NO. 12-___

In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 268–69 (1989), a plurality of this Court held that the *discrimination* provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), requires a plaintiff to prove only that discrimination was "a motivating factor" for an adverse employment action. In contrast, *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 179–80 (2009), held that the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602, requires proof that age was "the but-for cause" of an adverse employment action, such that a defendant is *not* liable if it would have taken the same action for other, non-discriminatory reasons. The courts of appeals have since divided 3-2 on whether *Gross* or *Price Waterhouse* establishes the general rule for other federal employment statutes, such as Title VII's *retaliation* provision, that do not specifically authorize mixed-motive claims.

The question presented is:

Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (*i.e.*, that an improper motive was one of multiple reasons for the employment action).

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PETITION FOR A WRIT OF CERTIORARI

This case presents an important and frequently recurring question of federal employment law over which the courts of appeals have divided. The First, Sixth, and Seventh Circuits have construed this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S 168, 174 (2009), to mean that, unless Congress has specified otherwise, the federal employment statutes require a plaintiff to prove "but-for" causation—*i.e.,* that an employer would not have taken an adverse employment action but for an improper motive. In contrast, the Fifth and Eleventh Circuits have limited *Gross* to the ADEA. They have held that other statutes using similar or even identical language to the ADEA, such as Title VII's retaliation provision, require a plaintiff to prove only that an improper motive was one of multiple reasons for an adverse employment action. Numerous judges and commentators have acknowledged this circuit split and called for its resolution.

Because "[t]he specification of the standard of causation under [the federal employment statutes] is a decision about the kind of conduct that violates" those statutes, this is a fundamental question in civil rights law. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989) (plurality opinion). The question also has great practical importance, in part because mixed motives are easy to allege and difficult to disprove. If a plaintiff need only allege that retaliation provided an additional motivation for an adverse employment action, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and

non-discriminatory policies (as happened in this case).

The issue's importance is confirmed by the numerous decisions of this and other courts addressing the question, as well as the emergence of a 3-2 circuit split within just three years of *Gross*. Only this Court can settle the deepening controversy over whether its decision in *Gross* establishes a general rule or is limited to the ADEA.

This case provides "a good vehicle" for resolving that question because it illustrates the problems with the mixed-motive approach and the reasons why the legal standard matters. *See* Pet. App. 63 (Smith, J., dissenting). The plaintiff, Dr. Naiel Nassar, contends that the University of Texas Southwestern Medical Center's ("Medical School's") Chair of Internal Medicine, Dr. Gregory Fitz, blocked his attempt to secure a new job in retaliation for Nassar's allegation that another doctor had discriminated against him. The Medical School presented undisputed documentary evidence that Fitz had consistently opposed Nassar's proposed new job *well before* Nassar engaged in any protected activity and therefore *well before* any retaliatory animus could have existed.

Under these circumstances, the mixed-motive approach was likely outcome-determinative. A jury would be hard-pressed to determine that Nassar had proven that Fitz would not have opposed the new job but for retaliation, considering that Fitz had consistently done exactly that before any basis for retaliation arose. But the Fifth Circuit's mixed-motive approach allowed the jury to hold the Medical

School liable on the theory that retaliation became an additional motive over time.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 674 F.3d 448 and reproduced at Pet. App. 1. The court's order denying rehearing *en banc* is unpublished but available on Westlaw at 2012 WL 2926956 and reproduced at Pet. App. 59. The district court's final judgment is also unpublished and available on Westlaw at 2010 WL 3000877 and reproduced at Pet. App. 16.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2012. Pet. App. 1. The court denied rehearing *en banc* on July 19, 2012. *Id.* at 59–60. The Medical School timely filed this petition on October 17, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) are reproduced at Pet. App. 96, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) are reproduced at Pet. App. 68, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (2007) are reproduced at Pet. App. 99.

STATEMENT OF THE CASE

A. The Statutory Backdrop

This case concerns Title VII's *retaliation* provision. In *Price Waterhouse*, a plurality of this Court held that, if a plaintiff in a Title VII *discrimination* case proves that discrimination "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [membership in a protected class] into account." 490 U.S. at 258; *see also id.* at 259–60 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.).

In the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress partially abrogated *Price Waterhouse* by adopting a more nuanced scheme for Title VII discrimination claims. Congress specified that a defendant is liable if "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). If a defendant then proves as an affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor," the court may award equitable relief (including equitable monetary relief such as front pay) and attorney's fees to the plaintiff, but not damages. *Id.* § 2000e-5(g)(2)(B).

