

MCDONNELL DOUGLAS BURDEN SHIFTING AND JUDICIAL
ECONOMY IN TITLE VII RETALIATION CLAIMS: IN PURSUIT
OF EXPEDIENCY, RESULTING IN INEFFICIENCY

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I. INTRODUCTION

In June of 1997, Sheila White was the only woman working in her department at Burlington's Tennessee Yard.¹ While in this department, White complained to Burlington officials that her immediate supervisor had made comments that women should not work in her department, and that he had also made insulting and inappropriate remarks to White in front of her male colleagues.² Apparently recognizing these allegations as having merit, Burlington suspended White's supervisor and ordered him to attend sexual harassment training.³ However, Burlington also saw fit to reassign White's duties at the same time.⁴ Prior to her supervisor's suspension, operating the forklift was White's primary responsibility.⁵ Subsequently, she was taken entirely off of forklift duty and reassigned to only standard track laborer tasks, in favor of giving the forklift job to a "more senior man."⁶

White filed two complaints with the Equal Employment Opportunity Commission (EEOC).⁷ Within a few days of Burlington receiving the second charge, White got into a disagreement with her immediate supervisor, and—by that afternoon—she was suspended for thirty-seven days without pay for insubordination.⁸

When it comes to allegations of discrimination, the employer—whether its actions were lawful or not—may instinctively respond in a defensive manner. The employer may impulsively reassign the employee's job duties, or it may impulsively or harshly react to perceived

* Associate Member, 2015–2016 *University of Cincinnati Law Review*. To Associate Dean of Faculty and Professor Sandra F. Sperino, thank you for your contributions to this submission. To my family and friends, thank you for your guidance and support.

1. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

2. *Id.* at 58.

3. *Id.*

4. *Id.*

5. *Id.* at 57.

6. *Id.* at 58.

7. *Burlington Northern*, 548 U.S. at 58.

8. *Id.* Of note, the "disagreement" was merely over which truck should be used to transport White from one location to another; further details of the disagreement, but not the subsequent suspension, were in dispute. When Burlington ultimately determined that she had not been insubordinate, it reinstated her and gave her backpay for the time she was suspended. *Id.* at 58–59. White then filed a third charge with the EEOC asserting that the suspension was the result of unlawful retaliation. *Id.* at 59.

insubordination without first obtaining the necessary facts to make such a determination.⁹

It is just as natural that an employee considers the consequences of his or her actions when speaking out against an employer. It is difficult to imagine an employee who files a complaint, participates in an investigation, or opposes an unlawfully discriminatory practice without considering the potential ramifications on his or her job.

In order that the employee's fears of retaliation not inhibit his or her participation in a protected activity under Title VII, the Act also protects against retaliation by the employer.¹⁰ As one could bring suit against an employer for status-based discrimination, one can also bring suit for retaliation following the employee's participation in protected activities under Title VII.¹¹

However, there exists a problem of proof. This is not to say that retaliation claims are necessarily difficult to prove; rather, they are arguably easier to prove than status-based¹² discrimination claims.¹³ The burden-shifting framework familiar to employment discrimination cases as established by *McDonnell Douglas v. Green*, and subsequently clarified in *Texas Department of Community Affairs v. Burdine*,¹⁴ is often cited by courts analyzing Title VII retaliation claims.¹⁵ This article proposes to abandon the use of *McDonnell Douglas* burden-shifting framework in Title VII retaliation claims because its use in that context is inconsistent with the precedential reasoning in the field, and results in judicial inefficiency.

Part II of this paper discusses the statutory and precedential bases for Title VII retaliation claims; Part III seeks to exemplify the underlying problems with the use of *McDonnell Douglas* burden shifting in Title VII retaliation claims; Part IV offers the legal reasoning in support of abandoning the *McDonnell Douglas* framework; finally, Part V concludes

9. *See id.* at 58–59.

10. 42 U.S.C. § 2000e-3(a) (2012).

11. *Id.*

12. As used from this point forward, status-based discrimination refers to discrimination on the basis of one's inclusion in a protected class. Title VII status-based claims stem from one's race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

13. Employers are unlikely to expressly identify a discriminatory animus in their decision-making. However, an employee asserting unlawful retaliatory discrimination has evidence of his or her participation in a statutorily protected activity at a time that has a close temporal connection to the adverse employment decision.

14. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 77 (2011) for a description of the burden-shifting framework established in *McDonnell Douglas* and its subsequent interpretation in *Burdine*. Subsequent references to the *McDonnell Douglas* burden-shifting framework incorporate the interpretations of the *Burdine* Court.

15. *See, e.g.,* Hutton v. Maynard, 812 F.3d 679, 684 (8th Cir. 2016); Foster v. Univ. of Md.-Eastern Shore, 787 F.3d 243, 252 (4th Cir. 2015).

that Title VII retaliation claims can and should proceed as do most other civil claims, without burden shifting.

II. BACKGROUND

Title VII retaliation claims are properly understood against the background of the Civil Rights Act of 1964, the *McDonnell Douglas* burden-shifting framework, the development of but-for causation, and the judicial interpretation of the burden of proof in retaliation cases. Additionally, though age discrimination claims are separate from Title VII and consequently Title VII retaliation, Age Discrimination in Employment Act (ADEA) precedent also informs Title VII retaliation analysis. This section explores the statutory and precedential background upon which a Title VII retaliation claim is tried.

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual based on that individual's status as a member of a protected class.¹⁶ These protected classes are defined by Title VII as an individual's race, color, religion, sex, or national origin.¹⁷

In addition to providing remedies for status-based discrimination,¹⁸ Title VII offers protections against retaliation.¹⁹ It is an unlawful employment practice for an employer to discriminate against any employee or applicant for employment because (1) "he has opposed any practice made an unlawful employment practice by this title," or (2) "he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."²⁰

Title VII "does not set forth 'a general civility code for the American workplace.'"²¹ However, it does make unlawful certain discriminatory and retaliatory conduct. The purpose of Title VII's protections against retaliation is "to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms."²² This is done by prohibiting employer actions that are likely to deter victims of discrimination from

16. 42 U.S.C. § 2000e-2(a)(1) (2012).

