#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, California

Panel Presentation

THERE'S NO SMOKING GUN; PROVING DISCRIMINATION & RETALIATION BY PRETEXT

Patricia A. Barasch, Esq.
Schall & Barasch LLC
110 Marter Avenue, Suite 302
Moorestown, NJ 08057
856-914-9200
856-914-9420
PBarasch@SchallandBarasch.com

I am attaching a brief we recently filed in New Jersey State Court in an age discrimination case brought under the New Jersey Law Against Discrimination in which we successfully defeated summary judgment both as to liability and the plaintiff's claim for punitive damages. While the evidence in the case included some direct evidence of age discrimination in the form of age-related comments, there was an abundance of different types of pretext evidence which doomed defendant's motion for summary judgment. As such, the brief provides a useful analysis for analyzing and categorizing the various ways of proving pretext in discrimination and retaliation cases.

PRELIMINARY STATEMENT

It is difficult to imagine a case more unsuited for disposition on a motion for summary judgment than the present one. As to defendant's arguments that plaintiff cannot make out either the second or fourth prong of his *prima facie* case, those arguments are founded on "bad law," long since overruled by the New Jersey Supreme Court. As to the various, and ever-changing, reasons offered by defendant for deciding to terminate him from his employment of 14+ years, plaintiff can point to evidence from which a reasonable jury could find each of those reasons "not worthy of credence." And finally, when a supervisor tells a plaintiff that he is going to be replaced because the Company needs to bring in "young blood," and the decisionmaker authors a memo stating he is terminating the plaintiff in order to "start fresh with talent," identifying a 23-year-old as the potential replacement for the 63-year-old plaintiff, a reasonable jury could likewise find this to be direct and/or circumstantial evidence that defendant was motivated by the plaintiff's age in deciding to terminate him. Thus, for all the reasons discussed below, defendant's motion for summary judgment must be denied.

SUMMARY JUDGMENT STANDARD

THE SUMMARY JUDGMENT STANDARD REQUIRES THAT ALL REASONABLE INFERENCES BE DRAWN IN FAVOR OF PLAINTIFF, THE NON-MOVING PARTY, THAT ALL FACTUAL DISPUTES BE RESOLVED IN HIS FAVOR, AND THAT ALL CREDIBILITY DETERMINATIONS AND WEIGHING OF THE EVIDENCE BE LEFT FOR THE JURY.

Summary judgment is appropriate if the movant establishes that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 501 (3d Cir. 2008). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct.

2505, 91 L. Ed. 2d 202 (1986); Dee v. Borough of Dunmore, 549 F.3d 225, 229 (3d Cir. 2008). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the suit. See Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. See Celotex v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the movant has carried its burden under Rule 56, "its opponent **[8]** must do more than simply show that there is some metaphysical doubt as to the material facts." Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Under Rule 56(e), the opponent must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. See Marten v. Godwin, 499 F.3d 290, 295 (3d Cir. 2007). At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. See Jiminez v. All American Rathskeller, Inc., 503 F.3d 247, 253 (3d Cir. 2007). In doing so, the court must construe the facts and inferences in the light most favorable to the non-movant. See Matsushita, 475 U.S. at 587; Horsehead Indus., Inc. v. Paramount Commc'ns, Inc., 258 F.3d 132, 140 (3d Cir. 2001)

A motion for summary judgment must be denied "if the evidence, together with the legitimate inferences therefrom, *could* sustain a judgment in plaintiff's favor." Brill v. The Guardian Life Insurance Co., 142 N.J. 520, 540 (1995) (internal citations omitted) (emphasis added). "In each case, the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him [or her] the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied." Id. (internal citations omitted). Thus, in an age discrimination case, as to inferences to be drawn from the conduct of defendant, if there is an inference on which a jury *could* base a finding that defendant's decision was influenced by consideration of plaintiff's age and also and an inference on which a jury *could* find to the contrary, the court must draw the first inference and deny the defendant's motion for summary judgment. In any event, summary judgment should not be granted if "the competent evidence materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

Moreover, because discrimination cases arising under the New Jersey Law Against Discrimination involve issues of "intent" and the "determination of a state of mind," the courts have also made clear that a motion for summary judgment in such cases "should ordinarily not be granted." Lozo-Weber v. State, 2012 N.J. Super. Unpub. LEXIS 851 at *21 (App. Div. 2012); see also Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551(App. Div. 1995) (In the context of surviving summary judgment, plaintiff need only raise a genuine issue of fact with regard to the employer's actual motive."); Gallo v. Prudential Residential Services, Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994) ("In an employment discrimination case a trial court must be cautious about granting summary judgment to an employer when, as

here, its intent is at issue."). "If a plaintiff who has established a *prima facie* case can raise enough suspicions that the employer's proffered reasons for termination were pretextual, the motion for summary judgment should thus be denied." Greenberg v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 200 (App. Div. 1998). "The standard, then, is 'whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to [the] conclusion that the employer did act for discriminatory reasons.'" Id. (internal citations omitted) (emphasis added).

STATEMENT OF FACTS

Plaintiff's Statement of Facts is submitted with this brief in a separate document, entitled "Plaintiff's Counter-Statement of Material, Disputed Facts Pursuant to Rule 4:46:2(b)."

ARGUMENT

I. GIVEN THAT DEFENDANT HAS CITED "BAD LAW" TO THIS COURT ON THE ELEMENTS OF A PLAINTIFF'S *PRIMA FACIE* CASE OF AGE DISCRIMINATION – IMPOSING REQUIREMENTS THAT HAVE NOW BEEN SQUARELY REJECTED BY THE NEW JERSEY SUPREME COURT – AND GIVEN THAT THE COURTS HAVE MADE CLEAR THAT PLAINTIFF'S BURDEN TO ESTABLISH A *PRIMA FACIE* CASE "IS NOT AN ONEROUS ONE," THE FACTS HERE SHOW THAT PLAINTIFF HAS EASILY MADE OUT A *PRIMA FACIE* CASE OF AGE DISCRIMINATION.

In arguing in its brief in support of its motion for summary judgment that plaintiff has failed to make out both the second and fourth prongs or "elements" of his *prima facie* case of age discrimination, defendant grievously misrepresents to this court the current state of the law on both of these prongs.

First, in arguing that plaintiff cannot make out the second prong of his *prima facie* case on the ground that this prong requires he show that he "performed his job at a level that satisfied

the employer's legitimate expectations," see Defendant's Brief at p. 31, defendant ignores the Supreme Court's holding in Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005). In that case, which has now been the law of this State for nearly nine years, the Supreme Court unequivocally rejected the very standard which defendant now advances -- the requirement that the employee need show that his performance was meeting "the employer's legitimate expectations" in order to make out the second prong of his *prima facie* case. Id. at 454-55. Not only did the Supreme Court in Zive make clear that the "employer's legitimate expectations" were entirely *irrelevant* to the second prong of plaintiff's *prima face* case, but the Court also made clear that all a plaintiff need show was that he was "actually performing the job" prior to his termination. Id. at 454. Since, in the present case, there can be no dispute, in light of Zive, as discussed more fully below, that plaintiff was "actually performing his job" prior to defendant's decision to terminate him, it is clear that plaintiff has satisfied the second prong of his *prima facie* case of age discrimination.

Likewise, as to the fourth prong of plaintiff's *prima facie* case, in representing to this court that this prong requires that a plaintiff establish that he was "replaced by a sufficiently younger candidate," see Defendant's Brief at 31, defendant again misrepresents the current, clearly established state of New Jersey law. It is now beyond question that under New Jersey law the fourth prong of plaintiff's *prima facie* case no longer requires (if it indeed ever did) that plaintiff show that he was replaced by someone "sufficiently younger." See Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82 (App. Div. 2001) ("it is erroneous, in an ordinary case of age discrimination in employment, to use reference to a particular replacement employee as the only means for satisfying the customary fourth element of a *prima facie* showing."). Rather, as our courts have now repeatedly made clear, the fourth element is a "flexible" one and

can be satisfied in a number of different ways. Cohen v. UMDNJ, 2013 N.J. Super. Unpub. LEXIS 3054 (App. Div. December 30, 2013) Thus, the courts have recognized that a plaintiff can satisfy the fourth prong of his *prima facie* case by simply showing that, following its decision to terminate plaintiff, the defendant "sought others to perform the same work" that plaintiff had done, see Dewees v. RCN Corp., 380 N.J. Super. 511, 525-26 (App. Div. 2005), or alternatively, that there is "other proof that the discharge was because of his age." See Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82 (App. Div. 2001). Here, since defendant concedes in its moving papers and attached exhibits (which show that it hired dozens of new supervisors following the termination of plaintiff -- all whom, as it turns out were in fact significantly younger than plaintiff), there can be no dispute that defendant "sought others to perform the same work" of plaintiff following his termination. Moreover, as discussed more fully below, there is an abundance of both direct and circumstantial evidence constituting "other proof that the discharge was because of his age" – far more than the minimal showing required to make out the fourth prong of plaintiff's *prima facie* case.

Finally, whether the issue is plaintiff's ability to successfully make out the second, the fourth, or indeed any of the prongs of his *prima facie* case, our courts have repeatedly stressed that the plaintiff's burden is "not onerous," "relatively simple," and "easily made out," Zive, 182 N.J. at 447-48, with its sole, "rather modest" purpose simply to establish that "discrimination *could* be a reason for the employer's action." Id. (internal citations omitted) (emphasis in original). As the Court in Zive stressed, imposing any greater burden at the *prima facie* stage would "generally prevent a plaintiff from accessing the tools . . . necessary to even begin to assemble a case . . . and would impose on plaintiff the very burden that McDonnell Douglas

sought to avoid -- that of uncovering the smoking gun." Id. Given this "very slight" burden imposed at the *prima facie* stage, plaintiff, as discussed more fully below, easily meets it.

A. Since There Can Be No Question That Plaintiff Was "Performing His Job" Prior To His Termination, Plaintiff Has Established The Second Prong Of His *Prima Facie* Case.

As set forth above, since our Supreme Court issued its decision in Zive nearly nine years ago, it has been the law of this State that all a plaintiff need establish to make out the second prong of his *prima facie* case is that, "he was actually performing his job prior to his termination." 182 N.J. at 454. In Zive, the Supreme Court directly took on, and repudiated, the line of cases that had imposed the requirement that, to satisfy the second prong of his prima facie case, a plaintiff had to show that he was "meeting the legitimate expectations of his employer." After extensively reviewing the case law from around the country on this issue, the Court found that the "legitimate expectations" requirement "cast[s] too great a burden on a LAD plaintiff" and held that cases that had imposed such a requirement were "at best imprecise and at worst misleading." Id.

Moreover, in adopting only the minimal requirement that a plaintiff show he was "actually performing his job prior to termination" as the sole test of the second prong of the *prima facie* case, the court held that "only the plaintiff's evidence should be considered," id. at 455, and that any "performance markers" coming from the defendant, such as performance evaluations and the like, "do not come into play as part of the second prong of the *prima facie* case." Id. Thus, the Court noted, sufficient evidence to satisfy the second prong of the prima facie case "can come from evidence documenting the plaintiff's longevity in the position at issue or from testimony from the plaintiff or others that she had, in fact, been working within the title from which she was terminated." Id.; see also Constance v. Lincoln Supply, LLC, 2007 N.J.

Super. Unpub. LEXIS 18 at *17-18 (App. Div.) (rebuking the trial court for not following the dictates of Zive as to the second prong of the prima facie case as follows: "the trial court's consideration, and indeed acceptance, of defendants' evidence [regarding plaintiff's job performance] when it undertook the second prong analysis, was error. The trial court's approach is violative of the Court's holding in Zive that only the plaintiff's evidence should be considered and that the evaluation of the adequacy of job performance should play no part in a court's review of the second prong of the prima facie case.").

In its brief to this Court arguing that plaintiff has failed to make out the second prong of his *prima facie* case, defendant ignores the controlling precedent in Zive and instead relies on outdated, and now repudiated, language extracted from the case of Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999), see Defendant's Brief at pp. 29-31 – a case that predates Zive by some six years and that was, on this point, clearly overruled by it. In then arguing, based on the now-overruled Sisler language that plaintiff did not meet its "legitimate expectations" and therefore doesn't satisfy the second prong of his *prima facie* case, defendant proceeds to spend some five pages of its brief discussing the purported dissatisfactions that P.J. Isaac – defendant's manager of operations and the person who decided to terminate plaintiff – claims he had with plaintiff's performance. See Defendant's Brief at 33-37. However, all of that argument, and the "evidence" on which it is based – the claims of P.J. Isaac, who was notably the author of the termination memo explaining he was looking to start "fresh" -- are irrelevant to the issue of whether plaintiff has satisfied the second prong of his *prima facie* case.

In fact, there can be no dispute that plaintiff was "actually performing his job" prior to his termination as there is uncontradicted "evidence documenting the plaintiff's longevity in the position at issue (here 14+ years) [and] from testimony from the plaintiff or others that []he had,

in fact, been working within the title from which []he was terminated." Zive, 182 N.J. at 455. In this regard, the evidence shows the following: Plaintiff began working for defendant on November 11, 1996 as a warehouse supervisor in defendant's refrigerated division and spent his entire tenure with defendant in this position until his sudden termination on May 19, 2011. As a warehouse supervisor, plaintiff was responsible for making sure that the men under his supervision carried out all their duties and responsibilities, which primarily involved the loading and unloading of fruit on the trucks. Plaintiff was also responsible for making sure that the work environment was clean and safe, for answering customers' requests, and for performing other work as assigned by his supervisor, Tim Murphy. The performance evaluations plaintiff received from his supervisors throughout his 14+ year tenure were always positive, and in all categories tracked by defendant, plaintiff received such ratings as: "Competent," "Distinguished," and "Exceeds Expectations." Plaintiff was considered by his supervisors to be an "asset to the company." This evidence is more than sufficient to establish the second prong of his *prima facie* case – that "he was actually performing his job."

B. Since Defendant Has Conceded That It Sought Others To Perform The Work Of Supervisor Following The Termination Of Plaintiff And Since There Is An Abundance Of Other Evidence Supporting A Conclusion That Age "Could Have Been" A Factor In Defendant's Decision To Terminate Plaintiff, He Has Also Easily Established The Fourth Prong Of His *Prima Facie* Case.

While defendant argues that plaintiff cannot establish the fourth element of his *prima facie* case because he cannot identify a particular, younger, employee who replaced him, see Defendant's Brief at 37-40, its argument is again based on an incorrect statement of the law. Our courts have explicitly rejected the requirement advanced by defendant, holding, in no uncertain terms that, "it is erroneous, in an ordinary case of age discrimination in employment, to use reference to a particular replacement employee as the only means for satisfying the customary

fourth element of a *prima facie* showing." Petrusky, 342 N.J. Super. at 82. Rather, a plaintiff can satisfy the fourth prong of his *prima facie* case, by, among other ways, showing either that, after his termination, the defendant "sought others to perform the same work" of plaintiff, see Dewees, 380 N.J. Super. at 525-26 or alternatively, that there is "other proof that the discharge was because of his age." See Petrusky, 342 N.J. Super. at 82; see also Williams v. Pemberton Twp. Public Schools, 323 N.J. Super. 490, 502-03 (App. Div. 1999) (holding it "unwise to require a plaintiff to establish unfailingly as part of the prima facie case that plaintiff was replaced by an individual outside the protected class," [and instead that it is sufficient to show only " that the challenged employment decision . . . took place under circumstances that give rise to an inference of unlawful discrimination."); Reynolds v. The Palnut Co., 330 N.J. Super. 162, 168 (App. Div. 2000) (plaintiff "need not show he was replaced by someone sufficiently younger" to make out fourth prong, but need only show that "the employer sought others to perform the work after the complainant had been removed.").

Here, plaintiff can show both that defendant sought others to perform his work after his termination and can also point to more than sufficient proof -- both direct and circumstantial – that "his discharge was because of his age."

As to showing that defendant "sought others to perform the same work" following its decision to terminate him, defendant has now conceded that in the seven months immediately following plaintiff's termination on May 19, 2011, it hired 16 new supervisors. While it turns out that all of the 16 hired were in fact significantly younger than plaintiff, including the six still in their 20's, two in their 30's, and the four in their 40's, see Defendant's Statement of Facts at ¶ 174, that fact, while certainly helpful to plaintiff, is not even necessary to establish his *prima facie* case, as all he needs to show is that, following his termination, "defendant sought others to

perform the same work." Dewees, 380 N.J. Super. at 525-26. Clearly here, that is the case. Then, adding to this picture, over the over the course of the next twelve months, defendant hired an additional three supervisors in the 20's; seven supervisors in their 30's, seven supervisors in their 40's, and three supervisors in their 50's, for a total of 20 more new supervisors hired in 2012. See Defendant's Statement of Facts at ¶174. And again, while all of the supervisors hired by defendant in 2012 were significantly younger than plaintiff, this fact, while bolstering plaintiff's case, is not even necessary to meet the minimal showing required that, "defendant sought others to perform the same work."

Thus, in admitting that it undertook a huge amount of hiring of new supervisors following its termination of plaintiff – an ill-advised admission apparently aimed at showing that it hired some supervisors over the age of 40 and therefore didn't discriminate – defendant has managed to conclusively establish for plaintiff the fourth prong of his *prima facie* case, i.e., that it "sought others to perform the work of plaintiff" following his termination. See Dewees, 380 N.J. Super. at 525-26. Moreover, in pointing to the fact that some of the supervisors hired after the termination of plaintiff were over 40, and therefore in what defendant refers to as in the "age-protected category," see Defendant's Statement of Facts at ¶ 174, defendant only further reveals its misunderstanding of New Jersey law, which has held that, "the fact that one person in the protected class has lost out to another in the protected class is . . . irrelevant so long as he has lost out *because of his age*." Petrusky, 342 N.J. Super. at 82 (internal citations omitted; emphasis in original); see also Dewees, 380 N.J. Super. at 525 ("[u]nless a plaintiff is claiming reverse discrimination, it is unnecessary to show a replacement outside of the protected class in order to satisfy the fourth prong of the *prima facie* case.").

In addition, the evidence has now revealed that, P.J. Isaac, at the time he announced to Leo Holly his decision to terminate plaintiff, identified a particular candidate he was eyeing to replace plaintiff -- a 23-year-old, not yet out of college, by the name of Sam Brown. See Exh. 4, Isaac Memo to Leo Holly, April 29, 2011 (stating that the termination of plaintiff and two other supervisors –one older than plaintiff and one in his 40's – might create "an opportunity" for Brown). While Brown apparently accepted another position before an interview could be arranged with him in regard to the position made available by these terminations, see Exh. L, Isaac Dep. at 323:17-20, the fact remains that Isaac, at the time he decided to terminate plaintiff, was specifically thinking of replacing him with a candidate some 40 years his junior. Such a fact, when added to the evidence of defendant's extensive hiring of dozens of significantly younger supervisors following the termination of plaintiff, is more than sufficient to satisfy plaintiff's minimal burden of proof on the fourth prong of his *prima facie* case.

Moreover, since proof of the fourth prong of the *prima facie* case is "flexible," Cohen v. UMDNJ, 2013 N.J. Super. Unpub. LEXIS 3054 at *9, the courts have recognized yet another method by which a plaintiff can satisfy this prong: by pointing to "other proof that the discharge was because of his age." See Petrusky, 342 N.J. Super. at 82 ("The focal question is not necessarily how old or young the claimant or his replacement was, but rather whether claimant's age, in any significant way, 'made a difference' in the treatment he was accorded by his employer."); see also Cohen, 2013 N.J. Super. Unpub. LEXIS 3054 at *9-10 ("The fourth element is 'flexible' and 'can be satisfied differently in different factual scenarios' including: actions or remarks by decisionmakers that could be viewed as reflecting a discriminatory animus.").

In the present case, there is both direct and circumstantial evidence sufficiently constituting "other proof that the discharge was because of [plaintiff's] age." Most glaring in this regard is the direct evidence of age-based animus in the form of the written justification for plaintiff's termination given in his April 29, 2011 email to Holly and in the verbal comments of supervisor Sean Murphy directly bearing on defendant's decision to terminate plaintiff. Given the very low threshold for making out a *prima facie* case, see Zive, 182 N.J. at 447-48, such evidence easily surmounts that standard.