When Congress amended Title VII's discrimination provision, it left Title VII's retaliation

provision unchanged. The latter provision continues to prohibit an employer from taking an adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Unlike Title VII's discrimination provision, this retaliation provision does not set forth or cross-reference a mixed-motive standard. *See id.*

Other employment statutes are similar to Title VII's retaliation provision in this respect. For example, the ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a), or "because" the employee opposed an unlawful practice or participated in protected activity. *Id.* § 623(d).

After the Civil Rights Act of 1991, this Court held that "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross*, 557 U.S at 174. Instead, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176. Shortly thereafter, the Fifth Circuit held in *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010), that, notwithstanding *Gross*, "we must continue to allow the *Price Waterhouse* burden shifting in [Title VII retaliation] cases unless and until the Supreme Court says otherwise."

B. The Underlying Events

Nassar was an assistant professor at the Medical School from November 2001 until his resignation in July 2006. Pet. App. 2, 5; R. 3033.[1] As a faculty member, he was assigned to the AIDS clinic at Parkland Hospital, with which the Medical School was affiliated. Pet. App. 2.

Nassar felt that his supervisor, Dr. Beth Levine, treated him unfairly because of his Middle Eastern background. Pet. App. 5. After the Medical School promoted Nassar in March 2006, he began discussions with the Hospital about switching his employer. *Id.* at 4. At trial, Nassar testified that he wanted to work at "exactly the same job" at the Hospital but be employed by the Hospital instead of the Medical School, so that Levine would no longer be his supervisor. R. 2960.

The Affiliation Agreement between the Medical School and the Hospital, as well as the Hospital's bylaws, rules, and regulations, required that a physician seeking regular employment within the Hospital's geography (including the AIDS clinic) be employed by the Medical School. Pet. App. 4–6. Beginning in late March 2006, Fitz declined to approve Nassar's request to work full-time for the Hospital in the AIDS Clinic without being a Medical School faculty member. Pet. App. 5. Fitz explained at that time that the Affiliation Agreement precluded such an arrangement. *Id.*

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[1] The "R." citations refer to the record on appeal in the Fifth Circuit.

Fitz met with Nassar approximately a month later, on April 27, 2006. Recounting their meeting in an e-mail to the responsible hiring official at the Hospital that same day, Fitz wrote that, "[a]s per discussion," Nassar could not be a "Parkland employee" because "it would be against our operating agreement with Parkland to have them employ faculty directly." Defendant's Trial Exhibit, No. 14. Fitz noted that Nassar was "OK with this." *Id.*

Unknown to Fitz, a Hospital employee who lacked hiring authority continued to work behind the scenes to hire Nassar as a Hospital employee. *See* R. 2781–82. By July 3, 2006, those efforts resulted in an unsigned offer letter from the Hospital. Pet. App. 5.

On July 3, 2006, believing he had secured employment with the Hospital, Nassar wrote a letter resigning from the Medical School and accusing Levine of discriminating against him. Pet. App. 5. In that letter, Nassar thanked Fitz "for all [his] support," described his interactions with Fitz as "pleasant and positive," and called Fitz "a very honorable person." Plaintiff's Trial Exhibit 15.

Fitz first learned that Nassar was claiming illegal discrimination when he received Nassar's resignation letter on July 7, 2006. R. 2749, 2827–28, 2829; Pet. App. 5–6. Fitz was "very saddened" and "shocked," as he "had not been aware of this sentiment" by Nassar. R. 2709.

A disaffected former employee of the Medical School, Dr. Phillip Keiser, testified that, after Nassar resigned, Fitz told him that Fitz had put a stop to

Nassar's effort to be employed by the Hospital. Pet. App. 5–6; R. 2414–16. Keiser interpreted Fitz's comments as admitting retaliation. Pet. App. 5–6; R. 2417, 2471, 2538. Fitz testified that he acted based on the Affiliation Agreement, not because of retaliation. R. 2661, 2686–87, 2711, 2716–17; Pet. App. 5.

C. The District Court Proceedings

Nassar sued the Medical School for constructive discharge and retaliation. Pet. App. 6. The Medical School asked the district court to instruct the jury that it could find the school liable only if discrimination was the "but-for" cause of Fitz's actions, *i.e.*, only if Fitz would not have taken those actions in the absence of retaliatory animus. *Id.* at 112–15, 119. The district court observed that "[t]he defense has put forth a strong defense with regard to the fact that it [had] some legitimate reason, primarily, at least, it appears, based upon this affiliation agreement." *Id.* at 115.

