No. 12-484

In the Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE*
DRI – THE VOICE OF THE DEFENSE BAR
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

DRI – The Voice of the Defense Bar ("DRI") is a voluntary membership organization comprised of more than 22,000 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys and to the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, balanced, and - where national issues are involved – consistent. To promote its objectives, DRI participates as *amicus curiae* in cases such as this that raise issues of importance to its membership, their clients, and the civil justice system.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should reverse the Fifth Circuit's judgment in this case. DRI's members are regularly called upon to defend their clients against Title VII retaliation and discrimination claims in federal courts around the country. Accordingly, DRI's members have considerable familiarity with the interplay between the causation standard employed in any given case and the resulting impact that standard imposes on a defendant's ability to mount a defense. Not only are

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, amicus curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

DRI's members well-versed in how retaliation cases are pleaded, briefed, and argued, they also witness first-hand how the causation standard is distilled into jury arguments and presentations at trial. The Fifth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to these types of suits since it authorizes plaintiffs to proceed with Title VII retaliation claims on an undemanding causation standard that Congress never specifically embraced and that is inconsistent with the language used in the statute that governs retaliation claims in the context of Title VII. Left unreviewed by this Court, the Fifth Circuit's decision strips defendants of their ability to mount a defense to a Title VII retaliation claim and forces defendants to disprove any claimed retaliatory motive no matter how small a part it played in the challenged decision.

DRI's members also know, as a result of their experience in defending litigation, of the need for clarification of the law regarding the proper causation standard applicable in federal retaliation claims brought pursuant to Title VII. If affirmed, the decision below will adversely affect the judicial system and the rule of law by subjecting defendants to broad-reaching liability for retaliation that Congress did not intend. DRI has a strong interest in assuring that a uniform rule is adopted which safeguards plaintiffs' ability to bring Title VII retaliation claims but requires plaintiffs to satisfy "but-for" causation, a standard that is consistent with the statutory language enacted by Congress.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§ 2000e, *et. seq*., prohibits an employer from taking an adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). By promising punishment for retaliatory acts, the retaliation provision of Title VII supports the statute's ultimate purpose – to protect against discrimination in the workplace. But when Congress amended Title VII's discrimination provision in 1991 to set forth a mixed-motive causation standard, 42 U.S.C. § 2000e-2(m), it left the language of § 2000e-3(a) unchanged. The decision to impose a more stringent causation burden on plaintiffs pursuing Title VII retaliation claims through use of the word "because" was intentional. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). Thus, the Fifth Circuit was wrong to engraft a looser standard on this claim despite Congress's retention of the word "because," a word that has long connoted "but for" causation in the common law, in common language, and in court interpretations of other statutory provisions.

The court is bound to interpret and apply statutes consistent with their express language. *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist*., 541 U.S. 246, 252 (2004). Under the plain language of

the retaliation provision, a plaintiff must prove that the adverse employment action occurred "because" of the charge; in the context of this case, the Respondent was required to prove that he was retaliated against because he complained about his supervisor's alleged discriminatory conduct. However, the Fifth Circuit held that plaintiffs suing for workplace retaliation under Title VII need only prove that retaliation was one of any number of factors in the challenged employment decision. *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448, 454 (5th Cir. 2012). In other words, the Fifth Circuit concluded that the proper causation standard applicable to retaliation claims brought pursuant to Title VII is a mixed-motive standard. *Id*. This runs directly afoul of the Court's determination in *Gross* that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), which uses the same language as is at issue here, imposes a "but-for" causation burden on plaintiffs bringing age discrimination claims. 557 U.S. at 180. In essence, the *Gross* Court determined that by virtue of the "because of" language in the ADEA, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Id*. Accordingly, the *Gross* Court rejected the burden-shifting approach of other statutes that requires an employer to show that it would have taken the same action regardless of age, even if plaintiff has produced some evidence of age as a motivating factor for the adverse action.