As to the evidence of the age-based animus lying behind defendant's decision to terminate plaintiff, it was most clearly revealed in the conversation between Sean Murphy -- one of defendant's supervisors and the son of Tim Murphy, plaintiff's immediate supervisor, who was directly involved in the decision to terminate plaintiff – and plaintiff, in which, Sean Murphy told plaintiff that defendant had made the decision to replace him and another 63-year-old supervisor, Rich Shore, with two younger supervisors because the company needed "young blood." See Plaintiff's Counter-Statement of Facts at ¶ 42. The conversation at issue – and Murphy's statement that the Company had decided to terminate plaintiff in order to bring in "young blood" – occurred only two weeks before plaintiff was called in by Tim Murphy, Sean's father, on May, 19, 2011 and informed of his termination and the Company's plan to "move in a new direction." See id. at ¶ 113.

Moreover, a reasonable jury could certainly conclude that the message which Sean Murphy delivered to plaintiff two weeks before his termination --that the Company planned to bring in "young blood" to replace him – was one that ultimately emanated directly from P.J. Isaac. As the courts have observed, "[w]hen a major company executive speaks, 'everybody listens' in the corporate hierarchy," see Morse v. Southern Union Company, 174 F.3d 917, 922

(8th Cir. 1999), and here a jury could certainly find that Sean Murphy had been "listening" to both this father and to P.J. Isaac before he informed plaintiff about his imminent termination. In the week or so immediately prior to Sean Murphy's conversation with plaintiff, Isaac had memorialized his decision to terminate plaintiff in his April 29, 2011 email to Leo Holly, after a long conversation with Tim Murphy, Sean's father, and plaintiff's direct supervisor. In that email, Isaac wrote that, "Tim [Murphy] and I talked for a long time about supervision and *starting fresh* with talent." See Plaintiff's Counter-Statement of Facts at ¶¶ 44-46, and see Isaac April 29, 2011 email to Leo Holly, attached to Barasch Certification as Exhibit 4. In that email, Isaac identified the three older supervisors he and Murphy had decided to terminate – the plaintiff, who was 63 at the time, Rich Scharp, who was 64 at the time, and Don Hardy, who was 42 at the time. Isaac then went on to identify in his email the individual he was interested in bringing in as a consequence of the terminations and apparently as part of the "fresh" start he had in mind: Sam Brown, a 23-year-old right out of college, who was some 40 years younger than both plaintiff and Scharp at the time, and nearly 20 years younger than Hardy.

Such evidence – that a company is replacing an older employee to "bring in young blood" or to "start fresh" -- is precisely the kind of direct and/or circumstantial evidence that the courts have found more than sufficient to satisfy the fourth prong of a plaintiff's *prima facie* case in constituting "other proof that the discharge was because of his age," and indeed is typically sufficient, in and of itself, to require denial of a defendant's motion for summary judgment. See Wright v. Southland Corp., 187 F.3d 1287, 1303-04 (11th Cir. 1999) (finding that evidence that the two decision makers had made comments regarding plaintiff's age and the need to bring in "younger" store managers was "direct evidence" of discrimination from which "a jury could reasonably conclude that, more probably than not, age discrimination was the cause of plaintiff's

termination."); Austin v. Cornell University, 891 F. Supp. 740, 748 (N.D.N.Y. 1995) (a comment by management that it was looking for "fresh help" in the context of deciding to terminate plaintiff was an "age-based stereotype" from which it could be concluded that age was a factor in the decision-making process); Evans v. Sears Logistics Services, 2011 U.S. Dist. LEXIS 141145 at *31 (E.D. Cal. 2011) (comments about the need to bring in "fresh blood" by Company managers "support an inference of discrimination."); Warter v. Bergen-Brunsig Corp., 1998 U.S. App. LEXIS 27111 (9th Cir. 1998) (comments by company executives that company wanted to hire "fresh, young blood," and "young, aggressive, recent college graduates" constitute "direct evidence" of age discrimination sufficient to support a jury verdict.).

II. GIVEN THAT A REASONABLE JURY COULD FIND THAT DEFENDANT'S ARTICULATED REASONS FOR TERMINATING PLAINTIFF ARE NOT "WORTHY OF CREDENCE" AND THEREFORE PRETEXTUAL AND GIVEN THE OTHER CIRCUMSTANTIAL EVIDENCE FROM WHICH A JURY COULD FIND THAT AGE WAS A MOTIVATING FACTOR IN DEFENDANT'S DECISION TO TERMINATE PLAINTIFF, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

"Because the factfinder may infer from the combination of the plaintiff's *prima facie* case and its own rejection of the employer's proffered non-discriminatory reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal its illegal act with the articulated reasons, a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by *either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Thus, if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir.

1994); see also Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551 (App. Div. 1995) (same, *quoting* Fuentes v. Perskie).

Here, plaintiff can easily point to (1) more than sufficient evidence to cast doubt upon defendant's shifting reasons for its decision to terminate plaintiff and (2) direct and circumstantial evidence showing that plaintiff's age, and defendant's desire to replace its older work force with "young blood" was a motivating factor in its decision to rid itself of plaintiff, age 63.

A. In Light of "Inconsistencies, Weaknesses and Contradictions" in the Ever-Changing Explanations Offered by Defendant for Terminating Plaintiff, A Reasonable Jury Could Find Such Explanations Pretext for Age Discrimination.

As our courts have repeatedly recognized, where there is sufficient evidence for the factfinder to disbelieve the reasons put forward by the defendant for its action against plaintiff, summary judgment must be denied. Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 347-48 (App. Div. 1997). "Although what constitutes evidence of pretext varies with the factual circumstances of each case, evidence in an age discrimination case suggesting that the defendant is not "providing the whole story," "prefers younger employees" or behaves inconsistently or contradictorily has been sufficient to rebut a defendant's legitimate, nondiscriminatory reason for the adverse employment action." Greenberg v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 204 (App. Div. 1998). The courts have repeatedly recognized that where the plaintiff can point to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," he has come forward with sufficient evidence of pretext to require that summary judgment be

denied." See Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551(App. Div. 1995), *quoting* Fuentes v. Perskie, 32 F.3d 759, 764-65 (3d. Cir. 1994).[1]

There are numerous ways in which a plaintiff can sufficiently identify such "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in an employer's story in order to survive a motion for summary judgment. First, where the evidence simply suggests that, "the employer is "not providing the whole story," Greenberg, 310 N.J. Super. at 204 and where it has singled out the plaintiff for discipline where others, equally or more responsible, go un-reprimanded, this can constitute strong evidence of pretext. See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 151-52 (2000) (fact that defendant placed only plaintiff on probation where others may have had similar issues constitutes evidence of pretext); Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 350 (App. Div. 1997) (fact that only plaintiff was disciplined, when six other employees had similar records, probative of pretext). Second, if an employer advances ever-changing reasons for the plaintiff's termination, that is "if a plaintiff demonstrates that the reasons given for [his] termination did not remain consistent, beginning at the time they were proffered and continuing throughout the proceedings, this may be viewed as evidence tending to show pretext." Abramson v. William Paterson College, 260 F.3d 265, 284 (3d Cir. 2001); Weiss v. JPMorgan Chase & Co., 332 Fed. Appx. 659, 664-65(2d Cir. 2009) (2d Cir. 2009) ("inconsistent or even post-hoc explanations for a termination decision may suggest discriminatory motive"). Third, where the articulated reason given for a plaintiff's termination is alleged "poor performance," but plaintiff's previous performance reviews show solid

[1] The courts have also stressed that in considering a defendant's motion for summary judgment, it is important not to view "each piece [of evidence] independently," but rather that they must look at the evidence "in its entirety," that is, they "should not consider the record solely in piecemeal fashion, giving credence to individual strands of evidence, [since] a jury would be entitled to view the evidence as a whole." Abramson v. William Paterson College, 260 F.3d 265, 285 (3d Cir. 2001).

performance, the courts have held that such evidence is sufficient for a reasonable jury to find the employer's articulated reason to be pretextual. Giacolletto v. Amax Zinc Co., 954 F.2d 424, 426-27 (7th Cir. 1992). Fourth, where an employer fails to follow its own policies and procedures before terminating a plaintiff – "failing to develop a plan to bring his performance up to acceptable levels, or keeping a written record of any counseling sessions with him" – a reasonable jury can find this to be evidence that "the employer's proffered justification was pretextual." Giacolletto, 954 F.2d at 427; Stern v. Trustees of Columbia University, 131 F. 3d 305, 313 (2d Cir. 1997) ("departures from procedural regularity . . . can raise a question as to the good faith of the process where departure may reasonably affect the decision.").[2]

In the present case, there is sufficient evidence of each of the four types of pretext discussed above from which a reasonable jury could find that defendant's reasons for terminating plaintiff were pretextual.

First, in singling plaintiff out and terminating him for the refrigeration incident that occurred on April 28, 2011 (or as Isaac testified, "accelerating" the decision he has previously reached to terminate plaintiff, see Plaintiff's Counter-Statement of Facts at ¶ 71), while not even disciplining any other employee in the slightest way, despite evidence that they were much more directly responsible for the incident, see Plaintiff's Counter-Statement of Facts at ¶¶ 73-105, defendant has provided a reasonable jury with evidence from which it could find "weaknesses" and "inconsistencies" in defendant's action sufficient to support a finding of pretext. Thus, the

[2] It is important to note that a plaintiff need not discredit all the reasons advanced by a defendant for its actions in order to establish sufficient evidence of pretext. Rather, "if the defendant proffers a bagful of legitimate reasons, and a plaintiff manages to cast doubt on a substantial number of them, the plaintiff need not discredit the remainder. That is because the factfinder's rejection of some of defendant' proffered reasons may impede the employer's credibility seriously enough so a factfinder may rationally disbelieve the remaining reasons, even if no evidence undermining those remaining rationales in particular is available." Fuentes, 32 F.3d at 764 n.7.

evidence shows that the refrigeration issue on April 28, 2011 was first observed by others of defendant's employees at 7:00 a.m. in the morning, even before plaintiff started his shift, but yet they failed to take any action on it. See Plaintiff's Counter-Statement of Facts at ¶¶ 74-76. While defendant attempted to claim that plaintiff was responsible for the problem by leaving the doors to the refrigerated unit open, a reasonable jury could find that claim "not worthy of credence" and therefore pretext for a whole host of reasons, including the following:

(1) Kopper, the customer whose product was at issue on April 28, 2011, identified the cause of the problem as resulting from defendant's "refrigeration units [] blowing out 38 degree air on the fruit" – an issue for which the refrigeration mechanics, and not plaintiff or his department would have been responsible and which would have nothing to do with the doors being left open. See Plaintiff's Counter-Statement of Facts at ¶ 77.

(2) It is the responsibility of the refrigeration mechanics (not the warehouse supervisors such as plaintiff) to monitor the temperatures in the refrigerated boxes by regularly checking the box temperature and recording it on the "Engineer Daily Temperature Report," and, therefore, if there were a temperature problem in the Annex, as defendant claims there was on April 28, 2011, the refrigeration mechanics would know about it before the warehouse supervisors and should have acted on it. See Plaintiff's Counter-Statement of Facts at ¶¶ 79-84;

(3) Rich Ramy, defendant's refrigeration supervisor, admitted that many people, including himself, Joe Macci, the head of defendant's engineering department, and Tim Murphy, plaintiff's supervisor, missed the elevated early morning temperature reading on April 28, 2011 and thus did nothing to remedy the problem with the refrigeration system. See Plaintiff's Counter-Statement of Facts at ¶ 85;

(4) In 2011, Ramy and Macci had acknowledged that there were big problems keeping the temperatures regulated in the Annex, with Ramy describing the existence of an ongoing "operational problem" during the course of normal operations at the Annex wherein a "wind tunnel" effect occurs when the temperature outside the Annex is warm, and that this causes the temperatures in Box 7 to become elevated. See Plaintiff's Counter-Statement of Facts at ¶¶ 89-93.

(5) In mid-March and April of 2011, defendant's refrigeration engineers acknowledged that they were having a difficult time in the Annex, specifically that because it was an old building with old cooling units, they were experiencing trouble keeping the temperatures down to the level demanded by its customer, Kopper. According to defendant's refrigeration department, there were more problems in 2011 than in previous years keeping the temperatures at the proper level in the Annex. See Plaintiff's Counter-Statement of Facts as ¶ 95.

(6) Defendants have admitted that on April 28, 2011, the day in question, none of defendant's management directly observed plaintiff leaving any doors open or disobeying orders to close doors, and no one in management ever bothered to ask plaintiff about his version of events. See Plaintiff's Counter-Statement of Facts at ¶¶ 104-05.

(7) Despite this evidence pointing to the significant responsibility of the refrigeration mechanics and supervisors for the April 28, 2011 incident, and virtually no evidence showing either that plaintiff had actually left the doors open more than necessary to move cargo on April 28, 2011 or that "open doors" were the cause of the problem, not a single one of the refrigeration mechanics or supervisors was disciplined for their role in the events on that date, while defendant singled plaintiff out for termination.

Given that this sort of "disparate treatment" evidence is one of the key kinds of evidence from which a jury could find pretext, see Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 151-52 (2000), a reasonable jury here could certainly find defendant's decision to blame plaintiff – and terminate him -- for the incident of April 28, 2011, to be "pretextual," given that it instituted no disciplinary action of any sort against those the jury could find much more directly responsible for the incident.

As to the second type of evidence on which a jury can base a finding of pretext – a defendant's "shifting explanations" for its decision, see Abramson v. William Paterson College, 260 F.3d 265, 284 (3d Cir. 2001) – there is an abundance of such evidence here as defendant, during the months following plaintiff's termination, offered four different reasons in an effort to justify its decision to terminate plaintiff -- reasons a rational jury might well find not credible. Initially, the only explanation offered plaintiff when he was informed of his termination on May 19, 2011 was that defendant's organization was moving in a "new direction"[3] and he "wasn't included." See Plaintiff's Counter-Statement of Facts at ¶125. Then, six days later, plaintiff was informed by another of defendant's managers, Walter Crown that the reason for his termination was "poor work performance." Id. However, in light of plaintiff's consistent record of good performance, as documented in his performance reviews over this 14 years of employment, see Plaintiff's Counter-Statement of Facts at ¶¶ 6-26, a jury could find this explanation, "not worthy of credence," i.e., pretextual. Thereafter, on June 3, 2011, in response to an inquiry by the Gloucester City Administrator, Leo Holly stated that plaintiff was terminated because of the company's decision to "downsize." See Plaintiff's Counter-Statement of Facts at

[3] As it turned out, the "new direction" defendant's organization was moving to was the hiring of "young blood." See discussion infra in Section IIB of this Brief.

¶ 126. Again, given defendant's aggressive hiring of dozens of new, younger supervisors following the termination of plaintiff, see Plaintiff's Counter-Statement of Facts at ¶¶ 132-39, a reasonable jury could find this explanation –its third, different one -- for plaintiff's termination to be pretextual. Finally, some three months after it terminated plaintiff's employment, and not until after litigation was underway, defendant's counsel offered a fourth reason for its decision to do so – the elevation of the temperature in the refrigerated boxes on April 28, 2011. See Plaintiff's Counter-Statement of Facts at ¶ 127. But again, as discussed above, given that there were others much more directly implicated in the temperature elevation but who were not disciplined at all, yet alone terminated, and given that this reason was not advanced until litigation was underway, a reasonable jury could find this reason pretextual as well. See EEOC v. Sears Roebuck & Co., 243 F.3d 846, 853 (4th Cir. 2001) (Moreover, a factfinder could infer from the late appearance of Sears's current justification that it is a post-hoc rationale, not a legitimate explanation for [defendant's] decision not to hire [plaintiff]"); see also Tyler v. Re/Max Mountain States, Inc., 232 F.3d 808, 813 (10th Cir. 2000) ("We are disquieted . . . by an employer who 'fully' articulates its reasons for the first time months after the decision was made.").

Thus, given the shifting and questionable reasons serially proffered by defendant, after-the-fact, to justify its decision to terminate plaintiff, a jury could certainly conclude that the defendant has engaged in a "strategy of simply tossing out a number of reasons . . . in the hope that one of them will 'stick,'" – a strategy that "could easily backfire" with a jury finding the shifting reasons to be evidence of pretext. Plotke v. White, 405 F.3d 1092, 1103 (10th Cir. 2005); see also Weiss v. JPMorgan Chase & Co., 332 Fed. Appx. 659, 664-65(2d Cir. 2009) (2d

Cir. 2009) ("inconsistent or even post-hoc explanations for a termination decision may suggest discriminatory motive").

As to the third type of evidence from which a reasonable jury can find pretext – an "inconsistency" between the defendant's claim that plaintiff was a "poor performer" and the actual record of plaintiff's good performance, see Giacolletto v. Amax Zinc Co., 954 F.2d 424, 426-27 (7th Cir. 1992), such evidence is present here. As already noted, the performance evaluations plaintiff received from his supervisors were always positive. Indeed, in his performance evaluations, in all categories tracked by defendant, over the 14+ years of his employment with defendant, plaintiff received such ratings as: "Competent," "Distinguished," "Exceeds Expectations." See Plaintiff's Counter-Statement of Facts at ¶¶ 6-7. Indeed, prior to the time Isaac decided to terminate plaintiff's employment in order to "start fresh with talent," see Exh. 4, plaintiff was considered by his supervisors to be an "asset to the company." See Plaintiff's Counter-Statement of Facts at ¶ 8. In this regard, one of plaintiff's supervisors, Kai Scharp, testified that plaintiff was a very good worker who utilized his manpower efficiently, and that he was not an "8 and skate" supervisor who would leave at 5 p.m., but rather that plaintiff would work more than eight hours a day and weekends when necessary. According to Scharp, plaintiff would stay until the job got done. Scharp testified that plaintiff was a "team player" who wouldn't "butt heads" but instead followed orders, even if he disagreed with them. See Plaintiff's Counter-Statement of Facts at ¶¶ 9-10. At no time did Isaac consult with Kai Scharp, one of plaintiff's supervisors, about the decision to terminate plaintiff. See Exh. C, Scharp Dep. at 79:16-80:1. Moreover, Scharp felt so strongly that plaintiff's termination was completely unwarranted because of plaintiff's positive work performance that he refused to inform plaintiff

that he was being terminated or even participate in the meeting at which defendant terminated plaintiff's employment. See Plaintiff's Counter-Statement of Facts at ¶¶ 116-18.

In light of the above demonstrated history of solid performance, a reasonable jury could conclude that defendant's statement that it fired plaintiff for poor performance was "unworthy of credence," and therefore pretextual. Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 350 (App. Div. 1997).

Finally, as to the fourth type of evidence from which a reasonable jury can find pretext – evidence showing that in terminating plaintiff, the defendant failed to follow its own policies, that type of evidence is also present here. For violation of defendant's policies and procedures, the Company Work Rules set forth the following penalties:

• 1st offense	Written warnings
• 2nd offense within six (6) month period of 1st offense. (Not necessarily the same rule as in 1st offense.)	One (1) day suspension
• 3rd offense within six (6) month period of 2nd offense. (Not necessarily the same rule as in 2nd offense.)	Three (3) day suspension
• Subsequent offense within six (6) month period of 3rd offense. (Not necessarily the same rule as in 3rd offense.)	Discharge

See Plaintiff's Counter-Statement of Facts at ¶ 131. However, during the entire course of his employment, plaintiff was never given any warnings or discipline about his performance, and instead, to the contrary, his performance reviews were always positive, rating him as "competent," "distinguished," or "exceeds expectations." See generally Plaintiff's Counter-Statement of Facts at ¶¶ 6 to 21.

Thus, in failing to follow its own policies, and in terminating plaintiff without any warning or progressive discipline, the defendant has given the jury yet another reason to find that the proffered reasons for its decision to terminate plaintiff were pretextual. See Stern v. Trustees of Columbia University, 131 F. 3d 305, 313 (2d Cir. 1997) ("departures from procedural regularity . . . can raise a question as to the good faith of the process where departure may reasonably affect the decision.").

In sum, given the presence in the record of all four types of evidence from which a jury could find that the defendant is not "providing the whole story," see Greenberg v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 204 (App. Div. 1998), there is more than sufficient evidence from which the jury could find the defendant's reasons for terminating plaintiff pretextual, and therefore, defendant's motion for summary judgment must be denied.

B. There is Also Direct And Circumstantial Evidence in the Record From Which A Reasonable Jury Could Find That Plaintiff's Age, And Defendant's Desire To Replace Its Older Work Force With "Young Blood" Was A Motivating Factor In Its Decision To Rid Itself Of Plaintiff, Age 63.