Pursuant to the Fifth Circuit's decision in *Smith*, however, the district court rejected the Medical School's request and instructed the jury that Nassar needed to prove only that discrimination was one of multiple motives for Fitz's actions. Pet. App. 115, 47. The court noted that "it remains to be seen what the Supreme Court does with this mixed motive issue once they look at it in the context of a Title VII [case], but they haven't." *Id.* at 115.

The jury found the Medical School liable for constructive discharge and retaliation. It awarded approximately $3.5 million in damages. Pet. App. 44;

id. at 6–7. The district court reduced the damages award to approximately $735,000 and awarded Nassar roughly $490,000 in attorney's fees. *Id.* at 7.

D. The Appellate Proceedings

The court of appeals reversed the constructive discharge verdict because it was unsupported by the evidence, but upheld the jury's finding of retaliation. Pet. App. 8–12. The Medical School had argued on appeal that "[t]he district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation," but acknowledged that the Fifth Circuit had held otherwise in *Smith*. *Id.* at 63 (quoting Medical School's opening brief in Case No. 11-10338, at 42 (5th Cir. June 13, 2011)). Because the Fifth Circuit panel was bound by *Smith*, it rejected the Medical School's challenge. *Id.* at 12 n.16.

The court of appeals proceeded to uphold the retaliation verdict. It explained that the Medical School had argued "that Fitz thwarted Nassar's prospective employment at Parkland as a routine application of [the Medical School's] rights under the . . . [A]ffiliation [A]greement." Pet. App. 11. But the court found sufficient evidence from which the jury could conclude that Fitz sought "to punish Nassar for his complaints about Levine." *Id.*

After addressing various damages issues, the court of appeals remanded "for reconsideration, consistent with this opinion, of Nassar's monetary recovery and the award of attorney's fees." Pet. App. 15.

The court of appeals denied the Medical School's petition for rehearing *en banc* by a 9-6 vote. Pet. App. 60. Dissenting from the denial of rehearing *en banc*, Judge Smith wrote that *Smith* was wrongly decided, that *Smith* created a circuit split, that the question has "exceptional importance in employment law," and that "[t]his case is a good vehicle for fixing" the court's mistake in *Smith*. *Id.* at 63. Judge Smith concluded that the court's "failure to take the case en banc is a serious error." *Id.* at 67.

One of the 15 judges on the *en banc* court stated, in a concurrence to the denial of rehearing *en banc*, that the Medical School had not properly preserved this issue. Pet. App. 61–62. Judge Smith responded by describing, in a detailed footnote, all the ways in which the Medical School had raised the issue in the district court and again on appeal. *Id.* at 65–66 n.1.

E. The Remand

On remand, the district court stayed all proceedings pending this Court's action on this petition. Order Staying Case, Dkt. No. 214 (Sep. 7, 2012).

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because it presents a question of great practical significance over which the courts of appeals are divided, and provides a good vehicle for addressing the question.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER *GROSS* IS LIMITED TO THE ADEA, OR INSTEAD APPLIES TO OTHER EMPLOYMENT DISCRIMINATION STATUTES THAT USE SIMILAR LANGUAGE.

Although *Gross* appeared to resolve mixed-motive questions under the federal employment discrimination laws, the circuit courts' longstanding divergence on that issue has persisted. The ADEA prohibits an employer from taking an adverse employment action "because of such individual's age" or "because" the employee opposed an unlawful practice or participated in protected activity. 29 U.S.C. § 623(a) and (d). The *Gross* Court held that, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 557 U.S. at 176. The Court explained that the "ordinary meaning" of the phrase "because of" is that "age was the 'reason' that the employer decided to act"—not merely one of the factors that led to the employer's decision. *Id.* And "nothing in the statute's text indicates that Congress has carved out an exception to that rule." *Id.* at 177.

The courts of appeals have differed on whether *Gross* established a generally applicable rule or is

limited to the ADEA. In the first major decision interpreting *Gross*, the Seventh Circuit, in an opinion by Judge Easterbrook, determined that "*Gross* . . . holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden *in all suits under federal law*." *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (emphasis added). For that reason, the Seventh Circuit applied *Gross* to a First Amendment retaliation claim under § 1983. *Id.* at 522, 525–26.