The same result should issue under Title VII's retaliation provision, which includes the same

"because" language found in the ADEA. In fact, the law favors this result. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (noting that "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (same). Where common words or phrases are interpreted differently from one employment statute to another, respect for the rule of law is undermined and those advising employers about potential liability are left to guess as to how the language will be interpreted.

Left intact, the Fifth Circuit's precedent-setting error threatens to create grave difficulties for employers forced to defend employment decisions with such a low standard regarding the cause of a termination or adverse employment action. Given the relative ease with which a plaintiff can show that some protected conduct was "a motivating factor" in the employer's decision, most retaliation claims under this framework will survive the summary judgment stage. At trial, juries will struggle to isolate one or another factor, and may err on the side of rendering a verdict against the employer even though the proofs demonstrate that the employer would have taken the adverse decision absent a retaliatory animus. These difficulties, and the attendant risk, will force employers to settle even meritless claims when the standard is lowered to allow liability for "a motivating factor" rather than a clear standard normally implied by but-for causation, i.e., but for the desire to retaliate, the employer would not have taken the adverse decision. With the number of Title VII retaliation charges on the rise, this phenomenon is likely to only increase in

coming years. U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1997 Through FY 2012, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited February 28, 2013).

This case provides this Court with the opportunity to reaffirm that the Legislature's intent as expressed in the language of its statutes must control. Inserting a motivating-factor standard into Title VII retaliation claims not only lessens the burden of proof for plaintiffs and in turn increases the burden on employers, but it assumes the legislative power of balancing these interests while disregarding legislative intent.

ARGUMENT

I. The Decision Below Misreads the Language of the Statute, Which Requires a Plaintiff to Establish That the Claimed Retaliation Occurred "Because" of Protected Conduct –A Phrase the Court Has Interpreted in a Similar Context to Require a Showing of "But-For" Causation.

The issue that confronts the Court is, at its core, one of Congressional intent, and thus capable of resolution by the bedrock principles of statutory interpretation that have guided the judiciary for decades. Chief among these is the canon that interpretation of a statute "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses that legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). When the

language used is unambiguous, the statutory text both begins and ends the inquiry. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004). See also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (the "inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"). Chief Justice John Marshall aptly observed that the power of the judiciary is confined to giving effect to the will of the Legislature as expressed in its statutory enactments:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Osborn v. Bank of the U.S., 22 U.S. 738, 866 (1824) (per Marshall, C.J.).

It is with these principles in mind that the language of the retaliation provision of Title VII of the Civil Rights Act of 1964 (the "Act"), must be examined. That statute provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, ***because*** he has opposed any practice made an unlawful employment practice by this subchapter, or ***because*** he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). While the Court has not had occasion to interpret the word "because" - and the causation standard it connotes - in the context of § 2000e-3(a), the Court has held, in the context of other similarly-worded statutes, that the word "because" requires a plaintiff to satisfy "but-for" causation. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). In *Gross*, the Court was called upon to interpret the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), which makes it "unlawful for an employer…to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual's age[.]" (Emphasis added). Noting that "because" is ordinarily defined to mean "for the reason that[,]" the *Gross* Court rejected outright the argument that the ADEA authorizes a mixed-motives age discrimination claim under which a plaintiff could prove age discrimination

simply by showing that age was a motivating factor in the employment decision even though another legitimate reason existed for the defendant's conduct. 557 U.S. at 176. To the contrary, the *Gross* Court held that to establish a disparate-treatment claim under the ADEA's clear language, "a plaintiff must prove by a preponderance of the evidence…that age was the 'but-for' cause of the challenged employer decision." 557 U.S. at 177-78. In this way, the *Gross* Court's holding reflects a commitment to the most fundamental semantic rule of statutory interpretation. *See, e.g.,* James Kent, Commentaries on American Law 432 (1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense."). It also aligns with everyday usage of the word "because". *The American Heritage Dictionary of the English Language*, p. 159 (4th ed. 2006); Webster's Ninth Collegiate Dictionary, p. 139 (1987). When one speaks of an action occurring "because of" another action, a direct cause and effect relationship is presumed.