Not only can a plaintiff defeat a defendant's motion for summary judgment by pointing to evidence of pretext, see discussion in Point II A of this Brief above, but there is an alternative method by which a plaintiff can defeat such a motion: by "adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994); see also Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551 (App. Div. 1995) (same, *quoting* Fuentes v. Perskie). Such evidence frequently takes the form of comments or statements by members of defendant's management team which reveal a

discriminatory bias in the defendant's culture, plans, and goals. See Wright v. Southland Corp., 187 F.3d 1287, 1303-04 (based on comments by one manager that plaintiff "might want to cease working as [defendant's] store manager because he was getting too old," and by another manager that defendant was "looking for younger store managers," "a jury could reasonably conclude that, more probably than not, age discrimination was the cause of [plaintiff's] termination.").

While such comments and statements sometimes flow directly out of the mouths of the decisionmakers, the courts have made clear that even where the statements come from other members of management, even if not directly from the decisionmakers themselves, they can be highly probative of a discriminatory motive and sufficient, often in and of themselves, to constitute evidence sufficient to defeat a motion for summary judgment. See Edwards v. Schlumberger-Wells Servs., 984 F. Supp. 264, 282 (D.N.J. 1997) (even though the supervisor making the discriminatory comments was not the decisionmaker, she "was acting within the scope of her employment both when she attended management meetings and when she spoke with [plaintiff] about her employment status. Her comments were warnings given to [plaintiff] concerning the gender-biased attitudes, intentions and policies of [defendant's] management . . . and [t]herefore, [her] comments are . . . admissible as circumstantial evidence to show that discrimination may have played a role in the layoff decision."); see also cases cited within Edwards v. Schlumberger Wells, including the following: Woodman v. Haemonetics Corp., 51 F.3d 1087 (1st Cir. 1995) (where plaintiff's supervisor stated in plaintiff's presence, following management meeting prior to reduction in force, that "these damn people -- they want younger people here," and, "they will be the one[s] that will be successful here," and supervisor acted within scope of employment in attending meeting, supervisor's statement was not hearsay, and district court abused its discretion in excluding plaintiff's affidavit recounting supervisor's

comments); Hybert v. Hearst, 900 F.2d 1050 (7th Cir. 1990) (where plaintiff's supervisor stated that "the people in New York" were bent on replacing older salesmen with younger ones, and "it's a concern of some of the guys in New York . . . .," and "there is a feeling in New York that . . . .," these statements were "direct warnings" from the supervisor "as to the attitude, intentions, and/or policy of higher-ups in management," and plaintiff's testimony about supervisor's statements was not inadmissible double hearsay); Zipf v. American Tel. & Tel. Co., 799 F.2d 889 (3rd Cir. 1986) (where plaintiff relied on supervisor's statements to the effect that defendant was firing plaintiff in order to prevent her from becoming eligible for disability benefits, supervisor's statements were admissible as admissions of defendant's agent because supervisor was designated to deal with plaintiff regarding termination and spoke within scope of agency); EEOC v. Learonal, Inc., 1994 U.S. Dist. LEXIS 13889 (N.D. Ill. Sep. 29, 1994) (statements made by sales manager, who participated in recruiting and gave input into hiring decisions, to plaintiff to effect that defendant wanted to hire young people were admissible as statements about attitudes and intentions of management); Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 1997 U.S. App. LEXIS 27093, 1997 WL 598392 at *3 (3rd Cir. 1997) ("We have recognized that a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives."); see also Velasquez-Garcia v. Horizon Lines, 473 F.3d 11, 18-19 (1st Cir. 2007) (evidence of discriminatory remarks, even by non-decisionmakers, "does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff." (internal citations omitted)).

In the present case, there is significant evidence, in the form of comments and statements directly out of the mouths of defendant's management, including supervisor Sean Murphy, the son of Tim Murphy, plaintiff's immediate supervisor, and P.J. Isaac, the principal decisionmaker in terminating plaintiff, from which a reasonable jury could find that plaintiff's age was a motivating factor in the decision to terminate his employment. Thus, approximately two weeks before plaintiff was terminated, Sean Murphy told plaintiff that he and Rich Shore (the two oldest supervisors at central dock operations) were going to be replaced by two younger supervisors, Nate Cook and James Crate, because defendant needed some "young blood" there. See Plaintiff's Counter-Statement of Facts at 42. When plaintiff questioned Murphy about this, Murphy told plaintiff that Shore was "too old and grumpy" and that it was time for Shore to retire. Id. at ¶ 43. When plaintiff further questioned Murphy about his own employment status, Murphy snickered and responded, "I don't know what to tell you, pal." Id. Previously, Sean Murphy, had spoken freely about how defendant wanted to get rid of the older employees and replace them with younger employees, who would run the organization more efficiently and how defendant didn't want its older employees teaching their ways to the younger employees, and instead defendant wanted to get rid of the ways of the older employees. Id. at ¶¶ 33-34. In discussing defendant's plan to rid itself of its older supervisors, Murphy specifically mentioned plaintiff's name and that of another older supervisor, Rich Shore. Id. at ¶ 35. Murphy often used the term "young blood" in describing this younger work force that the company planned to bring in. Id. at ¶ 36. As it turned out, Sean Murphy was actively involved in both the decision to terminate plaintiff and the hiring of defendant's younger work force following plaintiff's termination. Id. at ¶ 40.

Murphy even promised a young supervisor, James Crate, who was worried about being laid off, that, to the contrary, Crate would never have to look for another job again because he was one of "their" guys, a young guy who would be with defendant's organization for a long time because defendant was getting rid of the older employees. Id. at ¶ 41.

A reasonable jury could certainly find these statements by Sean Murphy, made in the scope of his employment as one of defendant's supervisors, to be "direct warnings" from the supervisor "as to the attitude, intentions, and/or policy of higher-ups in management," see Hybert v. Hearst, 900 F.2d 1050 (7th Cir. 1990), and "warnings given to [plaintiff] concerning the [age]-biased attitudes, intentions and policies of [defendant's] management . . . and [t]herefore, [his] comments are . . . admissible as circumstantial evidence to show that discrimination may have played a role in the layoff decision." See Edwards v. Schlumberger-Wells Servs., 984 F. Supp. 264, 282 (D.N.J. 1997). It is also noteworthy that Sean Murphy was both actively involved in the decision to terminate plaintiff and in the hiring of plaintiff's younger workforce following plaintiff's termination. See Plaintiff's Counter-Statement of Facts at ¶ 40.

Moreover, a reasonable jury could also find that the statements by Murphy directly reflected the attitude of P.J. Isaac, the 32-year-old new manager of defendant's operations and the person principally responsible for the decision to terminate plaintiff. As the courts have observed, "[w]hen a major company executive speaks, 'everybody listens' in the corporate hierarchy," see Morse v. Southern Union Company, 174 F.3d 917, 922 (8th Cir. 1999). Indeed, on April 29, 2011, in a memo sent to defendant's owner, Leo Holly, Isaac memorialized his plan to replace certain of defendant's older supervisors, including plaintiff, in order to "start fresh with talent." See Exh. 4, Isaac memo to Leo Holly dated April 29, 2011. In that memo, in addition to identifying plaintiff for termination, Isaac also identified two other older supervisors,

Richard Shore, age 64, and Don Hardy, age 42, for termination. Id. Moreover, in his April 29, 2011 Memo, Isaac further stated that by terminating plaintiff and the two other older supervisors, it "may create opportunity for Sam Brown," a 23-year-old not yet out of college. Id. Isaac believed that Sam Brown could have been considered for any number of positions, including the three supervisory positions left vacant by terminating plaintiff, Shore, and Hardy. See Plaintiff's Counter-Statement of Facts at ¶¶ 46-50. In describing why he had identified the 23-year-old Brown as a possible candidate to replace the 63-year-old plaintiff, Isaac cited to Brown's accomplishments as a high school and college student athlete ("He was a lineman of the year. So he's got some hutzpah to him, right.") as reasons he would be a good fit in defendant's new "culture." Id. at ¶ 50.

A reasonable jury could find that Isaac's stated desire to "start fresh with talent," particularly when combined with his immediately following that statement in the same memo by indicating an intention to replace plaintiff, age 63, with the 23-year-old Brown, provides further evidence that defendant's decision to terminate plaintiff was motivated by his age. See Austin v. Cornell University, 891 F. Supp. 740, 747-48 (N.D.N.Y. 1995) ("a jury could reasonably infer" that manager's stated desire to bring in "fresh help" was probative of age discrimination).

Thus, not only can plaintiff point to sufficient evidence of pretext to defeat defendant's motion for summary judgment, but the comments and written statements of both Sean Murphy and P.J. Isaac also provide sufficient "circumstantial or direct [evidence] that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes v. Perskie, 32 F.3d 759, 764.

CONCLUSION

For all the foregoing reasons, this Court should deny defendant's motion for summary judgment.

Respectfully submitted,

SCHALL & BARASCH, LLC

By: _____
Richard M. Schall, Esq.
Patricia A. Barasch, Esq.
Attorneys for Plaintiff Harry Heart

Dated: May 9, 2016

THERE'S NO SMOKING GUN:

PROVING DISCRIMINATION & RETALIATION

BY PRETEXT

Susan M. Coler
Halunen Law
80 South 8th Street
IDS Center, Suite 1650
Minneapolis, MN 55405
612/548-5284
coler@halunenlaw.com

www.halunenlaw.com

#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, California

pretext

noun pre·text \ˈprē-ˌtekst\

a reason that you give to hide your real reason for doing something[1]

pretext

articulated in ***McDonnell Douglas*, 411 U.S. 792, 805 (1973)**

a coverup for a racially discriminatory decision

McDonnell Douglas indirect method of proof

The United States Supreme Court case, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) provides a framework for proving discrimination through a process of elimination. It focuses on disproving the most obvious legitimate bases for an employment decision, and then allowing the jury to infer that the decision had an illegal motive. It is an accepted method of proving disparate treatment discrimination and retaliation in both federal and state courts.

[1] http://www.merriam-webster.com/dictionary/pretext

Where we're going

This "nuts and bolts" paper on using pretext to prove discrimination or retaliation contains materials related to substantive challenges we face in mounting cases without a smoking gun, as well as more practical concepts and citations that may also be useful in your day-to-day efforts to get your cases to a jury verdict for your plaintiff. More specifically, the materials include the following:

- ✓ Brief overview of the *McDonnell Douglas* framework (p. 5)

- ✓ Brief discussion – "Is pretext the same as the ultimate question?" (p. 6)

- ✓ Suggestions about ways to "Protect your case" when using evidence of pretext

    - focus on the "ultimate question" for summary judgment (p. 7)
    - make summary judgment about questions of fact, not *McDonnell Douglas* (p. 9)
    - use pretext evidence to challenge business judgment and reasonable belief claims (p. 11)
    - look for a "cat's paw" to provide a link to discriminatory animus (p. 12)
    - present a "whole" story (p. 13)

- ✓ Case Chart: Types of Evidence from which Discriminatory or Retaliatory Motive May Be Inferred (p. 15)

    A. Employer's reason(s) for adverse action (p. 15)
    - Falsity of reasons for defendant's employment decision
    - Shifting reasons for termination
    - Punishment doesn't fit the crime
    - Weakness, implausibility, inconsistency, inadequacy, incoherencies or contradictions in reasons given
    - Reason violates employer's policy
    - Reasons not false but not real reason; post hoc justification
    - Punishment for old crimes
    - Subjective criteria warranting scrutiny; sham criteria

    B. Employer's conduct related to adverse action (p. 19)
    - Deviation from usual business procedures, protocol
    - Misjudgment of plaintiff's performance
    - Lost documents, alteration of forms, perjury
    - Defendant fails to give straight answer regarding who made adverse decision ("hot potato")

- Heightened scrutiny
- Failure to investigate
- Suspicion of mendacity

C. Employer's treatment of plaintiff (p. 22)
- Employer sets up employee for failure
- Employer claims drastic decline in plaintiff's performance
- Pattern of antagonism

D. Employer's treatment of other employees (p. 23)
- Policies unduly burden protected class
- Discriminatory treatment of similarly situated members of protected class
- Better treatment of similarly situated employees outside protected class

E. Employee's qualifications/performance (p. 24)
- Superior qualifications
- Favorable performance history
- Change in view of prior less-than-perfect performance

F. Employer's attitude and motivation (p. 25)
- Past discrimination, other acts evidence
- Biased or stereotypical comments based on protect class
- Suspect business practice or procedure
- Statistics concerning employer's employment policy and practice

G. Timing (p. 27)
- Close temporal proximity
- "Revenge is a dish best served cold"

✓ Attachment 1: "Extricating Title VII from the Quagmire of *McDonnell Douglas: The Plain Language Solution*," by Leslie Lienemann and Celeste Culberth

Acknowledgements: A big thank you goes to Colin Pasterski, law clerk at Halunen Law, who did the bulk of the work on the case chart, to Leslie Lienemann and Celeste Culberth for sharing their paper, and to other NELA members who shared "favorite" pretext cases and other writings, Christian Bagin, John Beasley, Jr. ("Proof of Pretext" posted to NELA on 4/26/16), Nelson Cameron, David Conforto ("Inferring Pretext in Employment Discrimination Cases: A Baker's Dozen" posted at www.confortolaw.com/2016/02/), Samuel Cordes, ("Pretext 2014" posted to NELA on 4/26/16), Courtney Endwright, and Paul Harris.

McDonnell Douglas framework

I	II	III
Plaintiff shows she 1) belongs to protected class; 2) is qualified or satisfactorily performing job; 3) suffered adverse action; 4) adverse action occurred **under circumstances giving rise to inference of discrimination**.	Defendant offers claimed legitimate nondiscriminatory reason for adverse action.	Plaintiff shows that the reasons given are a **coverup** for a discriminatory decision, that is, a **pretex**t for discrimination.

I	III
NOTE : Because facts vary, so does appropriate prima facie proof vary. *McDonnell Douglas*, 411 U.S. at 802, f.n. 13. **TIP**: Do not get bogged down in a narrow 4th element (e.g. avoid articulating 4th element as involving similarly situated employees). To achieve the most freedom in terms of proof, always try to use "**under circumstances giving rise to inference of discrimination**." *See e.g..Jagmohan v. Long Island R.R. Co.*, 622 F. App'x 61, 63 (2d Cir. 2015); *Finashar v. Speedway SuperAmerica LLC*, 484 F.3d 1046, 1055 (8th Cir. 2007); *McDonald v. Boeing Co.*, 602 F. App'x 452, 455 n.2 (10th Cir. 2015) .	Articulations of pretext vary as well: *McDonnell Douglas:* "a coverup for a racially discriminatory decision." 411 U.S. at 805. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981)" plaintiff demonstrates "that the proffered reason was **not the true reason** for the employment decision. . . She may succeed in this either 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." **TIP**: Beware of articulations of pretext that reference "phony reason." Be sure you make clear that a reason can be phony because it is **either** not true or not the real reason.

Is pretext the same as the "ultimate question"?

It is not uncommon for courts to focus primarily on the ultimate question of whether discrimination or retaliation actually motivated an employment decision, rather than to doggedly work through the stages of *McDonnell Douglas*, particularly the fourth element of the prima facie case. This is because there really is not a difference between the questions whether a reason for an adverse action is discriminatory and whether the reason given is a pretext or coverup for discrimination.

One perspective: proceed right to "discrimination *vel non*"

In analyzing a motion for summary judgment in an age discrimination case, Judge Kyle (D. Minn.) explained the reasoning for this approach and outlined the question for summary judgment—whether "there exists a jury question whether Guardsmark discriminated against her due to her age":

> As the Court previously noted, "the McDonnell Douglas test is 'no longer relevant' and 'drops out of the picture' once the defendant has proffered a legitimate, nondiscriminatory reason for its actions. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The question to be decided in that instance is 'discrimination *vel non*.' Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983))." . . . Stated differently, when a defendant "has done everything that would be required of him if the plaintiff had properly made out a prima facie case, *whether the plaintiff really did so is no longer relevant.* The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff." Aikens, 460 U.S. at 715 (emphasis added). Courts, therefore, routinely skip over the *prima facie* case where an employer has proffered a nondiscriminatory explanation for its conduct, proceeding directly to the "ultimate question of discrimination *vel non*." Id.; accord, e.g., EEOC v. Trans States Airlines, Inc., 462 F.3d 987, 992 (8th Cir. 2006) ("Because the record was fully developed on motions for summary judgment, we may turn to the ultimate question of discrimination *vel non*."). The Court will do the same here.
>
> **II. A genuine issue of fact exists**
> Considering the totality of the evidence in the record, including the MDHR's probable-cause determination, and viewing that evidence in the light most favorable to Zacharias, the Court concludes that there exists a

> jury question whether Guardsmark discriminated against her due to her age. Several factors lead the Court to this conclusion.

Zacharias v. Guardsmark LLC, No. 12-174, 2013 WL 136240, *14-16 (D. Minn. Jan. 10, 2013) (emphasis in original).

Another perspective: *McDonnell Douglas* has lost its utility

Some courts have come to question the utility of *McDonnell Douglas* at all. In a concurring opinion affirming reversal of an award of summary judgment in a discrimination case, Judge Wood (7th Cir.) observed:

> The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside. . . If we move on to the indirect method, we engage in an allemande worthy of the 16th century, carefully executing the first four steps of the dance for the *prima facie* case, shifting over to the partner for the "articulation" interlude, and then concluding with the examination of evidence of pretext. But, as my colleagues correctly point out, evidence relevant to one of the initial four steps is often (and is here) equally helpful for showing pretext. Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way."

Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012).

Protect your case—focus on the "ultimate question" for summary judgment

When responding to a motion for summary judgment, plaintiffs are well advised to avoid getting bogged down in technicalities of the *McDonnell Douglas* dance. For example, even though the burden to establish the fourth element of a prima facie case is supposed to be "minimal" (*Sprenger v. S. Fed. Home Loan Bank*, 253 F.3d 1106, 1111 (8th Cir. 2001)), establishing whether differently treated employees are "similarly situated"

is such a difficult hurdle that, except in the best of facts, a plaintiff does not want to have to rely solely on that type of proof.

In the end, the ultimate question for summary judgment is whether plaintiff has demonstrated that a question of fact exists whether discrimination or retaliation occurred and all manner of evidence should be available to make a plaintiff's case.

Practice Tip: don't get bogged down in the prima facie case

Articulating the evidence satisfying the fourth element of a case (circumstances giving rise to an inference of discrimination) and laying out pretext evidence are redundant processes, even though Courts assert that a plaintiff must offer more substantial evidence at the pretext stage than the prima facie case stage, because "evidence of pretext and discrimination is viewed in light of the employer's justification." *Sprenger v. S. Fed. Home Loan Bank*, 253 F.3d 1106, 1111 (8th Cir. 2001).

In my experience, dividing up the evidence or presenting it first as the fourth element and then repeating it again as pretext tends to weaken the overall impact of the evidence.

When possible I structure my argument as follows: begin with a simple paragraph or two recounting plaintiff's membership in a protected class, qualifications for her position, and the adverse action; then go straight to proof related to pretext/discrimination *vel non* with a paragraph such as the following, stating that establishing pretext automatically establishes the *prima facie* fourth element as well.

Transition paragraph moving to ultimate question

> Plaintiff also has offered evidence meeting the final prima-facie requirement—showing that she was discharged under circumstances giving rise to an inference of discrimination. The evidence required here is "minimal." *Sprenger v. S. Fed. Home Loan Bank*, 253 F.3d 1106, 1111 (8th Cir. 2001). Moreover, "evidence of pretext, normally considered at step three of the *McDonnell Douglas* analysis, can satisfy the inference-of-discrimination element of the prima facie case." *Lake v. Yellow Transp. Inc.*, 596 F.3d 871, 874 (8th Cir. 2010). Accordingly, Plaintiff will rely on her proof of pretext to demonstrate that she has satisfied the requirements for a prima-facie claim of sex discrimination. *See id*. at 874-76 (analyzing plaintiff's pretext evidence in lieu of separately analyzing the fourth element of a prima-facie case).

Note: it should be easy to find authority in your jurisdiction that "minimal" proof is required for a *prima facie* case. It may be more challenging to find a citation equivalent

to *Lake*, but you should be able to find cases that, in fact, analyze a plaintiff's pretext evidence in lieu of the fourth step of the *prima facie* case—or find that the fourth element of the *prima facie* case has not been met but still analyze pretext evidence.