17. *Id.*

18. 42 U.S.C. § 2000e-5(g) (2012).

19. 42 U.S.C. § 2000e-3(a) (2012).

20. *Id.*

21. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998)).

22. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

participating in statutorily-protected activity, such as filing a charge of discrimination.²³ The *Burlington Northern* Court utilized a reasonable person standard, noting that “normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.”²⁴ While a simple lack of good manners will not deter a reasonable person from participating in protected activity, action such as reassignment of duties or suspension from work may constitute unlawful retaliation.²⁵

B. McDonnell Douglas Framework

Where there is an adverse employment decision, the decision-maker employer is unlikely to expressly state the reasons for the decision, especially where that decision was based in discrimination. Given the current state of society and the law, an employer would be naïve to expressly state that an employee was fired because she is a woman, or because he or she practices Islam, even where those reasons may be the underlying cause of the decision. In some cases, as observed in the Cat’s Paw Doctrine,²⁶ the decision maker may not even know the true reasons for the decision. A supervisor with animus against a particular employee may relay information to a decision maker with the intent that the information results in an adverse employment action. Though the decision maker holds no animus toward the employee, the supervisor’s animus plays a role in the adverse decision. In most situations, the affected employee may have a theory or an assumption about the basis for the decision, but only the supervisor has access to the actual basis for the decision. Whether intentional or inadvertent, the typical employer has greater access to employment-decision information than does the typical employee.

In recognition of the imbalance of information in employment cases, the *McDonnell Douglas* burden-shifting framework seeks to compel an employer to state its reason for making the adverse employment decision.²⁷ This requirement recognizes the high societal priority of

23. *Id.* (internal citations omitted).

24. *Id.* (internal citations omitted).

25. *See id.* at 70.

26. *See* John S. Collins, *Another Hairball for Employers? “Cat’s Paw” Liability for the Discriminatory Acts of Co-Workers After Staub v. Proctor Hospital*, 64 BAYLOR L. REV. 908, 912 (2012) (internal citations omitted) (describing the Cat’s Paw Doctrine).

27. *See* *TWA v. Thurston*, 469 U.S. 111, 121 (1985) (“The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the ‘plaintiff [has] his day in court despite the unavailability of direct evidence.’”) (internal citations omitted); 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, 997–98 (1999) (“Without [‘smoking gun’] evidence, plaintiffs using the general civil method had difficulty proving discrimination.”) (noting that—although the *McDonnell Douglas* Court failed to expressly state its reasoning for adopting the burden-shifting framework—the *McDonnell*

eliminating discrimination in employment, but also accommodates the apparent difficulty in proving discrimination.²⁸ It is well-stated that, at its inception, the *McDonnell Douglas* burden-shifting framework “probably functioned as a primitive quasi-discovery device, aimed at ‘smoking out’ the employer’s evidence as to why it acted adversely to the plaintiff.”²⁹

The burden-shifting analysis set forth by *McDonnell Douglas*³⁰ is central to the litigation of Title VII status-based discrimination cases.³¹ This framework requires first that the employee establish a prima facie case of discrimination by proving beyond a preponderance of the evidence³² that (1) he or she belongs to a protected class; (2) he or she was qualified for the position; (3) though qualified, he or she suffered some adverse employment action; and (4) the employer treated similarly situated people outside of his or her protected class differently, or the circumstances under which the adverse employment action occurred give rise to an inference of discrimination.³³

Courts have altered this prima facie case slightly—though significantly—when evaluating Title VII retaliation cases. In a retaliation case, the plaintiff is expected to demonstrate that: (1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse

Douglas burden-shifting framework intended to serve judicial expediency where plaintiffs do not have “smoking gun” evidence of discrimination).

28. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2231 (1995).

29. *Id.* at 2275.

30. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (evaluating a claim of racial discrimination in violation of Title VII where *McDonnell Douglas* failed to rehire Mr. Green despite his apparent qualifications for the open positions, but after Mr. Green’s involvement in unlawful protests against *McDonnell Douglas*).

31. See Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 745 (2006).

32. While the *McDonnell Douglas* Court does not expressly state that the burden of proof is by a preponderance of the evidence in the first phase of the burden-shifting framework, this can be deduced from the plaintiff’s ultimate burden to prove his claim by a preponderance of the evidence. Where the plaintiff carries both the burden of persuasion and the burden of production (as he does in the first and third phases of the *McDonnell Douglas* burden-shifting framework), it can be reasonably understood that the burden of proof mirrors the plaintiff’s ultimate burden (i.e. by a preponderance of the evidence). In evaluating the *McDonnell Douglas* burden-shifting framework, the *Burdine* Court acknowledged the requirement that the plaintiff satisfy this standard in establishing his prima facie case. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (“The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.”).

33. *McDonnell Douglas*, 411 U.S. at 802. Though the *McDonnell Douglas* Court more narrowly construed the prima facie case in application to the particular facts of this case, in footnote 13, the Court identified that the facts of a discrimination case “necessarily will vary,” thus altering the requirements of a prima facie case. *Id.* at 802 n.13. The framework identified in this paper is intended to reflect a more generally applicable understanding of the *McDonnell Douglas* burden-shifting framework per the *McDonnell Douglas* Court’s recognition that the particular facts of a case would necessarily alter the prima facie proof required of a plaintiff employee.

employment action; and (3) a causal connection exists between the protected activity and the adverse employment action.³⁴

The most notable difference between the prima facie case for status-based discrimination claims and retaliation claims is that, as commonly applied, the prima facie case for retaliation requires that the plaintiff establish a causal link. For both status-based discrimination claims and retaliation claims, satisfaction of the requirements of the prima facie case creates a rebuttable presumption of discrimination.³⁵ After the prima facie case, the two causes of action follow the same burden shifting under *McDonnell Douglas*.

