to discuss her new terminal contract and the Provost admitted his decision was not based on her teaching or professional performance. *See id.* Provost Thompson denied making any statements suggesting he made his decision based on the EEOC charge and asserted the decision was based on Dr. Grevious's interpersonal conflict with others at the university. *See id.* at 256.

105. *See id.* at 256 (discussing Dr. Grevious's ultimate termination and Provost Thompson's justification for terminating Dr. Grevious because of her consistent "inability to work collegially" with others).

106. *See id.* (recalling events leading to Dr. Grevious's final EEOC charge of retaliation).

107. *See Carvalho-Grevious v. Del. State Univ.*, No. 13-1386, 2015 WL 5768940, at \*1 (D. Del. Sept. 30, 2015) (addressing Dr. Grevious's claims including her complaints of retaliation solely against Dean Austin and Provost Thompson under 42 U.S.C. § 1981), *rev'd* *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249 (2017).

108. *See Carvalho-Grevious*, 851 F.3d at 256 (summarizing district court opinion).

district Court relied on *Nassar* and stated the plaintiff must prove the retaliation was the “but-for” cause of the adverse employment action.<sup>109</sup> 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.<sup>110</sup> On appeal, the Third Circuit reversed the district court because its application of “but-for” causation was misplaced.<sup>111</sup>

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.<sup>112</sup> Because Dr. Grevious relied on indirect evidence to prove her case, the court referenced the widely-used burden-shifting framework.<sup>113</sup> Considering the *Nassar* decision, the court addressed how the plaintiff’s prima facie case could survive summary judgment.<sup>114</sup>

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.<sup>115</sup> 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 253 (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.<sup>116</sup> Despite differing terms, the court stated that its “real reason” standard and *Nassar*’s “but-for” standard were “functionally the same.”<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> 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.”<sup>122</sup>

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.<sup>123</sup> The court found Dr. Grevious was

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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.<sup>124</sup> Additionally, the court found the allegations that Provost Thompson admitted to retaliating against Dr. Grevious supported the inference that retaliation was the *likely reason* the contract revision occurred.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

#### IV. 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 *Carvalho-Grevious* places a lesser causal burden on plaintiffs at the prima facie stage and makes clear that "but-for" causation is the *ultimate* burden.<sup>128</sup> 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.<sup>129</sup> Although this

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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. *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. *See id.*

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. *See id.*

126. *See id.* at 263 (reasoning evidence supported factual issue regarding employer's motivation in issuing terminal contract to Dr. Grevious).

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).

128. *See id.* at 259 (establishing lesser causal burden at prima facie stage and stating *Nassar* clarified plaintiffs' *ultimate* burden).

129. *See* Chappell, *supra* note 18, at 1022 (highlighting impact of *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. *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

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.<sup>130</sup> 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.<sup>131</sup>

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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

The court's decision largely advances the spirit of Title VII to protect employees from discrimination and retaliation in the workplace.<sup>135</sup> Title VII aims to encourage individuals to come forward when they believe em-

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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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> Thus, judges and attorneys in the Third Circuit will be able to proceed under the same framework rooted in more than forty years of

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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).

precedent.<sup>143</sup> 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.<sup>144</sup>

In addition to promoting use of the established burden-shifting framework, the Third Circuit’s decision promotes fairness.<sup>145</sup> 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 judgment.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

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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.<sup>149</sup> 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.<sup>150</sup> 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”<sup>151</sup>

The uncertainty of the new “likely reason” standard is emphasized through the Third Circuit’s own application in *Carvalho-Grevious*.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> Moreover, the first district court to apply the standard still granted summary judgment for the defendant-employers.<sup>155</sup> While uncertainty is on the horizon, practitioners can still prepare themselves for potential implications that may result from the Third Circuit’s decision.<sup>156</sup>

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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).

155. See *Horvath v. Urban Redevelopment Auth. of Pittsburgh*, No. CV 15-668, 2017 WL 1179008, at \*2 (W.D. Pa. Mar. 29, 2017), *appeal dismissed sub nom.* *Horvath v. Urban Redevelopment Auth.*, No. 17-1968, 2017 WL 5158644 (3d Cir. July 26, 2017) (reasoning time and proximity were insufficient to establish inference that retaliation was likely reason for adverse employment action). The district court described the “likely reason” standard as a “relatively light burden.” *Id.* Nonetheless, it seems that some courts may still be hesitant to let claims survive summary judgment in fear of frivolous claims by disgruntled employees. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358 (2013) (noting lesser causal burden will contribute to frivolous filing of claims). But see *Carvalho-Grevious*, 851 F.3d at 259 (recognizing potential for frivolous claims but arguing FRCP 11 will deter attorneys from making such claims).