Protect your case—make summary judgment about questions of fact, not *McDonnell Douglas*

Compelling arguments can be made that *McDonnell Douglas* is abused to make the plaintiff's burden heavier than required by federal and state Rule of Civil Procedure 56. In an article, "Extricating Title VII from the Quagmire of McDonnell Douglas: The Plain Language Solution,"[2] NELA members Celeste Culberth and Leslie Lienemann make this case. Plaintiff's attorneys need to be vigilant about making summary judgment about whether genuine issues of fact exist and not about whether the plaintiff, for purposes of summary judgment, can definitively prove pretext. Summary judgment, after all, is about whether the *defendant* has shown that plaintiff's evidence, taken as true and disregarding conflicting evidence, could *never* lead a jury to find in Plaintiff's favor.

This vigilance includes making clear that the summary judgment standard in an employment case is no different than for any other case, and a court may not weigh plaintiff's evidence against defendant's evidence in the context of summary judgment. The United States Supreme Court recently reiterated this principle in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).

> By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Id. at 1868.

Similarly, the Eighth Circuit recently reversed the grant of summary judgment in an age discrimination case because the lower court relied on a "possible" construction of the evidence and discounted other possible constructions. *See Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793 (8th Cir. 2014). The panel concluded that a jury must decide whether evidence that is "open to interpretation" reflects discriminatory intent:

[2] Originally published in the The Hennepin Lawyer (March 1, 2013).

> We agree with the district court that at the very least Gurbacki's choice of words—questioning whether "this is the best we can do" after pointing out that they had lost their "oldest and sickest employees," and how Associated Underwriters expected a rate decrease "from the group becoming younger and healthier"—was crude and perhaps an insensitive way to describe the composition of the then-current employees to the health care provider. But, there remains a possibility that these statements could also be a manifestation of discriminatory intent in the process used by Associated Underwriters to be rid of its older (and/or oldest) employees in general. The emails are open to interpretation and on a motion for summary judgment, they must be viewed in the light most favorable to Tramp. One could deduce from Associated Underwriters' own inquiries that it believed that as the age of employees increased so too did health care premiums. Tramp raises a genuine issue of material fact as to what Associated Underwriters supposed about age in making its employment decisions. *Hazen Paper,* 507 U.S. at 612, 113 S.Ct. at 1701.

Id. at 802-803.

It is well within Plaintiffs' prerogative to remind the court about the proper analysis required to award summary judgment to a Defendant in an employment case. The discussion of pretext should not be used to confuse the standard or to require more of the Plaintiff than the rules require.

There are signs, particularly post-*Tolan*, that courts are taking heed of this reality. Eighth Circuit Chief Judge Riley dissented in an affirmance of summary judgment, expressing a "fundamental concern is that the district court in this case made the same mistake that earned the Fifth Circuit a summary reversal earlier this year: the court "failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the non[-]movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 572 U.S. __, __, 134 S. Ct. 1861, 1863, 188 L. Ed. 2d 895 (2014) (per curiam) (first alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))." *Davis v. Ricketts*, 765 F.3d 823, 830 (8th Circuit 2014). And in *Malin v. Hospira, Inc.*, 762 F.3d 552 (7th Cir. 2014), the panel reversed the grant of summary judgment to Title VII and FMLA retaliation defendants, and particularly criticized the defendant for cherry-picking isolated evidence and presenting evidence that "amounted to nothing more than selectively quoting deposition language it likes and ignoring deposition language it does not like." *Id.* at 564-55. In other words, the Defendant was called to task for failing to follow summary judgment principles in mounting its defense.

Protect your case—use pretext evidence to challenge business judgment and reasonable belief claims

In the Eighth Circuit, Defendants are fond of citing *Kiel v. Select Artificials, Inc.*, for the proposition that neither a court nor a jury sits as a "super personnel committee" to review an employer's business decisions. 169 F.3d 1131, 1136 (8th Cir. 1999) (*en banc*). The problem with the citation is that it is incomplete. Here is what the Eighth Circuit said:

> "The employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, *except to the extent that those judgments involve intentional discrimination*." [citation omitted].

Id.

Taken in its entirety, the citation simply acknowledges that evidence of pretext (or direct evidence for that matter) can be used to challenge an employer's supposed legitimate business reason and that where such evidence exists, no deference is warranted to the business reason. This is particularly true in the context of summary judgment where all evidence must be viewed in the light most favorable to the Plaintiff.

Similarly, whether an employer can avoid liability if it reasonably believed that its reason for an adverse action was true, even though it was not, must be tested against all of the evidence. If evidence exists, for example, that an investigation was a "sham" or was not consistent with an employer's policies and procedures or was tainted by a cat's paw, then the reasonableness of an employer's belief should be decided by a jury. "An employer cannot use the 'objective' nature of its proffered criteria for personnel decisions to insulate itself from skeptical inquiry by the trier of fact." *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989).

No doubt similar arguments are made in other circuits and case law should be available to rebut it.

For example, in *Wexler v. White's Fine Furniture*, 317 F.3d 564, 576 (6th Cir. 2003), the Sixth Circuit overturned a district court's "unwarranted deference" to the "business judgment" defense. It noted that a claim of business judgment "is not an absolute defense to unlawful discrimination," and then cited *E.E.O.C. v. Yenkin-Majestic Paint*

Corp., 112 F.3d 831, 835 (6th Cir. 1997) for the proposition that "a decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision."

Similarly, in *Stockwell v. City of Harvey*, 597 F.3d 895, 901-02 (7th Cir. 2010), the Seventh Circuit observed that a business decision survives a pretext challenge only "if the decisionmaker honestly believed the nondiscriminatory reason. Little v. Illinois Dep't of Revenue, 369 F.3d 1007, 1012 (7th Cir. 2004).

Accordingly, where the facts suggest that a business decision or claimed reasonable belief is suspicious, not true, or a pretext for retaliation, that business decision or belief should be tested and its "reasonableness" will not provide an automatic basis for a grant of summary judgment. It is the role of the fact finder to decide "whether the employer gave an honest explanation of its behavior." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-149.

Protect your case—look for a "cat's paw" to provide a link to discriminatory animus

Obviously, it is easier to survive summary judgment and win at trial if you have more direct evidence of bias on the part of key actors. When evaluating evidence it is important to examine the motivations not only of the ultimate decision makers but also of any persons who could have the ability to shape or influence the ultimate decision through such things as a performance review, comment to a decision maker, email with information about a plaintiff, or accusation that the plaintiff did something wrong. In this scenario, the "cat's paw" theory of agency may provide a compelling means of linking the adverse action with a discriminatory motive.

> "In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484 (10th Cir.2006).

Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733, 742 (8th Cir. 2009).

In 2009, the United States Supreme Court affirmed the viability of this theory to establish liability in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

> We therefore hold that if a supervisor performs an act [1] motivated by antimilitary animus [2] that is *intended* by the supervisor to cause an

> adverse employment action,[3] and [3] if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.

Staub at 1194. The Supreme Court further stated it would not hold as a hard and fast rule that an independent investigation per se absolves an employer of liability where a cat's paw is involved:

> We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.

Id. at 1193.

Protect your case—present a "whole" story

It is a common mantra in summary judgments briefs and orders that the court must consider "the record as a whole" when deciding whether a case should go to the jury. *See e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587(1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011). Nonetheless, employers will seek to isolate each kind of evidence as insufficient by itself to establish pretext or discrimination *vel non*. It is up to plaintiff's counsel to resist such an attack. The individual pieces of evidence do not necessarily have to support the case on their own. Together they must provide a basis on which the court can find questions of fact requiring a jury to decide whether the reasons given for an adverse action are, in fact, a coverup for a discriminatory or retaliatory motive.

Below are some court expressions of this principle:

- *Ahmed v. Johnson*, 752 F.3d 490, 497 (1st Cir. 2014); *see also Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012), *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (looking for a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination").

- *Titus v. Elgin, Joliet & Easter*, 2005 WL 1432193 (N.D. Ind. 2005) (citing *Troupe v. May Dep't Store Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (noting "each type of circumstantial evidence can be used on its own or in conjunction with the other types of circumstantial evidence to establish discrimination").

- *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 102 (2nd Cir. 2001) (observing that it is the combination of factors, any of which judged on their own would be much less compelling, that provides sufficient evidence to allow a reasonable jury to conclude that an employer's explanation for some adverse action is a pretext for impermissible discrimination).

- *Jennette v. Hous. Auth.*, 2015 U.S. Dist. LEXIS 64458 at *12 (D. Conn.) (affirming that, taking the pieces of evidence together, plaintiff can "create a genuine dispute of material fact as to pretext, even though none of these pieces individually would").

But, never forget that it is up to plaintiff's counsel to put together a compelling "whole" story that creates a genuine issue of fact that discrimination or retaliation is the real reason for the employer's conduct. How this is done will depend on the facts of the case. Be wary, though, of just presenting the relevant evidence as a laundry list without a story to hold it together.

Finally, when preparing for trial, remember that the jury neither knows nor cares about *McDonnell Douglas*. They want a smoking gun. You have to give them a story that persuades them that the reasons given for an adverse action are, in fact, a coverup for a discriminatory or retaliatory motive.

Case Chart: Types of Evidence from which Discriminatory or Retaliatory Motive May Be Inferred

Navigating the evidence in employment cases is a challenge for plaintiffs. Understanding the kinds of evidence that may be probative of liability provides a guide for all that can be useful in evaluating the strengths and weaknesses of cases. There is no cookie-cutter approach, but understanding the nature and breadth of the evidence will hopefully enhance efforts to resolve cases short of full-blown litigation.

The chart below is not an exhaustive list of cases referencing these types of evidence, but a sampling. The intent is to give you an idea of the types of evidence that might be available and the types of language or words that may be useful in a search to find similar cases in your jurisdiction.

A. EMPLOYER'S REASON(S) FOR ADVERSE ACTION	
Falsity of reasons for defendant's employment decision	• *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (trier of fact may "infer the ultimate fact of discrimination from the falsity of the employer's explanation"; "trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"). • *Fuentes v.* Perskie, 32 F.3d 759, 764 n.7 (3rd Cir. 1994) (where "bagful" of reasons proffered, plaintiff need not cast doubt on all of them; rejection of some reasons may sufficiently impede credibility that factfinder may disbelieve the employer entirely). • *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 508 (7th Cir. 2014) (pretext question is "whether the employer honestly believed the reasons it has offered to explain the discharge"). • *Smith v. URS Corp.*, 2015 U.S. App. LEXIS 17832 at *20-21 (8th Cir.) (cites *Reeves*). • *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006) (plaintiff can rebut the employer's claimed reason by showing the reason has no factual basis). • *Beito v. Westwood Place, Inc.*, 2014 U.S. Dist. LEXIS 92326 at *77(D. Minn.) (jury can find discrimination if several of proffered reasons are false where employer said he relied on all reasons).

Shifting reasons for termination	• *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 449 (1st Cir. 2009) (finding fact that defendant waited a year to claim that plaintiff was terminated for stealing and selling company property supports a finding that "the reason it finally settled on was fabricated"). • *Abramson v. William Paterson Coll.*, 260 F.3d 265, 284 (3rd Cir. 2001) (pretext may be shown where reasons given for termination did not remain consistent, beginning at the time they were proffered and continuing throughout the proceedings). • *Morris v. City of Chillicothe*, 512 F.3d 1013, 1019 (8th Cir. 2008) ("Pretext may be shown with evidence that… the employer's preferred reason for its employment decision has changed substantially over time.") • Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1121, 1124 (8th Cir. 2006) (changing reasons raise inference that employer was "dissembling" to cover up impermissible motive). • *Beito v. Westwood Place, Inc.*, 2014 WL 3101321, at *18 (D. Minn. July 8, 2014) (changes probative where employer gave a number of reasons during her termination meeting, raised an entirely new set of issues in response to the unemployment commission and then raised yet different issues in response to EEOC charge). • *Zacharias v. Guardsmark, LLC*, 2013 U.S. Dist. LEXIS 3787 at *6 (D. Minn.) (substantial changes over time support pretext finding). • *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1194 (11th Cir. 2004) (shifting reasons allow jury to question employer's credibility and resulting damage to credibility allows jury to infer reasons offered are coverup). • *Walker v. Johnson*, 798 F.3d 1085, 1094 (D.C. Cir. 2015) "shifting and inconsistent justifications are 'probative of pretext' [citation omitted]"; but minor variations insufficient)
Punishment doesn't fit the crime	• *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290-91 (7th Cir. 1999) (where employee terminated for eating a handful of chips belonging to another employee "strikes us as swatting a fly with a sledge hammer" . . . this offense does not pass the straight-face test, especially in light of two additional facts: first, Wal-Mart did not terminate a Caucasian employee who also committed gross misconduct by failing to report to work as scheduled and then lying to her supervisor twice about

	the reason she was absent"). • *Raddatz v. Standard Register Co.*, 31 F.Supp.2d 1155, 1160 (D. Minn. 1999) (plaintiff violated written company policy, but transgression was minor in light of plaintiff's performance; trier of fact could conclude that the employer's decision to terminate plaintiff, rather than imposing some less severe discipline or imposing no sanction at all, was contrived).
Weakness, implausibility, inconsistency, inadequacy, incoherencies or contradictions in reasons given	• *Zann Kwan v. Andalex Group*, 737 F.3d 834, 846 (2d. Cir. 2013) ("weaknesses, implausibilities, inconsistencies, or contradictions" in reasons can prove retaliatory motive) • *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 306 (3rd Cir. 2007) (weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons could allow reasonable factfinder to rationally find them "unworthy of credence"). • *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 897 (3rd Cir. 1993) (employer exaggerated absences and penalized employee for excused absence). • *Laxton v. Gap, Inc.*, 333 F.3d 572, 580 (5th Cir. 2003) (pretext found where many reasons could be challenged as untrue, not warranting termination, lacking documentation, and for conduct actually authorized by employer). • *Greengrass v. International Monetary Systems, Ltd.*, 776 F.3d 481, 487 (7th Cir. 2015) ("weaknesses, implausibilities, inconsistencies, or contradictions" may evidence pretext). • *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1023 (8th Cir. 1998) (employee may show pretext by evidence show employer's "characterizations were at best carelessly inaccurate and at worst willfully exaggerated"). • *Daoud v. Avamere Staffing & Home Care*, 336 F.Supp.2d 1129, 1137 (D. Or. 2004) (employer's offered reasons based on incidents that occurred, but defendant allowed plaintiff to continue caring for patients after complaint; adverse action occurred only after accommodation request; delay raises reasonable inference the complaint did not trigger plaintiff's termination).
Reason violates employer's policy	• *Lake v. Yellow Transp., Inc.*, 596 F.3d 871 (8th Cir. 2010) (application of attendance policy to plaintiff violated that policy).

Reasons not false but not real reason; post hoc justification	• *Yazdian v. ConMed Endoscopic Technologies, Inc.*, 793 F.3d 634, 650 (6th Cir. 2015) (pretext may be established by rebutting reasons; disproving reasons not required). • *Wierman v. Casey's General Stores*, 638 F.3d 984, 995 (8th Cir. 2011) (doubt as to legitimacy of motive may be sufficient even if claimed reason is not contradicted or disproved). • *Daoud v. Avamere Staffing & Home Care*, 336 F.Supp.2d 1129, 1137 (D. Or. 2004) (employer's offered reasons based on incidents that occurred, but evidence shows plaintiff not told about alleged complaints or warned about her job performance and timing of criticisms came immediately after accommodation request).
Punishment for old crimes	• *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Ath. Dep't,* 510 F.3d 681, 693 (7th Cir. 2007) (highly praised coach was never told that prior use of foul language, claimed unsafe driving, and criticism of administration for a single decision could be basis for dismissal; court found "post hoc explanations, delay, exaggeration, and unusual conduct more than enough to create a question of fact concerning the legitimacy of its explanations for Peirick's termination"). • *Lake v. Yellow Transp., Inc.*, 596 F.3d 871 (8th Cir. 2010) (the employer pointed to plaintiff's attendance record while a casual worker to support the termination, but employer promoted plaintiff from casual to probationary status based upon performance). • *Antonich v. United States Bank Nat'l Ass'n*, 2015 U.S. Dist. LEXIS 106565 at *31-32 (D. Minn.) ("Where an employer tolerates an employee's undesirable conduct or behavior for an extended period of time, and then takes adverse action only after the employee engages in protected conduct, a reasonable jury may infer that the adverse action is based on the protected conduct.") • *Beito v. Westwood Place, Inc.*, 2014 U.S. Dist. LEXIS 92326 at *77 (D. Minn.) (finding pretext when the employer's list of 19 reasons for the employee's termination included alleged misconduct nearly two decades old, for which the employee was never disciplined until her termination.)

Subjective criteria warranting scrutiny; sham criteria	• *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988) (subjective criteria used in making warehouse promotion decisions, including such intangibles as correct attitude and the desire to "get ahead"; jobs not posted; seniority counted little; no written guidelines or posted qualifications). • *Hilde v. City of Eveleth*, 777 F.3d 998, 1008 (8th Cir. 2015) (plaintiff's "extremely low training-and-employment score, without justification, is further evidence of pretext when compared to the higher scores of other finalists with less training and experience"). • *Wingate v. Gage Cnty. Scho. Dist. No. 34*, 528 F.3d 1074, 1080 (8th Cir. 2008) (noting that subjective criteria are "easily fabricated"). • *McKay v. U.S. Dep't of Transp.*, 340 F.3d 695, 700 (8th Cir. 2003) (finding that probative evidence that the interview process was a sham may be used in considering whether reasoning is pretext for discrimination). • *Zacharias v. Guardsmark, LLC,* 2013 U.S. Dist. LEXIS 3787 at *6 (D. Minn.) (giving subjective reasons deserve greater scrutiny as they are easily fabricated).
B. EMPLOYER'S CONDUCT RELATED TO ADVERSE ACTION	
Deviation from usual business procedures, protocol	• *Brennan v. GTE Gof't Sys. Corp.*, 150 F.3d 21, 29 (1st Cir. 1998) (noting that deviation from established policy or practice may be evidence of pretext). • *Wishkin v. Potter*, 476 F.3d 180, 187 (3rd Cir. 2007) (pretext found where company had never routinely scheduled multiple employees for fitness for duty examinations but did so for disabled employees, who had previously been given warnings about their job status). • *Hilde v. City of Eveleth*, 777 F.3d 998, 1007 (8th Cir. 2015) (failure to follow policies particularly compelling "when the departure affects only the affected candidate"). • *Trujillo v. PacifiCorp.*, 524 F.3d 1149, 1160 (10th Cir. 2008) (pretext found where unusual audit procedures used to find terminable offense and others were not terminated for same or equally serious offences). • *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 854 (8th Cir. 2012) (pretext may be shown where employer failed to follow its own policies).

Misjudgment of plaintiff's performance	• *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1023 (8th Cir. 1998) (employee may show pretext by evidence show employer's "characterizations were at best carelessly inaccurate and at worst willfully exaggerated") • *Fishbach v. D.C. Dept of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question of whether its stated reason is a pretext masking prohibited discrimination.")
Lost documents, alteration of forms, perjury	• *Hilde v. City of Eveleth*, 777 F.3d 998, 1007 (8th Cir. 2015) (only plaintiff's interview scores were altered) • *Barrett v. Salt Lake Cnty.*, 754 F.3d 864 (10th Cir. 2014) (records showing claimed poor performance were lost) • *Zacharias v. Guardsmark, LLC*, 2013 U.S. Dist. LEXIS 3787 at *7 (D. Minn.) (discriminatory motive may be inferred from Defendant's altering of forms because dishonesty suggests employer is attempting to hide discriminatory intent). • *Nese v. Nordic Constr. Servs., Inc.*, 2004 U.S. Dist. LEXIS 9494, at *14 (N.D.Ill.) (finding pretext where documents altered).
Defendant fails to give straight answer regarding who made adverse decision ("hot potato")	• *Cockburn v. Rockwell Automation, Inc.*, 234 Fed. Appx. 112, 122 (6th Cir. 2007) (allowing inference that employer is "trying to hide something" when it "cannot give a straight answer about who recommended [the employee] for the RIF list"). • *Tinker v. Sears*, 127 F.3d 519, 523 (6th Cir. 1997) (concluding that inconsistent testimony as to "who was actually responsible for the [adverse employment act] against the plaintiff raised a genuine issue of material fact as to pretext"). • *Paup v. Gear Products Inc.*, 327 Fed. Appx. 100, 112 (10th Cir. 2009) (finding pretext from the defendant's failure to name individuals who made the challenged employment decision; noting that "a crucial factor" in the process was "left a mystery"). • *Zacharias v. Guardsmark, LLC,* 2013 U.S. Dist. LEXIS 3787 at *6 (D. Minn.) ("A jury could reasonably determine that [the plaintiff's] supervisor's game of 'hot potato' was an attempt to dissemble for discrimination.")
Heightened scrutiny	• *Hamilton v. GE*, 556 F.3d 428, 436 (6th Cir. 2009) (finding pretext where GE increased surveillance of plaintiff's work after he filed EEOC complaint and then waited for opportunity to fire him: when an "employer . . . waits for a

	legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee," the employer's actions constitute "the very definition of pretext"). • *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1155, 1160 (8th Cir. 2003) (evidence employer required more extensive documentation of pregnant employee's medical appointments than those of non-pregnant employees, in addition to employee comments, supports the jury's finding of pregnancy discrimination) • *Trujillo v. PacifiCorp.*, 524 F.3d 1149, 1160 (10th Cir. 2008) (pretext found where unusual audit procedures used to find terminable offense). • *Lundy v. Park Nicollet Clinic*, No. 12-2443 (JRT/SER), 2014 U.S. Dist. LEXIS 98378 at *37 (D. Minn. July 21, 2014) (finding evidence of retaliatory conduct where plaintiff faced higher scrutiny than she faced before engaging in the protected activity").
Failure to investigate	• *Humphries v. CBOCS W.*, 474 F.3d 387, 407 (7th Cir. 2007) (shoddy investigation alone is insufficient, but with evidence of a set-up as well, the quality of the investigation "may have some bearing on the truthfulness of [defendant]s proffered reasons for terminating [plaintiff]" and constitutes "the sort of disputed factual issues that a jury should sort out." • *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1160 (10th Cir. 2008) (employer failed to interview key witnesses). • *Topper v. Northwest Mechanical, Inc.*, 968 F. Supp.2d 1001, 1022-1027 (S.D. Iowa 2013) ("The way in which an employer conducts a decisionmaking process may give rise to an inference of discrimination, giving an employee the right to proceed to trial. … Certain shortcomings may suggest that the investigation was so limited it is unlikely it was conducted in good faith.").
Suspicion of mendacity	• *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. ").