Once the prima facie case is established, the burden of production shifts to the defendant to articulate some legitimate non-discriminatory reason for the adverse employment action.³⁶ Importantly, the *McDonnell Douglas* Court gave substantial rebuttal weight to the employer's proffered reason.³⁷ This allowance, coupled with the language requiring an employer merely to "articulate some legitimate, nondiscriminatory reason"³⁸ supports the conclusion that the second step of the *McDonnell Douglas* burden-shifting framework transfers the burden of production, but not the burden of persuasion.³⁹

Provided that the employer rebuts the presumption of discrimination by articulating some legitimate non-discriminatory reason for the adverse employment action, the third phase of the *McDonnell Douglas* burden-shifting framework affords the employee a fair opportunity to show that the employer's proffered reason is pretext or discriminatory in its application.⁴⁰ This shifts the burden of production back to the employee (who has maintained the burden of persuasion), and affords the employee

34. See, e.g., *Hutton v. Maynard*, 812 F.3d 679, 684 (8th Cir. 2016). Such a construction is arguably permissible in accordance with footnote 13 of *McDonnell Douglas*. See *McDonnell Douglas*, 411 U.S. at 802 n. 13.

35. *Burdine*, 450 U.S. at 254 ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. . . . The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.").

36. *McDonnell Douglas*, 411 U.S. at 802.

37. *Id.* at 803. ("[W]e think that the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled.").

38. *Id.* at 802.

39. See *Burdine*, 450 U.S. at 254 (In evaluating the second phase of the *McDonnell Douglas* burden-shifting framework, "[t]he burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons."); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177 (2009) (In statutory interpretation regarding burden of persuasion, "[w]here the text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." (Internal citations omitted)).

40. *McDonnell Douglas*, 411 U.S. at 804, 807.

an opportunity to prove by a preponderance of the evidence that the employer's reason is pretext for discrimination.⁴¹ The employee may show pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."⁴²

C. *Burden of Proof*

In 1989, by plurality opinion, the Court in *Price Waterhouse v. Hopkins* decided that "Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities."⁴³ On this foundation, the *Price Waterhouse* Court deemed the term "because of [a protected status]" to provide a causation standard of motivating factor, and further held that, where a plaintiff proved that a protected status was a motivating factor in the employment decision, the employer could escape liability only by proving by a preponderance of the evidence that it would have made that same employment decision regardless of the protected status.⁴⁴

The Civil Rights Act of 1991 codified *Price Waterhouse*'s motivating-factor causation in Title VII status-based discrimination claims.⁴⁵ Further, it modified the *Price Waterhouse* mixed-motive burden shifting⁴⁶ to allow an employer to limit damages—but not avoid liability—if, after the employee met his prima facie case, the employer could demonstrate that it would have taken the same employment action regardless of the discriminatory factor.⁴⁷

Despite, but also due to, *Price Waterhouse* and the Civil Rights Act of 1991, this motivating-factor standard has not been extended in cases of age discrimination under the Age Discrimination in Employment Act (ADEA),⁴⁸ or in Title VII retaliation claims,⁴⁹ both of which have been held to require but-for causation.

The legal reasoning behind the failure to extend motivating-factor causation to Title VII retaliation claims mirrors the reasoning for which it was not extended to ADEA claims. The *Gross* Court held that the

41. *Id.* at 804.

42. *Burdine*, 450 U.S. at 256.

43. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (Brennan, J., plurality).

44. *Id.* at 258.

45. 42 U.S.C. § 2000 e-2(m) (2012).

46. As initially established in *Price Waterhouse*, 490 U.S. at 242 ("Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities.").

47. 42 U.S.C. § 2000 e-5(g)(2)(B) (2012). Discussion of the *Price Waterhouse* mixed-motive burden-shifting framework in this paper refers to the framework as modified by the Civil Rights Act of 1991.

48. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009).

49. *See Univ. of Tex. Southwestern Med. Ctr. V. Nassar*, 133 S. Ct. 2517, 2522 (2013).

ADEA required but-for causation rather than motivating-factor causation.⁵⁰ The text of the ADEA does not expressly allow for mixed-motive age discrimination claims.⁵¹ Further, unlike Title VII's protected statuses (race, color, religion, sex, and national origin), age as a protected class was not included in the Civil Rights Act of 1991 as expressly requiring only motivating-factor causation.⁵² The *Gross* Court treated as intentional Congress's non-inclusion of age discrimination in the Civil Rights Act of 1991.⁵³

Relying on the legal reasoning of the *Gross* Court, the *Nassar* Court declined to allow mixed-motive claims of retaliation in violation of Title VII.⁵⁴ The *Nassar* Court's reliance on ADEA precedent, rather than Title VII precedent, in evaluating Title VII retaliation claims is noteworthy. The *Nassar* Court drew a distinct line between the status-based discrimination made unlawful by Title VII and the retaliation made unlawful by it.⁵⁵ This distinction was key in the Court's reliance on *Gross* and its assignment of but-for causation to Title VII retaliation claims.⁵⁶

As addressed above, the Civil Rights Act of 1991 codified motivating-factor causation and *Price Waterhouse* mixed-motive burden shifting⁵⁷ for Title VII status-based discrimination claims.⁵⁸ The same cannot be said of Title VII retaliation claims.⁵⁹ The anti-retaliation provision of Title VII was treated by the *Nassar* Court as more similar to the ADEA than to Title VII status-based discrimination.⁶⁰ Subsequently, in accordance with the *Gross* Court's textual analysis from which it drew Congressional intent, the *Nassar* Court concluded that Congress had acted intentionally in the Civil Rights Act of 1991 when it amended the causation standard for status-based claims but failed to amend it for

50. *Gross*, 557 U.S. at 177–78.

51. *Id.* at 175.

52. *Id.*

53. *Id.* at 174–75 (“When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”) (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991)).

54. *See Nassar*, 133 S. Ct. at 2523 (“In *Gross*, the Court concluded that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct. The holding and analysis of that decision are instructive here.”).

55. *Id.* at 2522–23.

56. *See Gross*, 557 U.S. 167. Emphasized in this decision was the distinction between Title VII and the ADEA. Without similarly distinguishing Title VII retaliation claims from Title VII status-based claims, the *Nassar* Court would have had a much more difficult time in finding but-for causation as a requirement for retaliation claims.

