

## Experimental Evidence that Retaliation Claims are Unlike Other Employment Discrimination Claims

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I love retaliation; it's in the Bible and people get it.<sup>1</sup>

## I. INTRODUCTION

Like the pigs' description of the animals in Orwell's *Animal Farm*,<sup>2</sup> all employment discrimination laws are equal, but some employment discrimination laws are more equal than others. While it is unlawful for sex, race, color, national origin, and religion to even *motivate* employment decisions, after the Supreme Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*,<sup>3</sup> retaliation, age,<sup>4</sup> and, in all likelihood, disability may sometimes lawfully motivate employer conduct.<sup>5</sup> In other words, while some level of employer discrimination based on age, disability, or retaliation is tolerated, no amount of employer discrimination based on the five other statutory protected classes is permitted. Despite nearly identical statutory language, the Court has held that the protected classes must be litigated under different standards of proof.<sup>6</sup> *Nassar* held that an employee-plaintiff alleging that he suffered adverse employment action as a form of retaliation must prove his case according to traditional principles of "but for" causation, not the more easily established causation test stated in Title VII.<sup>7</sup>

Perhaps not surprisingly, within weeks of the *Nassar* holding, a bipartisan group of law-makers re-introduced parallel bills in the U.S. House of Representatives and the Senate, called the Protecting Older Workers against Discrimination Act (POWADA).<sup>8</sup> POWADA, originally proposed in 2009 after the Supreme Court held that an employee's age could motivate employer conduct,<sup>9</sup> would expand the

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<sup>1</sup> Wayne Outten, Managing Partner, Outten & Golden, LLP, Remarks at New York University's 62<sup>nd</sup> Annual Conference on Labor and Employment Law Initiatives and Proposals in the Obama Administration (June 5, 2009).

<sup>2</sup> GEORGE ORWELL, *ANIMAL FARM* 133 (Signet Classic 1996) (1946) ("There was nothing there now except a single Commandment. It ran: 'ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS.'").

<sup>3</sup> 133 S. Ct. 2517 (2013).

<sup>4</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

<sup>5</sup> *Nassar*, 133 S. Ct. at 2532–33.

<sup>6</sup> *Id.*; see 42 U.S.C. §2000e-2(m) (2011); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2012).

<sup>7</sup> *Id.*; see 42 U.S.C. §2000e-2(m) (2011).

<sup>8</sup> H.R. 2852, 113th Cong. (1st Sess. 2013).

<sup>9</sup> *Gross*, 557 U.S. at 180.

so-called mixed-motive jury instruction to age, retaliation, and disability, and would allow plaintiffs, not judges, to decide which types of instruction the jury would receive.<sup>10</sup>

While POWADA's sponsors and the Court have staked out very different views on this issue,<sup>11</sup> Congress and the Court seem to equally lack helpful data to inform their respective opinions. The lack of data informing opinions is ironic, but unfortunately typical, considering that *Nassar* and POWADA are both attempting to inform areas noted for their stark absence of data germane to the interaction of legal rules in the employment discrimination context.<sup>12</sup> Consequently, regardless of whether Congress abrogates *Nassar* (and perhaps *Gross*), POWADA will remain flawed because either age and disability will be treated differently than other protected classes, or retaliation law will be so employee-friendly that employers will overcompensate in instances in which an employee complains about any type of unlawful conduct. POWADA could make a bit more sense, however, if both Congress and the courts took relevant experimental social science evidence and its interaction with legal doctrine more seriously.

More nuanced attention to burden of proof allocations is one important way to improve employment discrimination law. Presently, two types of jury instructions are available: (1) the "pretext," or "but-for" instruction; and (2) the "mixed-motive" or "motivating-factor" instruction.<sup>13</sup> These two jury instructions apply to at least three employment discrimination statutes: Title VII of the Civil Rights Act

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<sup>10</sup> Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009).

<sup>11</sup> See Press Release, Tom Harkin, U.S. Senator, Bipartisan Senate Legislation Seeks to Protect Older Workers from Discrimination (July 30, 2013), available at <http://www.harkin.senate.gov/press/release.cfm?i=345436> ("The Supreme Court's divisive holding in *Gross* has created uncertainty in our civil rights laws, making it incumbent on Congress to clarify our intent." (quoting Patrick Leahy, U.S. Senator)).

<sup>12</sup> The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing, (May 9, 2001), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-01-715T/html/GAOREPORTS-GAO-01-715T.htm> ("Currently, because of the lack of data, the federal government lacks a clear picture of the volume of discrimination and whistleblowing reprisal cases involving federal employees."); Carolyn Shaw Bell, *Comparable worth: how do we know it will work?*, *The Monthly Labor Review*, 5, 5 (Dec. 1985), <http://blsweb1.psb.bls.gov/opub/mlr/1985/12/art2full.pdf> (noting the "dearth of useful data" in related to employment discrimination).

<sup>13</sup> See generally David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 *ARIZ. ST. L.J.* 901, 905–15 (2010).

of 1964 (Title VII),<sup>14</sup> the Age Discrimination in Employment Act (ADEA),<sup>15</sup> and the Americans with Disabilities Act (ADA).<sup>16</sup> Each of the statutes prohibits retaliation against those who oppose discrimination based on any of the relevant protected classes, and those who participate in a government investigation (*e.g.*, by the Equal Employment Opportunity Commission or a state or municipal agency) or in discrimination litigation.<sup>17</sup>

The mixed-motive jury instruction arose out of the Supreme Court's *Price Waterhouse v. Hopkins* decision.<sup>18</sup> The Civil Rights Act of 1991 codified the mixed-motive jury instruction, made it significantly more plaintiff-friendly, and, for all intents and purposes, expanded its use so that mixed motive is now a misnomer and should be called "motivating-factor" instruction.<sup>19</sup> Two subsequent Supreme Court cases, *Gross* and *Nassar*, held that the motivating-factor instruction does not apply to age<sup>20</sup> or retaliation<sup>21</sup> cases. After *Gross* and *Nassar*, then, there is no legal basis to apply the motivating-factor instruction to ADA cases. After all, it would make little sense for the Court to infer a "motivating-factor" instruction into the ADA after failing to do so for age and retaliation. The ADA is similar to both retaliation and ADEA in that none of three laws specially allow for the motivating factor instruction (Congress did not amend the ADEA, did not address retaliation, and the ADA went into effect after the CRA of 1991) and all use the term "because of." Thus, as of the writing of this Article, an employer motivated by race, color, sex, national origin, or religion, but who would have made the decision regardless of the protected class, is liable for discrimination *and* associated attorneys' fees and costs.<sup>22</sup> Alternatively, an employer motivated by age, disability, or retaliation, but who would have made the decision

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<sup>14</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2008) (protecting against discrimination based on race, color, religion, sex, or national origin).

<sup>15</sup> Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2012) (protecting people over forty).

<sup>16</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2011) (protecting people with disabilities).

<sup>17</sup> 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a).

<sup>18</sup> 490 U.S. 228 (1989) (plurality opinion).

<sup>19</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 2 (1991) (codified as amended at 42 U.S.C. § 1981 (2008)) ("[T]he decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (2011) has weakened the scope and effectiveness of Federal civil rights protections . . .").

<sup>20</sup> *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 180 (2009).

<sup>21</sup> *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2532-33 (2013).

<sup>22</sup> See Sherwyn & Heise, *supra* note 13, at 930.

anyway is *not* liable for discrimination nor associated costs and fees.

POWADA directly implicates the motivating-factor jury instruction by extending it to include age, disability, and retaliation. As explained below, the Supreme Court's *Gross* and *Nassar* decisions pivot on a statutory construction approach that makes sense in a vacuum, but makes far less sense in the context of *Price Waterhouse* and the history of employment discrimination laws. The *Gross* decision is further undermined because there is little support for distinguishing age, or disability for that matter, from Title VII.<sup>23</sup> The nature of retaliation claims within the context of actual employment discrimination litigation, however, fundamentally differs from claims moored in other protected classes. As well, these claims differ in a manner that will unduly tilt jurors in a direction favorable to employee assertions of employer retaliation. Consequently, we argue that POWADA's desire to extend the motivating-factor jury instruction to include employer retaliation claims is misguided as it ignores important differences that distinguish retaliation claims from other employer discrimination claims.

To test our claim we replicated and slightly modified a prior jury experiment<sup>24</sup> by substituting a retaliation claim for a national origin employment discrimination claim in an otherwise constant employment discrimination fact pattern. Just over 40 percent of the mock jurors in the earlier study (2010) were persuaded by an employee's claim that national origin motivated an employer's adverse action.<sup>25</sup> In the instant experiment, almost 60 percent of the mock jurors were persuaded by a retaliation claim holding constant the other salient parts of the fact pattern from the prior study.<sup>26</sup> Simply altering the *nature* of the employment discrimination claims (national origin versus retaliation) likely explains at least some of the observed increased likelihood of jurors concluding that the complaining employee successfully established a viable legal claim. If this is so, then extending mixed-motive jury instructions to include retaliation claims, as contemplated by POWADA, is unlikely to resolve

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<sup>23</sup> See generally Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-Gross World (But Should)*, 64 ALA. L. REV. 1067 (2013). At least one scholar, Lex K. Larson, concluded that the motivating-factor jury instruction does apply to retaliation claims. *Id.* at 1111–12 & n.85, 376–82.

<sup>24</sup> See Sherwyn & Heise, *supra* note 13, at 926–47.

<sup>25</sup> Sherwyn & Heise, *supra* note 13, at 937 Table 5.

<sup>26</sup> See *infra* Part IV.

key problems challenging employment law doctrine and, worse still, may exacerbate other problems.

Part II includes a brief history of the “but for” and “motivating factor” burden of proof schemes that dominate employment discrimination litigation. Part III discusses the law of employer retaliation and argues why retaliation is fundamentally different from other protected employee classes. Part IV presents results from our jury study in which we seek to experimentally assess the consequences of applying the motivating-factor jury instruction in the employer retaliation context. Finally, Part V discusses a possible solution for the burden of proof conundrum as well as avenues for further productive empirical research in this area.

## II. THE BURDEN OF PROOF IN DISCRIMINATION CASES UNDER TITLE VII AND THE ADEA

More comprehensive accounts of the “but for” and “motivating factor” schemes’ development can be found in other law review articles,<sup>27</sup> including one by two of the authors.<sup>28</sup> The abbreviated summary that follows seeks only to frame the main argument of this Article.

Title VII, the ADEA, and the ADA each expressly state that employers may not discriminate because of the certain employee characteristics protected by the statutes.<sup>29</sup> These statutes do not go on to explain, however, how parties prove their case, which party bears the burden of proof, or how much, if any, employer discrimination is tolerated. Thus, the courts developed the methods, burdens, and standards of proof in a series of Supreme Court and lower-court decisions,<sup>30</sup> modified by Congress in the Civil Rights Act

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<sup>27</sup> See, e.g., Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 75–111 (2010). See Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000), for a discussion of the evolution of the “motivating factor” framework.

<sup>28</sup> See generally Sherwyn & Heise, *supra* note 13.

<sup>29</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2008); Age Discrimination in Employment Act, 29 U.S.C. § 623 (2012); Americans with Disabilities Act, 42 U.S.C. § 12112 (2011).

<sup>30</sup> See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 909–915 & n.57 (1973); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

of 1991, and then subsequently refined by *Desert Palace, Inc. v Costa*,<sup>31</sup> *Gross, Nassar*, and a host of lower court decisions.<sup>32</sup> To understand the current state of the burden of proof assignment, it is necessary to understand its evolution, beginning with the Court's holding in *McDonnell Douglas Corp. v. Green*.<sup>33</sup>

#### A. *A Brief History*

In *McDonnell Douglas*, the Court established the method of proof in discrimination cases. The Court held that to prove discrimination, employees first had to establish a prima facie case of discrimination. To prove a prima facie case, employees had to establish that: (1) they belonged to a protected class; (2) they were minimally qualified for the position in question and that they applied for the position; (3) they suffered an adverse employment action; and (4) that the job remained open.<sup>34</sup> The fourth element was fact-specific to the *McDonnell Douglas* case as it was a "failure to hire" case and the allegations occurred before the company filled the position.<sup>35</sup> Thus, the Court's framework focused on the fact that the company continued to look for employees after rejecting the plaintiff and made that the fourth element.<sup>36</sup> Over the years, courts have expanded the fourth element to address situations where a company hired (or fired) an employee other than the plaintiff. In such cases, the fourth element is either: (1) the job went to an employee outside the plaintiff's protected class,<sup>37</sup> or (2) in a discharge case, that

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<sup>31</sup> 539 U.S. 90 (2003).

<sup>32</sup> For cases pre-*Costa*, see *Stella v. Minetta*, 284 F.3d 135, 146 (D.C. Cir. 2002) (holding that it is not necessary for a plaintiff to establish that she was replaced by a person outside of her protected class to satisfy the burden under *McDonnell Douglas*); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (holding that a prima facie case may exist even if one white worker is replaced by another white worker); *Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1262 (7th Cir. 1993) (holding that Title VII plaintiff must show satisfactory work at the time of discharge to state a prima facie case); *Johnson v. Grp. Health Plan, Inc.*, 994 F.2d 543, 546 (8th Cir. 1992) (holding that ADEA plaintiff must show satisfactory work at the time of discharge to state a prima facie case).