C. EMPLOYER'S TREATMENT OF PLAINTIFF	
Employer sets up employee for failure	• *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989) (evidence of failure to train for a position followed by criticism for unsatisfactory performance may be evidence of pretext). • *Humphries v. CBOCS W.*, 474 F.3d 387, 407 (7th Cir. 2007) (evidence of a setup can support inference that claimed terminable offense "was a fabrication to justify his firing"). • *Willnerd v. First Nat'l Neb., Inc.*, 558 F.3d 770, 779 (8th Cir. 2009) (imposition of unattainable goal may be viewed by jury as "an effort to set up an employee for failure"). • *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (employer cannot create immunity from liability by deliberating handicapping an employee's performance and then cite that performance as the basis for the adverse action). • *Tate v. Orthopaedics-Indianapolis*, P.C., No. 1:12-cv-1188-WTL-DKL, 2014 U.S. Dist. LEXIS 36050 at *18 (S.D. Ind. Mar. 19, 2014) (employer moved employee to position where she was unqualifiedl and failed to give her feedback like that given to others).
Employer claims drastic decline in plaintiff's performance	• *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61 (3d. Cir. 1996) (evidence of pretext where employer claimed a drastic decline in performance in a review that had never been given to plaintiff.) • *Duchon v. Cajon Co.*, 791 F.2d 43, 40 FEP 1432 (6th Cir. 1986) (summary judgment in favor of employer reversed where discharge for alleged poor performance was inconsistent with employee's never having been warned about her performance and having received regular wage increases). • *Morales v. Merit Systems Protection Board*, 932 F.2d 800 (9th Cir. 1991) (precipitous decline, where a plaintiff performs well for a number of years and then is suddenly written up, or demoted or fired, can indicate pretext.)
Pattern of antagonism	• *Jenson v. Potter*, 435 F.3d 444 (3d. Cir. 2006) (adverse action, temporal proximity, and pattern of antagonism may suffice to show retaliatory motive).

D. EMPLOYER'S TREATMENT OF OTHER EMPLOYEES	
Policies unduly burden protected class	• *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (employer's imposition of policies that create a significant burden on pregnant workers, when the employer's legitimate, non-discriminatory reasons are not sufficiently strong to justify the burden, give rise to an inference of intentional discrimination). • *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 874-875 (11th Cir. 1986) (finding that the employer's idiosyncratic or questionable policies related to women as truck drivers raised an inference that the company was deliberately trying to exclude women)
Discriminatory treatment of similarly situated members of protected class	• *Spring/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008) (no *per se* exclusion of "other act" evidence). • *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1285-86 (11th Cir. 2008) (discrimination against other employees may be used to show intent to discriminate). • **See "Past discrimination, other acts evidence"**
Better treatment of similarly situated employees outside protected class	Note: Most circuits have established a very demanding standard for proving that employees are similarly situated, generally requiring similarity in all material respects. *See e.g. Eaton v. Indiana Dep't of Corr.*, 657n F.3d 551, 556 (7th Cir. 2011) (same supervisor, same employment standards and had engaged in conduct similar to plaintiff). *See* Beasley, "Proof of Pretext" at 19-21 (for circuit review). • *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 210 (2nd Cir. 1990) (reversing district court where plaintiff presented considerable evidence alleging that carriers who had committed more serious safety infractions and more outrageous episodes of disrespect had not been threatened with termination unless the violator also had filed EEO complaints). • *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1085 (8th Cir. 2013) (comparator employee need not have engaged in the exact same offense, only one of "comparable seriousness"). • *Lynn v. Deaconess Med. Ctr.-W. Campus*, 160 F.3d 484, (8th Cir. 1998) *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (finding employee accused of sleeping on the job comparable to an employee accused of various performance deficiencies because to hold otherwise "would result in a scenario where evidence of

	favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination"; also finding that plaintiff's different disciplinary history at least created "a factual dispute as to whether the differences in [comparator's] disciplinary history and his were due to gender discrimination"). • *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) (holding comparable employees must be similarly situated "in all relevant aspects" such as being involved or accused of the same offense and then disciplined in different ways). • *Tate v. Orthopaedics-Indianapolis*, P.C., No. 1:12-cv-1188-WTL-DKL, 2014 U.S. Dist. LEXIS 36050 at *18 (S.D. Ind. Mar. 19, 2014) (noting "similarly situated test "is a flexible, commonsense inquiry whose requirements vary from case to case," citing *Barricks v. Eli Lilly & Co.*, 481 F.3d 556, 560 (7th Cir. 2007), and noting the standard "generally" requires same supervisor, standards and conduct)
E. EMPLOYEE'S QUALIFICATIONS/PERFORMANCE	
Superior qualifications	• *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (superior qualifications of the plaintiff for a position may suffice, to show pretext, and if no reasonable employer could have concluded that qualifications were not superior, "this evidence alone could support a finding of discrimination"). • *Hilde v. City of Eveleth*, 777 F.3d 998, 1007 (8th Cir. 2015) (altering scores to level the qualifications of candidates is evidence of pretext).
Favorable performance history	• *Sala v. Hawk*, 481 F.App's 729, 734 (3rd Cir. 2012) (offering of 25 reasons for adverse action after positive annual employment evaluation raises "serious questions of material fact"). • *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1084 (8th Cir. 2013) (strong evidence of positive performance may provide sufficient evidence of pretext if reason for adverse action is performance). • *Phillips v. Mathews*, 547 F.3d 905, 913 (8th Cir. 2008) (quoting *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006)) (pretext may be shown by receipt of a favorable review shortly before adverse action). • *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915 (8th Cir. 2000)(prior performance ratings plus "stray remarks" sufficient for

	pretext). • *Lake v. Yellow Transp. Inc.*, 596 F.3d 871 (8th Cir. 2010) (when a plaintiff's performance is at issue in a case, courts do not require her to disprove the employer's reason for termination at the prima facie stage because to do otherwise would collapse all of *McDonnell Douglas* into the prima facie case).
Change in view of prior less-than-perfect performance	• *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973) (employer"may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races"). • *Lake v. Yellow Transp. Inc.*, 596 F.3d 871 (8th Cir. 2010) (noting that Title VII "does not protect merely the [female] worker who is perfect from the standpoint of h[er] employer.... It protects, as a practical matter, the imperfect [female] worker from being treated worse than the imperfect" male worker"). • *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 332-33 (3rd Cir. 1995) (pretext found where successful salesperson had received criticisms of other aspects of job performance over the 23 years of his employment and critiques only came into play for termination when he became an older employee; court found evidence cast "sufficient doubt on Quaker State's contention that Brewer was discharged because of poor job performance in areas which the company had long overlooked or tolerated"). Note: case contains numerous citations to other circuits for same proposition.
F. EMPLOYER'S ATTITUDE AND MOTIVATION	
Past discrimination, other acts evidence	• *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (general policy and practice with respect to minority employment relevant to proving race discrimination). • *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 111-12 (3rd Cir. 1999) (noting that discriminatory harassment and treatment "stem from similar motives" and finding testimony about general atmosphere of sexism relevant to disparate treatment and retaliation claims because it is "quite probative of whether decisionmakers at the ACPD felt free to take sex into account when making employment decisions" and "because harassers may be expected to resent attempts to curb their male prerogatives"). • *Hawkins v. Technical Center*, 900 F.2d 153, 155-156 (8th Cir. 1990) (holding that an employer's past discriminatory policy or practice may well illustrate that the employer's asserted

	reasons for disparate treatment are a pretext for intentional discrimination). • *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) ("unflattering testimony about the employer's history and work practices . . . may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive").
Biased or stereotypical comments based on protected class ***May also be direct evidence in some cases***	• *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-153 (2000) (biased statements by decision maker probative of pretext even if not made in context of adverse decision). • *Burrows v. Twp. Of Logan*, 415 Fed. Appx. 379, 384 (3d Cir. 2011) (biased statements by non-decisionmakers can be used to support circumstantial case of discrimination). • *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 332-33 (3rd Cir. 1995) (executive's statement relevant to proving age discrimination: "two of our star young men in their mid-40s. That age group is our future"). • *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3rd Cir. 1989) ("When a major company executive speaks, 'everybody listens' in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman."). • *Laxton v. Gap*, 333 F.3d 572, 583 (5th Cir. 2003) (supervisor's statement about impact of employee's pregnancy found as evidence of discriminatory motive: "You realize this means that I have to pull other management out of other stores to cover your store, when, basically, you know, this store should have been taken care of. What management do you think we're supposed to use?"). • *Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1019 (8th Cir. 2011) (Pretext can be shown through "biased comments by a decisionmaker.") • *Beito v. Westwood Place, Inc.*, 2014 WL 3101321, at *22 (D. Minn. July 8, 2014) (finding that age-based comments would permit reasonable jury to conclude that a pervasive attitude of age discrimination or a preference for younger employees existed at employer and influenced the supervisor's termination decision).

Suspect business practice or procedure	• *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1345-46 (11th Cir. 2011) (indication of "race" on discipline matrix indicative that "race was pertinent to the discipline decisions made, and Lockheed has not explained satisfactorily why").
Statistics concerning employer's employment policy and practice	• *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2nd Cir. 1990) ("Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive.") • *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 611 (8th Cir. 1997) (finding company-wide statistics as "usually admissible as probative circumstantial evidence of pretext to be considered with other evidence of pretext"). • *MacDissi v. Valmost Indus., Inc.*, 856 F.2d 1054, 1058 n.3 (8th Cir. 1988) (acknowledging that statistics may be "useful in establishing the presence or absence of a general climate of [discrimination]").
G. TIMING	
Close temporal proximity	• *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 311 (3rd Cir. 2012) (finding timing pertinent to pretext even though performance issues had basis in fact where issues were known prior to taking leave, but employee terminated only after taking leave). • *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1019 (8th Cir. 2005) (noting it is rare that temporal proximity alone suffices to create an inference of discrimination, and stating that generally additional evidence needed to create genuine fact issue). • *Arraleh v. County of Ramsey*, 461 F.3d 967 (8th Cir. 2006) (observing that temporal proximity (3 weeks) may be sufficient for *prima facie* causation, but more is needed to prove pretext). • *Lobato v. New Mexico Environmental Dept.*, 733 F.3d 1283, 1293 (10th Cir. 2013) ("protected conduct closely followed by adverse action" may be sufficient to prove retaliation)

"Revenge is a dish best served cold"	• *Hamilton v. GE*, 556 F.3d 428, 436 (6th Cir. 2009) (We have held that when an "employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee," the employer's actions constitute "the very definition of pretext." Jones, 488 F. 3d at 408. Hamilton has sufficiently alleged that this is exactly what happened to him; GE increased its surveillance of his work after he filed an age-discrimination complaint with the EEOC and then GE waited for an opportunity to fire him."). • *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 891, n.6 (7th Cir. 1996) ("If the plaintiff has evidence from which one may reasonably infer that her former employer waited in the weeds for five or ten years and then retaliated against her for filing an EEOC charge, we see no difficulty with allowing the case to go forward."). • *Eversole v. Spurlino Materials of Indianapolis, LLC*, 804 F. Supp. 2d 922, 935 (S.D. Ind. 2011) (issues over several years). • *Krutchen v. Zayo Bandwidth Ne., LLC*, 591 F. Supp. 2d 1002, 1015-1016 (D. Minn. 2008) (five years). • *Kelly v. Sulfsted*, 1:06-CV-0455, 2008 WL 886140 (S.D. Ohio Mar. 28, 2008) (two years).

Extricating Title VII from the Quagmire of *McDonnell Douglas*: The Plain Language Solution

Leslie L. Lienemann and Celeste E. Culberth
Culberth & Lienemann, LLP

For decades, state and federal courts have imposed upon employment discrimination plaintiffs the *McDonnell Douglas* "test," an evidentiary framework originally intended to provide to a plaintiff an indirect method of proving discrimination under Title VII of the Civil Rights Act of 1964 where the plaintiff did not have access to so-called "direct" evidence of the discrimination.[i] Over the years, the courts have turned a doctrine intended to be an optional method of demonstrating discrimination into a rigid rule requiring a plaintiff to vault an ever-heightening evidentiary bar by having to prove "pretext" in order get to trial. The result has been that plaintiffs lose their cases at summary judgment based on an evidentiary standard not rooted in the text, legislative history or the purpose of the statute.[ii] Plaintiffs lose under a test deemed inappropriate for use as an instruction in a jury trial. Plaintiffs lose with no opportunity to have the credibility of the employers' recitation of its reasons questioned or challenged, while the plaintiffs' testimony is submitted to the court in the form of deposition cross-examination, with direct testimony by affidavit criticized as being "self-serving."

The pendulum has swung so far in the direction of dismissing discrimination cases at summary judgment that some courts and legislatures have begun to reject the rote mantra of the *McDonnell Douglas* standard, instead viewing the evidence produced by a plaintiff in its totality as required under the Rule 56 standard, where the burden is on the moving party to demonstrate a lack of evidence for the statutory elements of the claim.

Misinterpretation of *McDonnell Douglas*

The *McDonnell Douglas* standard was not meant to be a recitation of elements of a claim, but rather one method an employee may use to set forth evidence of discrimination under Title

VII of the Civil Rights Act of 1964. In the *McDonnell Douglas* case, the Court stated that a *prima facie* case of discrimination:

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

Under the much-repeated *McDonnell Douglas* "framework," setting forth evidence of a *prima facie* case creates a "rebuttable presumption" of discrimination or retaliation. [iv] The "burden of production" then shifts to the employer to articulate a legitimate non-discriminatory reason for the action.[v] If the employer satisfies its burden (which it always does, making the *prima facie* case always null), then presumption of discrimination "drops from the case."[vi] The burden then shifts to the employee to show "pretext." "Pretext" has been defined in an ever-narrowing fashion, holding that a showing that the employer's articulated reason is false is not sufficient, and requiring an employee to demonstrate that the employer's articulated reason is not only false, but also that there is additional evidence proving discrimination.[vii] The Eighth Circuit holds that the "plaintiff has the burden of persuasion at all time."[viii] The Eighth Circuit has not explained why the plaintiff has the burden of persuasion at summary judgment, when Rule 56 places that burden on the moving party.

Until recently, this now "familiar" three-step burden shifting paradigm had been required by state and federal courts in nearly all cases of discrimination or retaliation. Yet, nowhere in the *McDonnell Douglas* opinion did the Supreme Court suggest that this method of making a *prima facie* showing of discrimination **must** be used either in discrimination or in retaliation cases. To the contrary, the Court noted: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily

applicable in every respect to differing factual situations."[ix] It is merely one method of proof that a plaintiff may choose to use to show discrimination or retaliation.

Yet, the application of the *McDonnell Douglas* framework is routinely used by state and federal courts at summary judgment to deprive employees of their right to a jury trial. This was not the intent of the Supreme Court. The *McDonnell Douglas* framework was not designed to be an obstacle to trial for the employee. Quite the opposite, it was intended to assure that "the employee has his day in court despite the unavailability of direct evidence."[x]

This one phrase in the *McDonnell Douglas* opinion set off decades of misinterpretation, in which courts routinely held that, if the plaintiff presents no "direct evidence," then the "Title VII burden-shifting analysis" set forth in *McDonnell Douglas* is followed.[xi] This misinterpretation of *McDonnell Douglas* was furthered by the Supreme Court in its divided decision in the case of *Price Waterhouse v. Hopkins.*[xii]

In *Price Waterhouse*, the Court considered whether an employment decision is "because of sex," and therefore prohibited by Title VII, if the employer acted with so-called "mixed motive," meaning that the decision resulted from both legitimate and illegitimate motives. With divided opinions, most practitioners began citing to the concurring opinion of Justice O'Conner, who believed that, in a so-called "mixed motive" case, unless the employee could show discrimination by "direct evidence," the employee must bear the burden to show that the illegitimate consideration was a "substantial factor" in the employment decision. Justice O'Conner believed that an employer could then avoid liability by showing that it would have made the same employment decision regardless of sex or other protected status.

After *Price Waterhouse*, Congress amended the Civil Rights Act, clarifying Title VII prohibited discrimination whenever an employee could show that the protected status was a

"motivating" factor in the employment decision, lowering the standard from "substantial factor," as articulated by Justice O'Connor. Congress also rejected the *Price Waterhouse* employer escape hatch, instead permitting an employer to be held liable even in "mixed motive" cases, but limiting damages if the employer could prove that it would have made the same decision absent the protect status.[xiii]

Despite this amendment, some courts continued to apply *McDonnell Douglas* framework to all discrimination cases, unless the employee could show "direct evidence." The Supreme Court in the case of *Desert Palace v. Costa*, however, rejected this distinction between "direct" evidence and "circumstantial" evidence. In *Desert Palace*, the Court held:

> Our precedents make clear that the starting point for our analysis is the statutory text. *See, Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). And where, as here, the words of the statute are unambiguous, the "judicial inquiry is complete." *Id*., at 352, 112 S. Ct. 1146 (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed.2d 633 (1981)). Section 2000e-2(m) unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[xiv]

The Court then noted that it had held in *Reeves v. Sanderson Plumbing Products, Inc*., that "evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination.""[xv] As it had originally in *McDonnell Douglas*, the Supreme Court reiterated that a showing of pretext is merely one method of proving discrimination. Despite this clear direction by the Supreme Court that the plain text of Title VII imposes no burden on employees other than to show by any form of evidence that discrimination was a motivating factor in the challenged employment decision, most courts continued to require plaintiffs to jump through the *McDonnell Douglas* hoops, requiring a showing of pretext in every case.

Despite predictions from commentators that *McDonnell Douglas* was "dead," after the Civil Rights Act of 1991 and again after *Desert Palace*, most courts have continued to use the standard without change. For example, the Eighth Circuit Court of Appeals directly stated that *Desert Palace* has not changed the standard for summary judgment in mixed motive case.[xvi]

Trend Toward Rejection of *McDonnell Douglas*

The Minnesota Supreme Court has repeatedly held that courts are not tied to a rigid adherence to the *McDonnell Douglas* test.[xvii] Instead, Minnesota courts have recognized that a plaintiff my attempt to prove her case directly or indirectly.[xviii]

The Minnesota Supreme Court recognized in *Fletcher v. St. Paul Pioneer Press* that, "following a trial on the issue of retaliation, the three-part [*McDonnell Douglas*] test drops from the case, and the district court must only decide whether the employer intentionally discriminated or retaliated against the employee."[xix] Likewise, the Eighth Circuit instructs that a jury should decide the ultimate issue in the matter without reference to the *McDonnell Douglas* paradigm.[xx]

In the *Fletcher* opinion, however, the Minnesota Court did not explain why any employee would be required to follow the *McDonnell Douglas* burden-shifting framework at summary judgment, when that evidentiary burden would not be required at trial. The same is true for the Eighth Circuit Court of Appeals.