It is well settled that words should be interpreted consistently to have the same meaning. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006). And this principle is particularly important to lawyers representing employers because they must interpret a host of state and federal statutes governing employment relationships, and establishing potential causes of action. If the same words are interpreted differently from one employment statute to another, neither in-house counsel for employers nor those representing them in litigation will be able to predict how the courts will apply a particular provision. Such

varying interpretations of the same language undermine respect for the rule of law, and give rise to practical difficulties for those advising employers about potential liability.

The framework presented in *Gross* requires a plaintiff suing under Title VII's retaliation provision to prove that his charge, testimony, assistance, or participation in an investigation, proceeding, hearing or the like was the "but-for" cause of the alleged retaliatory action. To allow a Title VII retaliation claim to proceed under a mixed-motives theory, as the Fifth Circuit has in this case, *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448, 454 (5th Cir. 2012), results in a holding that directly contradicts Congressional intent as interpreted by this Court in *Gross*. It is not sheer coincidence that the "because" language of Title VII's retaliation provision withstood Congress's 1991 amendments to the statutory scheme. Congress made a deliberate choice to impose a more stringent causation burden on plaintiffs pursuing retaliation claims under Title VII than on plaintiffs pursuing discrimination claims under the same statutory scheme. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), amended the 1964 version of the statute to establish a "motivating factor" test applicable to mixed-motive cases brought under Title VII's discrimination provision:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was ***a motivating factor*** for any employment

> practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). However, the amendments left the Act's retaliation provision unchanged, preserving the original "because" language.

The legislative decision to adopt a motivating-factor causation standard in the Title VII discrimination provision represents a deliberate, policy-driven choice to deviate from traditional, but-for causation principles. Congress explicitly enacted language with a much lesser standard, "a motivating factor", which was in turn interpreted by this Court to create liability in mixed motive cases. But Congress manifested no similar intent to tip the scales in favor of employees with respect to a diminished burden of proof for retaliation claims brought under Title VII. The fact that Congress amended the discrimination provision without also amending the retaliation provision is extremely persuasive that the motivating-factor standard was purposefully excluded. Where words differ, the Court presumes that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006), quoting *Russello v. U.S.,* 464 U.S. 16, 23 (1983). Here, the different language of the retaliation and discrimination provisions reflects a legislative intent to impose different causation standards. In short, Congress intended its words to make a legal difference.

A more stringent causation standard for retaliation claims is entirely consistent with the purpose for which it was created. *Robinson v. Shell Oil Co.*, 519 U.S. 337,

345 (2001) (noting that Title VII's anti-retaliation provision must be interpreted in accordance with Title VII's overall remedial purpose). While the substantive provisions of Title VII seek to eliminate unlawful discrimination based on certain protected categories, the retaliation provision has a different objective: to protect those who seek to enforce their primary rights under the statute. *Id*. (noting that "[m]aintaining unfettered access to statutory remedial mechanisms" is "a primary purpose of antiretaliation provisions[.]"). The retaliation provision is not intended to create a broad right of action in itself. Its inclusion in Title VII serves primarily as a shield for aggrieved plaintiffs voicing discriminatory practices. See *Peterson v. Utah Dep't of Corr.*, 301 F.3d 1182, 1189 (10th Cir. 2002) ("The purpose of § 2000e-3(a) is to let employees feel free to express condemnation of discrimination that violates Title VII."); and *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (noting that without the protections afforded by the anti-retaliation provision, employers might be permitted to discriminate against an employee because of an employee's past use of Title VII's remedial mechanisms, which could significantly deter employees from engaging in such proceedings). By "promising punishment for such retaliatory acts by the employer," the retaliation provision strengthens "the statute's ultimate aim: protecting individuals against unlawful discrimination." James Concannon, *Reprisal Revisited: Gross v. FBL Financial Services, Inc. and The End of the Mixed Motive Title VII Retaliation*, 17 Tex. J. on C.L. & C.R. 43, 46 (Fall 2011). See also *Burlington*, *supra*, at 63 ("[t]he antiretaliation provision seeks to secure [the] primary objective [of the antidiscrimination provision] by preventing an

employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."). The Legislature therefore carefully worded the retaliation provision consistent with its intended purpose. *Id.* ("[t]here is strong reason to believe that Congress intended the differences that its language suggest, for the [discrimination and retaliation] provisions differ not only in language but in purpose as well.").

The Court has the opportunity to clear up the confusion that has divided the federal appellate circuits and apply the *Gross* Court's analysis to Title VII's retaliation provision. Under that framework, a plaintiff bringing suit under the retaliation provision must prove that "but-for" his conduct, the retaliation would not have occurred. This is the only interpretation that will give effect to the clear and unambiguous language of the statute. Adopting a lesser standard will not only result is a paradox that directly contradicts Congressional intent, it will also create an unworkable test making it exceedingly difficult for defendants to defend against such retaliation claims.

II. The Motivating-Factor Standard Compromises Defendants' Ability to Erect a Defense and Imposes Substantial Burdens on Defendants.

The legislative decision to require a showing of "but-for" causation in Title VII retaliation claims is deeply rooted in traditional causation philosophy. The but-for causation standard has long served as the preferred standard in tort law. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984) (defining but-for causation as: "[t]he

defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."). Even though other causation standards have emerged over time, the but-for test remains the favored approach. See John D. Rue, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679 (2003). Indeed, unless specifically indicated otherwise, "but-for causation is part of the plaintiff's burden in all suits under federal law." *Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (construing *Gross*).

A but-for causation standard appropriately accounts for the complicated realities of workplace decision-making, balances the interests of the employer and employee in litigation, and properly limits employer liability to situations where the retaliatory motive actually has a demonstrably negative impact on the employee. Replacing this causation standard with a motivating-factor standard would create such a low test that employers defending against Title VII retaliation claims can be expected to be held liable on many occasions when the claimed retaliatory motive had little or no impact on the adverse employment decision. "'Motivating factor' appears to mean only that the protected characteristic was real and present to help explain the employer's decision, but such a factor need not be significant, much less determinative." Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 Mercer L. Rev. 693, n. 23 (2000). Thus, a plaintiff could prevail

simply by showing proof that an improper motive was one of multiple reasons for the employment action. Plaintiffs have "the option of not contesting the truthfulness of the stated reason, but instead demonstrating that discrimination was also a motivating factor behind the adverse employment action." Robert M. Weems, *Selected Issues and Trends in Civil Litigation in Mississippi Federal District Courts*, 77 Miss. L.J. 977, 1031 (2008). Defendants, on the other hand, would face the difficulties associated with proving a negative – that they did not retaliate – in order to avoid liability and damages. This is an extremely difficult standard for employers, especially when one considers that in most cases, an employer's decision is based on multiple factors. As Senator Case famously noted during the debate over the Civil Rights Act of 1964, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 Cong. Rec. 13837-38 (1964). See also David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA 391, 432 (2001) (noting that employment decisions "are almost always mixed-motive decisions turning on many factors.")