<sup>33</sup> 411 U.S. 792 (1973).

<sup>34</sup> *Id.* at 802 ("This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.").

<sup>35</sup> *Id.* at 801-02 & n.13.

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 918-19 (8th Cir. 2000) (reversing the district court's entry of summary judgment for the employer where the

similarly situated employees outside the protected class engaged in similar conduct, but were treated differently.<sup>38</sup>

The establishment of a prima facie case creates a rebuttable presumption that the employer discriminated.<sup>39</sup> Employers may refute this presumption by “producing (not proving)” a legitimate, non-discriminatory reason for the decision.<sup>40</sup> After an employer satisfies this very low burden, the employee can, in turn, prove discrimination by establishing that the real reason for the decision was discrimination or that the reason articulated by the employer was pretextual, and hence, unworthy of belief.<sup>41</sup>

The framework articulated in *McDonnell Douglas* was refined by several subsequent decisions.<sup>42</sup> In *Texas Department of Community Affairs v. Burdine*,<sup>43</sup> the Court of Appeals explicitly held that the employer had to prove that: (1) the articulated reason was the real reason for the decision; and (2) the person hired was more qualified than the plaintiff.<sup>44</sup> The Supreme Court rejected this expanded, or inaccurate, interpretation of *McDonnell Douglas* and reiterated that: (1) the employer need only articulate a non-discriminatory reason and; (2) there was no obligation to hire the best candidate for a job.<sup>45</sup> Instead, the employer simply could not discriminate.<sup>46</sup> For some reason, courts and employment professionals use the term “legitimate non-discriminatory reason.”<sup>47</sup> Such language is redundant, however, because a reason is legitimate if it is non-

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plaintiff was a member of an age protected group and was replaced by younger individuals.); *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) (finding that plaintiff did not make out his prima facie case as he *was* replaced by another male).

<sup>38</sup> See *Silvera v. Orange Cnty. Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (“In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different way.”) (quoting *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1311 (11th Cir. 1998)). Furthermore, the courts recognized that some employees may not apply for the jobs and thus, prong two was modified as well.

<sup>39</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 804–07.

<sup>42</sup> See generally *Tex. Dep’t Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

<sup>43</sup> 450 U.S. at 251–52.

<sup>44</sup> *Id.* at 256–59.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 257.

<sup>47</sup> See, e.g., *id.* at 252.



discriminatory. Thus, firing employees because of the color of their shirts, their favorite sports teams, or their taste in music is non-discriminatory and legitimate even if such characteristics have no effect on the employees' ability to do their jobs. Employers who engage in such decision making are human resource professionals' worst nightmares and provide opportunities for union organizers, but are squarely within the law.<sup>48</sup>

In 1989, the Supreme Court confronted another type of employment discrimination—the so-called mixed-motive case. In *Price Waterhouse v. Hopkins*,<sup>49</sup> the firm denied Ann Hopkins a promotion to partnership on two separate occasions, despite her excellent job performance, because of her allegedly poor interpersonal skills.<sup>50</sup> After the initial decision, some of the firm's partners counseled Hopkins that in order to improve her chances of being promoted, she should wear makeup, get her hair done, stop cursing, and walk, talk, and act in a more "feminine" manner.<sup>51</sup> Hopkins argued that these statements were evidence of sexual discrimination and that this evidence, along with her strong performance, proved that the denial of partnership was unlawful. The employer conceded that the plaintiff's performance was strong, but that the firm would not promote Hopkins, regardless of her skills because of her poor interpersonal skills and because she was difficult to get along with.<sup>52</sup>

The Court found that the employer had both legitimate (the interpersonal skills) and illegitimate (sex-based discriminatory standards applied only to female associates) reasons for its conduct.<sup>53</sup> The *Price Waterhouse* Court made it seem like this was a unique

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<sup>48</sup> Employment at-will is the standard in almost all states and thus, employers have the right to hire and fire whomever they wish for any reasons they want as long as the reasons do not violate specific laws. Thus, a reason that is non-discriminatory is legitimate even if illogical, unfair, and / or seemingly absurd.

<sup>49</sup> 490 U.S. 228 (1989).

<sup>50</sup> *Id.* at 231–36.

<sup>51</sup> *Id.* at 235.

<sup>52</sup> *Id.* at 231–36. Many partners simply did not get along with Hopkins and stated that "[s]he tended to alienate the staff in that she was extremely overbearing. Ann needs improvement in her interpersonal skills." Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, in *EMPLOYMENT DISCRIMINATION STORIES* 65, 69 (Joel Wm. Friedman ed., 2006). Further, partners were bothered by "the arrogance and self-centered attitude that Ann projects." *Id.* at 70. Other partners saw her positive attributes and her negatives, "I found her to be (a) singularly dedicated, (b) rather unpleasant." *Id.*

<sup>53</sup> *Price Waterhouse*, 490 U.S. at 234–35 (plurality opinion).

situation.<sup>54</sup> The reality of legitimate and illegitimate motives is likely not as unique as the availability of evidence of both kinds of employer motivation. It was the availability of both legitimate and illegitimate evidence of employer motivation for the adverse employment action against the plaintiff that made *Price Waterhouse* unique. A single-issue case would mean that the employer was completely motivated by lawful reasons *or* completely motivated by unlawful reasons. Such an implication, however, conflicts with theories of human behavior that tend to advance the notion of complex and multi-faceted motivations in almost all decisions.<sup>55</sup> Further, this simplified view of employment decision making does not accurately account for agency. It is quite possible, and more likely the case in larger organizations, for multiple agents to possess different motives in rendering employment decisions. For instance, a manager might be motivated to terminate an employee because of her gender, but a human resources department might be motivated only by that employee's poor interpersonal skills.

The Court produced no majority opinion in *Price Waterhouse*.<sup>56</sup> Justice Brennan's plurality opinion established a new scheme for proving discrimination. Under the plurality opinion, plaintiffs satisfy their burden by proving that discrimination was a motivating part of the employer's decision.<sup>57</sup> The employer, according to Brennan's opinion, could escape liability by proving that it would have made the same decisions regardless of the protected class.<sup>58</sup>

While six justices agreed with Brennan's two-prong and true burden-shifting approach, they did not agree on the standard needed for a case to fall into this classification.<sup>59</sup> Accordingly, Justice O'Connor's concurrence was widely accepted as the holding in the

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<sup>54</sup> See *id.* at 241 ("It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges.").

<sup>55</sup> See, e.g., Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 47 (2006) (finding that decision makers unconsciously rely on racial information in their decisions but mask its influence by inflating the value of non-racial justifications); Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 150-51 & n.142 (2007).

<sup>56</sup> *Price Waterhouse*, 490 U. S. 228 (plurality opinion).

<sup>57</sup> *Id.* at 240-42 (plurality opinion).

<sup>58</sup> *Id.* (plurality opinion).

<sup>59</sup> *Price Waterhouse*, 490 U. S. at 261 (O'Connor, J., concurring); see *Marks v. United States*, 430 U.S. 188, 193 (1977) (noting that the holding of the Court is the narrowest point on which five justices agree).

case.<sup>60</sup> O'Connor's concurrence states that the shift in the burden of proof inherent in the mixed-motive analysis is only available when the employee proves, with direct evidence, that the protected class was a substantial factor in the employer's decision.<sup>61</sup> Like Brennan's opinion, O'Connor's holding allowed employers to escape liability if they could prove that they would have made the same decision regardless of the protected class. The dissenting justices opposed burden shifting and argued that the plaintiff always bore the burden of proving that discrimination was the "but for" cause of an employer's decision.<sup>62</sup> In addition to arguing for a "but for" standard, the dissenting justices contended that the holding created unnecessary confusion for employers and courts.<sup>63</sup>

Both of these arguments have merit.<sup>64</sup> First, in the prior term, the Court held in *Watson v. Fort Worth Bank & Trust*<sup>65</sup> that the burden of proof did not shift in adverse impact cases, and that courts and commentators had misinterpreted *Griggs v. Duke Power Co.*<sup>66</sup> for close to twenty years. Thus, there was no real precedent for shifting the burden. Second, it is not easy to put every piece of evidence into a direct or circumstantial box. There were numerous cases in which parties argued whether certain evidence could be considered direct evidence.<sup>67</sup> Last, the term "substantial" eludes an easy, consistent

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<sup>60</sup> See, e.g., *Kriss v. Sprint Commc'ns Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995); *Hook v. Ernst & Young*, 28 F.3d 366, 373-74 (3d Cir. 1994); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, (2d Cir. 1992).

<sup>61</sup> *Price Waterhouse*, 490 U.S. at 276-78 (O'Connor, J., concurring).

<sup>62</sup> *Id.* at 282-84 (Kennedy, J., dissenting).

<sup>63</sup> *Id.* at 286-93. (Kennedy, J., dissenting).

<sup>64</sup> For the differing definitions of "direct evidence," see *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Fuller v. Phipps*, 67 F.3d 1137, 1141-42 (4th Cir. 1995); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 181-83 (2d Cir. 1992); see generally *Belton*, *supra* note 27.

<sup>65</sup> 487 U.S. 977 (1988).

<sup>66</sup> 401 U.S. 424 (1971) (holding that a policy requiring a high school education and the passing of standardized tests as employment conditions though neutral on its face was discriminatory" because it disparately impacted blacks).

<sup>67</sup> See Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1005 n.122 (1999) (citing *Trans World Airlines*, 469 U.S. 111, 121 (finding a policy to constitute direct evidence of a violation of the ADEA in which it made the transfer method available to a disqualified captain dependent on age; *City of Los Angeles Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 705 (1978) (finding a policy to constitute direct evidence of discrimination in which it required that female employees make larger contributions to a pension fund; *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989) (treating a memorandum as direct evidence of discrimination where the company president stated that he wanted to hire a young man between the ages of thirty and forty).

definition. Thus, in some cases, seemingly meaningless words or even a court reporter's error effectively determined the burden proof.<sup>68</sup> Despite these (and other) problems, *McDonnell Douglas*, *Burdine*, and *Price Waterhouse*, when cobbled together, created a relatively straightforward framework that shaped employment discrimination claims. Cases with direct evidence in which discrimination played a substantial role were labeled "mixed motive." Cases with circumstantial or no evidence at all were analyzed under the "but for" or "pretext" model. This framework, however, did not last long.

In *St. Mary's Honor Center v. Hicks*,<sup>69</sup> the plaintiff alleged that he was terminated because of his race.<sup>70</sup> The employer argued that it terminated Hicks for violating rules, failing to supervise subordinates, and for verbally threatening another employee.<sup>71</sup> The district court held that the articulated reasons were not true, but rather that the termination was personal and that the plaintiff failed to prove that race was the real reason behind the decision.<sup>72</sup> Accordingly, the district court found for the employer.<sup>73</sup> On appeal, the Eighth Circuit reversed and held that when the proffered reasons are found to be untrue, the employee has proven pretext and the plaintiff wins as a matter of law.<sup>74</sup> The Supreme Court reversed and held that the plaintiff will prevail, as a matter of law, only if the employee proves pretext and provides evidence that the real reason was discrimination.<sup>75</sup> Many commentators refer to this as "pretext plus."<sup>76</sup> Despite Justice Souter's assertions in his dissent, the case expressly stated that fact finders were free to infer discrimination from a finding of pretext, but they did not have to do so.<sup>77</sup> Still, the reaction

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<sup>68</sup> For how courts have analyzed certain "code" words, see *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (holding that an employer referring to African American employees as "boy" potentially showed discriminatory animus); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116–17 (9th Cir. 2004) (stating that "a mere offensive utterance" may be evidence of a hostile work environment). In *Austin v. Cornell University*, 891 F. Supp. 740 (N.D.N.Y. 1995), a deponent responded to the question: "so you said you wanted some fresh blood?" with the question: "I did?" The court reporter missed the inflection and the transcript stated: "I did." The court allowed a mixed motive instruction based on the deposition.

<sup>69</sup> 509 U.S. 502 (1993).

<sup>70</sup> *Id.* at 505.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 508.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 508–09.

<sup>75</sup> *Hicks*, 509 U.S. at 514–16.

<sup>76</sup> *See id.* at 535–36 (Souter, J., dissenting).

<sup>77</sup> *Id.* at 511.

to *Hicks* from employee rights advocates was swift and strong. Employee advocates contended that by requiring evidence of discrimination, *Hicks* made prevailing in discrimination cases nearly impossible for employees.<sup>78</sup> While impossible may be too strong, *Hicks* did, in fact, alter the terrain of employment discrimination's rights assertion.