Two state supreme courts have rejected the application of the *McDonnell Douglas* framework to claims of discrimination or retaliation at summary judgment because the framework is not required by the plain language of the statute, and because its use violates the summary judgment standard itself. *See, Gossett v. Tractor Supply Company, Inc.,* 320 S.W.3d 777 (Tenn. 2010); *Daugherty v. City of Maryland Heights,* 231 S.W.3d 814 (Mo. 2007).

In *Gossett*, the Supreme Court of the State of Tennessee held that the lower court had improperly applied the *McDonnell Douglas* test to a claim for common law retaliatory discharge.[xxi] It considered the "continued viability" of the *McDonnell Douglas* framework at the summary judgment stage, and concluded that evidence satisfying an employer's burden of production pursuant to the *McDonnell Douglas* framework does not necessarily demonstrate that there is no genuine issue of material fact.[xxii] It noted that articulation of a legitimate reason for discharge, which is all that is required of the employer under the *McDonnell Douglas* standard, "is not always mutually exclusive of a discriminatory or retaliatory motive and thus does not preclude the possibility that discriminatory or retaliatory motive played a role in the discharge decision."[xxiii]

The summary judgment standard places the burden on an employer to prove the absence of material fact. Recognizing this burden, the Tennessee Court concluded that because evidence showing a legitimate reason for discharge can satisfy the requirements of the *McDonnell Douglas* framework without tending to disprove any factual allegation by the employee, "the *McDonnell Douglas* framework obfuscates the trial court's summary judgment analysis."[xxiv]

The *Gossett* Court found the pretext prong of the *McDonnell Douglas* test particularly problematic. It found persuasive the reasoning of Judge Tymkovich of the United States Court of Appeals for the Tenth Circuit, who wrote, "the compartmentalization of evidence causes courts to put on blinders, looking at categories of evidence narrowly while the totality of the evidence may point to discrimination."[xxv] The *Gossett* Court concluded that this compartmentalization of evidence causes courts to contravene the instruction that evidence must be construed in a light most favorable to the employee as the nonmoving party.[xxvi]

In *Daugherty*, the Supreme Court of Missouri also rejected the *McDonnell Douglas* framework in analyzing its state anti-discrimination statute. [xxvii] The Court noted that a plaintiff has no higher standard to survive summary judgment than is required to submit a claim to a jury.[xxviii] It then held that its analysis of discrimination claims at summary judgment should track the plain language of the statute, which required only that plaintiff show that the employee's protected classification was a contributing factor in the employment decision. [xxix]

The conclusion that the *McDonnell Douglas* framework imposes a burden of proof on an employee that is not required under state or federal anti-discrimination statutes is not confined to the state courts. United States District Court Judge Magnuson, District of Minnesota, in his concurring opinion, explained that the pretext requirement imports a "sole motivating factor test" which is at odds with the "motivating" factor test that exists under both Title VII and the MHRA.[xxx] He wrote:

> In 1991, Congress extended the protection of the Civil Rights Act, which until that point only prohibited employment decisions motivated *primarily* by an improper characteristic such as race or gender. In amending the Civil Rights Act in 1991, Congress sought to prohibit any consideration of race or other improper characteristic, no matter how slight, in employment decisions. Despite this clear language, courts continued to apply a test that determined whether a discriminatory motive was the necessary and sufficient cause of an employment decision, not one to determine whether a discriminatory motive played a lesser role in the employment decision. Courts ignored the Civil Rights Act of 1991 in 1991, and they continue to ignore this congressional mandate today. *Desert Palace* exposes the legal fiction for what it is, and in its wake, I can no longer adhere to or apply an arbitrary and antiquated test that has been superseded by Congress.[xxxi]

Judge Magnuson noted that Congress had rejected amendments to the Civil Rights Act that proposed to insert the word "solely" into the text of the statute.[xxxii] He noted further that Congress in its 1991 amendments to the Civil Rights Act unambiguously required that discrimination only be "a" motivating factor in the employment decision for liability to

attach.[xxxiii] "Any analytical paradigm that requires greater proof to prevail on liability contradicts the express language of the statute." [xxxiv]

Further, Judge Magnuson noted that the United States Supreme Court in *Desert Palace* "admonished that the key issue under Title VII is whether intentional discrimination occurred, instead of how intentional discrimination is proved."[xxxv]

> For thirty years, courts have been slaves to the *McDonnell Douglas* burden shifting paradigm that is inconsistent with Title VII. *McDonnell Douglas* cannot be reconciled with the Civil Rights Act of 1991, as it is indignant to the clear text of the statute. *McDonnell Douglas* impermissibly focuses on the but-for cause of the employment decision, when all that the Civil Rights Act of 1991 requires is that discrimination be a motivating factor in the employment decision.[xxxvi]

Judge Magnuson referred to the requirement of the employer to articulate a nondiscriminatory reason as "worthless" because employers always deny discrimination and offer a non-discriminatory reason for their actions, and because requiring the articulation of a reason without requiring proof is a "useless ritual."[xxxvii] Furthermore, Judge Magnuson pointed out that, even when an employee successfully disproves the employer's articulated reason, under the *McDonnell Douglas* framework, this does not necessarily result in judgment in favor of the plaintiff, citing to the cases of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.133 (2000) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Judge Magnuson concluded that, while pretext is circumstantial evidence that may demonstrate that an employer was motivated by discrimination, plaintiffs need not show pretext in every case, as that is not required by the plain language of the statute.[xxxviii]

Similarly, in a concurrence joined by all three judges of the panel, the Seventh Circuit Court of Appeals questioned the continuing utility of *McDonnell Douglas*.

> I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts

> and litigants alike. The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside. We now have, for both discrimination and retaliation cases, two broad approaches—the "direct" and the "indirect." But the direct approach is not limited to cases in which the employer announces "I have decided to fire you because you are a woman [or a member of any other protected class]." Instead, the direct method permits proof using circumstantial evidence, as we acknowledged in *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir.1994). Like a group of Mesopotamian scholars, we work hard to see if a "convincing mosaic" can be assembled that would point to the equivalent of the blatantly discriminatory statement. If we move on to the indirect method, we engage in an allemande worthy of the 16th century, carefully executing the first four steps of the dance for the *prima facie* case, shifting over to the partner for the "articulation" interlude, and then concluding with the examination of evidence of pretext. But, as my colleagues correctly point out, evidence relevant to one of the initial four steps is often (and is here) equally helpful for showing pretext.
>
> Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way. In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason. Put differently, it seems to me that the time has come to collapse all these tests into one. We have already done so, when it comes to the trial stage of a case. See, *e.g.*, *EEOC v. Bd. of Regents of Univ. of Wisc. Sys.*, 288 F.3d 296, 301 (7th Cir.2002). It is time to finish the job and restore needed flexibility to the pre-trial stage.[xxxix]

In 2005, New York City amended its discrimination statute, entitled the Restoration Act of 2005, adding language mandating liberal construction even if similarly worded state and federal laws receive more narrow construction. In the first case that interpreted the meaning of this more liberal construction, the New York court held that an employer's articulation of a reason for the employment action based on a second set of facts could not result in summary judgment for the defendant where plaintiff had articulated a set of facts that established the

prima facie case of causation.[xl] The court placed the burden on the defendant to show that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action. Further, the court took into account the use of pretext evidence when evaluated by a jury. It recognized that where a plaintiff "responds with some evidence that at least one of the reasons proffered by defendant is false, misleading or incomplete, a host of determinations properly made only by a jury come into play, *and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied*." [xli]

In what could be interpreted as a refusal to dilute the anti-discrimination protections afforded to members of our armed forces, the federal courts have rejected the *McDonnell Douglas* framework in claims brought under the Uniform Services Employment and Reemployment Rights Act (USERRA). USERRA provides that an employer may not discriminate against any person who is a service member, and prohibits any employment decision if the person's military service or actions to enforce USERRA is a "motivating factor" in the employment decision.[xlii] This "motivating factor" standard is the same standard found in the text of Title VII of the Civil Rights Act of 1964, as amended in 1991.[xliii]

Yet, federal courts, including the Court of Appeals for the Eighth Circuit, have held that the *McDonnell Douglas* framework does not apply to claims brought under USERRA, because the plain language of USERRA places the burden on the employer to show that it would have taken the same action absent of the service membership or protected conduct. Startlingly, this conclusion is not drawn from a comparison of the two statutes, but rather from a comparison of the plain language of USERRA to the *McDonnell Douglas* framework.[xliv]

A comparison of the plain language of the two statutes demonstrates the lack of textual support for the continued use of *McDonnell Douglas* in Title VII claims. USERRA provides:

> **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service;…[xlv]

USERRA places the burden on the employer to show that the adverse employment action would have been taken in the absence of the illegitimate reason. The text of Title VII does the same. Title VII provides:

> m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> 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.[xlvi]

* * *

> **(B)** On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
>
> **(i)** may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
> **(ii)** shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).[xlvii]

Indeed, Title VII provides *more expansive rights* to employees than USERRA does. Under USERRA, if the employer proves that it would have taken the same action in the absence of discrimination, the employer is not liable. Under Title VII, however, even if the employer

proves that it would have taken the same action absent discrimination, the employer is still held liable, but the employee is only given declaratory relief, injunctive relief, attorney's fees and costs.

Most courts continue to routinely impose upon employees the burden of proving at summary judgment pretext under the *McDonnell Douglas* framework.[xlviii] Some courts, however, are moving to extricate discrimination claims from the quagmire of the *McDonnell Douglas* standard to be replaced with a textually based standard, consistent with Rule 56.

---

[i] *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[ii] Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell-Douglas is Not Justified by Any Statutory Construction Methodology*, University of Illinois College of Law, Law and Economics Working Papers, Paper 56 (2006).
[iii] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)(emphasis added).
[iv] *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981).
[v] *Id*. at 252-253.
[vi] *Id* at 255 n.10.
[vii] *See, e.g., Bone v. G4S Youth Services, LLC*, 686 F.3d 948 (8th Cir. 2012); *Twiggs v. Selig*, 679 F.3d 990 (8th Cir. 2012)(at pretext stage, plaintiff must satisfy "more rigorous standard" and show that she and individuals used as comparator had the same supervisor, were subjected to the same standard, engaged in the same conduct without mitigating or distinguishing circumstances).
[viii] *Bone*, 686 F.3d at 955 (citing *Pope v. ESA Servs., Inc*., 406 F.3d 1001, 1007 (8th Cir. 2005).
[ix] *Id*. n. 13.
[x] *Trans World Airlines, Inc. v. Thurston*, 469 U.S.111, 121 (1985)(quoting *Loeb v. Textron, Inc*. 600 F.2d 1003, 1014 (1st Cir. 1979).
[xi] *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)(holding in an ADEA case that *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination).
[xii] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[xiii] 42 U.S.C. §§2000e-2(m) and 2000e-5(g)(2)(B).
[xiv] *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 99 (2003).
[xv] *Id.* at 100, citing *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000).
[xvi] *Griffith v. City of Des Moines*, 387 F. 3rd 733, 735 (8th Cir. 2004).
[xvii] *See, Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619, 627 (Minn. 1988).
[xviii] See, e.g. *Friend v. Gopher Co.,* 771 N.W.2d 33 (Minn. Ct. App. 2009).
[xix] *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999) citing *Maness v. Star-Kist Foods, Inc*., 7 F.3d 704, 707 (8th Cir. 1993) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

[xx] *See* 8th Cir. Model Civil Jury Instructions 5.01, Title VII Elements and 5.96 Definition of Motivating Factor.
[xxi] *Gossett v. Tractor Supply Co., Inc*., 320 S.W.3d 777 (2010).
[xxii] *Id*. at 782.
[xxiii] *Id*.
[xxiv] *Id*. at 782-783.
[xxv] *Id*. at 783 quoting Timothy M. Tymkovich, *The Problem with Pretext,* 85 Denv. U. L. Rev. 503, 519 (2008).
[xxvi] *Id*.
[xxvii] *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (2007).
[xxviii] *Id*. at 820.
[xxix] *Id*.
[xxx] *See, Griffith v. City of Des Moines*, 387 F. 3rd 733, 745-46 (8th Cir. 2004)(concurring opinion).
[xxxi] *Id*. at 739.
[xxxii] *Id*. at 740 n.4.
[xxxiii] *Id*. at 742.
[xxxiv] *Id*.
[xxxv] *Id.* at 743.
[xxxvi] *Id* at 745.
[xxxvii] *Id*.
[xxxviii] *Id*. at 746.
[xxxix] *Coleman v. Donohoe*, 667 F.3d 835, 863-64 (7th Cir. 2012)(concurrence byJudge Wood, joined by Judges Tinder and Hamilton.)
[xl] *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 936 N.Y.S.2d 112, 2011 NY Slip Op 09206 (December 20, 2011).
[xli] *Sandiford v City of New York Dept. of Educ.*, 94 A.D.3d 593, 943 N.Y.S.2d 48, (N.Y.A.D. 1 Dept.,201, April 24, 2012) (quoting, *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 936 N.Y.S.2d 112,2011 NY Slip Op 09206 (December 20, 2011)).
[xlii] 38 U.S.C. §4301 *et seq*.
[xliii] 42 U.S. C. §2000e2-m
[xliv] *See, e.g., Maxfield v. Cinas Corp. No. 2*, 427 F.2d 544 (8th Cir. 2005).
[xlv] 38 U.S.C. §4311(c)(1)
[xlvi] 42 U.S.C. §2000e-2(m)
[xlvii] 42 U.S.C. §2000e-5(g)(2)(B)
[xlviii] *See, e.g., Hilt v. St. Jude Medical S.C. Inc*., 687 F.3d 375 (8th Cir. 2012); *Guimares v. Super Value, Inc.*, 674 F.3d 962 (8th Cir. 2012); *Gibson v. American Greeting Corp*., 670 F.3d 844 (8th Cir. 2012); *West v. Allina Health System*, 2012 WL 3776464 (D. Minn. Aug. 30, 2012); *Prody v. City of Anoka*, 2012 WL 2449932 (D. Minn., June 27, 2012); *Muor v. U.S. Bank Nat. Ass'n*, 2012 WL 2449925 (D. Minn., June 27, 2012); *Jackson v. Metropolitan Council HRA Management Ass'n*, 2012 WL 4470439 (D. Minn. May 17, 2012); *Wandersee v. Farmers State Bank of Hartland*, 2012 WL 1666391 (D. Minn., May 9, 2012); *Luster v. Wells Fargo Bank*, N.A., 2012 WL 1379342 (D. Minn. Apr. 20, 2012); *Wood v. Sat Com Marketing, LLC*, 2012 WL 591503 (D. Minn. Feb. 22, 2012).

National Employment Lawyers Association
2016 Annual Convention
Los Angeles, California
June 22-25, 2016

Panel Presentation

There's No Smoking Gun: Proving Discrimination and Retaliation By Pretext[1]

Michael Foreman
Penn State Law
Director, Civil Rights Appellate Clinic
329 Innovation Park, Suite 118
State College, PA 16803
814-865-3832
mlf25@psu.edu

I. Introduction

Retaliation claims are among the most prevalent type of discrimination claim EEOC receives.[2] In FY 2015, the EEOC received 39,757 retaliation complaints, which made up 44.5% of the total claims, making it the single most reported ground for an EEOC charge.[3] Management attorneys and indeed several Supreme Court Justices have seized this type of data as a basis for arguing the ability to bring retaliation claims should be significantly curtailed. For example, management attorneys have whined that "[c]ourts are weary of extensive single plaintiff trials which require lengthy testimony concerning the performance of a single individual plaintiff…" and that Title VII is "a shield against retaliation but should not be used as a sword to defeat discipline for wrongdoing." *The New Tsunami in Employment Litigation: Getting Mad, Getting Even, Getting Sued*, Peter M. Panken and Epstein Becker Green, SX001 ALI-CLE 1695 (2015). Further, management attorneys have argued that the rise in retaliation claims are because

[1] I want to thank Penny Scudder who was a member of my clinic and my research assistant for her tireless work culling through the circuit court cases and helping analyzing the issues involved and preparing this paper.
[2] U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1997 – FY 2015, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
[3] *Id*.

"employers are faced with an employee who has engaged in misconduct or performed poorly, knows his or her job is on the line, and makes a claim of discrimination in the hopes of creating job security." Karen M. Buesing, Written Testimony, Equal Employment Opportunity Commission Meeting of June 17, 2015—Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention.

Reacting in part to these arguments the Supreme Court decision in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013) has changed how these cases are proven.[4] Guidance on circumstantial, or pretextual, retaliation cases is necessary. Because retaliation claims are almost never proven using direct evidence, pretextual evidence comes into play any time the indirect *McDonnell Douglas* burden shifting framework is used. This article aims to provide an overview of how the circuits have considered retaliation cases post-*Nassar*,[5] examine how the recent EEOC Guidance may affect a practitioner's approach, and provide some general suggestions.

II. A Moment of Author Prerogative

While not directly on the point of this presentation, in reality we cannot ignore the issue of causation. It drives everything about the case—whether it survives summary judgement and whether the jury believes you have carried the burden entitling your client to relief. Plus I think I have addressed this issue at every NELA convention since the Supreme Court so kindly gave us

[4] We say the *Nassar* decision "is in" part a reaction to the number of retaliation claims now being filed because the *Nassar* opinion explained "[t[he proper interpretation and implementation of § 2000-e3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency." *Nassar* at 2531.

[5] As is our practice here are the disclaimers: some of the cases may be decided under statutes other than Title VII but have been included because in that circuit the court apply the same standards as in Title VII retaliation claims. Additionally some of the cited cases under local rules are non-precedential but we have included them because it provides insight into that circuit's analysis of the issue.

Gross v. FBL Financial Services, 557 U.S. 167 (2009); I would feel empty if I did not at least mention it.

We all know that *Nassar* now requires "but for" causation in Title VII retaliation cases. While I think we all have an understanding of what "but for" causation means it is not at all clear that the Justices of the Supreme Court are of one mind as to its meaning. It should however be clear what it does not mean. It does not mean the "real reason," the "only" reason or the "sole" reason. Indeed as discussed in Section III, *infra*, since *Nassar* the Second, Sixth, Seventh, Eighth, and Ninth Circuits have explicitly rejected the idea that "but for" cause means "sole cause."

Further, the Supreme Court in *Burrage v. United States*, 134 S.Ct. 881, 888-89 (2014) clarified its view of what "but for" cause means: "the desire to retaliate was [a] but-for cause of the challenged employment action." In *Burrage* the Supreme Court recognized that 'but-for' causation can include multiple causes. Further, the most recent update to the EEOC's proposed guidance on retaliation in light of *Univ. of. Tex. SW Med. Ct. v. Nassar*, 133 S.Ct. 2517, 2528 (2013) and *Gross v. F.B.L. Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) makes the same point.[6]

If "but for" cause can be established even in face of multiple causes then it follows that it cannot require a showing of "sole" cause. Before the Court's decision in *Burrage*, Justices over the years have made this point. *See, e.g., CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2645 (2011) (Roberts, C.J., dissenting, arguing that "but for" causation was present when "negligence played any part, even the slightest" in the outcome), *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (Brennan, J., discussing "but for" causation as a 'substantial' or 'motivating' factor), *Price Waterhouse* at 259 (White, J., concurring, applying *Mt. Healthy City Bd. Of Ed. v. Doyle*, 419

[6] Equal Employment Opportunity Commission Proposed Enforcement Guidance on Retaliation and Related Issues, 150-51 FN 151 (Jan. 21, 2016) https://www.regulations.gov/#!documentDetail;D=EEOC-2016-0001-0001 (specifically noting that the causation standard was "a but for" cause.)