Subsequent Seventh Circuit panels have reiterated that holding in the specific context of the employment discrimination laws, ruling that the ADA does not authorize mixed-motive claims for disparate treatment, *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62 (7th Cir. 2010), or for retaliation, *Barton v. Zimmer*, 662 F.3d 448, 455–56 & n.3 (7th Cir. 2011). The court explained that, "[l]ike the ADEA, the ADA renders employers liable for employment decisions made 'because of' a person's disability," and nothing else in the statute indicates that Congress meant to permit mixed-motive claims. *Serwatka*, 591 F.3d at 962. The *Serwatka* court also emphasized that its decision was consistent with an earlier Title VII retaliation case, *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706 (7th Cir. 1998), which held that "mixed-motive decisions based on retaliation were not" authorized by the statute. *Serwatka*, 591 F.3d at 962–63; *see also Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001).

In *Smith*, however, a divided panel of the Fifth Circuit split from the Seventh Circuit. The *Smith* majority "recognize[d] that the *Gross* reasoning could be applied in a similar manner to the instant case," which involved Title VII's retaliation provision. *Smith*, 602 F.3d at 328. It held, however, that "*Gross* is an ADEA case, not a Title VII case," and "the *Price Waterhouse* holding remains our guiding light." *Id.* at 329. The Fifth Circuit majority therefore sanctioned mixed-motive Title VII retaliation claims. *Id.* at 330. In doing so, it expressly disagreed with the Seventh Circuit's "broad" holding that *Gross* states the general rule for federal statutes. *Id.* at 329 n.28.

In contrast, the dissenting opinion agreed with the Seventh Circuit's decisions in *Fairley* and *Serwatka*: "As the Seventh Circuit has correctly reasoned, without statutory language indicating otherwise, the mixed-motive analysis is no longer applicable outside of Title VII discrimination, and consequently does not apply to this retaliation case." *Id.* at 336 (Jolly, J., dissenting).

The dissent also criticized the majority for relying on the "lame distinction that, although the language is identical, *Gross* was an age discrimination case under the ADEA and the case today is a retaliation case under Title VII." *Id.* at 337. "Given the uniform principle set out in *Gross*, the majority's distinction is the equivalent of saying that a principle of negligence law developed in the wreck of a green car does not apply to a subsequent case because the subsequent car is red—a meaningless distinction indeed." *Id.* The dissenters

from denial of rehearing *en banc* in this case reiterated that "[t]he panel decision in *Smith* . . . created an unnecessary circuit split," making the denial of *en banc* review "confounding." Pet. App. 67.

Three more circuits have now taken sides, deepening this division among the circuits. After observing in a Title VII retaliation case that, "[n]otably, there is a circuit split between the Fifth and Seventh Circuits on this issue," the Eleventh Circuit aligned itself with the Fifth, albeit in an unpublished decision. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012).

Two other circuits have gone the other way. In a deeply divided decision, the *en banc* Sixth Circuit observed that "[t]here are two ways to look at" the issue. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (Sutton, J.). "One is that *Price Waterhouse* established the meaning of 'because of' for Title VII *and* other statutes with comparable causation standards . . . ." *Id.* (emphasis in original). The other is that *Price Waterhouse*'s "motivating factor" test applies only to the extent that Congress has expressly imposed it. *Id.* After concluding that "*Gross* resolves this case" by adopting the second of those views, the majority held that the ADA does not permit mixed-motive claims for the same reasons the ADEA does not. *Id.* at 318–19. The majority emphasized that it had "taken the same path" as the Seventh Circuit. *Id.* at 319.

Although the Sixth Circuit majority recognized that the *Gross* analysis is generally applicable, it purported to distinguish *Smith* because that case concerned "a different provision of *Title VII*." *Id.* at

321 (emphasis in original). But "*Smith* cannot be dismissed so easily." *Id.* at 328 (Stranch, J., concurring in part and dissenting in part). Just like the ADA and the ADEA, Title VII's retaliation provision prohibits adverse employment actions "because of" an improper purpose, with no indication that Congress intended to authorize mixed-motive claims. 42 U.S.C. § 2000e-3(a). Because the question does not turn on "the title of the statute at issue," the Sixth Circuit majority's distinction of *Smith* is no distinction at all, as the dissenters observed. *Lewis*, 681 F.3d at 328 (Stranch, J., concurring in part and dissenting in part); *see also id.* at 330 n.5 (arguing that *Smith* was correctly decided and *Serwatka* wrongly decided); *id.* at 337 & n.1 (Donald, J., dissenting) (citing *Smith* for the proposition that "the *Price Waterhouse* burden-shifting doctrine remains controlling law outside of the ADEA context").[2]