57. As noted in *Nassar*, 133 S. Ct. at 2526, the codification of the *Price Waterhouse* mixed-motive burden-shifting framework was only in-part; in fact, some elements of the framework were modified in the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(a) (2012); 42 U.S.C. § 2000 e-2(m) (2012).

58. *See Nassar*, 133 S. Ct. at 2528.

59. *Id.* at 2526.

60. *Id.*

retaliation claims.⁶¹ Following in the footsteps of the *Gross* Court, and differentiating retaliation claims from status-based claims, the *Nassar* Court held that Title VII retaliation claims required a showing of but-for causation.⁶²

D. Burden Shifting in But-For Causation

In accordance with its holding that ADEA claims require proof of but-for causation (alternatively stated that liability is not found where age was merely a motivating factor for the adverse employment decision), the *Gross* Court expressly held that the *Price Waterhouse* mixed-motive burden-shifting framework does not apply to cases alleging age discrimination under the ADEA.⁶³ Despite the *Gross* Court's express disavowal of the *Price Waterhouse* mixed-motive burden-shifting framework in ADEA claims, the Court declined to answer the question of the applicability of the *McDonnell Douglas* burden-shifting framework in ADEA claims.⁶⁴ In a footnote, the *Gross* Court acknowledged that it had not "definitively decided whether the evidentiary framework of [*McDonnell Douglas*] utilized in Title VII cases is appropriate in the ADEA context."⁶⁵

The *Nassar* Court again followed the legal reasoning in *Gross* when it also expressly disallowed motivating-factor causation and the use of the *Price Waterhouse* mixed-motive burden-shifting analysis for Title VII retaliation claims.⁶⁶ However, whereas the *Gross* Court acknowledged that it had not resolved the question of the applicability of the *McDonnell Douglas* burden-shifting framework to ADEA claims, the *Nassar* Court failed to even mention *McDonnell Douglas* and its potential application to Title VII retaliation claims.⁶⁷ The *Nassar* Court's complete inattention to the utility of the *McDonnell Douglas* burden-shifting framework in Title VII retaliation claims leaves unanswered whether and how the burden-shifting framework should be applied in such claims.

III. DISCUSSION

Perhaps the *Nassar* Court's lack of mention of the *McDonnell Douglas* burden-shifting framework—despite its reliance in nearly every

61. *See id.* at 2517.

62. *See id.* at 2533.

63. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 173–74 (2009).

64. *Id.* at 175 n.2.

65. *Id.* (internal citations omitted).

66. *See Nassar*, 133 S. Ct. 2517.

67. *Gross*, 557 U.S. at 175 n.2 (internal citations omitted); *see Nassar*, 133 S. Ct. 2517.

other aspect on the legal reasoning of *Gross*—is indicative of the attenuated relationship between Title VII retaliation claims and *McDonnell Douglas* burden shifting. Neither the Supreme Court nor Congress has clarified when or how the *McDonnell Douglas* burden-shifting framework should be used, leaving the lower courts to their own devices on its application to cases involving but-for causation and retaliation.⁶⁸ Circuit courts are inconsistent with their use of the *McDonnell Douglas* burden-shifting framework. While some courts remain tied to the framework theoretically, their use of it is superficial and unlikely to yield consistent results in accordance with the framework. This section will identify discord among the lower courts in order to establish some of the underlying problems with application of the *McDonnell Douglas* burden-shifting framework in Title VII retaliation cases.

A. How Does Causation Fit in Burden Shifting?

Without burden shifting, a typical civil case proceeds with the claimant maintaining both the burdens of production and persuasion, collectively the burden of proof.⁶⁹ In order to establish liability, the claimant must prove by a preponderance of the evidence the elements of a claim, including causation where applicable.⁷⁰ But-for causation must be demonstrated for an employee to prevail on a Title VII retaliation claim.⁷¹ However, the *McDonnell Douglas* burden-shifting framework does not consistently or effectively incorporate but-for causation as an element.

The *McDonnell Douglas* burden-shifting framework does not expressly incorporate causation as an element of any step of the framework.⁷² Because it does not expressly direct evaluation of causation, the *McDonnell Douglas* burden-shifting framework is

68. See *Nassar*, 133 S. Ct. 2517; *Foster v. Univ. of Md.-Eastern Shore*, 787 F.3d 243, 246 (4th Cir., 2015) (“[T]he *Nassar* Court was silent as to the application of but-for causation in *McDonnell Douglas* pretext cases.”) (holding that *Nassar* did not alter the *McDonnell Douglas* analysis for retaliation claims).

69. See Herman N. (Rusty) Johnson, Jr., *The Evolving Strong-Basis-In-Evidence Standard*, 32 BERKELEY J. EMP. & LAB. L. 347, 355 (2011) (“[T]he burden of persuasion may be described as ‘the degree to which the jury (or other fact finder) must be persuaded of a factual proposition if it is to find for a given party on the issue of whether that proposition is true,’ and the burden of production may be defined as the obligation to ‘introduce enough evidence [so] that a reasonable jury could find that the burden of persuasion has been met.’”) (internal citations omitted).

70. See *id.* at 357 (“The Supreme Court has delineated three standards, or levels, of proof: the minimum level, preponderance of the evidence, for typical civil cases; the intermediate level, clear and convincing evidence, for certain civil cases such as those involving fraud or civil commitment for mental illness; and the high level for criminal cases, proof beyond a reasonable doubt.”).

71. *Nassar*, 133 S. Ct. at 2523.

72. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

inconsistently altered to accommodate but-for causation requirements.