U.S. 274 (1977) for the proposition that "but for" cause required only a 'substantial' or 'motivating' factor analysis), *Price Waterhouse* at 268-69 (O'Connor, J., concurring, and applying the standards from *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

While the Court has since opined that the "problems associated with [*Price Waterhouse*'s] application have eliminated any perceivable benefit to extending its framework to ADEA claims," *Gross* at 179, it has never found that "but for" causation means "sole cause." Indeed even Justice Kennedy who dissented in *Price Waterhouse* but was in the majority in both *Gross* and wrote *Nassar* made the point in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 284 (Kennedy, J., dissenting) (noting that "discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause."). Most recently Justice Thomas seemed to recognize this as well in his dissent in a Section 1983 retaliation case. Citing to *Nassar*'s slip opinion at page 23, Justice Thomas explained that "a retaliation claim requires proving that [the employee's] protected activity was a cause in fact of the retaliation." *Heffernan v. City of Paterson, New Jersey*, No. 14-1280, Slip. Op. at 3 (Thomas, J. dissenting) (Decided April 26, 2016). If you actually resurrect the slip opinion, it is 23 pages and the actual quote on page 23 provides: "The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under Sec. 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." Clearly if this group of Justices believed it must be *the* "but for" cause rather than *a* "but for" cause the majority would have made that clear. *Id.*

III. How *Nassar* Is Playing Out In the Circuits.[7]

Generally speaking, the Circuits follow the same framework. This framework, outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) provides that a plaintiff must demonstrate they engaged in protected conduct, the employer took a materially adverse action against them, and that a causal nexus between the first two elements exists. If a plaintiff succeeds in proving their prima facie case, their employer then bears the light burden to articulate a legitimate, non-discriminatory explanation for their actions. At this point, the employee must prove that the articulated explanation is a pretext for the true, unlawful, retaliatory motive. It is this last step where the circuits diverge.

a. First Circuit

Following *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), the First Circuit incorporated the "but-for" cause standard into the prima facie case, requiring that a plaintiff show that the retaliation was causally connected to the protected activity. *Abril-Rivera v. Johnson*, 806 F.3d 599, 608 (1st Cir. 2015).

Under *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 179 (1st Cir. 2015), a plaintiff must point to "some evidence of retaliation by a pertinent decisionmaker" to defeat summary judgment. The pretext inquiry focuses on "whether the employer believed that its

[7] The riptide that *Gross* and now *Nassar* have created will engulf other statutes as well. But any discussion of this is left for other presentations. However just by way of example in *Wheat v. Fla Parish Juvenile Justice Comm'n*, 2016 BL (BNA) 1364, 5th Cir., No. 14-30788, 1/5/2016), the Fifth Circuit, while acknowledging that neither the Supreme Court nor the Fifth Circuit has decided "whether the heightened 'but for' causation standard required for Title VII retaliation claims applies with equal force to FMLA retaliation claims," nonetheless applied but for causation in its analysis. The opinion did go on to reiterate that the plaintiff "may avoid summary judgement on but for causation by demonstrating a conflict in substantial evidence on this ultimate issue." *Id.* (citing *Hernandez v. Yellow Transp., Inc.* 670 F.3d 644, 660 (5th Cir. 2012). The opinion continued "evidence is substantial if it is of such quality and weight that reasonable and fair minded men in the exercise of impartial judgement might reach different conclusions." *Id*. (Internal citations omitted).

stated reason for the termination was credible." *Ponte v. Steelcase, Inc.*, 741 F.3d 310, 323 (1st Cir. 2014) (citing *Melendez v. Autogermana, Inc.*, 622 F.3d 46, 53 (1st Cir. 2010)). Furthermore, the plaintiff may not simply cast doubt on the story of the employer, they must "proffer specific facts that would enable a reasonable factfinder to conclude that the employer's reason for termination was a 'sham' intended to cover up the employer's true motive." *Ponte*, 731 F.3d at 323.

Although the First Circuit recognizes that temporal proximity may be sufficient to establish a prima facie case of retaliation, temporal proximity must be "very close." *Abril-Rivera v. Johnson*, 806 F.3d 599, 609 (1st Cir. 2015). Moreover, in the third stage of the framework "the temporal proximity between [the] complaints and [the] threats," without more, is insufficient to raise an inference of pretext. *Planandeball*, 793 F.3d at 179; *see also Colón v. Tracey*, 717 F.3d 43, 51(1st Cir. 2013) ("'[t]he mere proximity of these acts…without any indication of discrimination or retaliation does not serve to establish pretext'") (citing *Colón v. Infotech Aerospace Services, Inc.*, 2012 WL 3155140 at *9 (1st Cir. 2012)).

The First Circuit also recognizes and allows for the inference of pretext in circumstances where there are "'deviations from standard procedures, the sequences of occurrences leading up to a challenged decision, and close temporal proximity between relevant events.'" *Abril-Rivera*, 806 F.3d at 609-610 (citing *Harrington v. Aggregate Industries Northeast Region, Inc.*, 668 F.3d 25 (1st Cir. 2012)).

b. Second Circuit

The Second Circuit, following *Nassar*, has found that a plaintiff need not prove retaliation "was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." *Vega v. Hempstead Union Free*

School Dist., 801 F.3d 72, 90-91 (2d. Cir. 2015). Further, a plaintiff does not need to disprove the proffered rationale by the employer to prevail. *Summa v. Hofstra Univ.*, 708 F.3d 115, 129 (2d Cir. 2013). A plaintiff may prove that "retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action." *Zann Kwan v. Andalex Group*, 737 F.3d 834, 846 (2d. Cir. 2013). This is of course entirely consistent with the Supreme Court holding in *Reeves v. Sanderson Plumbing Products, Inc*, 530 U.S. 133 (2000) where the Court held that "it is permissible for a trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves* 530 U.S. at 147.

The Second Circuit is less willing to permit temporal proximity to raise an inference of pretext. *See Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 79 (2d. Cir. 2015) ("'temporal proximity' between a protected complaint and an adverse action 'is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext'") (citing *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d. Cir. 2010)). However, a plaintiff "may rely on evidence comprising her prima facie case, including temporal proximity, together with other evidence such as inconsistent employer explanations, to defeat summary judgment at [the pretext] stage." *Zann Kwan*, 737 F.3d 834, 847 (2d. Cir. 2013).

c. Third Circuit

The Third Circuit has noted that in assessing whether there is a causal connection between the protected activity and the employment action, the Court has "focused on the temporal proximity of the protected activity and the adverse employment action, as well as if there is a pattern of antagonism." *Tourtellotte v. Eli Lilly and Co.*, 2016 WL 146455, *13 (3d. Cir. 2016) (citing *Jenson v. Potter*, 435 F.3d 444 (3d. Cir. 2006)). Where a plaintiff uses

temporal proximity to prove a causal connection, "'the timing of the alleged retaliatory action must be "unusually suggestive" of retaliatory motive before a causal link will be inferred.'" *Jones v. Southeastern Pa. Transp. Authority*, 796 F.3d 323, 331 (3d. Cir. 2015) (citing *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d. Cir. 1997)). However, absent an unusually suggestive relationship between protected activity and employment action, courts will "consider the circumstances as a whole, including any intervening antagonism by the employer, inconsistencies in the reasons the employer gives for its adverse action, and any other evidence suggesting that the employer gives for its adverse action, and any other evidence suggesting that the employer had a retaliatory animus when taking the adverse action." *Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 196 (3d. Cir. 2015).

The Third Circuit has not issued a precedential opinion on pretext following *Nassar*. However, the Third Circuit has noted that under the summary judgment standard, "a plaintiff must either (1) offer evidence that 'cases sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication,' or (2) present evidence sufficient to support an inference that 'discrimination was more likely than not a motivating or determinative cause of the adverse employment action.'" *Hoist v. New Jersey*, --Fed. Appx.--, 2016 WL 639439, *2 (3d. Cir. 2016) (citing *Fuentes v. Perskie*, 32 F.3d 759, 762 (3d. Cir. 1994)). As a result, it appears that the Third Circuit has not incorporated the *Nassar* standard into the pretextual stage of the inquiry.

d. Fourth Circuit

The Fourth Circuit provides for two different avenues in proving retaliation claims; a plaintiff can either use direct or indirect evidence of retaliatory conduct. Following *Nassar*, both methods now require the plaintiff demonstrate "but for" causation between the protected activity

and the adverse employment action. *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 249 (4th Cir. 2015).

With respect to the indirect method of proof, the Fourth Circuit has found that although *Nassar* implemented a "but for" causation standard for retaliation, it did not affect the prima facie case or the pretext portion of the framework. *Foster*, 787 F.3d at 252. This is because "establishing causation at the prima facie stage is 'less onerous'" than pretext; and because "the *McDonnell Douglas* framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action." *Foster*, 787 F.3d at 251, 252.As a result, the Fourth Circuit does not require "but for" causation at the prima facie stage, but at the pretext stage requires that a plaintiff must "establish 'both that the [employer's] reason was false and that [retaliation] was the real reason for the challenged conduct.'" *Id*.

Further, the Fourth Circuit has noted that "timing alone generally cannot defeat summary judgment once an employer has offered a convincing, nonretaliatory explanation." *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cnty.*, --F.3d--, 2016 WL 1391787 (4th Cir. 2016). The Fourth Circuit permits pretext to be shown through "evidence that an employer treated similarly situated individuals differently" and where an employee demonstrates a "fatal contradiction" between the employer's proffered reason and other statements. *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 212 (4th Cir. 2014).

Although the Fourth Circuit has not explicitly mentioned and rejected "but for" cause being the equivalent of "sole cause," it has noted that "*Nassar*'s but-for causation standard is not the 'heightened causation standard' described by the district court, and does not demand anything beyond what is already required by the *McDonnell Douglas* 'real reason' standard." *Foster*, 787 F.3d at 252.

e. Fifth Circuit

The Fifth Circuit imposes the *Nassar* "but-for" causation standard on the pretext stage of the retaliation case. *See Feist v. Louisiana Dept. of Justice, Office of the Att'y Gen.*, 730 F.3d 450, 454 (5th Cir. 2013). It does not appear to impose this causation standard on the prima facie case. *Feist v. Louisiana Dept. of Justice, Office of the Att'y Gen.*, 450 F.3d at 454, *Fabela v. Socorro Independent School Dist.*, 329 F.3d 409, 415 (5th Cir. 2003) (mixed motive case applies to direct evidence), *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001) ("the causation showing at the prima facie stage is much less stringent than a 'but for' standard."); *but see Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015) ("*Nassar* and cat's paw analysis both bear on the third element [of the prima facie case], causation").

A plaintiff may satisfy the causal connection element of the prima facie case by temporal proximity, but that proximity "must generally be 'very close'." *Feist v. Louisiana Dept. of Justice, Office of the Att'y Gen.*, 450 F.3d at 454. The Fifth Circuit has found that a lapse of four months may be sufficient, but that a lapse of five months, without more, will not be sufficient. *Feist v. Louisiana Dept. of Justice, Office of the Att'y Gen.*, 450 F.3d at 454.

To withstand a summary judgment claim, a plaintiff must show "'a conflict in substantial evidence' on the question of whether the employer would not have taken the action 'but for' the protected activity." *Feist v. Louisiana Dept. of Justice, Office of the Att'y Gen.*, [454] (citing *Long v. Eastfield College*, 88 F.3d 300, 308 (5th Cir. 1996)).

f. Sixth Circuit

The Sixth Circuit appears to apply *Nassar*'s "but for" causation standard to only the prima facie case. *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1066 (6th Cir. 2015) ("the EEOC had to establish but-for causation to establish the retaliation claim"); *Yazdian v. ConMed Endoscopic Technologies, Inc.*, 793 F.3d 634, 649 (6th Cir. 2015) ("the Supreme Court has held that [a causal connection in the prima facie case] 'requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.'") (Internal citations omitted).[8]

With respect to evidence required to prove a prima facie case of retaliation, the Sixth Circuit has found that temporal proximity may alone be sufficient in certain circumstances. *Yazdian*, 793 at 650 (6th Cir. 2015) (citing *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008) ("'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."). "'Unlike its role in establishing a *prima facie* case, the law in this circuit is clear that temporal proximity cannot be the sole basis for finding pretext.'" *Amos v. McNairy County*, 622 Fed. Appx. 529, 538 (6th Cir. 2015) citing *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274, 285 (6th. Cir. 2012).

In circumstances where some time elapses between the protected activity and the adverse action, however, an employee must couple temporal proximity with other evidence. "Suspicious

[8] Unrelatedly, in line with every circuit except the Fifth, the Sixth Circuit has found that "protected activity" includes demanding that a supervisor stop harassing conduct. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015). The Fifth Circuit case explaining this is *Frank v. Harris Cnty.*, 118 Fed. Appx. 799, 804 (5th Cir. 2004).

timing, however is a strong indicator of pretext when accompanied by some other independent evidence." *Amos*, 622 F.Appx. at 538 (internal citations omitted).

Once an employee has made the prima facie case and the employer has presented evidence to rebut that case, an employee may prove the proffered reason is pretext in several ways. The Sixth Circuit has found that a plaintiff may prove a stated reason is pretext "by producing 'enough evidence to…rebut, but not to disprove [the employer's] proffered rationale.'" *Yazdian*, 793 F.3d at 651. Importantly, the Sixth Circuit also notes that the plaintiff does *not* need to show that retaliation was the sole cause of his discharge. *Laughlin v. City of Cleveland*, 2015 WL 8290037, *3 (6th Cir. 2015) (citing *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315-6 (6th Cir. 2012) (en banc)). Instead, the Court has noted that "events may have more than one but-for cause." *Id*.

g. Seventh Circuit

The Seventh Circuit has noted that *Nassar*'s "but for" causation requirement does not mean that the protected activity must be the sole cause of the adverse action. *See Carlson v. CSX Transp., Inc.*, 758 F.3d 819, n. 1 (7th Cir. 2014). Indeed, the Court has noted that "the ultimate question the parties and the court always must answer is whether it is more likely than not that the plaintiff was subjected to the adverse employment action because of his protected status or activity." *Hobgood v. Illinois Gaming Bd.*, 731 F.3d 635, 644 (7th Cir. 2013). Furthermore, the Seventh Circuit has noted that at least with respect to the direct method of retaliation, a plaintiff "'must provide evidence from which a reasonable jury could conclude that the protected conduct…'was a 'substantial' or 'motivating' factor in the defendant's action. '" *Boston v. U.S. Steel Corporation*, --F.3d--, 2016 WL 851552, *6 (7th Cir. 2016).

The Seventh Circuit provides two separate *methods* (as opposed to evidentiary routes) to prove retaliation.[9] The Seventh Circuit notes that "the direct method of proof requires the plaintiff to show: (1) that he engaged in activity protected by the statute; (2) that his employer took an adverse employment action against him; and (3) that there is a causal connection between the plaintiff's protected activity and the adverse employment action." *Moultrie v. Penn Aluminum Intern., LLC*, 766 F.3d 747, 754 (7th Cir. 2013) (citing *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630-31 (7th Cir. 2011).

In contrast, "the indirect method of proof for retaliation mirrors that for discrimination. Specifically, [a plaintiff must show] that he: (1) engaged in statutorily protected activity; (2) met his employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees who did not engage in protected activity." *Id.* (citing *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 983 (7th Cir. 2014). Importantly, under this indirect method, a plaintiff "*need not show even an attenuated causal link.*" *Alexander*, 739 F.3d at 983 (emphasis added).

In proving that an inference of retaliatory intent can be drawn, the Seventh Circuit has noted that "a plaintiff's case could include: '(1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive better

[9] NELA member J. Bryan Wood filed a petition for rehearing en banc in *Bagwe v. Sedgwick Claims Management Services, Inc.*, No. 14-3201 which explores many of the confusing issues present in the Seventh Circuit. Among these issues, as noted in Wood's Petition for Rehearing en Banc at footnote 5 is the fact that the panel of judges "questioned counsel about the qualitative differences between 'the so-called traditional *McDonnell Douglas* method on one hand and the Hamilton-Posner-whatever it is-Wood super deluxe method." Moreover, the Seventh Circuit itself has found that the standards it applies are unclear, noting "we recognize and join the majority of active judges in this circuit who have opined that the time has come to jettison the 'ossified direct/indirect paradigm' in favor of a simple analysis of whether a reasonable jury could infer prohibited discrimination." *Perez v. Thorntons, Inc.*, 731 F.3d 699, 703 (7th Cir. 2013).

treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action." *Hobgood*, 731 F.3d at 643-44.

The Seventh Circuit has noted that although, "under most circumstances, suspicious timing alone does not create a triable issue on causation," it has also noted that "no bright-line timing rule can be used to decide whether a retaliation claim is plausible or whether it should go to a jury." *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 828-29 (7th Cir. 2014) (citing *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 508 (7th Cir. 2014). Instead, the Seventh Circuit has required the timing to be considered in light of all of the relevant facts in the case. *Carlson*, 758 F.3d at 829.

Further, in terms of proving that the decision is pretextual, the Seventh Circuit has noted that "the question is not whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reasons it has offered to explain the discharge." *Cung Hnin*, 751 F.3d at 506 (citing *Coleman v. Donahoe*, 667 F.3d 835, 852 (7th Cir. 2012).[10] Pretext can be shown by "'identifying weaknesses, implausibilities, inconsistencies, or contradictions' in an employer's asserted reason for taking an adverse employment action 'such that a reasonable person could find it unworthy of credence.'" *Greengrass v. International Monetary Systems, Ltd.*, 776 F.3d 481, 487 (7th Cir. 2015) (citing *Coleman*, 667 F.3d at 852-53).

The Seventh Circuit has found that when an employer's proffered reason for termination is on the basis of tardiness but there is a material dispute as to whether an employee was tardy on certain days, that explanation must be left to a trier of fact and it is inappropriate to grant summary judgment. *Gosey v. Aurora Medical Center*, 749 F.3d 603, 608 (7th Cir. 2014).

[10] The Supreme Court applied this standard in the context of 42 U.S.C. § 1983, noting that what mattered was "the employer's motive, and in particular, the facts as the employer reasonably understood them" which controlled whether the employer had taken a lawful or unlawful action. *Heffernan v. City of Paterson, New Jersey*, No. 14-1280, Slip Op. at 5-6 (2016).

h. Eighth Circuit

The steps to prove retaliation in the Eight Circuit follow those other circuits have adopted. Moreover, the Eight Circuit has found that "the threshold of proof necessary to establish a *prima facie* case [of retaliation] is minimal." *Gibson v. Geithner*, 776 F.3d 536, 540 (8th Cir. 2015) (citing *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1022 (8th Cir. 1998). Despite this statement, however, the Eight Circuit has also found that "but for" causation is applicable to the prima facie case of retaliation. *Musolf v. J.C. Penney Co., Inc.*, 773 F.3d 916 (8th Cir. 2014). The Eight Circuit has not applied "but for" cause to mean "sole cause," however, noting that the conduct must be a determinative factor. *Wright v. St. Vincent Health System*, 730 F.3d 732, 738 (8th Cir. 2013). Further, once the prima facie case has been met, "proof of pretext 'requires more substantial evidence.'" *Id*. (citing *Logan v. Liberty Healthcare Corp.*, 417 F.3d 877, 881 (8th Cir. 2005)).

Once an employer has articulated a legitimate nondiscriminatory reason for the employment action, the Eight Circuit has found that "'to survive summary judgment, an employee must both discredit the employer's articulated reason and demonstrate the 'circumstances permit a reasonable inference of discriminatory animus.'" *Keefe v. City of Minneapolis*, 785 F.3d 1216, 1225 (8th Cir. 2015) (citing *Johnson v. Securitas Sec. Servs. SA, Inc.*, 769 F.3d 605, 611 (8th Cir. 2014) (en banc).

The Eighth Circuit has also noted that "there are at least two routes for demonstrating a material question of fact as to pretext: first, a plaintiff may succeed indirectly by showing the proffered explanation has no basis in fact; or, second, a plaintiff can directly persuade the court that a prohibited reason more likely motivated the employer." *Gibson*, 776 F.3d at 540 (citing *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 954 (8th Cir. 2012)).

The Eighth Circuit has noted that "although it is not dispositive, 'the length of time between the protected activity and the adverse action is important' in the causation calculus." *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551 (8th Cir. 2013) (citing *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002). However, "temporal proximity alone is insufficient to show that an employer's proffered reason for action was a pretext for discrimination." *Hutton v. Maynard*, 812 F.3d 679, 685 (8th Cir. 2016) (citing *Gibson v. Geithner*, 776 F.3d 536 (8th Cir. 2015).

Temporal proximity, along with other evidence—such as shifting reasons given by the employer, and providing examples of comparator individuals who were similarly situated—may be sufficient to prove pretext. *Hutton*, 812 F.3d at 686. Moreover, the Eight Circuit has noted that "perhaps a decision-maker's general discriminatory attitude toward a particular race or group of people as evidenced by derogatory comments or the expression of bigoted views would, under some circumstances, be sufficient to defeat a motion for summary judgment." *Id*. at 685-86 (noting that in the context of retaliation, where this attitude or comment is tethered to the adverse employment action, they may be sufficient to demonstrate pretext). Further, "where an employer has known about its stated reason for taking adverse action against an employee 'for an extended period of time,' but only acts after the employee engages in protected activitry, the employer's earlier inaction supports an inference of pretext. *Brown v. Diversified Distribution Systems, LLC*, 801 F.3d 901, 910 (8th Cir. 2015) (citing *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1122 (8th Cir. 2006).

i. Ninth Circuit

Even before *Nassar*, the Ninth Circuit required a plaintiff demonstrate at the prima facie stage that the protected conduct was the "but for" cause of the adverse employment action.