Given the many factors that can contribute to any one employment decision, the legislative scheme opted for clarity by employing the traditional "because" language which requires a showing of "but-for" causation in Title VII retaliation cases. Bright-line rules like this offer obvious benefits because they avoid dispute about whether something is inside of the line, which is "bright" or clearly established. That delicate balance is hard to achieve with standards, which can be set too low and result in lots of weak claims, or set too

high and result in violators of a statutory policy doing so with impunity. The legislature makes a policy choice when it selects a bright-line rule over a standard. See e.g. Louis Kaplow, *Rules versus standards: An economic analysis*, 42 Duke L.J. 557, 557 (1992); Kathleen M. Sullivan, *The justices of rules and standards*, 106 Harv. L.R. 22, 26 (1992). Congress made such a choice here when it employed the traditional language "because," which requires a showing of "but-for" causation. Under such a policy, employers who engaged in an adverse action directed at an employee "because of" his exercising his or her Title VII rights, are to be held liable. But one that may be irritated by exercise of Title VII rights but who took action that would have occurred anyway, may not be held liable.

Disregarding the bright-line rule in favor of a standard will create grave difficulties for the businesses and individuals DRI's members are regularly called upon to defend. Even where employers comply with the law, the nature of motives and the motivating – factor causation standard will allow plaintiffs to defeat summary judgment motions in retaliation claims with relative ease:

> While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input in the process was in some way motivated by an impermissible factor – a much lighter burden than demonstrating that the forbidden ground of decision was a *determining* factor…Summary judgment will be

> less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart, *supra* (emphasis in original). Because direct evidence is not required in order to obtain a mixed-motive jury instruction, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92, 101-102 (2003), plaintiffs can avoid summary judgment simply by a showing of circumstantial evidence – an undemanding burden, to say the least. See *White v. Baxter Healthcare Corp*., 533 F.3d 381, 400 (6th Cir. 2008) (noting that "[t]his burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim."). This means that employers will be forced to spend the resources necessary to litigate a claim at trial, even where the evidence of retaliation is relatively weak. See, e.g., *Holcomb v. Iona College*, 521 F.3d 130, 142 (2d Cir. 2008) (vacating and remanding the district court's grant of summary judgment of plaintiff's Title VII race discrimination claim and holding that even though the plaintiff "has adduced little evidence to suggest that he was terminated *solely* because his wife was black…he needs only to prove that the decision was partly so motivated to prevail on the ultimate merits of his claim."). Employers faced with this situation often choose to settle to avoid the negative publicity of a trial or to save their scarce resources for more productive activities than litigating.

When the standard is lowered to allow for liability on the basis of a mixed motive, the scales will continue to tip in favor of plaintiffs at trial. To illustrate, take

two simple retaliation jury instructions, one which utilizes a "but-for" approach, and the other which employs a "motivating factor" standard:

> Did plaintiff, P, establish by a preponderance of the evidence that defendant, D, retaliated against him because P participated in an investigation, proceeding, or hearing?
>
> Did plaintiff, P, establish by a preponderance of the evidence that his participation in an investigation, proceeding, or hearing was a motivating factor in the decision by defendant, D, to terminate him?

The latter instruction is more favorable to plaintiffs. Stated another way, plaintiffs who must show that the protected characteristic was merely "a motivating factor" in the employer's decision have a much easier burden than those who must satisfy the "but-for" test. Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L. Rev. 563, 607-08 (1996).

The Third Circuit witnessed this firsthand in the age discrimination context when a jury was given both "but-for" and "motivating factor" instructions in the same case. *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995). *Abrams* was an age discrimination case involving both state and federal claims which proceeded to a jury trial. The jury was instructed that "Abrams had to show that age was *the sole motivating factor* for his discharge" in order to prevail on his federal age discrimination claim brought under the ADEA. *Id*. at 1211 (emphasis in original). However, in

contrast, the jury was instructed that it could find in favor of Abrams on his state-law age discrimination claim by showing that age was "a determinative factor" in the discharge decision. *Id*. Not surprisingly, the jury found that age was not the sole motivating factor for Abrams' termination – thus rejecting his federal claim – but nevertheless concluded that age was a determinative factor in his termination – thus subjecting the employer to back-pay, future losses, and pain and suffering damages under the state-law discrimination act. The lax causation standard for the state-law discrimination claim allowed the jury's verdict to withstand an appeal, even over evidence that Abrams' termination followed a failure to memorialize an oral modification of shipping rates with a third company, which resulted in litigation and cost Abrams' employer nearly one million dollars in settlement and attorney's fees. *Id*. at 1210.