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[2] After a 2008 amendment, the ADA continues to prohibit *retaliation* "because" an individual has opposed an unlawful employment practice, but now prohibits *discrimination* "on the basis of disability." 42 U.S.C. § 12112(a); *see* ADA Amendments Act of 2008, § 5, 122 Stat. 3553. This amendment to the ADA's discrimination provision, which is only one of the statutes implicated by the circuit split, has no bearing on the court of appeals' division on the question whether *Gross* articulates a generally applicable rule for numerous statutes. Nor does the amendment alter the meaning of the ADA's discrimination provision. As *Gross* observed, "the [statutory] phrase 'based on' indicates a but-for causal relationship" and "has the same meaning as the phrase, 'because of.'" 557 U.S. at 176. The House Report explains that the amendment addresses the different question "whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists," and that

The First Circuit has joined the Sixth and Seventh Circuits. Expressly agreeing with *Serwatka* and *Lewis,* the First Circuit held that materially identical provisions in the Rehabilitation Act require the plaintiff to prove but-for causation. *See Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). The First Circuit understood that "*Gross* is the beacon by which we must steer, and textual similarity between the Rehabilitation Act and the ADEA compels us to reach the same conclusion here." *Id.* at 74. In drawing that conclusion, the First Circuit (like the Seventh Circuit) relied heavily on circuit precedent concerning Title VII's retaliation provision—the statute at issue in this case. *Id.* at 73–74 (citing *Tanca v. Nordberg*, 98 F.3d 680, 682–83 (1st Cir. 1996)).

Notwithstanding its reliance on Title VII retaliation authority, the First Circuit attempted to distinguish *Smith* on the ground that, "[o]n any reading, *Smith* is a case in which but-for causation is required in order to hold an employer liable." *Id.* at 75. Because *Smith* held exactly the opposite, the First Circuit's attempt to distinguish *Smith* only confirms the circuit split.

District courts in other circuits have acknowledged this circuit split. *See Fordham v. Islip Union Free Sch. Dist.*, No. 08-2310, 2012 WL 3307494, at *6 n.5 (E.D.N.Y. Aug. 13, 2012); *Mingguo Cho v. City of New York*, No. 11-1658, 2012 WL 4376047, at *10 n.21 (S.D.N.Y. July 25, 2012). The

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Congress did not intend to change a plaintiff's burden of proof. H. Rep. 110-730, pt. 2, at 21 (2008); *accord* H. Rep. 110-730, pt. 1, at 16-17 (2008).

district courts have likewise divided on the question. Following *Gross*, some district courts have held that Title VII's retaliation provision does not permit mixed-motive claims. As one of them explained, there is "no compelling reason to define 'because,' as used in Title VII's anti-retaliation provision, any differently than the Supreme Court defined the phrase 'because of' in *Gross*." *Zhang v. Children's Hosp. of Phila.*, No. 08-5540, 2011 WL 940237, at *2 (E.D. Pa. Mar. 14, 2011); *accord Hayes v. Sebelius*, 762 F. Supp. 2d 90, 110–15 (D.D.C. 2011); *Beckford v. Geithner*, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009). But other district courts have limited *Gross* to its ADEA roots. *See, e.g.*, *Hylind v. Xerox Corp.*, 749 F. Supp. 2d 340, 355–56 (D. Md. 2010), *vacated in part on other grounds*, Nos. 11-1318, 11-1320, 2012 WL 2019827 (4th Cir. June 6, 2012); *cf. Morrow v. Bard Access Sys., Inc.*, 833 F. Supp. 2d 1246, 1248 (D. Or. 2011).

Commentators have also noticed "the resulting circuit split," which "positions the issue for the Supreme Court to address." Kimberly Cheeseman, *Recent Development*, Smith v. Xerox Corp.: *The Fifth Circuit Maintains Mixed-Motive Applicability in Title VII Retaliation Claims*, 85 TUL. L. REV. 1395, 1406 (2011); *accord* Andrew Kenny, Comment, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases After* Gross, 78 U. CHI. L. REV. 1031, 1032 (2011); James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 TEX. J. C.L. & C.R. 43, 85 (2011); *see also* Kourtni Mason, Article, *Totally Mixed*

Up!: An Expansive View of Smith v. Xerox *and Why Mixed-Motive Jury Instructions Should Not Be Applied in Title VII Retaliation Cases*, 38 S.U. L. REV. 345, 352–33 (2011).