This issue is observable in the lower courts' application of but-for causation in ADEA claims following the *Gross* holding.⁷³ In consideration of the causation requirements in ADEA claims, some courts inserted but-for causation as a component of showing pretext,⁷⁴ while others proceeded under a traditional *McDonnell Douglas* analysis with but-for causation as a backdrop.⁷⁵

This lack of clarity is even more prominent in Title VII retaliation cases where the prima facie case requires that the plaintiff demonstrate a causal link.⁷⁶ As in ADEA claims, but-for causation has no express placement in the *McDonnell Douglas* analysis of Title VII retaliation claims.⁷⁷ The circuit courts disagree on the proper application of but-for causation in the *McDonnell Douglas* burden-shifting analysis following the *Nassar* holding.⁷⁸ *McDonnell Douglas* as applied to retaliation claims has two stages in which the plaintiff in a retaliation claim must grapple with causation.⁷⁹ First, the final element of the prima facie case is that there is a causal link between the protected activity and the adverse employment action.⁸⁰ Second, the plaintiff must establish causation in proving pretext and in satisfying his or her ultimate burden of persuasion.⁸¹

The *Foster* court considered whether and how but-for causation fit into both of these stages of the plaintiff's case.⁸² Acknowledging that it was without guidance from the *Nassar* Court as to the proper application of but-for causation within the *McDonnell Douglas* burden-shifting framework,⁸³ the *Foster* court ultimately concluded that the *Nassar* decision did not affect the causal link element in the plaintiff's prima facie case.⁸⁴ While the *Foster* court is not alone in this holding, there is no consensus among the circuits, some of which do require but-for causation within the causal link element of the plaintiff's prima facie case.⁸⁵ Even

73. *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009).

74. *See, e.g., Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 106 (2d Cir. 2010).

75. *See, e.g., Loberger v. Del-Jen Inc.*, 616 Fed. Appx. 922 (11th Cir. 2015).

76. *See, e.g., Foster v. Univ. of Md.-Eastern Shore*, 787 F.3d 243, 250 (4th Cir. 2015).

77. *Id.* at 246. (“[T]he *Nassar* Court was silent as to the application of but-for causation in *McDonnell Douglas* pretext cases.”).

78. *Id.* at 250–51 n.10.

79. *Id.* at 250.

80. *Id.*

81. *Id.*

82. *Foster*, 787 F.3d at 250.

83. *Id.* at 246.

84. *Id.* at 250–51.

85. *See, e.g., id.* at 250–51 n.10 (identifying four cases in which a sister circuit required but-for causation at the prima facie stage of the proceedings, and identifying five cases in which a sister circuit expressly or implicitly held that *Nassar* did not alter the causation requirement of the prima facie case); *see also, e.g., Wheat v. Fla. Parish Juvenile Justice Comm’n*, 811 F.3d 702, 705–06 (5th Cir. 2016)

a prior case in the *Foster* court's own circuit would have required but-for causation in the prima facie stage of the plaintiff's burden.⁸⁶

The *Foster* court identified the pretext stage of *McDonnell Douglas* burden shifting as the second occasion on which the plaintiff must address causation.⁸⁷ In its analysis of the effect of *Nassar* on causation at this stage, the *Foster* court held that the pretext stage of *McDonnell Douglas* burden shifting was not affected as the framework had "long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action."⁸⁸ The Fourth Circuit thus interpreted the holding in *Nassar* as having no effect on *McDonnell Douglas* burden shifting.

This discord among and within the circuits is indicative of a problem in the application of *McDonnell Douglas* in cases requiring but-for causation, and more specifically in cases of Title VII retaliation. A framework that is not consistently applied warrants a closer look into its utility.

B. Indirect Evidence Resulting in Use of McDonnell Douglas

In evaluating a Title VII retaliation claim, the Eighth Circuit requires that a plaintiff "offer direct evidence of retaliation or create an inference of retaliation under the *McDonnell Douglas* burden-shifting framework."⁸⁹ Direct evidence of a retaliation claim is evidence which shows a specific, causal link between the decision maker's discriminatory animus and the adverse employment decision.⁹⁰ This can include statements indicating discriminatory intent if those statements were made by decision makers.⁹¹ Where, as is common in employment discrimination claims, the evidence is circumstantial in nature, an inference of discrimination must be drawn that would support a finding of unlawful retaliatory discrimination.⁹²

(incorporating the requirement of but-for causation into the prima facie element of causal link).

86. *Foster*, 787 F.3d at 251 n. 11 (citing, but not following, *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 210 (4th Cir. 2014)).

87. *Id.* at 250.

88. *Id.* at 252.

89. *Hutton v. Maynard*, 812 F.3d 679, 683 (8th Cir., 2016) (internal citations omitted) (emphasis added). The Second and Tenth Circuits also rely on the *McDonnell Douglas* burden-shifting framework in Title VII retaliation cases based in indirect evidence. See *Rumsey v. Northeast Health*, 634 Fed. Appx. 318, 321 (2nd Cir., 2016) (internal citations omitted); *Unal v. Los Alamos Pub. Sch.*, 638 Fed. Appx. 729, 740-41 (10th Cir. 2016) (internal citations omitted).

90. *Hutton*, 812 F.3d at 683 (internal citations omitted).

91. *Id.* (internal citations omitted).

92. Often in Title VII retaliation cases, the temporal connection between the point at which the employee engaged in the protected activity and the point at which the employer made an adverse employment decision is cited as indirect (circumstantial) evidence of unlawful retaliatory discrimination.

Where a retaliation case is based in indirect circumstantial evidence, the Eighth Circuit applies the “familiar three-step burden-shifting analysis from *McDonnell Douglas*.”⁹³ Among others, the Eighth Circuit altered the specifics of the *McDonnell Douglas* burden-shifting analysis to accommodate retaliation claims.⁹⁴ The Eighth Circuit in *Hutton v. Maynard* observed that, to proceed under the *McDonnell Douglas* burden-shifting framework, the prima facie case required an initial showing that “[the plaintiff] engaged in statutorily protected conduct, that he suffered an adverse employment action, and that a causal connection exists between the two.”⁹⁵ Means of establishing a causal connection may consist of evidence that would “justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action” when coupled with proof that the decision maker was aware of the plaintiff’s participation in a protected activity.⁹⁶

The district court in *Hutton* found that the plaintiff failed to establish a causal link as would satisfy the prima facie case.⁹⁷ However, the district court and subsequently the circuit court, evaluated the claim under the second and third steps of the *McDonnell Douglas* burden-shifting framework regardless.⁹⁸ The Eighth Circuit identified these as a burden shift to the defendant to articulate a non-discriminatory reason, then a shift back to the plaintiff who has the opportunity to prove that the articulated reason is pretext.⁹⁹

93. *Hutton*, 812 F.3d at 684 (internal citations omitted).