After *Hicks*, plaintiffs without evidence could only prevail if fact finders inferred discrimination from a finding of pretext.<sup>79</sup> In other words, fact finders are free to conclude that while the proffered

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<sup>78</sup> See, e.g., Civil Rights Standards Restoration Act, S. 1776, 103d Cong. (1st Sess. 1993) (proposing an amendment to the Revised Statutes § 1979 that would restore the pre-*Hicks* plaintiff's burden in intentional discrimination cases); Employment Discrimination Evidentiary Amendment of 1993, H.R. 2787, 103d Cong. (1st Sess. 1993) (proposing an amendment to Title VII that would override the majority holding in *Hicks*); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995); Note, *Title VII—Burden of Persuasion in Disparate Treatment Cases*, 107 HARV. L. REV. 342, 348 (1993) (arguing that requiring the plaintiff to show direct evidence of intent “will severely curtail the ability of many Title VII plaintiffs to succeed on their disparate treatment claims”); Sherie L. Coons, Comment, *Proving Disparate Treatment After St. Mary's Honor Center v. Hicks: Is Anything Left of McDonnell Douglas?*, 19 J. CORP. L. 379, 408 (1994) (“The Hicks majority's holding is ill-conceived and furthers unsound policy because [it] . . . places an impossible burden of persuasion on plaintiffs . . .”); Derrick L. Horner, Recent Development, *Toward Clarifying the Ambiguity of Merging Burdens—St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), 11 HARV. BLACKLETTER L.J. 205, 213 (1994) (concluding that *Hicks* confronts plaintiffs with an “impossible burden of having to disprove any reason for the employer's action a factfinder might see sketched in the record.”); Shannon R. Joseph, Note, *Employment Discrimination: Shouldering the Burden of Proof After St. Mary's Honor Center v. Hicks*, 29 WAKE FOREST L. REV. 963, 988–89 (1994) (contrasting civil rights attorneys' reactions to *Hicks* with that of management attorneys and evaluating proposed legislation attempting to overturn *Hicks*); Michael C. McPhillips, Note, *St. Mary's Honor Center v. Hicks: The Casual Abandonment of Title VII Precedent*, 23 CAP. U. L. REV. 1045, 1066 (1994) (“[T]he court's newly-developed burdens will make it impossible for many plaintiffs to get beyond summary judgment . . . [and] might chill their initiation of legitimate claims.”); Louis M. Rappaport, Note, *St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned its Back on Title VII by Rejecting “Pretext-Only?”*, 39 VILL. L. REV. 123 (1994); Ronald A. Schmidt, Note, *The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non—St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), 73 NEB. L. REV. 953, 976–81 (1994) (summarizing criticism of *Hicks* but concluding that a *Hicks* plaintiff bears no greater burden than that of any other civil plaintiff); *EEOC Urges Congress to Overturn Supreme Court's 1993 Hicks Decision*, 1993 DAILY LAB. REP. (BNA), Oct. 7, 1993, at D-7 (quoting EEOC Chairman as saying of post-*Hicks* litigation, “it may be impossible to prove discrimination in the absence of direct evidence, which is so rarely available”); *Management, Civil Rights Attorneys Differ on Effect of Hicks Decision*, 1993 DAILY LAB. REP. (BNA), July 2, 1993, at D-26 (quoting numerous employee groups characterizing the decision as a “hard blow to civil rights advocates” and calling for a legislative response).

<sup>79</sup> See Malamud, *supra* note 78 at 2243.

reason is unworthy of belief, the employer did not discriminate. In such instances, fact finders may find for employers. Assuming that most plaintiffs' lawyers work on a contingency fee arrangement, and that they are rationally self-interested, it makes little sense for lawyers to take cases in which they can satisfy their burden of proving pretext, but can still end up with no damages or costs and fees assessments. Put simply, betting on such an inference is a risky proposition for plaintiffs' lawyers. Professor Samuel Estreicher, one of the nation's leading experts on ADR and outspoken supporter of arbitration in employment disputes, aptly refers to cases without evidence as "orphan" cases because they are unlikely able to find a lawyer to adopt them.<sup>80</sup>

After *Hicks*, one would expect that plaintiffs' lawyers would take cases with direct evidence and ask for the mixed-motive jury instruction, take cases with circumstantial evidence and accept the pretext or but for instruction, and avoid cases with insufficient evidence. Plaintiffs' preference for mixed-motive cases should have increased dramatically after the passage of the Civil Rights Act (CRA) of 1991.<sup>81</sup>

After the CRA of 1991, the distinction between mixed motive and pretext changed from a theoretical one regarding the effect of the burden of proof to a more tangible difference in available damages. In addition to providing for jury trials in Title VII cases,<sup>82</sup> codifying the concept of, and altering the burden of proof in, disparate impact cases,<sup>83</sup> and adding punitive and compensatory damages,<sup>84</sup> the CRA of 1991 partially codified and partially overturned *Price Waterhouse's* mixed-motive scheme. First, the CRA of 1991 recognized that in addition to intentional discrimination (disparate treatment) there is a second type of discrimination – unintentional discrimination known as disparate (or adverse) impact: (1) the plaintiff can demonstrate a disparate impact on the basis of a protected class and the respondent fails to demonstrate that the impact is job related and "consistent with business necessity," or (2) the plaintiff can demonstrate that the respondent refused to

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<sup>80</sup> See Robin Pogrebin & Edward Klaris, *The Rules of the Game*, THE L. SCH., Autumn 2006, at 25, 34, available at [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_061129.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_061129.pdf).

<sup>81</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 102 (1991) (codified as amended at 42 U.S.C. § 1981 (2011)).

<sup>82</sup> § 102(c) (codified as amended 42 U.S.C. § 1981a(c) (2011)).

<sup>83</sup> § 105 (codified as amended 42 U.S.C. § 2000e-2(k) (2011)).

<sup>84</sup> § 102(b) (codified as amended 42 U.S.C. § 1981a(b) (2011)).

implement an “alternative employment practice.”<sup>85</sup> Next, the CRA of 1991 altered the mixed-motive scheme. Under the CRA of 1991, the plaintiff can satisfy the first prong and thus, shift the burden of proof if the protected class is a motivating (as opposed to a substantial) factor in the employer decision.<sup>86</sup> Further, the employer does not escape liability if it proves that it would have made the decision regardless of the protected class.<sup>87</sup> Instead, the judge may award such plaintiffs a declaratory judgment and costs and attorney fees if they can satisfy the first prong of the two-prong mixed-motive test.<sup>88</sup> Employers unable to satisfy the second prong are subject to back pay, reinstatement, punitive damages, compensatory damages, and are also liable for costs and fees.<sup>89</sup>

As to be expected, the CRA of 1991 contained statutory gaps. Two of these gaps directly affected the mixed-motive instruction and the burden of proof. One was easily and logically decided. The other is a source of contention without which there would be no need for most of the scholarship on this topic. First, the CRA of 1991 did not distinguish between circumstantial and direct evidence. This would be fine if the statute stated that the type of evidence was irrelevant. It did not do this. Courts were split as to whether O’Connor’s direct evidence requirement survived the CRA of 1991.<sup>90</sup> Second, the CRA of 1991 did not expressly amend the ADEA or mention retaliation, leaving another open question: did the new mixed-motive damage scheme apply to age, retaliation, and, subsequently, the ADA?<sup>91</sup> It took the Supreme Court twelve years to answer the direct evidence question,<sup>92</sup> seventeen years to resolve the age question,<sup>93</sup> and twenty-one years to answer the retaliation question.<sup>94</sup> Plaintiffs cheered the first ruling,<sup>95</sup> while employers

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<sup>85</sup> § 105(a) (codified as amended 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2011)); see also *The Civil Rights Act of 1991*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited Sept. 18, 2013).

<sup>86</sup> § 107(a) (codified as amended 42 U.S.C. § 2000e-2(m) (2011)).

<sup>87</sup> *Id.* (codified as amended 42 U.S.C. § 2000e-2(m) (2011)).

<sup>88</sup> *Id.* (codified as amended 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2011)).

<sup>89</sup> *Id.* (codified as amended 42 U.S.C. § 2000e-5(g)(1) (2011)).

<sup>90</sup> See Sherwyn & Heise, *supra* note 13 at 918–19 & nn.109–15 (discussing the circuit split over whether *McDonnell Douglas* applied to mixed-motive cases).

<sup>91</sup> Congress passed the ADA one year before the CRA of 1991.

<sup>92</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding that there was no need for direct evidence in order to obtain the mixed motive instruction).

<sup>93</sup> *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167 (2009).

<sup>94</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

<sup>95</sup> See Jeffrey A. Van Datta, “*Le Roi Est Mort; Vive Le Roi!*”: *An Essay on the Quiet*

exhaled a sigh of relief after the second and third.<sup>96</sup> The Court has still not expressly ruled on the ADA.<sup>97</sup>

In *Costa* the Court posed and answered a simple question: does the CRA of 1991 require plaintiffs to provide direct evidence that discrimination was a substantial factor in the employer's decision to receive a mixed-motive instruction?<sup>98</sup> The answer is no.<sup>99</sup> Both the majority opinion and Justice O'Connor's concurrence state that the only conclusion to be drawn from Congress' replacement of the term "substantial" with "motivating" and its failure to mention direct evidence is that any evidence that discrimination motivated the employer is enough to warrant a mixed-motive instruction.<sup>100</sup> Along with opening the mixed-motive instruction to a significant number of cases, *Costa* destroyed the employment discrimination litigation framework that had developed over time by the lower courts. After *Costa*, pretext cases were limited to situations in which there was no evidence. As stated above, however, because plaintiffs' lawyers should be reluctant to take these "orphan" cases, it seemed that all cases transmogrified into mixed-motive cases.<sup>101</sup> Because of its widespread use, the term "mixed motive" should be replaced by "motivating factor."

All cases did not, however, become motivating-factor cases<sup>102</sup> for

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*Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 79 (2003) ("[T]he quiet little revolution started in *Costa* will be one of the most significant advances for civil rights enforcement in the twenty-first century.").

<sup>96</sup> See David G. Savage, *Age Bias Much Harder To Prove; The Supreme Court Shifts the Burden of Proof to the Worker Making the Claim. Businesses Cheer.*, L.A. TIMES, June 19, 2009, at A1 ("Businesses applauded the decision in *Gross v. FBL Financial Services . . .*"); see also Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motive Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399 (2009).

<sup>97</sup> It seems logical that, absent Congressional intervention, courts will follow the Court in ADA cases.

<sup>98</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003).

<sup>99</sup> *Id.* at 101-02 ("[D]irect evidence of discrimination is not required in mixed-motive cases . . .").

<sup>100</sup> See *id.* at 102 (O'Connor, J., concurring).

<sup>101</sup> See Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004); Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004). For further insight into the debate, see William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212-19 (2003); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004).

<sup>102</sup> Reports of *McDonnell Douglas*' death were greatly exaggerated. In fact, a Lexis search conducted by Professor Prektert found that in the six-month period between



two reasons. First, plaintiffs' lawyers were reluctant to ask for the instruction. Lawyers representing employers report that they have had numerous cases in which the motivating-factor instruction is proper, but the employee's counsel did not ask for the instruction.<sup>103</sup> These lawyers surmised that the instruction can be confusing and that award of costs and fees, but no damages, is difficult to explain to clients.

Second, courts simply did not know if the motivating factor applied to ADEA, retaliation, and ADA cases. *McDonnell Douglas* and its progeny's burden-shifting scheme had always applied to ADEA and retaliation cases.<sup>104</sup> Indeed, after *Price Waterhouse* and before the CRA of 1991, the mixed-motive instruction was available in age cases.<sup>105</sup> The CRA, however, did not amend the ADEA or discuss retaliation.<sup>106</sup> This placed courts in a difficult situation: apply the CRA of 1991 to age and retaliation cases despite the lack of Congressional guidance; apply *Price Waterhouse*, which had been modified by the CRA of 1991; or hold that after Congress codified and strengthened the mixed-motive instruction in race, sex, color, national origin, and religion cases, Congress intended to force age and retaliation cases to be labeled single motive cases. In choosing this last option, courts would effectively hold that Congress intended to outlaw motivation based on the five classes protected by Title VII, but allow it in age, retaliation and likely ADA cases.

Somewhat shockingly, the Court in *Gross* and *Nassar* held that

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December 2006 to May 2007, courts used the *McDonnell Douglas* framework in over 400 cases. Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AMER. BUS. L.J. 511, 538 n.142 (2008).

<sup>103</sup> Proskauer's Joe Baumgarten stated such at the Cornell Labor & Employment Roundtable in May of 2007 and the other lawyers present, including Gregg Gilman (Davis & Gilbert), Ilene Berman (Taylor English), and Paul Wagner (Stokes Wagner) agreed. This Annual Roundtable began in 2002 and features partners from well-respected labor and employment law firms, in-house counsel, and professors from several different law firms. *See Labor and Employment Roundtable*, CORNELL U. SCH. HOTEL ADMIN., <http://www.hotelschool.cornell.edu/research/chr/events/roundtables/recent/labor.html> (last visited Feb. 15, 2014).

<sup>104</sup> A retaliation claim involves different *prima facie* elements: (1) did the employee engage in a protected expression; (2) was the employee discriminated against again; and (3) is there a link between elements one and two. *See Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998). At this point the burdens for retaliation are identical to that in *McDonnell Douglas*. *See id.*

<sup>105</sup> *See, e.g., Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (referring to similar cases as "mixed motive age discrimination" cases).

<sup>106</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 102 (1991) (codified as amended at 42 U.S.C. § 1981 (2011)).