II. THE COURT OF APPEALS' DECISION IS IRRECONCILABLE WITH THIS COURT'S DECISON IN *GROSS.*

The Fifth Circuit's decision cannot be squared with *Gross*. *See Smith*, 602 F.3d at 338 (Jolly, J., dissenting). Just like the ADEA, the Title VII retaliation provision "does not provide that a plaintiff may establish discrimination by showing that [retaliation] was simply a motivating factor." *Gross*, 557 U.S. at 174. Both statutes prohibit adverse employment actions against employees "because" of improper reasons. 42 U.S.C. § 2000e-3(a). Under the "ordinary meaning of [that] requirement," "a plaintiff must prove that [the improper factor] was the 'but-for' cause of the employer's adverse action." *Gross*, 557 U.S. at 176.

As with the ADEA, moreover, Congress did not add a motivating-factor provision to Title VII's *retaliation* provision when it added such provisions to Title VII's *discrimination* provision. *Compare* 42 U.S.C. § 2000e-3 (retaliation), *with id.* § 2000e-2(m) (prohibiting mixed-motive discriminatory employment practices), *and id.* § 2000e-5(g)(2)(B) (providing remedies for violations of § 2000e-2(m). *See also Gross*, 557 U.S. at 174; *Smith*, 602 F.3d at 337–38 (Jolly, J., dissenting). That "careful tailoring" of the 1991 amendments to Title VII "should be read as limiting the mixed-motive analysis to the

statutory provision under which it was codified—Title VII discrimination only, which excludes retaliation, the claim here." *Smith*, 602 F.3d at 338 (Jolly, J., dissenting) (quoting *Gross*, 557 U.S. at 178 n.5).

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

This question has "exceptional importance in employment law" and beyond. *See* Pet. App. 63 (Smith, J., dissenting). That importance is reflected in the issue's regular recurrence over the past quarter century, both before and after *Gross*, which makes the question more than ripe for this Court's resolution.

1. Under the court of appeals' holding, a plaintiff may establish liability by showing that retaliation provided an additional motivation for an adverse employment action. *Smith*, 602 F.3d at 329–30. The burden of proof then shifts to the defendant to try to prove, as an affirmative defense, that it would have taken the same action for other reasons. *Id.* at 330. That "pro-employee" framework puts an employer at a decided disadvantage because mixed motives are easy to allege and difficult to disprove. *See* Kenny, 78 U. CHI. L. REV. at 1032. As in this case, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and non-discriminatory policies. *Cf. Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193–94 (2011).

Even if an employer carries its burden of proof on that affirmative defense, it faces significant

liability. Under the court of appeals' view, the employer is liable and subject to equitable relief and an award of attorney's fees. *See* 42 U.S.C. § 2000e-5(g)(1); *Smith*, 602 F.3d at 333. It is exonerated only from damages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

As a result, even defendants that prevail on the affirmative defense face grave consequences. The reputational consequences alone of being held liable for a federal civil rights violation can be substantial, including for the individuals accused of perpetrating the violation.

Moreover, equitable relief and attorney's fees can be far *more* burdensome than a damages award. Equitable relief may include the intrusive remedy of ordering the defendant to reinstate a former employee or to promote or transfer a current employee. *Id.* § 2000e-5(g)(1). It may also include an award of front pay, which can total far more than the maximum $300,000 compensatory-damages award allowed by statute. *See* Pet. App. 14; *see also* 42 U.S.C. § 1981a(b)(2). Indeed, Nassar sought $4.2 million in front pay. Plaintiff's Application for Court Award of Front Pay, Dkt. No. 147, at 5 (June 11, 2010). Attorney's fees awards can likewise exceed compensatory damages. Here, the district court awarded Nassar's counsel almost half a million dollars in fees. Pet. App. 7.

An empirical study has confirmed the obvious: plaintiffs recover "significantly more often" when courts give a "so-called motivating factor instruction" to the jury. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences*

Employment Discrimination Case Outcomes, 42 ARIZ. ST. L.J. 901, 944 (2010). Numerous other commentators have recognized the "extremely important practical issues" at stake. Michael Fox, *5th Circuit En Banc Request on* Smith v. Xerox, *Please!* (Mar. 25, 2010), http://employerslawyer.blogspot.com/2010/03/5th-circuit-en-banc-request-on-smith-v.html; *accord* Kenny, 78 U. CHI. L. REV. at 1032. That commentary has generally been highly critical of the Fifth Circuit's "mixed-up" and "unexpected" departure from *Gross* and *Serwatka*. *See* Mason, 38 S.U. L. REV. at 362; Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 440–46 (2010).