94. *Id.* (citing to *Fiero v. CSG Sys., Inc.*, 759 F.3d 874, 880 (8th Cir. 2014)). Per *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973), such an alteration of the prima facie case is proper as the “facts necessarily will vary in Title VII cases, and the specification [in *McDonnell Douglas*] of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.” However, it is the contention of this author that such an alteration, while arguably necessary to the analysis of a retaliation claim, fundamentally changes the purpose of the *McDonnell Douglas* burden-shifting framework, to the point that it is not compatible with the but-for causation required for Title VII retaliation claims. See *Univ. of Tex. Southwestern Med. Ctr. V. Nassar*, 133 S. Ct. 2517, 2522 (2013). For further discussion to this point, see *infra* Part IV.

95. *Hutton*, 812 F.3d at 684. The Tenth Circuit also relies on these factors to establish a prima facie case of discriminatory retaliation under the *McDonnell Douglas* burden-shifting framework. See *Unal v. Los Alamos Pub. Sch.*, 638 Fed. Appx. 729, 740–41 (10th Cir. 2016) (internal citations omitted).

96. *Unal*, 638 Fed. Appx. at 741–42 (internal citations omitted) (noting also that close temporal proximity may be—but is not necessarily—sufficient as to indicate retaliation). While some courts, like the *Unal* court, expressly require a showing, during the prima facie case, that the decision maker had actual knowledge that the plaintiff had engaged in protected activity, it is frequently implicit in the requirement to show a causal link. See, e.g., *Hutton*, 812 F.3d 679 (not expressly requiring that the plaintiff show that the decision maker had actual knowledge, but which does require that the plaintiff show a causal link between the protected activity and the adverse employment decision). Because actual knowledge can be implicit in causal link, and because causal link is central to this author’s argument, while actual knowledge is not, the remainder of this paper, unless otherwise noted, will presume that actual knowledge need not be independently demonstrated in the plaintiff’s prima facie case.

97. *Hutton*, 812 F.3d at 684–86.

98. *Id.*

99. *Id.* at 684–85.

While the Eighth Circuit purports to follow the *McDonnell Douglas* burden-shifting framework, its disregard for the plaintiff's failure to meet the prima facie case creates a superficial analysis under the remaining steps of the framework. That the framework is purportedly followed for the sake of familiarity, but in reality is tossed aside, indicates a potential for inconsistent outcomes despite "reliance" on the decades-old framework.

IV. ARGUMENT

The *McDonnell Douglas* burden-shifting framework as applied to Title VII retaliation cases is inconsistent with the legal reasoning employed in *McDonnell Douglas* as well as that in *Nassar*. This section will put forth arguments in support of abandonment of the *McDonnell Douglas* burden-shifting framework and Title VII retaliation cases. First, this section will argue that *McDonnell Douglas* seeks to tip the scales in favor of a disadvantaged employee, but the employee in a Title VII retaliation claim has access to largely the same evidence as the employer such that use of the framework is unnecessary. Second, though the *Nassar* Court did not address the issue of applicability of *McDonnell Douglas* burden shifting, it indicated a chasm in the analysis of Title VII status-based claims and retaliation claims such that there is little support for reliance on a status-based discrimination framework in retaliation cases. Third, both *McDonnell Douglas* and *Nassar* seek to serve judicial expediency, though the application of *McDonnell Douglas* burden shifting in retaliation cases hinders such expediency.

Title VII retaliation cases should proceed as would a typical civil case outside of employment discrimination. In so proceeding, the plaintiff should retain both the burden of persuasion and the burden of production, and ultimately, the finder of fact should weigh the plaintiff's evidence and defendant's defenses to determine the prevailing party.

A. *Why Burden Shift? Employee Has Access to Information in Retaliation Cases*

The *McDonnell Douglas* burden-shifting framework operates in apparent recognition of the imbalance of information in employment discrimination cases.¹⁰⁰ This imbalance does not appear to the same extent in retaliation cases. Though an employee is unlikely to be told that the cause of his or her termination is the employee's participation in a statutorily protected activity, the employee will have the information

100. See *TWA v. Thurston*, 469 U.S. 111, 121 (1985); Green, *supra* note 27.

necessary to draw such an inference.

To prove a retaliation case, a plaintiff must demonstrate that he or she participated in a statutorily protected activity.¹⁰¹ The employee need not rely on information known only to the employer in order to show his or her participation in such protected activity; the employee is necessarily aware of his or her involvement in such activity. The plaintiff must then show that his or her participation in the protected activity caused the adverse employment action.¹⁰² Again, the employee has access to this information insofar as it is demonstrable by temporal proximity to the protected activity.¹⁰³

Where temporal proximity has been held as sufficient to establish causation, it has required a “very close” relationship between the protected activity and the adverse employment action.¹⁰⁴ So, where an employee has weaker evidence of a temporal connection (where time has lapsed between the protected activity and the adverse employment action), he or she must put forth additional evidence of causation. This problem does not result from the imbalance of information that *McDonnell Douglas* sought to remedy with burden shifting. This evidentiary problem indicates a possible weakness in the plaintiff’s case that he or she must overcome regardless of the applicability of the *McDonnell Douglas* burden-shifting framework.

The Sixth Circuit has held that, to prove the causation element of a plaintiff’s prima facie case of retaliation, (A) he or she must demonstrate a close temporal relationship between the protected activity, or (B) where some time has elapsed between the protected activity and adverse employment action, “the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.”¹⁰⁵

If a court faithfully applies *McDonnell Douglas* burden shifting to a retaliation claim where time has lapsed and the employee cannot provide other evidence of retaliatory conduct, the prima facie case of retaliation cannot be met, and the inquiry should necessarily stop there, without the burden ever reaching the defendant to articulate a legitimate non-discriminatory reason for the employment action. If a court proceeds

101. 42 U.S.C. § 2000e-3(a) (2012).