Congress' intent is found in the third option above. What makes this problematic is that the Court focuses on the fact that both the ADEA and the retaliation provision of Title VII use the phrase "because of."<sup>107</sup> The Court has now held twice that such language is evidence of Congressional intent to require but-for causation. The problem is that Title VII uses the exact same language.<sup>108</sup> The Court in *Price Waterhouse* interpreted Title VII's language to create the mixed-motive scheme.<sup>109</sup> After the mixed-motive scheme was codified and strengthened by CRA 1991, the Court held that the same language requires but-for proof in three other statutes.<sup>110</sup> This inconsistency in interpretation is difficult to understand or justify.

In a prior article, two of this Article's authors discussed how the two schemes are used and whether they should both still be used.<sup>111</sup> Again, it is beyond the scope of this Article to report in detail how the two schemes are, and if they should be, applied. It is, however, important to know that *McDonnell Douglas*, in most jurisdictions, is used in the summary judgment phase only<sup>112</sup> and is deemed no longer relevant in cases that go to trial.<sup>113</sup> Instead, the jury instruction simply

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<sup>107</sup> *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 183 (2009) (Stevens, J., dissenting) ("[T]he Court interprets the words 'because of' in the ADEA as colloquial shorthand for 'but-for' causation." (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion) (internal quotation marks omitted))); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2545 (2013). ("The meaning of 'because' in Title VII's retaliation provision should be read to mean just what the Court held 'because' means for ADEA-liability purposes.") (Ginsburg, J., dissenting).

<sup>108</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, §105(a) (1991) (codified as amended in scattered subsections of 42 U.S.C. § 21) (making it unlawful to engage in discrimination "because of race, color, religion sex, or national origin").

<sup>109</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989) (plurality opinion).

<sup>110</sup> 42 U.S.C. § 2000e-2(a)(1) (2011) ("[T]o discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

<sup>111</sup> See generally Sherwyn & Heise, *supra* note 13.

<sup>112</sup> See Kristina N. Klein, Note, *Oasis or Mirage? Desert Palace and Its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1186-87 (2006) (discussing *McDonnell Douglas* in the context of summary judgment).

<sup>113</sup> See Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 376-78 (2007) (chronicling the case law of the circuits in great detail); See also *Whittington v. Nordam Grp. Inc.*, 429 F.3d 986, 997-98 (10th Cir. 2005); *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 758 (2d Cir. 2004); *Sanghvi v. City of Claremont*, 328 F.3d 532, 539-40 (9th Cir. 2003); *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis."); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988) (arguing that the "shifting burdens of production of *Burdine* . . . are beyond

asks the jurors to decide if the employer made its decision “because of” the protected class.<sup>114</sup> This is an odd result jurisprudentially speaking, to say the least. Conversely, the entire motivating-factor scheme, when applied, has always been fully present in the jury instruction.<sup>115</sup> After *Costa*, however, some courts used the motivating factor scheme in summary judgments while others refused to do so.<sup>116</sup>

*B. The Current and Proposed State of Employment Discrimination Law*

Title VII plaintiffs may request the motivating-factor instruction, and they should. Judges, however, can choose whether or not to give the instruction.<sup>117</sup> The judicial decision as to whether a case is a

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the function and expertise of the jury” as well as “overly complex”).

<sup>114</sup> See *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 221–22 (3d Cir. 2000) (holding that it is improper to instruct the jury on the *McDonnell Douglas* burden shifting scheme, but it is proper “to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown”); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) (“Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age.”); *but see Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 167 & n.9 (6th Cir. 1993) (holding that it was proper to “guid[e] the jury through a three-stage order of proof as opposed to instructing the jury solely on the ultimate issue of sex discrimination”), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010); *see also Brown v. Packaging Corp. of Am.*, 338 F.3d 586, 595–99 (6th Cir. 2003) (Clay, J., concurring); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425–26 & n.3 (10th Cir. 1993); *Lynch v. Belden & Co.*, 882 F.2d 262, 269 (7th Cir. 1989) (“[I]t was proper for the district court to instruct the jury as to the *McDonnell Douglas/Burdine* formula for evaluating indirect evidence.”); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200 (1st Cir. 1987) (“[T]he district court was correct in using the [*McDonnell Douglas*] framework in the instructions to the jury.”), *abrogated on other grounds by Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999).

<sup>115</sup> See, e.g., *Donovan v. Milk Mktg. Inc.*, 243 F.3d 584, 586 (2d Cir. 2001) (“[W]hen the jury might reasonably conclude on the evidence that both illegal discrimination and legitimate non-discriminatory reasons were present in an employer’s decision-making process, the court may charge the jury on mixed-motivation in accordance with *Price Waterhouse*.”).

<sup>116</sup> See generally Kerry S. Acocella, Note, *Out with the Old and in with the New: The Second Circuit Shows It’s Time for the Supreme Court to Finally Overrule McDonnell Douglas*, 11 CARDOZO WOMEN’S L.J. 125 (2004).

<sup>117</sup> See, e.g., *Sukenic v. County of Maricopa*, 2004 U.S. Dist. LEXIS 31837 (D. Az 2004) stating:

In the last paragraph of the Court’s Opinion in *Costa*, the Court explicitly adopted a standard equivalent to Rule 50(a), Federal Rules of Civil Procedure, for judgment as a matter of law in jury trials, for determining if a plaintiff was entitled to obtain a mixed-motive instruction. *Desert Palace v. Costa*, 539 U.S. at 101, 123 S. Ct. at 2155. We contend that having the court “label” the case is waste of time.

motivating factor case could best be described as difficult to categorize and understand. In every case that makes it to trial, the employee alleges discrimination and the employer claims that the employee deserved the adverse employment action for non-discriminatory reasons. One of three truths should emerge: (1) the employer discriminated; (2) the employer did not discriminate against the employee; or (3) there were both legitimate and illegitimate reasons operating simultaneously. Deciding which of the three occurred is the job of the jury<sup>118</sup> and thus, the POWADA correctly allows any discrimination plaintiff to select their preferred scheme.<sup>119</sup> The problem with POWADA is that it includes retaliation plaintiffs.<sup>120</sup> Below, we explain from a doctrinal standpoint why retaliation is like the Orwellian quote from *Animal Farm* mentioned at the beginning of the Article—it is equal but somehow more equal

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Such analysis is a waste of time because if the employee has no evidence of discrimination, the court should dismiss the case. If the employer has no evidence of legitimate reasons, the court should find for the employee. In all other cases, the court should provide a mixed motive instruction. More problematic is that having a judge label a case as “mixed motive” presupposed the holding of the jury. Accordingly, the jury instruction should be referred to as the motivating factor instruction. Because it is the role of the jury to determine whether the evidence presented by each side is credible, it seems clear that all discrimination plaintiffs should be allowed to prove and all juries should decide their cases, under the same instruction.

<sup>118</sup> References to *Price Waterhouse* as a “mixed-motive” case imply that *McDonnell Douglas* cases are “single-motive” cases. This distinction makes little or no sense. First, absent certain reprehensible behavior, such as workplace violence, it is illogical to think that sophisticated business decision makers hire, fire, promote, or demote people for any individual reason. Instead, human resources departments have multi-step procedures to make such decisions. It is even harder to believe that forty-five years after Title VII, in a multi-cultural society where diversity is often easily seen and judged, numerous employers base a business decision exclusively on a protected class. If this were the case, it would surely trigger quick litigation. Moreover, the fact that the majority of discrimination cases are discharge cases makes the single motive argument even less persuasive. The company at least initially hired the terminated employee. Unless there was a change in decision-making personnel, this means that the hiring employees were not racists or sexists when they first hired the employee, but became discriminators when they made termination decisions. Employers typically rely on numerous factors in the employment context, many legitimate and, unfortunately, some unlawful. There is another reason to argue against the bifurcated single-motive versus mixed-motive label. Currently, judges decide to label the case before it goes to the jury. We contend that whether the case is a single-motive case (assuming this is possible) or mixed-motive case is a question for the jury.

<sup>119</sup> Protecting Older Workers against Discrimination Act, H.R. 2852, 113th. Cong. (1st Sess. 2013).

<sup>120</sup> *Id.*

than the other protected classes of discrimination.<sup>121</sup>

### III. EMPLOYER RETALIATION

Retaliation cases have more than doubled in the last twenty years and there are now more retaliation claims than any other employment discrimination cause of action.<sup>122</sup> As most employers know and employees come to understand, employees may not file discrimination charges in federal court without first filing such charges with either the Equal Employment Opportunity Commission (EEOC) or an affiliated state agency (commonly referred to as Fair Employment Practices Agencies (FEPA)).<sup>123</sup> As a result, tracking the percentages of claims alleging violations of anti-discrimination employment statutes may be accomplished by analyzing EEOC or FEPA charge filing statistics. In the 1980s and early 1990s, the EEOC and state FEPAs received about the same number of charges each year.<sup>124</sup> FEPA charge data are often difficult to find and may be incomplete. EEOC data, by contrast, are readily available and are more likely complete. This is why we rely on EEOC data regarding enforcement of Title VII, ADEA, ADA, and the Equal Pay Act. In the last twenty-one years, total employment discrimination charges filed with the EEOC have ranged from a low of 72,302 charges in 1992, to a high of 99,947 in 2011.<sup>125</sup> In 2012, 99,412 charges were filed.<sup>126</sup> Because of this year-to-year fluctuation, using the raw numbers to evaluate which claims are most prevalent is not informative. Instead, we analyze the percentage change in claims filed per year. The largest single year-to-year percentage change occurred in Americans with Disabilities (ADA) claims filed in 1992 and 1993.<sup>127</sup> Only 1.4% of

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<sup>121</sup> See ORWELL, *supra* note 2 and accompanying text.

<sup>122</sup> *Charge Statistics FY 1997 Through FY 2013*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>123</sup> *Filing a Charge of Discrimination*, EEOC, <http://www.eeoc.gov/employees/lawsuitcharge.cfm> (last visited Jan. 4, 2014); *Filing a Lawsuit*, EEOC, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Feb. 15, 2014);

<sup>124</sup> *Charge Statistics FY 1997 Through FY 2012*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>125</sup> *Charge Statistics FY 1992 Through FY 1996*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); *Charge Statistics FY 1997 Through FY 2012*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>126</sup> Press Release, EEOC, EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012 (Jan. 28, 2013), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm>.

<sup>127</sup> *Charge Statistics FY 1992 Through FY 1996*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); *Charge Statistics FY*

the cases filed in 1992 were ADA cases, but that number exploded to 17.4% in 1993.<sup>128</sup> This jump can be attributed to the ADA taking effect in July 1992.<sup>129</sup> Beginning in 1993, the ADA cases have made up between 17.4% and 26.5% of EEOC filings.<sup>130</sup> Besides disability, the greatest fluctuation in any claim based on a protected class was the 7.2% differential between ADEA cases filed in 1992 (27.1%) and the cases filed in 1995 (19.9%).<sup>131</sup> In 2012, ADEA cases made up 23.0% of the total claims filed.<sup>132</sup> These fluctuations may be the result of random variability. In any event, little in the way of trends can be discerned in these statistics. There is, however, one cause of action that exhibited a dramatic linear increase that is almost certainly non-random—retaliation.

In 1993, retaliation claims made up 15.7% of the total cases brought.<sup>133</sup> By 2013, that percentage more than doubled to 41.1%.<sup>134</sup> In 2009, both retaliation and race accounted for 36% of the claims. Since 2010, retaliation cases have supplanted race as the most prevalent claim.<sup>135</sup> Moreover, unlike any other category, retaliation's percentages did not rise and fall throughout the time period in question. Instead, except for a slight drop from 2001 to 2002 (27.5% to 27.0%), retaliation cases, as a percentage of total cases filed, rose each year.<sup>136</sup>

The increase in the percentage of retaliation cases is not, as one would logically surmise, accompanied by a decrease in the

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1997 Through FY 2012, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>128</sup> *Charge Statistics FY 1992 Through FY 1996*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014).

<sup>129</sup> *Id.*

<sup>130</sup> *Charge Statistics FY 1992 Through FY 1996*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); *Charge Statistics FY 1997 Through FY 2012*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>131</sup> *Charge Statistics FY 1992 Through FY 1996*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); *Charge Statistics FY 1997 Through FY 2012*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>132</sup> *Charge Statistics FY 1997 Through FY 2013*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>133</sup> *Charge Statistics FY 1992 Through FY 1996*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014).

<sup>134</sup> *Charge Statistics FY 1997 Through FY 2013*, EEOC, <http://eoc.gov/eoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

percentages of other employment discrimination claims. The reason that the percentages can exceed 100 is that a single employee can allege discrimination under more than one cause of action.<sup>137</sup> For example, assume that a forty-five year old African-American woman, who is Jewish and blind, files a charge against a potential employer who failed to hire her. Based on one incident, this individual can allege discrimination based on age, race, sex, religion, and disability. Each theory of discrimination would be tallied despite the fact that they arose from a single charge filed.

Between 1997 and 2012, the percentage of “cases” rose from 145.6% to 170.3%. Over the same time period, the percentage of retaliation cases rose 15.5%.<sup>138</sup> While it is possible that the 15.5% increase in retaliation cases resulted from mostly stand-alone cases, a large portion of the increase is likely fueled by what some refer to as “tack-on” cases. Retaliation tack-on cases are cases that allege a violation based on one of the seven protected classes with a retaliation case “tacked-on.”