Moreover, the issue's importance extends well beyond the employment discrimination context. Causation is an element of almost all causes of action. As noted, the Seventh Circuit construes *Gross* to hold that, unless a statute "provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all* suits under federal law," including § 1983 actions. *Fairley*, 578 F.3d at 525–26 (emphasis added).

2. The practical importance of this question is confirmed by the frequency with which it recurs. Before this Court decided *Price Waterhouse* in 1989, "[t]his question ha[d], to say the least, left the Circuits in disarray," at least with respect to Title VII's discrimination provision. *Price Waterhouse*, 490 U.S. at 238 n.2 (citing numerous cases). After Congress partially abrogated *Price Waterhouse* with respect to Title VII discrimination claims, courts remained unclear on the treatment of other claims,

including Title VII retaliation claims. *Compare Vialpando v. Johanns*, 619 F. Supp. 2d 1107, 1119 (D. Colo. 2008) (applying but-for test to Title VII retaliation claims), *with Porter v. U.S. Agency For Int'l Development*, 240 F. Supp. 2d 5, 7 (D.D.C. 2002) (applying motivating-factor test to such claims).

Now, in the three years since *Gross*, five circuits have divided 3-2, one of them has granted *en banc* review, another has narrowly denied *en banc* review, three of the appellate decisions have drawn vigorous dissents, and numerous district courts have also weighed in. *See* pp. 11–17, *supra.* Those decisions demonstrate that, in addition to recurring frequently, the issue has percolated thoroughly. Indeed, the five circuits that have addressed the question account for 43% of the federal courts' civil-rights caseload, including 15,070 civil rights actions in fiscal year 2011 alone. *See* Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts: Fiscal Year 2011, table C-3, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C03Sep11.pdf.

3. Over the past decade, this Court has recognized the importance of causation issues under federal employment statutes of all types. *See, e.g.*, *Gross*, 557 U.S. 167; *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (burden of proof for the ADEA's "reasonable factors other than age" defense); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (causation standard under Federal Employers' Liability Act); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (evidentiary standard for obtaining a

mixed-motive jury instruction under Title VII); *Price Waterhouse*, 490 U.S. at 258.

The question presented here is at least as important as the questions presented in those cases, because the meaning of *Gross* is fundamental to the interpretation of *all* employment statutes. Especially since the current division among the lower courts turns on the meaning of this Court's decision in *Gross*, as well as its earlier plurality decision in *Price Waterhouse*, lower courts and litigants need this Court's guidance on the meaning of the Court's own precedents.

IV. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case provides an especially "good vehicle" for considering the question presented. Pet. App. 63 (Smith, J., dissenting). There is no procedural obstacle to the Court's review, and this case's fact pattern illustrates the practical importance of the issue.

1. Although respondent argued below that the Medical School had waived its objection, there is no such impediment to this Court's review. The Court reviews questions that were pressed *or* passed upon below. *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992). The question presented is properly before this Court for *both* of those reasons.

The Medical School squarely raised this issue before the court of appeals panel. Pet. App. 63 (quoting Medical School's brief). The court of appeals then reached and addressed this issue on its merits—

without even intimating there had been any waiver. *See id.* at 12 n.16. That is all this Court's pressed-or-passed-upon standard requires.

The Medical School also took pains to preserve the issue in the district court, as detailed by Judge Smith. *See* Pet. App. 65–66 n.1. A party preserves an objection to a jury instruction by raising it on the record, before closing arguments, and before instructions are read to the jury. Fed. R. Civ. P. 51(b) & (c). The Medical School "did so." Pet. App. 65–66 n.1 (Smith, J., dissenting).

In the initial charge conference, the Medical School argued that Nassar's burden was to "show that [retaliation] is the sole motive of the defendant" using "but for language," which the School described as "something more stringent than motivating factor." Pet. App. 119. The district court rejected that objection on the ground that "this case is a mixed motive retaliation case, which calls for . . . a motivating factor; that the discriminatory intent is a motivating factor, it doesn't have to be the sole motivating factor." *Id.* at 121.