156. For further discussion of practitioner advice, see *infra* notes 157–86 and accompanying text.

1. *Fend and Prove: Advice to Practitioners Representing Employees in Title VII Retaliation Claims*

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.<sup>157</sup> Accordingly, while plaintiffs may be able to survive summary judgment, the onerous burden of “but-for” causation awaits at trial.<sup>158</sup> In many cases, courts have even interpreted “but-for” causation to mean the protected activity was the *sole* cause of the adverse employment action.<sup>159</sup>

In order to meet the high burden of persuasion, plaintiffs' attorneys should be mindful of the evidence that is available to make the case.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup>

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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.<sup>163</sup> Without much definition surrounding the "likely reason" standard, employees should argue it is a relatively low threshold in order to survive summary judgment.<sup>164</sup> 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.<sup>165</sup> Additionally, many courts—including the Supreme Court—have established that making a prima facie case is not meant to be a difficult task.<sup>166</sup> 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.<sup>167</sup>

## 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.<sup>168</sup> As a result, employers are exposed to having litigation extended to trial in the event a plaintiff has a weaker—yet still meritorious—claim.<sup>169</sup> 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.<sup>170</sup>

With a chance that more cases will proceed to trial, employers should take steps to protect themselves from juries that may favor injured plaintiffs.<sup>171</sup> Employers' attorneys should emphasize the importance of adhering to existing procedures when deciding to terminate employees or alter employees' positions in a material way.<sup>172</sup> Moreover, attorneys should focus on compliance with internal protocols and provide documentation of performance-based reasons leading to employment decisions.<sup>173</sup> These protocols are strengthened with timely work evaluations and substantive, fair investigations of employees' behaviors.<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> Thus, employers can take steps to ensure summary judgment even in light of the "likely reason" standard.<sup>177</sup> 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.<sup>178</sup> In particular, even Dr. Grevious failed to meet the "likely reason" standard on her chairperson claim alleging retaliation by Dean Austin.<sup>179</sup> Rather than seeing *Carvalho-Grevious* as negative authority, employers' attorneys should

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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 antiretaliation 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.<sup>180</sup> 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.<sup>181</sup> Thus, in moving forward, employers' attorneys can use the uncertainty of the "likely reason" standard to create a pro-employer interpretation.<sup>182</sup>

At this point, it is unclear how the "likely reason" standard will play out in lower courts.<sup>183</sup> This includes how the standard will be met, how frequently employees will survive summary judgment, or how plaintiffs will fare at trial.<sup>184</sup> Nonetheless, on its face, the Third Circuit's decision appears pro-employee, and employers should be prepared to face trial more frequently.<sup>185</sup> Even so, employers can rest easy knowing, ultimately, plaintiffs will still need to overcome the "but-for" causation hurdle—only a little later.<sup>186</sup>

#### 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.<sup>187</sup> 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.<sup>188</sup> Since the Supreme Court's decision in *Nassar*, many critics have noted that Title VII has

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180. *See id.* (discussing evidence that failed to establish "likely reason" standard on chairperson claim including idea that temporal proximity, by itself, is insufficient to prove causation).

181. *See Horvath v. Urban Redevelopment Auth. of Pittsburgh*, No. CV 15-668, 2017 WL 1179008, at \*2 (W.D. Pa. Mar. 29, 2017), *appeal dismissed sub nom. Horvath v. Urban Redevelopment Auth.*, No. 17-1968, 2017 WL 5158644 (3d Cir. July 26, 2017) (reasoning time and proximity were insufficient to establish inference that retaliation was likely reason for adverse employment action).

182. *See 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.<sup>189</sup> 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.<sup>190</sup>

Even with a pro-employee decision, the application of the new "likely reason" standard remains uncertain.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup>

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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).

191. See Francis, *supra* note 11 (stating *Carvalho-Grevious* decided too recently to determine "likely reason" standard's effect on retaliation claims, summary judgment, and settlements); see also Todd, *supra* note 4, at 304–12 (discussing failure of Supreme Court to define "but-for" causation standard and differences in applying standard throughout circuit courts). Compare *Carvalho-Grevious*, 851 F.3d at 259 (establishing "likely reason" standard and finding plaintiff met standard in one retaliation claim but did not in other retaliation claim), with *Horvath v. Urban Redevelopment Auth. of Pittsburgh*, No. CV 15-668, 2017 WL 1179008, at \*2 (W.D. Pa. Mar. 29, 2017), *appeal dismissed sub nom. Horvath v. Urban Redevelopment Auth.*, No. 17-1968, 2017 WL 5158644 (3d Cir. July 26, 2017) (finding plaintiff did not meet likely reason standard).

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.