Tacking on additional claims to a complaint is relatively inexpensive. The obvious benefit of tacking on claims is the creation of an additional basis from which to recover.<sup>139</sup> As explained below, even if the underlying claim fails, employees may nonetheless succeed on a retaliation claim. Retaliation claims may also augment the perceived legitimacy of underlying claims. Plaintiffs alleging retaliation may be more likely to be regarded as having attempted to resolve a workplace problem without resort to the courts. Such behaviors may appear reasonable to a fact finder, and they may reduce the impression that the plaintiff is only ex post attempting to extort money from an employer.

In addition to serving as tack-on claims for plaintiffs in protected categories, retaliation is an attractive cause of action because an employee may file a complaint when he is not a member of a protected class affected by an underlying claim and when the only evidence of discrimination is the timing of an employer’s actions.<sup>140</sup> In this instance, retaliation opens the door to a number of arguably less meritorious claims. Lawyers representing employers may argue

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<sup>137</sup> For example in 2012 the total percentages of claims were 170.1%. *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Joan M. Savage, Note, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 219 & n.36 (2004) (“Retaliation charges serve as independent legal claims, which do not depend on the validity of the underlying claim.”).

<sup>140</sup> *Id.* at 219–20; *see infra* note 179 and accompanying text.

that employees make frivolous complaints of discrimination as a temporary means of establishing job security, particularly when the threat of losing one's job is high.<sup>141</sup> The supposed job security involves the likelihood of a stand-alone retaliation claim, which is the natural outgrowth of such a complaint. It is not irrational for an employee with a job (as opposed to a career) to consider complaining about unlawful behavior as a form of insurance against an employer taking adverse employment action against him. An inverse correlation likely exists between the degree to which an employee is in a job with few available alternatives and the likelihood of engagement in this type of behavior.

On a more practical level, compared to discrimination, retaliation is easier for employees to identify and juries to understand.<sup>142</sup> Discrimination can be subtle and difficult to interpret. Employees may wonder whether the employer is basing a decision on the employee's protected class or because of a personal dislike or other non-discriminatory reason. Retaliation, by definition, follows a complaint or another clear action,<sup>143</sup> and the employee consequently feels confident in the reason for adverse treatment. In addition, lawyers report that juries are often skeptical about discrimination.<sup>144</sup> Without a "smoking gun" evidencing a specific employer action or pattern, it is often difficult to convince a jury that the employer's negative feelings about a protected class were so strong that that the employer was willing to take a discriminatory action and thereby risk the time, money, and negative publicity associated with a discrimination lawsuit.<sup>145</sup> This is especially true in discharge cases in which it is often difficult for juries to accept that an employer hired a member of a protected class but then terminated the employee because of that same class. It may seem illogical for an employer to not discriminate at the time of hiring the plaintiff but then to discriminate at the time of the employee's discharge. Alternatively, people tend to more readily appreciate that employers (and their

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<sup>141</sup> Proskauer's Joe Baumgarten said as much at the Cornell Labor & Employment Roundtable in May of 2007. *See supra* note 103.

<sup>142</sup> *See* B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 469 (2008) ("Because the juror can more easily project his or her own revenge or retaliation instinct in a similar situation, he or she may more easily conclude that retaliation played a role in the adverse decision made.").

<sup>143</sup> *Retaliation*, EEOC, <http://www.eeoc.gov/laws/types/retaliation.cfm> (last visited Feb. 15 2014).

<sup>144</sup> *See supra* note 103.

<sup>145</sup> *See supra* note 103; *see also*, Norton et al, *supra* note 55, at 37-38 (discussing why racial bias is a difficult thing to prove).



agents) may become upset and angry when being accused of discrimination, whether falsely or fairly, and therefore likely want to retaliate against the individual making those accusations. Because it is easy for employees to identify and juries to understand, plaintiffs' lawyers, acting as rational, self-interested actors that must decide whether to invest their time and money in each case with which they are presented, are often more interested in retaliation cases than other types of discrimination cases, all else being equal.<sup>146</sup> A case in which the employee can identify unlawful actions based on an easily understandable unlawful motivation is more attractive to most jury members.<sup>147</sup> Finally, as explained below, when using the pretext standard, retaliation cases are easier to prove than traditional discrimination cases.

A. *The Law of Employer Retaliation*

After *Nassar*, to establish a case of retaliation under either clause, employees must prove that they engaged in a "protected activity," that they were discriminated against, and that there is a link between the protected activity and the adverse employment action.<sup>148</sup>

A protected expression, for retaliation purposes, can occur under either the participation or the opposition clause.<sup>149</sup> An employee invokes the participation clause when he or she takes part (e.g., as a party or witness) in a Title VII, ADEA, or ADA proceeding (e.g., agency investigation or litigation).<sup>150</sup> The opposition clause applies to situations in which an employee complains that the employer violated a discrimination law.<sup>151</sup> The complaint did not come as part of a discrimination proceeding and is instead based on an internal complaint, other notification to management, or even the filing of a claim.<sup>152</sup> Regardless of which applies, it is important to note that the discrimination at issue does not have to involve the complaining employee.<sup>153</sup> For example, a male employee who

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<sup>146</sup> See *supra* note 103.

<sup>147</sup> See George, *supra* note 142, at 469 ("Because the juror can more easily project his or her own revenge or retaliation instinct in a similar situation, he or she may more easily conclude that retaliation played a role in the adverse decision made.").

<sup>148</sup> See *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998).

<sup>149</sup> George, *supra* note 142, at 446–51.

<sup>150</sup> George, *supra* note 142, at 446–47 & nn.27–30.

<sup>151</sup> George, *supra* note 142, at 447–50.

<sup>152</sup> George, *supra* note 142, at 447–51.

<sup>153</sup> George, *supra* note 142, at 447 ("[T]his protection extends not only to the

testifies at trial or complains to his employer that women are being sexually harassed has engaged in a protected expression under the participation or opposition clause. Still, what constitutes a protected expression is sometimes a challenging question.

In *Payne v. McLemore's Wholesale and Retail Stores*,<sup>154</sup> the Fifth Circuit addressed the definition of a protected expression in opposition clause cases. Employee Payne believed that his employer refused to hire people of color into positions in which the employees would have to handle money.<sup>155</sup> Payne, who was temporarily laid off each summer, joined a civil-rights group that picketed in front of the employer's store.<sup>156</sup> After the picketing occurred, the employer did not rehire Payne, who alleged retaliation under the opposition clause.<sup>157</sup> The employer argued that because Payne's allegations of racial discrimination were unfounded, there could not be a protected expression.<sup>158</sup> The employer asserted that employees could not succeed on a retaliation claim unless they proved that the underlying claim of employment discrimination did, in fact, occur.<sup>159</sup>

In rejecting the employer's argument, the court held that the employee engaged in a protected expression even if the underlying claim failed and the employer had not, in fact, violated the law.<sup>160</sup> Instead, the court explained, the employee need only have reasonable belief that the subject of the complaint was true.<sup>161</sup> Other courts hold that to be protected, the expression must be in good faith as well as reasonable.<sup>162</sup> An expression is considered to be held in good faith if the employee truly believes the alleged conduct occurred. An employee has a reasonable belief if there is a basis on

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employee who filed the complaint but also to anyone who testifies or otherwise participates in the investigation or hearing.”).

<sup>154</sup> 654 F.2d 1130 (5th Cir. 1981).

<sup>155</sup> *Id.* at 1135–36.

<sup>156</sup> *Id.* at 1134–35.

<sup>157</sup> *Id.* at 1135.

<sup>158</sup> *Id.* at 1137.

<sup>159</sup> *Id.*

<sup>160</sup> *Payne*, 654 F.2d at 1137.

<sup>161</sup> *See id.* at 1140 & n.11.

<sup>162</sup> *See, e.g., Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (“[A] plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices . . . . A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.”). The court referred to a good faith belief as one that is “honest and bona fide.” *Id.*

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which to believe that the alleged conduct did occur, and if true, the conduct would violate the law.<sup>163</sup>

The participation clause protects an employee who participates in any Title VII procedure regardless of the extent of such participation.<sup>164</sup> In fact, the EEOC guidelines state that the protection under the participation clause applies to testifying, assisting, and preparing affidavits in conjunction with a proceeding or investigation under Title VII, ADEA, ADA, or EPA.<sup>165</sup> These present very broad parameters on which to base a claim. For instance, an employee who files an EEOC charge or who assists another in filing or preparing such a charge qualifies as being in a protected class. This is the case even if the charge is not true, not reasonable, or not even brought in good faith.<sup>166</sup> As the Second Circuit noted in *Deravin v. Kerik*, the participation clause “is expansive and seemingly contains no limitations.”<sup>167</sup> No case illustrates this point more clearly than *Merritt v. Dillard Paper Company*.<sup>168</sup> There, the Eleventh Circuit held that a company could not discharge an employee for his admitted sexual harassment when the admission occurred as part of testimony proffered in a Title VII case.<sup>169</sup>

The application of the opposition and participation clauses makes sense: not requiring an opposing plaintiff to prove the truth of the underlying claim prevents the chilling effect of possible dismissal for speaking up. If employees are protected only when they can prove that their employer violated the law, employees will be reluctant to use company harassment policies or otherwise complain about discrimination. Because the Supreme Court, numerous lower courts, and commentators consistently contend that the key to ending discrimination is employee complaints followed by swift

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<sup>163</sup> *Payne*, 654 F.2d at 1140–41. *Payne* reasonably believed McLemore’s hiring and promotional practices violated Title VII. *Id.* at 1141. The minority position requires the plaintiff to hold a good-faith belief that the employer violated the law. See *Ficus v. Triumph Grp. Operations, Inc.*, 24 F. Supp. 2d 1229, 1241 (D. Kan. 1998).

<sup>164</sup> EEOC, Directives Transmittal, EEOC Compliance Manual, Vol. 2 § 8-II(C)(1), 8-8–8-9, available at <http://www.eeoc.gov/policy/docs/retal.pdf>.

<sup>165</sup> *Id.* at 8-2.

<sup>166</sup> See, e.g., *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) (“The participation clause . . . has accordingly been interpreted as shielding recourse to the EEOC, regardless of the ultimate resolution of the underlying claim on its merits.”).

<sup>167</sup> 335 F.3d 195, 203 (2d Cir. 2003).

<sup>168</sup> 120 F.3d 1181 (11th Cir. 1997).

<sup>169</sup> *Id.* at 1182.

employer action, this chilling effect needs to be curbed.<sup>170</sup> Similarly, employees should not fear participating in EEOC investigations or litigation because of their perceptions that unlawful employer activity may not constitute violations of the discrimination law and thus, they could be terminated for such testimony. The competing incentives make it difficult to craft bright-line parameters that toe the line in this area without tipping the balance and yielding undesirable results in either direction.

*B. The Supreme Court's Characterization of Employer Retaliation*

In the five years prior to *Nassar*, the Supreme Court issued three “employee friendly” retaliation decisions that made it easier for employees to prove retaliation. What makes these cases relevant to the discussion here is that in two of the cases the Supreme Court expanded retaliation to include types of harm and classes of plaintiffs not protected in other statutes. In *Burlington Northern & Santa Fe Railway Company v. White*,<sup>171</sup> the Court held that, unlike the other protected classes, a plaintiff in a retaliation case did not have to suffer an adverse employment action.<sup>172</sup> Instead, an employee simply had to prove that the employer’s response to a complaint of discrimination was one that would dissuade a reasonable person from complaining in the future.<sup>173</sup> The theory underwriting the ruling seemed to accord with the principle that the best way to eradicate discrimination is to encourage employees to complain and that most impediments to such ability to complain would undermine this goal and should therefore be considered unlawful retaliation.<sup>174</sup> After *Burlington Northern*, allegations of retaliation included conduct such as receiving the “cold shoulder” (being ignored),<sup>175</sup> a poor performance evaluation,<sup>176</sup> and issuance of a performance improvement plan.<sup>177</sup>

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<sup>170</sup> See, e.g., *Wilson v. Moulison N. Corp.*, 639 F.3d 1, 8 (1st Cir. 2011) (“[T]he company’s response was both swift and appropriate. After hearing the plaintiff’s complaint, [the company’s chief executive and owner] immediately looked into it, concluded that the misconduct had occurred, and reprimanded [the plaintiff’s coworkers] in very strong terms.”).

<sup>171</sup> 548 U.S. 53 (2006).

<sup>172</sup> *Id.* at 67–70.

<sup>173</sup> *Id.* (“[T]o retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.”).

<sup>174</sup> See *id.*

<sup>175</sup> *Johnson v. Weld Cnty.*, 594 F.3d 1202 (10th Cir. 2010).

<sup>176</sup> *Weber v. Battista*, 494 F.3d 179 (D.C. Cir. 2007).

<sup>177</sup> *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584 (6th Cir. 2007).

The Court's decisions, taken together, imply that retaliation is more equal than the other protected classes.