102. *Id.*

103. *See Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 524–25 (6th Cir. 2008) (“Furthermore, one could read the Supreme Court as having accepted that temporal proximity may be sufficient in a narrow set of cases . . . [where the temporal proximity is very close.]”) (internal citations omitted); *see, e.g., Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 650 (6th Cir. 2015) (citing *Mickey*, 516 F.3d at 525) (“Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation.”).

104. *See Mickey*, 516 F.3d at 524–25.

105. *Yazdian*, 793 F.3d at 650 (internal citations omitted).

without *McDonnell Douglas* burden shifting in the same case, the result remains the same; the plaintiff is unable to establish the causal link between his or her protected activity and the employer's adverse employment decision. Without establishment of the causal link, the claim fails. Because the outcome is not impacted by the application (or non-application) of the *McDonnell Douglas* burden-shifting framework, the framework fails to meet its intended goal of resolving the imbalance of information as between the employee and employer.

B. Use of McDonnell Douglas Burden Shifting Not Consistent with Nassar

When evaluating the holding in *Price Waterhouse*, the *Nassar* Court relied on *Gross* in part through its holding that “it would not be proper to read *Price Waterhouse* as announcing a rule that applied to both statutes, despite their similar wording and near-contemporaneous enactment.”¹⁰⁶ Though *Gross* referred to “both” statutes as meaning Title VII and the ADEA, the *Nassar* Court imported the legal reasoning to distinguish Title VII retaliation from Title VII status-based claims.¹⁰⁷ The *Nassar* Court emphasized the differences between status-based claims and retaliation claims in terms of causation and application of the *Price Waterhouse* mixed-motive burden-shifting framework.

As such, an implication exists that, despite its inattention to the framework, the *Nassar* Court would disavow use of *McDonnell Douglas* burden shifting in retaliation cases. As it was not proper to read *Price Waterhouse*—a status-based discrimination case—as “announcing a rule that applied to both statutes,” it would be improper to read *McDonnell Douglas* post-*Nassar* as announcing a rule that applied to both status-based discrimination and retaliation claims.

Judicial Inefficiency Inconsistent with *McDonnell Douglas* and *Nassar*

In its interpretation of the *McDonnell Douglas* burden-shifting framework, the Court in *Texas Department of Community Affairs v. Burdine* observed that “[t]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.”¹⁰⁸ Further, the *Nassar* Court held that the proper interpretation of the anti-retaliation provision of Title VII and its but-for causation standard as having “central importance in the fair and responsible allocation of resources in the judicial and litigation systems.”¹⁰⁹ Both *McDonnell Douglas* and *Nassar*

106. Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013).

107. See *id.*; *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009).

108. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

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

seek judicial expediency but together fail to achieve it. Rather, superficial application of the *McDonnell Douglas* burden-shifting framework in Title VII retaliation cases results in judicial inefficiency.

Theoretical discussion of the *McDonnell Douglas* burden-shifting framework would lead one to believe that its application is clean, that the parties are able to clearly separate and articulate arguments under each step, and the outcome flows clearly from burden shifting to the court's decision. In reality, the steps become conflated, especially where the causation standard is but-for causation. A critical examination of the Eighth Circuit's analysis in *Hutton v. Maynard*¹¹⁰ demonstrates that but-for causation is incompatible with the *McDonnell Douglas* burden-shifting framework as adapted to accommodate Title VII retaliation claims.

In *Hutton*, the court acknowledged the Eighth Circuit standard for prima facie cases in retaliation claims as requiring that (1) the plaintiff demonstrate that he engaged in statutorily protected conduct, (2) he suffered an adverse employment action, and (3) a causal connection exists between the two.¹¹¹ This third element of the prima facie case, the showing of a causal connection between the statutorily protected conduct and the adverse employment action, should set off red flags for the courts. Because the required causation in retaliation cases after *Nassar* is but-for causation, it seems that such an articulation of the first step of the *McDonnell Douglas* burden-shifting framework would necessarily require the plaintiff to show but-for causation in the prima facie case.¹¹² The Fifth Circuit, outlining the same prima facie case as the Eighth Circuit, directly inserted but-for causation into this third element of the prima facie case, holding that for the “causal link” requirement of a Title VII retaliation claim, the employee must provide substantial evidence that “but for” exercising protected rights, she would not have been discharged.”¹¹³

This requirement negates the purpose of the *McDonnell Douglas* burden-shifting framework entirely.¹¹⁴ If the plaintiff is able to demonstrate a but-for causal link between the protected conduct and the adverse employment action, he has apparently proven his claim,

110. 812 F.3d 679 (8th Cir., 2016).

111. *Id.* at 684.

112. *See Nassar*, 133 S. Ct. at 2523.

113. *Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702, 705–06 (5th Cir. 2016).

114. The *Foster* court would agree, though it held this to mean that the *Nassar* Court necessarily intended for the causal link element to be unaffected by the holding requiring but-for causation. *Foster v. Univ. of Md.—Eastern Shore*, 787 F.3d 243, 251 (4th Cir. 2015) (“Adopting the contrary rule (and applying the ultimate causation standard at the prima facie stage) would be tantamount to eliminating the McDonnell Douglas framework in retaliation cases by restricting the use of pretext evidence to those plaintiffs who do not need it.”).

establishing a non-rebuttable presumption of discriminatory retaliation. Even where a defendant employer could articulate a non-discriminatory reason for the employment decision, the plaintiff's prima facie proof of but-for causation would effectively silence the defendant's articulation as pretextual.

Conversely, where the plaintiff could not establish but-for causation in his prima facie case, a court would necessarily be required to find in favor of the defendant employer. If the evaluation ends after the prima facie case, whether satisfied or not, there is no need for the *McDonnell Douglas* burden-shifting framework in Title VII retaliation claims.