Application of a motivating-factor causation standard can easily result in a windfall to plaintiffs. See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L. J. 489, 512 (2006). Take, for example, an employee who engaged in insubordinate conduct and was terminated. And assume that his employer harbored some retaliatory animus in terminating the employee, but would have terminated the employee regardless based on his insubordinate behavior. Under the "a motivating factor" standard, the employee may prevail in such a case, and the employer could be ordered to reinstate the employee or pay compensatory damage, even though the employee's own misconduct was the reason he was terminated.

The insubordinate employee is therefore placed in a better position than he would otherwise have been. *Id*.

Employers, on the other hand, are often placed in a lose/lose situation. They must choose to either retain the employee who has violated their legitimate rules thus undercutting their enforcement and legitimacy in the workplace, or chance the cost and uncertainties of litigation under a framework that permits an employee to establish a retaliation claim without showing a direct causal connection between his protected status and the injury suffered. For many defendants, the former presents the only economically viable option. This is particularly true where Title VII allows prevailing plaintiffs to recover statutory attorney's fees with relative ease. 42 U.S.C. § 2000e-5(k) ("[i]n an action or proceeding under this subchapter the court in its discretion, may allow the prevailing party…a reasonable attorneys' fee (including expert fees) as part of the costs[.]" In contrast, it is exceedingly difficult for "prevailing defendants," to recoup their attorney's fees. Compare *Newman v. Piggie Park, Enterprises, Inc*., 390 U.S. 400, 402 (1968) (noting that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."), with *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (holding that prevailing defendants should receive attorney fees only if the plaintiff's action "was frivolous, unreasonable, or groundless[.]"). The threat of an adverse jury verdict and attorney's fees also places intense pressure on defendants to settle even meritless retaliation claims.

With retaliation claims on the rise, the economic burden on defendants will likely become even more

onerous. Wayne N. Outten et al., *When Your Employer Thinks You Acted Disloyally: The Guarantees and Uncertainties of Retaliation Law,* 693 Prac. L. Inst.-Litig. 151, 153 (2003) (noting that "In part due to the success rate of retaliation claims before juries, more and more plaintiffs are adding retaliation to their discrimination and whistleblower claims."). In fiscal year 2012 alone, Title VII retaliation charges comprised nearly 1/3 of all charges filed with the U.S. Equal Employment Opportunity Commission. U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1997 Through FY 2012, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited February 28, 2013) (reporting that of the 99,412 total charges filed in FY 2012, 31,208 of them, or 31.4%, were retaliation charges brought pursuant to Title VII). Given the consistent upward trend in Title VII retaliation charges over the past decade (*id.*), it is likely that this number will increase in coming years.

Amicus curiae DRI does not dispute that eliminating retaliation in the workplace is a laudable goal. But this goal must be balanced with equally important goals, including ensuring that employers are not restricted in their decision-making processes because of litigation fears or unnecessarily burdened with the costs of defending or settling meritless lawsuits based on insufficient evidence of retaliation. All of these important considerations, and the interests of both employers and employees, should inform any discussion of the appropriate burden of proof in a retaliation claim brought under Title VII. Congress balanced these competing interests when it enacted a retaliation provision that requires a plaintiff to show

that the retaliation occurred "because" he or she engaged in protected conduct. The Court must give credence to the legislature's word choice, just as it did in *Gross* when it held that "because" as used in the ADEA requires a showing of "but-for" causation. *Gross*, 557 U.S. 176-78. Failure to similarly do so in the Title VII retaliation context will have a harmful impact on the businesses and individuals DRI's members are regularly called upon to defend.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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