In *Thompson v. North American Stainless*,<sup>178</sup> the Court took the application of this principle one step further by holding that a retaliation plaintiff need not even engage in a protected expression.<sup>179</sup> In *Thompson*, the employer terminated the complaining employee's fiancé.<sup>180</sup> The Court applied the so-called "zone of interest" protection under which a complaining employee's fiancé and, we presume, spouse, is protected from retaliation.<sup>181</sup> Whether this logic similarly extends to siblings, parents, children, boyfriends, girlfriends, best friends, roommates, or other relationships will likely form the basis of litigation. In *Crawford v. Metro. Gov't.*, 555 U.S. 271 (2009), the third Supreme Court retaliation case, the Court held that an employee who, during an in-house investigation, stated that she had seen sexual harassment was opposing discrimination, despite the fact that she never complained and did not express any horror or even disgust.<sup>182</sup> By expanding the definition of protected expression and discrimination, the retaliation trilogy—*Crawford*, *Burlington Northern*, *Thompson*, and *Crawford v. Metropolitan Government*, made retaliation even more attractive to plaintiffs and plaintiffs' lawyers because both stand alone and tack-on retaliation cases are significantly easier to get to a jury. Again, these cases stand for the principle that retaliation is more equal than other forms of unlawful employment discrimination.

C. *Retaliation Is More Equal Than Other Employment Discrimination Claims*

Similar to the Supreme Court, we also contend that retaliation differs from other causes of action in the employment discrimination context for two key reasons. First, a truly innocent employer can not only have its business and reputation destroyed, but the law also forces the employer to continue to employ the person who seriously damaged the company. An examination of the *Payne* case illustrates this point.<sup>183</sup> Assume for the sake of illustration that Payne's

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<sup>178</sup> 131 S. Ct. 863 (2011).

<sup>179</sup> *Id.* at 870. ("We know of no other context in which the words carry this artificially narrow meaning.")

<sup>180</sup> *Id.* at 867.

<sup>181</sup> *Id.* at 870.

<sup>182</sup> In *Crawford v. Metro. Gov't.*, 555 U.S. 271 (2009).

<sup>183</sup> See *supra* notes 154–169 and accompanying discussion.

allegation was false, even though Payne believed it to be true. Assume further that the employer in *Payne* offered the money-related job in question to its two most senior employees, both of whom were individuals of color. Assume that the two employees of color turned down the job. The employer is disappointed but believed it was the employees' decision to make and thus offered the position to the third most senior employee, a white employee, who accepts the job. Payne, however, has no way of knowing how the hiring decision was made. Instead, Payne observes no people of color in positions in which employees handle money and jumps to a logical, albeit erroneous, conclusion that the two most senior employees, both of whom were African-American, were passed over for the open position in favor of a white employee. Payne notifies the company and the EEOC of his belief that the employer violated the law (thus activating the opposition clause). The EEOC investigates and soon the local newspaper publishes a front-page story about the investigation. A protest ensues outside the employer's front door, and people hold signs accusing the employer of being a racist. Online media picks up the story too. The employer's business suffers, the owners' standing in the community is diminished, and the owners' families are attacked due to the false accusation. Furious at being maligned, the owners do not wish to continue to employ the individual whose false accusations caused all of this pain and suffering. They could not tolerate continuing to pay someone whose judgment they did not trust and someone whom they feel stabbed the company in the back.

The owners want to terminate the employee but do not because the law prohibits it. Several months after the complaint and the accompanying fall out, employee Payne violates company policy by providing his company discount to a friend. The company has a strict policy of terminating employees who engage in such action and can prove that it has terminated several other employees who engaged in such conduct but had never complained about discrimination and were not part of the same protected class as Payne. At trial the plaintiff's attorney asks one of the company's owners if the accusation of discrimination angered her and if she was relieved to have Payne off the payroll. Regardless of how she answers, given the facts, we propose that most juries would infer that the owner was angry and is now relieved. In fact, we contend that even if there was little fall out, most employers would not wish to continue to employ an individual who accused the company of reprehensible behavior, and thus, would be relieved at the opportunity to legitimately terminate such an individual's employment. This is a perfect cross-examination

question because no matter how the witness responds, the case is made for the plaintiff. Either the jury will believe that the witness is lying if she says that she harbored no ill will towards Payne for accusing her of being a racist because that seems so implausible, or if the witness says she did harbor ill will towards Payne, the jury will think that the witness admitted having a retaliatory motive. This illustrates our central point that retaliation claims are more equal than other employment discrimination claims. No analogous Scylla and Charybdis cross-examination question like this one exists in other discrimination contexts; however, it is not clear whether and to what extent the hypothetical juror reaction posited here is empirically valid.

It is likely that jurors will be quicker to infer retaliation than other protected classifications as motivating employer conduct. This is because, as human beings, most people can relate to being motivated to retaliate against someone who wrongs you. That instinct likely predates the Bible<sup>184</sup> and may be a part of innate human nature across cultures.<sup>185</sup> This obviously cannot be said of other motives for discrimination. Particularly, as some have come to regard racial discrimination as becoming less prevalent, it is even more likely that individuals will be slower to impute racial motives to employer actions in the absence of direct evidence of discrimination.<sup>186</sup> If a white employer failed to promote a Hispanic employee, how frequently would a jury infer that discrimination was a motivating factor? Conversely, all things equal, if an employer failed to promote an employee who complained that other employees were being racially discriminated and sexually harassed, how much more or less frequently would a jury infer that retaliation was a motivating factor? Keeping the facts almost identical, this is what we sought to find out by repeating our 2010 mock jury study but modifying the national original fact pattern used there to a claim of unlawful retaliation.

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<sup>184</sup> See Christopher Boehm, *Retaliatory Violence in Human Prehistory*, 51 *BRIT. J. CRIMINOLOGY* 518 (2011).

<sup>185</sup> See, e.g., Simon Gächter & Benedikt Herrmann, *Reciprocity, Culture and Human Cooperation: Previous Insights and a New Cross-Cultural Experiment*, 364 *PHIL. TRANSACTIONS OF THE ROYAL SOC'Y: BIOLOGICAL SCI.* 791 (2009); Karl Sigmund, *Punish or Perish? Retaliation and Collaboration among Humans*, 22 *TRENDS IN ECOLOGY & EVOLUTION* 593 (2007); see also, Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 *CORNELL L. REV.* 419 (2003) (discussing the retributive psychology of punishment and experimentally testing this in a laboratory setting).

<sup>186</sup> See Jonathon Hunyor, *Skin-deep: Proof and Inferences of Racial Discrimination in Employment*, 25 *SYDNEY L. REV.* 535, 551–54 (2003).

Before discussing the results from our retaliation study, we briefly describe our prior national origin study.

#### IV. EXPERIMENTAL EVIDENCE OF THE IMPACT OF BURDENS OF PROOF ON JUROR DECISION MAKING

Do employees alleging retaliation fare better at trial than employees alleging discrimination based on other protected classes? General methodological limits and problems specific to jury instruction research limit our ability to answer this question as definitively as we would like. First, selection bias lurks, as not all litigated legal cases are reported,<sup>187</sup> and the stream of cases that are reported is non-random.<sup>188</sup> Second, the overwhelming majority of cases settle and, increasingly, settlements are confidential.<sup>189</sup> Third, even if all employment discrimination lawsuits went to trial (and did not settle) and generated published legal opinions, factual, legal, and contextual variations across cases complicate efforts to generalize.

Our prior research focused on whether the “motivating-factor” versus the “but-for” jury instruction influences case outcomes.<sup>190</sup> Using an experimental mock jury research design, our results demonstrated how jury instruction variations in the employment discrimination context can inform case outcomes.<sup>191</sup> Assuming facts that could support the claim as much as deny it, employers have a substantially equal chance of prevailing in pretext and motivating factor cases, but we found a “non-trivial chance that a motivating factor instruction will result in costs and fees being awarded.”<sup>192</sup> Consequently, we suggested that employers are better off with a

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<sup>187</sup> See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 246 (2001) (“The most important caveat that emerges from these [methodological] considerations is that appellate investigations in the employment discrimination area reflect a selection bias.”).

<sup>188</sup> For example, the U.S. Courts of Appeals publish opinions only selectively, and the circuits follow different rules regarding unpublished opinions. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 104–05 (1999) (noting the problems of statistical representation inherent in empirical analysis of appellate court decisions); see also Colker, *supra* note 187, at 244–47.

<sup>189</sup> The few exceptions include settlement agreements for class actions, claims filed by a governmental plaintiff, such as the EEOC, and, in some states, claims against a governmental defendant regarding public records. See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869–70 & nn.3–17 (2007).

<sup>190</sup> See Sherwyn & Heise, *supra* note 13 at 931–44.

<sup>191</sup> See Sherwyn & Heise, *supra* note 13 at 931–44.

<sup>192</sup> Sherwyn & Heise, *supra* note 13 at 937.



pretext instruction than a motivating factor instruction.<sup>193</sup>

To be sure, that differing burdens of proof generate different results does not by itself imply a problem. If legitimate rationales support different proof burdens, different results would not only be acceptable, they would be desirable. In fact, as an economic matter, burdens of proof should be constructed in civil litigation this way.<sup>194</sup> Regrettably, however, this is not the case. After *Costa* and prior to *Gross*, there was no clear standard as to when courts would apply the motivating factor instruction and not the pretext instruction. After *Gross* and *Nassar*, this problem remains in Title VII cases. POWADA endeavors to provide equity for all protected classes by overturning *Gross* and *Nassar* and allowing employees to select their preferred method of proof in all discrimination cases.<sup>195</sup> While the statute solves the problem of judicial (i.e., judges deciding when to allow the motivating factor instruction or not) and statutory inconsistency (treating age and disability differently than the other five protected classes), there are three problems that the statute either does not address or exacerbates. First, should jurors *unwittingly* award thousands of dollars in costs and fees to plaintiffs? Second, should employers that render legitimate business decisions be penalized for *perceived* illegitimate motivations? In other words, should Congress penalize an employer if a jury infers (correctly or incorrectly) motivation based on the decision maker's race, sex, or religion but agrees that the decision would have been made *regardless* of the protected class? The third question—and the focus of this study— involves whether retaliation should be included with other protected classes when it comes to the motivating factor jury instructions. Below, we posit that it should not.

#### A. *Experimental Mock Jury Studies*

We selected an experimental research design, specifically, a mock jury experiment, as the best available methodology to address the empirical challenges noted above. Although mock jury studies are increasingly common in legal scholarship, the method warrants a brief discussion. Mock jury studies endeavor to leverage the benefits

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<sup>193</sup> *Id.* at 937–38 (“Both [the motivating factor without the affirmative defense option and the full motivating factor option] . . . are less desirable than the pretext jury instruction for employers.”).

<sup>194</sup> Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 418–22 (1997).

<sup>195</sup> Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009).

of experimental research (such as manipulating key variables) while minimizing problems of ecological validity.<sup>196</sup> When reviewing mock jury research, researchers have noted a variety of issues in which mock jury experiments were instrumental—juror characteristics, the effects of prejudicial pretrial news coverage, the use of impermissible information, jurors' ability to understand standards of proof and instructions on the law, and deliberation phenomena, to name a few.<sup>197</sup> Two experiments are described below detail to illustrate the process.

Mock jury experiments have assisted research efforts to investigate the role of race in jury decision making. A 2001 mock jury experiment, for example, examined the effect of racially-charged facts on white jurors' biases in a criminal case.<sup>198</sup> Researchers randomly distributed packets containing a trial summary, judicial instructions, and a questionnaire to white participants in an airport waiting area.<sup>199</sup> Half of the summaries involved a white defendant and half involved a black defendant.<sup>200</sup> Additionally, while half contained racially charged factual circumstances, racial tension was absent in the other half.<sup>201</sup> Subjects rendered a verdict, recommended a sentence, and rated the strength of the prosecution's and defendant's cases.<sup>202</sup> Statistical analyses illustrated that in race-neutral cases, white jurors more readily display anti-black bias than in racially

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<sup>196</sup> See generally David De Cremer and Daan Van Knippenberg, *How Do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858 (2002); Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 FLA. ST. U. L. REV. 511 (2005); Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997).

<sup>197</sup> See Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1999); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 9–44 (1997). Mock jury studies have also been used to lend insight on important questions of how well decision makers understand certain kinds of evidence commonly presented to jurors. See, e.g., D.H. Kaye and Jonathan J. Koehler, *Can Jurors Understand Probabilistic Evidence?*, 154 J. ROYAL STAT. SOC'Y 75 (1991).

<sup>198</sup> Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 214–26 (2001).

<sup>199</sup> *Id.* at 216.