However, as observable in *Hutton*, the courts cling to the "familiar" framework, without explicit consideration of its ultimate utility (or lack thereof).¹¹⁵ In what is arguably an attempt to force compliance with the *McDonnell Douglas* burden-shifting framework, the district court in *Hutton* conflated the first and third parts of *McDonnell Douglas* burden shifting.¹¹⁶ The district court assumed that Hutton had engaged in statutorily protected activity and that he had suffered an adverse employment action, but ruled that he had failed to establish the causal link required in a prima facie case in the Eighth Circuit.¹¹⁷ However, rather than ending its analysis at the failed prima facie case, the district court "concluded alternatively that Hutton failed to demonstrate that the reasons given for his termination were pretextual."¹¹⁸ Following the district court's disregard for its own finding that Hutton had not established a prima facie case, the circuit court also deemed it unnecessary to address Hutton's prima facie case.¹¹⁹

The theoretically clear progression of the *McDonnell Douglas* burden-

115. See *Hutton*, 812 F.3d at 684.

116. See *id.*

117. *Id.* (discussing the holding in the district court).

118. *Id.* (discussing the holding in the district court); see also *Rumsey v. Northeast Health*, 634 Fed. Appx. 318, 319–20 (2nd Cir. 2016); *Unal v. Los Alamos Pub. Sch.*, 638 Fed. Appx. 729, 745 (10th Cir. 2016) (on one of the retaliation claims brought by Unal, the court, without affirmatively saying whether or not Unal had established her prima facie case, continued its analysis under the second and third steps of the *McDonnell Douglas* burden-shifting framework). But see *id.* at 741–42 (despite the Tenth Circuit's similar approach to the that of the Eighth Circuit, in utilization of the *McDonnell Douglas* burden-shifting framework and in defining the elements of the prima facie case, the *Unal* court did not presume as satisfied the prima facie element of causal link, and unlike the Eighth Circuit, ended its analysis once it determined that the plaintiff failed to establish her prima facie case regarding one claim of retaliation).

119. *Hutton*, 812 F.3d at 684–85. While it bears mentioning, it shall be saved for another day and another paper that a similar approach was taken in the Eighth Circuit's evaluation of a retaliation claim under the ADA. See *Lors v. Dean*, 746 F.3d 857, 868 (8th Cir. 2014). Rather than evaluating the prima facie case, the circuit court in *Lors* assumed as satisfied the plaintiff's prima facie case in order to hold that the plaintiff failed to establish as pretextual the defendant's articulated non-discriminatory reason for the adverse employment action. See Malamud, *supra* note 28, at 2300–01 (discussing *McDonnell Douglas* burden shifting generally and offering possible explanations for the "district courts' propensity to evaluate all of the evidence," even where the courts have determined the prima facie case not to have been met, or have assumed without deciding that a prima facie case has been met).

shifting framework fails where the court finds that the prima facie case is not satisfied, yet continues its analysis of the second and third steps. The parties to a retaliation case do not take orderly turns putting forth arguments; these cases do not play out in a manner that allows for the court to evaluate each step sequentially. Rather all three phases are evaluated simultaneously after both sides have put forth proffered evidence. In cases like *Hutton*, the role of burden shifting is superficial, and where such a “familiar” framework serves only a superficial purpose, its utility should be questioned.

The issue of judicial efficiency in the use of *McDonnell Douglas* burden shifting as applied to retaliation claims has long been questioned. The district court in *Fierro v. Saks Fifth Avenue* was particularly illustrative in its criticisms of the utility of *McDonnell Douglas*, noting that “[t]o promote an expeditious resolution to this case, the Court will . . . [proceed] directly to the real issues presented by a plaintiff’s claims, by simply conceding in the abstract the existence of a prima facie case, thereby bypassing the much criticized minuet [of *McDonnell Douglas*].”¹²⁰

The *Nassar* Court was concerned with the increasing frequency of retaliation claims, so it stands to reason that it would take issue with the continuation of judicial inefficiency.¹²¹ Because *McDonnell Douglas* and *Nassar* both seek judicial expediency but together fail to achieve it, the Court should affirmatively abandon the *McDonnell Douglas* framework in Title VII retaliation claims.

V. CONCLUSION

Civil cases routinely proceed without burden shifting, and Title VII retaliation cases should operate no differently. The intent of *McDonnell Douglas* is not served by its inconsistent and often superficial application to Title VII retaliation claims. Further, neither the legal reasoning of *McDonnell Douglas* nor that of *Nassar* exists in accordance with the continued use of the burden-shifting framework in retaliation claims.

The *McDonnell Douglas* burden-shifting framework sought to alleviate the imbalance in access to information as between employees and employers in Title VII status-based discrimination claims, but that imbalance is not similarly present in Title VII retaliation claims. In such claims, employees have access to evidence of their engagement in statutorily protected activity as well as evidence of a temporal link to the

120. *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 488 (1998) (internally citing various district court cases that assumed a prima facie case in pursuit of efficiency) (evaluating a both status-based discrimination and retaliatory discrimination prior to the *Nassar* decision).

121. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531 (2013).

adverse employment decision.

In its finding that retaliation claims require but-for causation, the *Nassar* Court parted retaliation claims from status-based claims. In an effort to marry the *McDonnell Douglas* burden-shifting framework and the *Nassar* decision, the courts have inconsistently incorporated but-for causation into the burden-shifting framework. The *Nassar* Court asserted that retaliation claims should not be inexorably tied to status-based discrimination precedent. Given this, and the prior and subsequent confusion among the courts, *McDonnell Douglas* burden shifting should not continue to be applied to retaliation claims.

Finally, though *McDonnell Douglas* and *Nassar* sought judicial expediency, their application has resulted in judicial inefficiency. The burden-shifting framework is often only superficially utilized, and its insincere application results in the courts' inevitably moving from one step to the next without due consideration as to the satisfaction of each element of the framework.

Because of the aforementioned reasons, the *McDonnell Douglas* burden-shifting framework should be abandoned as applied to Title VII retaliation cases, and such claims should proceed under the routine procedure of a civil case, without burden shifting.