Westendorf v. W. Coast Contractors of Nevada, Inc., 712 F.3d 417, 422 (9th Cir. 2013). Importantly, *Westendorf* notes that "but for" cause does not mean "sole cause." *Id*. As a result, where a plaintiff introduces sufficient evidence at the summary judgment stage to support an inference or finding that the protected activity is "a but for" cause of the employment action, they have met their burden at the prima facie stage. *Id*. at 422-23.

Further, the Ninth Circuit has noted that "when evaluating evidence at the summary judgment stage, 'the district court may not disregard a piece of evidence…solely based on itself serving nature." *Greene v. Buckeye Valley Fire Dept.*, 617 Fed. Appx. 779, 780 (9th Cir. 2015) (citing *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497-98 (9th Cir. 2015)).

At the pretext stage, the Ninth Circuit requires that a plaintiff "'produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the [employer]." *Ambat v. City and Cnty. Of San Francisco*, 757 F.3d 1017, 1033 (9th Cir. 2014) (citing *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004)) (noting that the plaintiff could not rebut the County's evidence for their action).

j. Tenth Circuit

With respect to causation, it is unclear how the Tenth Circuit has implemented the *Nassar* standard. Notably, the Tenth Circuit continues to explain that a "'plaintiff bringing a retaliation claim "must establish that retaliation played a part in the employment decision…"'" *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1233 (10th Cir. 2015) (citing *Twigg v. Hawker Breechcraft Corp.*, 659 F.3d 987, 988 (10th Cir. 2011)). However, the Tenth Circuit has also noted that *Nassar*'s "but for" requires that the plaintiff "must establish that the decision to terminate him resulted from retaliatory animus" and that when considering this, the plaintiff "can ordinarily meet this burden 'through the combination of a prima facie case and the presentation of "sufficient

evidence to find that the employer's asserted justification is false."'" *Zisumbo v. Ogden Regional Medical Center*, 801 F.3d 1185, 1199 (10th Cir. 2015) (citing *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1288 (10th Cir. 2000)). Because, however, the Tenth Circuit also notes that the burden of establishing a prima facie case is not onerous, it would therefore appear that a plaintiff must satisfy the *Nassar* standard at the pretext stage. *Lobato v. New Mexico Environmental Dept.*, 733 F.3d 1283, 1293 (10th Cir. 2013). As noted below, this causation standard only applied to indirect evidence.

Further, the Tenth Circuit notes that there are two different ways to demonstrate that retaliation played a part in the employment decision. First, a plaintiff may "offer direct evidence that retaliation 'played a motivating part'[11] in an employment decision adverse to her interests" or she may "rely upon circumstantial evidence under 'the familiar three-part *McDonnell Douglas* framework to prove that the employer's proffered reason for its decision is a pretext for retaliation.'" *Lounds*, 812 F.3d at 1233 (citing *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1225 (10th Cir. 2008)). With respect to the second approach, a plaintiff may demonstrate the required causal nexus "'by proffering "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."'" *Lounds*, 812 F.3d at 1234 (citing *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004)).

The Tenth Circuit has found that temporal proximity alone is insufficient to demonstrate pretext, but where pretext is combined with other forms of evidence, it can support a finding of pretext. *Zisumbo v. Ogden Regional Medical Center*, 801 F.3d 1185, 1200-01 (10th Cir. 2015) (where employee's complaints about race discrimination were followed by his termination two

[11] It seems clear that *Nassar* would require more than playing "a motivating part." It is not clear how this phrasing squares with *Lounds* requiring that "retaliation played a part." *Lounds* 814 Fed at 1233.

months later, along with suspicious timing of proffered reason for termination, employee had introduced sufficient evidence to permit inference of pretext).

k. Eleventh Circuit

The Eleventh Circuit appears to impose a higher standard for the prima facie case of retaliation than some other circuits. Notably, with respect to demonstrating an adverse action in a retaliation case, the Court has noted that "a work reassignment may constitute an adverse employment action when the change is 'so substantial and material that it…alter[s] the terms, conditions, and privileges of employment.'" *Trask v. Sec'y, Dept. of Veterans Affairs*, --F.3d--, 2016 WL 1319748, *12 (11th Cir. 2016) (citing *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1245 (11th Cir. 2001)). This cuts against what the Supreme Court has required in *Burlington Northern*, where it noted only that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."'" *Burlington Northern &Sante Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

Despite noting that retaliation claims require analysis using "but for" causation, the Eleventh Circuit has not provided clear guidance as to what kinds of actions will satisfy this requirement. *Trask*, 2016 WL at *11 (noting that decision to reassign pharmacists not selected for program to "float" nearly eight months before plaintiffs engaged in protected activity meant that protected activity could not have been a "but for" cause of reassignment.)

The Eleventh Circuit requires that "the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff." *Trask v. Sec'y, Dept. of Veterans Affairs*, --F.3d--, 2016 WL

1319748, *10 (11th Cir. 2016) (citing *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001)).

l. D.C. Circuit

Once a plaintiff has made out a prima facie case and the employer has provided a legitimate, non-discriminatory reason for the action, "the 'one central inquiry' that remains is whether a reasonable jury could infer retaliation…from all the evidence." *Nurriddin v. Bolden*, --F.3d--, 2016 WL 1319727, *6 (D.C. Cir. 2016) (citing *Hamilton v. Geithner*, 666 F.3d 1344, 1351 (D.C. Cir. 2012)). The D.C. Circuit notes that "we evaluate this question 'in light of the total circumstances of the case,' asking 'whether a jury could infer [retaliation] from the combination of (1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of [retaliation] that may be available to the plaintiff…or any contrary evidence that may be available to the employer.'" *Id*.

Further, the D.C. Circuit has noted that "plaintiffs may survive summary judgment based solely on evidence of pretext when the evidence is such that a reasonable jury not only could disbelieve the employer's reasons but also could conclude that the employer acted, in part, for a prohibited reason." *Walker v. Johnson*, 798 F.3d 1085, 1096 (D.C. Cir. 2015).[12] The D.C. Circuit

[12] Interestingly, *Calhoun v. Johnson*, 623 F.3d 1259 (D.C. Cir. 2011), although it is a discrimination case and not a retaliation case and was decided before *Nassar*, notes that the *McDonnell Douglas* framework applies equally to discrimination and retaliation claims and its analysis does not appear to have been altered by *Nassar*. Specifically, Judge Garland notes that "the 'central question' is whether 'the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason…'" *Calhoun*, 623 F.3d at 1261.

Further, Supreme Court nominee Garland was on the panel that decided *Doak*, and was also on the panels of three other retaliation cases following *Nassar*. Of those three, only one sheds any light on evidence used to prove pretext. In *Harris v. District of Columbia Water and Sewer Authority*, 791 F.3d 64 (D.C. Cir. 2015), Garland wrote that a five-month time lag, coupled with evidence of positive work reviews and

has also noted that "typically, successful rebuttal of an employer's statement reason counts as evidence of the invidious motive that is a required element of a …retaliation claim." *Allen v. Johnson,* 795 F.3d 34, 40 (D.C. Cir. 2015). However, this is not always the case and the plaintiff's evidence must be strong enough to support an inference of discrimination. *Id*. Further, at the summary judgment stage, evidence of a causal temporal link between the protected activity and the adverse action alone is insufficient. Instead, a plaintiff must "offer 'positive evidence beyond mere proximity.'" *Doak v. Johnson*, 798 F.3d 1096, 1108 (D.C. Cir. 2015) (citing *Solomon v. Vilsack,* 763 F.3d 1, 16 (D.C. Cir. 2014)).

When considering whether an employer's proffered reason is pretext, the D.C. Circuit notes that "shifting and inconsistent justifications are 'probative of pretext.'" *Walker,* 798 F.3d at 1094 (D.C. Cir. 2015) (citing *Geleta v. Gray,* 645 F.3d 408 (D.C. Cir. 2011)). However, it goes on to say that where there are only minor variations in the description" and the critical details are the same, "such fine descriptive differences between materially consistent accounts, without more, do not…support an inference of discrimination or retaliation." *Walker*, 798 F.3d at 1094.

The D.C. Circuit also notes that pretext can be shown by "citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group…its deviation from established procedures or criteria, or the employer's pattern of poor treatment of other employee's in the same protected group as the employee, or other relevant evidence…" *Walker*, 798 F.3d at 1093. Further, "the temporal proximity between an employee's protected activity and her employer's adverse action is a common and often probative form of evidence of retaliation." *Id*. (citing *Hamilton*, 666 F.3d at 1357-59). Moreover, despite the remarks about temporal proximity in *Solomon*, the D.C. Circuit has also noted that it is a "common and highly probative

a dispute over the veracity of the employer's proffered explanation was enough to survive a motion to dismiss, and indeed, might be enough to show "a case sufficient to survive summary judgment outright." *Harris* at 70.

type of circumstantial evidence of retaliation" to support an inference that an employer's proffered reason was not the actual reason. *Allen v. Johnson*, 795 F.3d 34, 40 (D.C. Cir. 2015).

IV. EEOC Guidance

On January 21, 2016, the EEOC released its Proposed Enforcement Guidance on Retaliation.[13] Although it is unclear how much of this draft will be the final guidance, language and examples are illustrative. This section explains ways in which the EEOC Guidance will be helpful as well as to highlight areas that are unclear.

Particularly with respect to pretext, the EEOC provides several examples which may be helpful to practitioners. Specifically, the information contained at pages 53-55 and examples 21, 22, 23, 24 on pages 55-57 provide a detailed overview of how pretext can be demonstrated and when the evidence may point in the other direction. In addition to its discussion of inconsistent or shifting explanations, comparative evidence, verbal or written statements, and suspicious timing, it is worth noting in particular the EEOC's discussion of "other evidence." The EEOC's citations to case law are particularly useful, as they provide good examples of other forms of evidence that a plaintiff may not immediately identify as demonstrating pretext.[14]

The EEOC's discussion of what *Nassar*'s "but for" causation standard, however, is not as helpful as it could be. Although so far post *Nassar* five circuits have explicitly held that "but for" cause can include more than one cause and that it does not mean "sole cause,"[15] the EEOC's Guidance suggests that "but-for" indicates a level of causation almost as high as "sole cause,"

[13] This proposed guidance is available at https://www.regulations.gov/#!documentDetail;D=EEOC-2016-0001-0001.

[14] The EEOC's proposed guidance does include a troubling example on pages 10-11 at Example 2. The Penn State Civil Rights Appellate Clinic provided comments on this as well as the issue of "but for" causation which are available at https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Civil-Rights/20160425110243942.pdf.

[15] The Fourth Circuit has not explicitly found this, but there is language that indicates they also view the causation requirement as not being "sole cause." *See* discussion at Section III, *supra*.

noting at page 50 that the employee must prove "the real reason" was retaliation. Further, the EEOC does not indicate at which stage of the retaliation analysis "but for" causation is applied. As discussed above several circuits make it clear that the requirement of "but for" causation is relevant only at the pretext stage and not at the employee's prima facie case. This, combined with the disparity in how and where the Circuits have applied the causation requirement, means that the Guidance is not helpful on this point.

V. Some Practical Considerations Regarding The Use of Evidence to Prove Pretext

So where does this discussion leave us in terms of how pretext evidence plays out at trial. The other presentation by my co-panelist discusses in much more detail the use of "pretext evidence" at the trial level and I will not duplicate that discussion. I do however want to highlight some practical observations regarding pretext evidence post *Nassar.*

1. Duh—you have to know how your circuit is treating this type of evidence. As you can see from an overview of the circuits they are all over the place. Generally—and I stress generally—the Circuits honor *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) that proving the prima facie case is not onerous. What follows from this is the employee does not need to present evidence of "but for" cause in the prima facie case but ultimately needs to carry this burden.
2. If you are in a circuit that has not specifically rejected the sole cause requirement the briefing should make this clear in hopes we cut off these arguments. The cases highlighted in the Second, Sixth, Seventh, Eighth, and Ninth Circuits all make the point that "but for" does not equal sole cause.
3. "Convincing Mosaic" Requirement.

We are all no doubt familiar with the quote that courts "must determine if 'there is a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination."'" *Ahmed v. Johnson*, 752 F.3d 490, 497 (1st Cir. 2014); *see also Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012), *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). This is a great quote and actually is an accurate description of how the appellate courts approach a showing of pretext. This quote or one like it appears in most plaintiffs' briefs. Unfortunately all too often the mosaic consists of one form of evidence hoping it will carry the day. Counsel notes the character of the evidence that needs to be presented but ignore the individual paint strokes that create this mosaic. To be most effective, Counsel should show how each form of evidence combines together to effectively rebut the employer's proffered reason.

4. Temporal Proximity

Temporal proximity is the one type of evidence that pervades retaliation claims and indeed may be unique to them. Logically this makes sense and circuit law confirms this is relevant evidence. However, too often counsel relies on temporal proximity to carry the day, while ignoring other pertinent and often required evidence. As discussed below, temporal proximity generally should not be used alone to prove a plaintiff's case, it should be paired together with other forms of evidence to create this convincing mosaic of pretext.

Obviously where temporal evidence is strongest is where the time between the protected activity and adverse action is very short.

> Employee A files a claim of sexual harassment in April, 2014. Less than a week later, she is terminated. The employer's proffered reason is Employee A's absenteeism four months prior. Employee A admits that four months previously, she had missed two days of work, but that since then her attendance has been nothing but perfect.

Because the employer's explanation is based on behavior which occurred four months previously and there is nothing to suggest why discipline was not effected at the time, a reasonable jury could infer that this is pretextual and find in favor of the employee. But be aware that while in some circuits this temporal proximity will be sufficient to get beyond the prima facie case in other circuits this evidence in isolation will be insufficient to get to the jury on pretext.

However, even where the time is relatively short, if the employer provides an explanation as to why it took the action at that time, it can have the effect of diluting or undermining the evidence of proximity. As an example, considering the following situation:

> Employee A files a claim of discrimination on the basis of race in October of 2015. One month later, his employer terminates him, citing absenteeism and a history of disciplinary issues. The employer explains that the policy of the company is to work with the employee to attempt to address the issues before terminating them. Despite the fact that Employee A was disciplined three times for the absenteeism and other issues, the employer believed that the issues had been resolved. However, in the weeks leading up to and following the filing of the discrimination claim, the employee missed work or was late repeatedly and they were written up three more times.

Based on this scenario, it is more likely than not that, without more evidence from the employee to demonstrate that this is pretextual, a court will likely find in favor of the employer. Where available, inconsistent statements, comparator employees, stray remarks, or any other evidence should be included at the pretext stage to rebut the proffered explanation. In short courts seems to have recognized the truism in the memorable line from the Godfather where Don Corleone explains "revenge is a dish that tastes best when it is cold." The colder the plate the less willing the courts are to infer pretext.

5. Shifting or Inconsistent Statements Given by Employer

The most obvious scenario involving shifting or inconsistent statements given by the employer is where the employer proffers a reason which is directed contradicted by the evidence.[16] As an example, consider the following:

> Employee A helps Employee B file a sexual harassment claim. Almost immediately afterwards, Employee A, along with the other employees who offered to be witnesses for Employee B, face disciplinary action. Employee A is demoted, and the employer tells him that the reason for this is because his performance has been poor. However, the records purporting to justify the action are lost, and the only records that the company has dealing with Employee A his good reviews and promotions for the last fourteen years.

The facts here are adapted from *Barrett v. Salt Lake Cnty.*, 754 F.3d 864 (10th Cir. 2014) where the 10th Circuit found that the circumstances "support[ed]—if not compel[led]—a rational inference that unlawful retaliation took place." *Barrett*, 754 F.3d at 868.

Where the facts are this clear, courts have no trouble finding in favor of the plaintiff. However, if the facts are shifted slightly, and the plaintiff initially had excellent performance reviews but in the last five years his reviews went steadily downhill, a jury could find that the reason was not pretextual. Without more, it is unlikely that a plaintiff would succeed on these facts.

6. Insisting Upon Meaningful Pretext Evidence Jury Instruction.

[16] But note that the Supreme Court's requirement that a plaintiff must show "the employer's 'explanation is unworthy of credence or by offering other forms of circumstantial evidence sufficiently probative of retaliation'" has been interpreted by some circuits as requiring the demonstration of a legitimate inconsistency. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). The Fourth Circuit in particular requires that the inconsistencies are not "minor discrepancies," but must be genuine inconsistencies which demonstrate that an employer's explanation is unworthy of credence. *Walker v. Mod-U-Kraf Homes LLC*, 775 F.3d 202, 212 (4th Cir. 2014) (citing *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006)).

If you are in a circuit where a "pretext" instruction is not automatic you should advocate for a meaningful instruction[17] along the lines of "[t]he employee may prove pretext directly by persuading you that a the adverse employment action was because of the discriminatory reason or indirectly by showing that the employer's offered reasons are unworthy of belief. If you don't believe the defendant's stated reason you may, but are not required to presume the employer acted because of [unlawful basis]."[18]

VI. Conclusion

When we started this analysis we hoped to provide a roadmap of the types of evidence that post *Nassar* were most successful in showing pretext. On that front I believe we failed. Beyond temporal proximity there appears to no unique type of evidence that most often shows pretext in these cases. Instead the successful cases are the ones that weave together that combination of evidence from which a reasonable factfinder could find pretext for retaliation. But we all know that, and do that in our cases. What the analysis did highlight is how it is important to have the courts understand how "but for" cause plays out at summary judgement vs at trial and ultimately what it means to show pretext. Since much of our battle is getting beyond summary judgement this lesson is worth the ink I have spilled. The Fourth Circuit summed it up this way.

[17] The following an example of proposed jury instructions dealing with causation and pretext. *See e.g.*, Plaintiff's Amended Proposed Jury Instructions, 2014 WL 5320606, *Amos v. McNairy Cnty*., 28 F.Supp.3d 757 (W.D. Tenn. 2014), summary judgement reversed *Amos v. McNairy County*, 622 Fed. Appx. 529, 538 (6th Cir. 2015).

[18] Carolyn L. Wheeler, *Comments on Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences.* , 61 WASH. & LEE L.REV. 459 (2004). While the article is a bit dated it still provides a meaningful discussion of the importance of, and legal basis for, a pretext instruction.

> As an initial matter, the causation standard for establishing a prima facie retaliation case and proving pretext are non-identical. Rather, the burden for establishing causation at the prima facie stage is "less onerous." 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 causes by restricting the use of pretext evidence to those plaintiffs who do not need it: if plaintiffs can prove but-for causation at the prima facie stage, they will necessarily be able to satisfy their ultimate burden of persuasion without proceeding through the pretext analysis. Conversely, plaintiffs who cannot satisfy their ultimate burden of persuasion without the support of pretext evidence would never be permitted past the prima facie stage to reach the pretext stage. Had the *Nassar* Court intended to retire *McDonnell Douglas* and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect.

Foster v. Univ. of Maryland-Eastern Shore, 787 F.3d at 251 (internal citations omitted).

From the moment that *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) was decided, there were cries that *McDonnell Douglas* was dead,[19] or at least dying on the vine.[20] Some judges agreed.[21] Well to the extent there was truth to those sentiments, *Nassar* resurrected it. As a review of appellate decisions since *Nassar* demonstrate, *McDonnell Douglas* and particularly the analysis of the role pretext evidence plays in proving discrimination is the core of the courts' analysis. We hope this limited review of pretext evidence provides you some useful information in your advocacy.

[19] *See e.g*. William R. Corbett, *McDonnell Douglas 1972-2003*: *May you rest in Peace?* 6 U.PA. Lab. & Emp. L. 199. (2003).
[20] *See e.g*. Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 Emory L.J. 1887 (2004).
[21] *Griffith v, City of Des Moines*, 2003 WL 21976027, at 12 (S.D. Iowa, July 3, 2003; *Dare v. Walmart Stores, Inc*. 267 F. Supp. 2d 987, 992 (D. Minn. 2003). In fact the Supreme Court in *Gross* observed that "[a]nd the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* utilized in Title VII cases is appropriate in the ADEA context." 129 S.Ct. at 2349, n. 2 (internal citations omitted).