<sup>200</sup> *Id.*

<sup>201</sup> In the racially-charged version, the defendant was one of only two of his race on a basketball team and had suffered racial remarks and unfair criticism by teammates. The race-neutral version did not mention racial tension. However, all summaries identified the defendant's race in a demographic information section. *Id.*

<sup>202</sup> *Id.* at 217.

charged cases.<sup>203</sup> The authors hypothesized that the presence of race issues prompts jurors to conceal prejudice.<sup>204</sup>

Researchers have also frequently turned to mock jury experiments to investigate jurors' ability to disregard inadmissible evidence.<sup>205</sup> A seminal mock jury study, part of the University of Chicago jury project, examined damage awards for a fictional automobile accident case.<sup>206</sup> Three groups of participants listened to tape-recorded mock trials.<sup>207</sup> In the first group's recording, the defendant revealed he had no insurance, to no objection; in the second group, the defendant revealed he had insurance, to no objection; and in the third, the defendant revealed he had insurance, counsel objected, and the court directed the jury to disregard the statement.<sup>208</sup> The average awards were \$33,000, \$37,000, and \$46,000 for the three groups, respectively.<sup>209</sup> The study concluded that attention drawn to the defendant's insurance coverage sensitized jurors to that fact and contributed to higher damage awards.<sup>210</sup>

Mock jury experiments provide important advantages over post-trial jury interviews and trial outcome quantitative analyses. Notably, the ability to change one variable at a time permits researchers to gain purchase on mechanisms and relations among variables that are often otherwise unobservable using other empirical methodologies.<sup>211</sup> Nonetheless, the experimental approach is not without important limitations, mostly with the consequence of reduced external validity. Standard problems include the following: (1) mock jurors are often students rather than a more representative general population sample; (2) facts are presented in writing or by video or audio recording rather than through a live trial; (3) verdicts lack real-world consequences; and, most often, (4) the absence of group (jury-room)

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<sup>203</sup> *Id.* at 220.

<sup>204</sup> Sommers & Ellsworth, *supra* note 198, at 220.

<sup>205</sup> See Koehler and Kaye, *supra* note 197.

<sup>206</sup> See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753 (1959).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 753–54.

<sup>209</sup> *Id.* at 754.

<sup>210</sup> *Id.* But see Shari Seidman Diamond et al., *Damage Anchors on Real Juries*, 8 J. EMPIRICAL LEGAL STUD. 148 (2011) (suggesting that jurors are less sensitive to plaintiffs' damage award demands, in spite of the theoretically plausible existence of strong anchoring effects).

<sup>211</sup> Seidman Diamond et al, *supra* note 197, at 302–03; Samuel R. Sommers and Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1002–03 (2003).

deliberation.<sup>212</sup>

The degree to which student mock jurors attenuate external validity is unclear. For example, studies examining the use of students have found “little or no difference in . . . verdicts by student and adult jury-eligible respondents for the same cases.”<sup>213</sup> A meta-analysis of twenty years of jury simulations found no conclusive differences between student and non-student participants.<sup>214</sup> Where infrequent differences arose, students demonstrated a slight preference against criminal conviction and for defendant civil liability.<sup>215</sup>

Although the absence of real-world consequences in mock jury experiments certainly limits external validity, results from studies of how actual and mock-jury study findings differ are mixed.<sup>216</sup> For example, of the five studies discussed in the Bornstein and McCabe Article, one study found the absence of real-life consequences increased conviction rates, another study found the opposite effect, and the remaining three found no main effect at all.<sup>217</sup> Regardless, difficulties associated with studying—let alone manipulating—jury behavior make access to such data not readily feasible.

The absence of group deliberations, however, perhaps poses the greatest threat. Fieldwork examined by a 2001 meta-analysis suggests that in 10 percent of trials, a jury majority will change post-deliberation.<sup>218</sup> Deliberation comes at a cost, however—it requires more time and reduces sample size to one verdict for every six, eight, or twelve subjects, resulting in greater expense per unit of analysis. We tried to mitigate this problem by first having groups of six deliberate as one body. After deliberations were complete, the students then filled out the special jury verdict sheet on their own. Altogether, limitations notwithstanding, mock jury experiments are a necessary first step in designing more expensive and elaborate studies

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<sup>212</sup> See Saks, *supra* note 197, at 7.

<sup>213</sup> Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 SCI. 1046, 1046 (1989).

<sup>214</sup> Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75, 77–80 (1999).

<sup>215</sup> *Id.* at 80.

<sup>216</sup> Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. U. L. REV. 443, 452 (2005).

<sup>217</sup> *Id.* at 453 Table 1.

<sup>218</sup> Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 701 (2001).

that examine deliberation.<sup>219</sup>

*B. Jury Instruction Studies in the Employment Discrimination Context*

In an effort to enhance external validity, our experiment used case statements constructed (and used) by experienced employment discrimination specialists at a leading New York City law firm.<sup>220</sup> Before describing our experimental design, we first describe the jury instructions and special verdict sheets used in our study.

One problem with studying jury instructions is the variation in real-world jury instructions used by judges. In some jurisdictions, judges are permitted to develop their own proprietary jury instructions, as long as they accord with settled law. Judges typically ask each party to draft proposed jury instructions and then choose one of the two proposals or draft a third version themselves. Other jurisdictions have established model jury instructions that are routinely deployed.<sup>221</sup> These jury instructions are accompanied by “special jury verdict sheets.” This study exploits sample discrimination jury instructions and special verdict sheets that the Northern District of Illinois made publicly available. Appendix A contains the jury instructions and special verdict sheets used in this study.<sup>222</sup>

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<sup>219</sup> Sommers & Ellsworth, *supra* note 198, at 224.

<sup>220</sup> Founded in 1875, Proskauer, Rose LLP is a full service law firm with offices in New York, New Jersey, Florida, Los Angeles, Boston, Chicago, New Orleans, Washington D.C., and throughout the world. Proskauer, *About Us*, <http://www.proskauer.com/about/> (last visited Feb. 1, 2014).

<sup>221</sup> *See, e.g.*, Lopez v. Mendez, 432 F.3d 829, 835 (8th Cir. 2005) (finding no error in the trial court’s determination that an applicable Arkansas Model Jury Instruction stated Arkansas law correctly); Gatlin v. Cooper Tire & Rubber Co., 481 S.W. 2d 338, 340–41 (Ark. 1972) (finding error where the trial court substituted its own instruction for an applicable Arkansas Model Jury Instruction without stating the basis for refusal); Irwin v. Omar Bakeries, Inc., 198 N.E.2d 700, 704–05 (Ill. App. Ct. 1964) (finding no error where the trial court did not use a specific Illinois Pattern Jury Instruction that the court determined was inapplicable); Means v. Sears, Roebuck & Co., 550 S.W. 2d 780, 786–87 (Mo. 1977) (finding no error where the trial court modified the Missouri Approved Jury Instruction to apply it to the case facts); Anderson v. Welsh, 527 P.2d 1079, 1086–87 (N.M. Ct. App. 1974) (finding non-prejudicial error where the trial court gave not only the applicable Uniform Jury Instruction but additional inapplicable Uniform Jury Instructions).

<sup>222</sup> FED. CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR., § 3.01 & cmt. c (Comm. on Pattern Civ. Jury Instructions of the Seventh Cir., Draft, Oct. 2004), *available at* [http://web.archive.org/web/20050120184720/www.ca7.uscourts.gov/Rules/pjury\\_civil\\_draft.pdf](http://web.archive.org/web/20050120184720/www.ca7.uscourts.gov/Rules/pjury_civil_draft.pdf).

*C. Experimental Evidence on Employer Retaliation*

While we previously argued, and currently argue, that disability and age should fall under the same standard as sex, race, color, national origin, and religion,<sup>223</sup> we contend that retaliation is different. Since most discrimination cases are discharge cases, there is a strong argument that the protected class is irrelevant, or at least less relevant. We begin from the truism that a company may not discharge an employee who is a member of a protected class (e.g., gender, race, or religious group) without having hired this employee in the first instance. So, before any additional facts are added, on its face, it is difficult to explain why an employer would offer employment to an employee in a protected class at some expense, risking liability, and then take an adverse employment action against that person with animus against him because of the protected class some time later. At least, one may say that the logic may seem inconsistent and the explanation for the adverse employment action may not be obvious on its face. Such logic, of course, has critical limitations. For example, the actors making hiring decisions are not necessarily those responsible for the allegedly adverse employment actions, or certain protected groups could be judged under different standards. Still, absent evidence to support the plaintiff, it seems unlikely that juries will more often than not *presume* that the protected class “motivated” the employer. Conversely, we propose that a person terminated or denied a promotion after making a complaint of discrimination is in a very different position. Retaliation plaintiffs’ status changes during employment. By engaging in protected expression, such plaintiffs land in a protected class they were not in upon hire. Thus, the jury is not perplexed as to how the employer hired a person in a protected class and subsequently became, for example, a sexist, racist, or ageist. In such contexts, we suggest the possibility that juries will likely find that retaliation motivated the employer. Results from our study comport with this suggestion.

We replicated our 2010 study with a few key changes. Instead of a national origin case, we used a retaliation case. We altered the name of the plaintiff so that it sounded more similar (or familiar) to the decision makers (employer). We also slightly modified the fact pattern. In the new fact pattern, the plaintiff, a senior employee, was approached by coworkers who believed that their supervisor sexually

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<sup>223</sup> See generally Sherwyn & Heise, *supra* note 13.

harassed women and discriminated against African Americans. The plaintiff engaged in a protected expression by telling the supervisor that he sexually harassed and discriminated against employees. We also altered the jury instructions and the special jury verdict sheet to reflect the employee's retaliation claim.

To enhance replicability, our current study otherwise matches our past study. In both studies, the subjects were Cornell University undergraduate students, with the vast majority enrolled in a management program. The statement of the case was delivered by associates from a New York City law firm, and the subjects reviewed the materials under conditions similar to the prior study. This time, we did not vary the kind of jury instructions that the subjects reviewed. Instead, all participants received the motivating-factor instruction. Some key results differed between the two studies. These are discussed below.

#### *D. The Experiment*

Senior litigation associates from Proskauer Rose's New York City office developed a standard employment discrimination scenario. Specifically, in the scenario, a plaintiff alleged his employer retaliated against him by denying him a promotion for complaining about sexual harassment and racial discrimination in the workplace. Cornell University undergraduate students (N=128) served as mock jurors.<sup>224</sup> All subjects received an identical presentation of the case statement. At two different times, participants watched the case statements on large video screens in a lecture hall. We showed the plaintiff's statement first and then immediately showed the defendant's statement. Subjects were then provided a motivating factor jury instruction. After hearing the jury instructions, participants were randomly assigned into groups of six and provided special jury verdict sheets. They were given twenty minutes to deliberate. After concluding their deliberations, subjects were asked to fill out individual verdict forms.<sup>225</sup>

Table 1 presents salient respondent demographics. Just over one-half were female and most were white. The majority of non-white students were Asian. Moreover, just over one-half of the

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<sup>224</sup> Most of the participating students were attending Cornell's School of Hotel Administration.

<sup>225</sup> To minimize underreporting and esteem-based influences, the experiment was conducted in a large auditorium classroom. Special jury verdict forms were completed anonymously.

subjects came from households in which reported annual family income exceeded \$250,000. White subjects from homes with the highest annual family income (in excess of \$250,000) comprised 35.5 percent of the sample.

TABLE 1: RESPONDENTS' SUMMARY STATISTICS

	%	(N)
All Respondents		128
<i>Gender:</i>		94
Female	54.3	
<i>Race/Ethnicity:</i>		92
White	68.5	
Non-White	31.5	
Hispanic	1.1	
Mixed	9.8	
Asian	18.5	
Black	1.1	
[other]	1.1	
<i>Annual Family Income:</i>		93
\$50K or less	5.4	
\$51K—\$100K	9.7	
\$101K—\$150K	9.7	
\$151K—\$200K	14.0	
\$201K—\$250K	10.8	
More than \$250K	50.5	
Prior work experience	98.9	93
<i>Interaction:</i>		93
White-highest income	35.5	

### E. Results and Discussion

Table 2 reports the main findings. More than 59 percent of the jurors agreed that the plaintiff (employee) successfully established that retaliation from plaintiff's complaints about sexual and racial discrimination in the workplace was a motivating factor in the employer's failure to promote plaintiff resulted from. The difference



between jurors' "yes" and "no" votes is statistically significant.<sup>226</sup> Moreover, while 59 percent of the jurors found that retaliation motivated the employer, results in Tables 2 and 4 demonstrate that only 9.3 percent (12/128) of jurors found that the employer failed to prove that it would have made the same decision regardless of retaliation. Overall, our results, while merely descriptive and experimental, illustrate how the two-question motivating-factor instruction results in the majority of jurors awarding the plaintiff attorneys' fees and litigation costs even when the jurors believe that the plaintiff did *not* deserve damages.

To assess whether jurors' background characteristics inform jurors' assessment of the plaintiff's retaliation claim, additional analyses considered the potential influence of gender, race, and family income. While assessing various juror sub-pools reduces statistical power, it is still worth noting that none of these listed individual characteristics are statistically significantly associated with juror decision rendering.

TABLE 2: SUBJECTS' JURY VERDICTS: PLAINTIFF ESTABLISHED RETALIATION CLAIM

	<i>Yes</i>	<i>No</i>	<i>Sig.</i>	<i>(N)</i>
Total	76	52	*	128
<i>Gender:</i>				
Female	23	28		51
Male	26	17		43
<i>Race:</i>				
White	30	33		63
Non-white	17	12		29
<i>Family Income:</i>				
Less than \$250K	24	22		46
More than \$250K	24	23		47
<i>Interactions:</i>				
White, highest income	16	17		33
Non-white, highest income	32	28		60

NOTE: \*  $p < 0.05$ .

<sup>226</sup>  $P = 0.041$  (two-tailed binominal distribution test).

To provide additional context, we compare our main result in Table 2 with results from prior research on a similar—though distinct—issue. Over a two-year period in the early 2000’s we ran a similar experiment drawing from the same pool of subjects (undergraduate students attending Cornell University) that focused on an employee’s claim that national origin discrimination was the reason that his employer failed to promote the plaintiff.<sup>227</sup> In that study, jurors were provided with either: (1) the full motivating-factor jury instruction and special jury verdict sheet; (2) the motivating-factor instruction without the second question (i.e. the employer’s affirmative defense that it would have made the same decision regardless of national origin); or (3) the so-called “but-for” jury instruction and special verdict jury sheet. The purpose of that study was to determine whether the different instructions affected outcomes. We found that there was no statistically significant difference between the full motivating-factor instruction and the “but-for” instruction when it came to the ultimate question of whether the employee was entitled to damages. We did find, however, that there was a significant difference between the first question in the motivating-factor special jury verdict sheet and the one and only “but for” question. Because answering the first question in the motivating-factor scheme results in costs and fees, the difference was not only statistically different, but it also carried important practical legal consequences.

In our current study, we explored whether simply changing the employment discrimination claim from national origin to retaliation would influence juror results. By replicating the general nature of the factual case and, insofar as our experimental juror population remained essentially constant, we sought to control the influence of salient background variables. On the ultimate question of whether the employee was entitled to damages, we did not expect a major change in how jurors ruled. Results on the employee damages question generally comported with our expectations. While the percentage of jurors awarding full damages to the complaining employee increased (from 6.3 percent to 9.3 percent), such an increase strikes us as *de minimus* (though suggestive). Insofar as we feel the underlying nature of employee retaliation claims fundamentally differs from that of national origin claims in the employment discrimination litigation context, we expected to find different juror outcomes. Results from our two studies comport with

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<sup>227</sup> See Sherwyn & Heise, *supra* note 11.

these expectations.

Table 3 presents core results from the two separate studies and illustrates the important difference regarding how the mock jurors answered the motivating-factor question. In 2010, just over 40 percent of the mock jurors concluded that the employee successfully established that discrimination based on national origin motivated the employer. In 2013, however, almost 60 percent of the mock jurors concluded that the employee established that retaliation motivated the employer. While it is true that a few years separate these two experiments, there is little, if any, reason to expect that students drawn from the same underlying population would behave differently in the two experiments. We are unaware of any material changes in terms of the composition of Cornell University undergraduates over these years. Rather, differences in the *nature* of the employment discrimination claims (national origin versus retaliation) more likely account for the increase (from 40.1 percent to 59.4 percent) in jurors concluding that the complaining employee successfully established its legal claim.

TABLE 3: SUBJECTS' JURY VERDICTS: PLAINTIFF ESTABLISHED  
EMPLOYMENT DISCRIMINATION CLAIM

	(1) National Origin (2010)	(2) Retaliation (2013)
Yes	40.1%	59.4%
No	59.9%	40.6%
(N)	142	128

NOTES: Values in column 1 derive from our 2010 study of jury instructions' influence in a national origin employment discrimination claim. Values in column 2 come from row 1 in Table 2, *supra*.

SOURCE: Sherwyn & Heise, *supra* note 11 (column 1).

For the fifty-two mock jurors who concluded that the plaintiff failed to establish that retaliation was a motivating factor, their work as a juror ended. The remaining seventy-six mock jurors, who concluded that the plaintiff successfully established that retaliation motivated the employer, proceeded on to question 2 on the juror special verdict form. Question 2 asks whether the defendant

(employer) successfully established that its decision not to promote the employee was made independently of the employee's sexual and racial workplace harassment claims. As the results in Table 4 make clear, over 84 percent of the jurors agreed with the employer's (defendant's) claim that the employer would have made the same decision regardless of retaliation. Similar to the results in question 1, the difference between jurors' "yes" and "no" votes in question 2 is statistically significant.<sup>228</sup> Also, similar to the results in question 1, none of the results involving demographic characteristics are statistically significantly associated with juror decision making.

TABLE 4: SUBJECTS' JURY VERDICTS (PART 2): DEFENDANT ESTABLISHED NO PLAINTIFF PROMOTION DESPITE PLAINTIFF DISCRIMINATION CLAIM

	<i>Yes</i>	<i>No</i>	<i>Sig.</i>	<i>(N)</i>
Total	64	12	**	76
<i>Gender:</i>				
Female	17	6		23
Male	24	2		26
<i>Race:</i>				
White	27	3		30
Non-white	12	5		17
<i>Family Income:</i>				
Less than \$250K	19	5		24
More than \$250K	21	3		24
<i>Interactions:</i>				
White, highest income	15	1		16
Non-white, highest income	25	7		32

NOTE: \*\*  $p < 0.01$ .

Insofar as all but one of our respondents already benefit from employment experience and all are enrolled in a management preparation program, our sample drawn from a population of undergraduate students might represent a more traditional management perspective. Moreover, while the experienced New York City employment lawyers who drafted the factual scenario used in both of our studies attempted to make the case a very close call legally, they had represented the employer in the actual case and thus

<sup>228</sup>  $P < 0.001$  (two-tailed binominal distribution test).

had developed and lived with the employer's strategies and theories of the case. Thus, it is likely that both the sample of mock jurors and the source of the factual scenario are predisposed to side with management. Despite a likely net bias favoring the employer, however, almost 60 percent of our jurors awarded either full damages or costs and fees to the *employee*.

These results greatly affect the three concerns articulated above. First, employers are penalized for their thoughts, not their actions. An employer who would not have promoted the hypothetical plaintiff regardless of his complaints is still found liable for costs and fees. Congress determined that even being motivated by race, sex, color, religion, or national origin is unlawful and worthy of declaratory judgment as well as costs and fees. It seems that Congress wants to create a world in which these protected characteristics do not even cross an employer's mind. This is a laudable goal and we agree that the world would be a better place if this lack of prejudice became standard behavior. We contend this is not the case in retaliation. As noted above, retaliation is a biologically engrained human response to negative stimuli.<sup>229</sup> Is it reasonable to suggest that humans have evolved to the point where a plaintiff's good faith and reasonable, but false, accusation of reprehensible behavior (like sexual harassment or racial discrimination) will not factor into a decision maker's motives? Is this a goal that we should pursue so that those who do not let such actions be a but for cause, but do let it play a role in a decision, are guilty of discrimination and need to suffer financial and social consequences?

Second, the jury does not know that checking the box for motivating factor results in costs and fees. In fact, several students remarked that "yes / yes = no." In terms of damages, it does. In discrimination cases, however, costs and fees can greatly exceed back pay. Thus, this kind of special jury verdict sheet can functionally mislead jurors. This is particularly problematic given the likely way in which jurors endogenously consider damage awards with their determination of the merits of a case. For instance, Hans and Reyna posit that jurors first make a categorical "gist judgment" that money damages are warranted and then make an ordinal gist judgment ranking the damages deserved as low, medium, or high.<sup>230</sup> If this is

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<sup>229</sup> See *supra* Part III.C.

<sup>230</sup> Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 120 (2011).

the case, the findings in this study are even more problematic.<sup>231</sup>

This issue is not limited to retaliation, but our third concern shows that retaliation exacerbates the problem. In the 2010 study, 40 percent of the mock jurors found that national origin motivated the employer.<sup>232</sup> With an almost identical fact pattern, 60 percent of the mock jurors in the instant study found retaliation motivated the employer. In addition, fifty percent of the mock jurors found that retaliation motivated the employer, but it would have made the same decision regardless. In our 2010 study, only 34 percent of the jurors ruled the same way.<sup>233</sup> The stark contrast in these numbers supports our contention that retaliation differs in important ways from other protected employee classes. The fact that our sample of mock jurors likely skews in a direction that favors employers only deepens the concerns. If POWADA passes, it seems highly likely that the vast majority of retaliation plaintiffs will successfully obtain *at the very least* cost and fees. If so, this should stimulate employee retaliation claims, particularly from employees uneasy with their job security. By pushing retaliation claims, strategic employees can exploit employers' aversion to increased legal uncertainty and exposure. Moreover, this might also prompt judges to look more favorably on employers' summary judgment motions owing to fears—real or perceived—about cost and fees awards. Judges may also increasingly deny costs and fees despite jury findings. In reality, employers faced with retaliation claims will settle a greater percentage of cases and for higher amounts. These settlements will, in turn, fuel further litigation. To dampen the likely tide of retaliation claims, employers could reduce avenues to complain of discrimination as such complaints will be too costly or seek to create a more homogeneous workforce in which complaints will carry less weight. Fewer complaints and an incentive to avoid diversity will perpetuate discrimination. This is an admittedly pessimistic and unfortunate vicious cycle.

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<sup>231</sup> Another recent article suggests that this result is problematic because it belies the extent to which fact-finders try to establish “the truth, rather than a statistical surrogate of the truth, while securing the appropriate allocation of the risk of error.” Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 557–602 (2013).

<sup>232</sup> Sherwyn & Heise, *supra* note 13, at 934 Table 1.

<sup>233</sup> Sherwyn & Heise, *supra* note 13, at 934 & Tables 1 & 2.

## V. CONCLUSION: START MAKING SENSE

We suggest three fixes to the challenges outlined above flowing from POWADA's proposal to extend the mixed-motive jury instruction in employer retaliation discrimination cases. First, Congress could return to the *Price Waterhouse* holding and not award costs and fees for motivations that do not pass the "but for" causation test. This is a value judgment of whether motivations that do not really impact employers' decisions should be unlawful. If so, should the plaintiffs' lawyers be compensated for bringing cases in which protected categories form non-determinative motivations in adverse employment actions? Second, juries should be informed that checking the motivating factor box will lead to awarding plaintiffs costs and fees. At least then juror will be aware of the consequences of their decisions. There is an important policy concern associated with this response. Should decision makers be aware of the monetary consequences of fact finding, or is it better to let them blindly assess facts and leave to judges the consequences of those findings? The third option is to simply accept that retaliation is equal, but that some kinds of employment claims are less equal than others and to exclude it from POWADA.

While we contend that either of the first two steps would resolve problems, neither is necessary. Smoking gun evidence supporting discrimination claims is less common now. It is difficult to prove discrimination, and thus, the motivating factor scheme provides plaintiffs a reasonable chance to prevail. This is not the case with retaliation, however. The motivating-factor scheme will unduly increase the prospects for costs and fees awarded employees. Even now, employment lawyers warn employers not to try to "save" a struggling employee.<sup>234</sup> Once the employee receives a performance improvement plan, the employee knows it is time to file a claim and buy six to eight months of fear-based employment.<sup>235</sup> Fear-based employment occurs when the employer fears the costs of termination more than the costs of an unproductive or disruptive employee. From a social standpoint, this not a positive development—people often need coaching to perform in a job. POWADA would further discourage employers to help poor performing employees. The potential negatives outweigh the benefit of penalizing employers for retaliatory impulses.

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<sup>234</sup> Gregg A. Gilman, Partner, Davis & Gilbert LLP, Remarks at 6<sup>th</sup> Annual HR in Hospitality Conference, Las Vegas, Nevada (Mar. 2013).

<sup>235</sup> *Id.*

We propose that the categories of age and disability be treated like all other protected classes. There is neither a statutory nor logical basis to distinguish age and disability from other traditionally protected employee classes. In contrast, employer retaliation is different and, as such, should be treated differently by employment discrimination doctrine.



**Appendix A**

**Special Verdict Sheet:**

\_\_\_\_\_X

Dennis Ferguson,

Plaintiff,

– against –

**SPECIAL VERDICT FORM**

ROCHESTER CHRONICLE, INC.,

Defendant.

\_\_\_\_\_X

1. Did plaintiff Dennis Ferguson establish by a preponderance of the evidence that retaliation for his complaints of sexual harassment and racial discrimination was a motivating factor in the decision by defendant, Rochester Chronicle, Inc., not to offer him a promotion in December 2009?

Yes \_\_\_\_No \_\_\_\_

You should answer the next question only if you answered “yes” to Question 1. If you answered Question 1 “no,” you should not answer any further questions but sign this special verdict form on the last page and return the form to the clerk.

2. Did defendant establish by a preponderance of the evidence that the defendant would have treated plaintiff the same way even if retaliation for plaintiff’s complaints of sexual harassment and racial discrimination had not played any role in the employment decision?

Yes \_\_\_\_No \_\_\_\_

If you answered “yes” to Question 2, sign the special verdict form on the last page. If you answered “no” to Question 2, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is \$75,000. Check the box below to signify that the plaintiff is entitled to damages of \$75,000 and then sign the special verdict form.

Plaintiff is entitled to back pay in the amount of \$75,000. \_\_\_\_\_

SIGNED:

Please answer the following questions:

1. Gender: M F
2. Race / National Origin:
3. Have you worked for an employer?: Y N
4. Family Income:
  - a. Under \$50,000
  - b. \$51,000-\$100,000
  - c. \$101,000-150,000
  - d. \$151-\$200,000
  - e. \$201,000-\$250,000
  - f. Over \$250,000