Shortly before closing arguments, the Medical School pressed its but-for argument a *second* time. Pet. App. 112–15. After expressing some frustration with the Medical School's second objection, *id.* at 114, the court again denied the objection on its merits, not based on a finding of waiver. The court stated "that the mixed motive analysis still applies in a Title VII retaliation case," expressly relying on *Smith*. *Id.*

One judge on the *en banc* court nonetheless concluded that the Medical School had failed to

preserve the objection because its "own proposed jury instruction included the motivating factor instruction language used by the district court." Pet. App. 61 (Elrod, J., concurring). That is incorrect. As discussed above, the Medical School squarely objected to a mixed-motive approach twice. Judge Smith correctly explained that, "[h]aving lodged that objection, [the Medical School's] attorneys, as officers of the court, also complied with *Smith* by tendering a jury instruction that treated but-for causation as an affirmative defense." *Id.* at 66 n.1; *see id.* at 104. Even then, to make absolutely sure there would be no doubt about its position, the Medical School, "along with its proposed instruction, . . . emphasized its objection to a mixed-motive instruction by including a detailed presentation on the conflicting state of the law, citing authority supporting a but-for causation standard." *Id.* at 66 n.1; *see id.* at 104 n.8.

The Medical School is aware of *no* authority indicating that its preservation of the issue was anything short of exemplary, especially since *Smith* made the School's objection futile in the lower courts.

2. Far from presenting an obstacle to review, the facts of this case provide a great vehicle for considering the question presented. Whether Nassar was entitled to a mixed-motive instruction, or whether he had to prove that retaliation was the but-for cause of the adverse employment action, was likely outcome-determinative.

Nassar's retaliation claim is a narrow one: he contends that Fitz blocked his attempt to get a job at the Hospital's AIDS clinic in retaliation for Nassar's discrimination claim. Pet. App. 11. In response, the

Medical School presented undisputed documentary evidence that Fitz consistently opposed Nassar's proposed employment at the Hospital's AIDS clinic—based on an Affiliation Agreement between the Medical School and the Hospital—beginning well before Nassar engaged in any protected activity and therefore well before any retaliatory animus could have existed. *See* pp. 6–8, *supra.*

The jury's evaluation of these facts was significantly different under a mixed-motive instruction than it would have been under a but-for standard. A jury would be hard-pressed to determine that Nassar had proven that Fitz would not have opposed the hospital job but for retaliation, considering that Fitz consistently did exactly that before learning of any protected activity by Nassar. Indeed, the district court observed before trial that "[t]he defense has put forth a strong defense . . . based upon this [A]ffiliation [A]greement." Pet. App. 115. But the mixed-motive instruction allowed Nassar to recover if retaliation was only an additional subjective motivation for Fitz's consistent application of the Affiliation Agreement.

The only question the jury asked the district court during its deliberations confirms the importance of the mixed-motive standard. The jury asked to see "an email from Dr. Nassar to Dr. Fitz when he first complained about discrimination or being treated differently." Pet. App. 123. That question is relevant only to *when* Fitz allegedly acquired a retaliatory animus, *i.e.,* to whether Fitz settled on his course of conduct before or after any cause for retaliation arose. The facts of this case put

the practical significance of the mixed-motive instruction in stark relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10338

NAIEL NASSAR, MD,

Plaintiff - Appellee Cross-Appellant

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Defendant - Appellant Cross-Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas

OPINION

Before: REAVLEY, ELROD, and HAYNES, Circuit Judges

Filed March 8, 2012

Dr. Naiel Nassar, the Appellee, was a member of the faculty at Appellant University of Texas Southwestern Medical Center ("UTSW"). UTSW is affiliated with Parkland Hospital, where UTSW faculty make up most of the physician staff. Nassar served as a clinician at Parkland's Amelia Court Clinic, which specializes in HIV/AIDS treatment. Nassar claimed and a jury found that he was constructively discharged from his UTSW faculty position because of racially motivated harassment by a superior. The jury also found that UTSW retaliated against Nassar by preventing him from obtaining a position at Parkland after he resigned from UTSW. Although there was sufficient evidence to support the jury's verdict on the retaliation claim, there was insufficient evidence of constructive discharge. We therefore VACATE in part, AFFIRM in part, and REMAND the case for reconsideration of Nassar's monetary recovery and attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dr. Naiel Nassar, who is of Middle Eastern descent, came to UTSW in 1995 to work in Parkland's Amelia Court Clinic. After three years at the Clinic, Nassar pursued additional training at the University of California at Davis. In 2001 he returned to UTSW as an Assistant Professor of Internal Medicine and Infectious Diseases and Associate Medical Director of the Clinic. His immediate supervisor was Dr. Phillip Keiser, Professor of Internal Medicine and the Clinic's Medical Director. Keiser's supervisor at UTSW was Dr. Beth Levine, whom UTSW hired in June 2004 as

Chief of Infectious Disease Medicine. Levine oversaw the Amelia Clinic, but she did not work there on a daily basis.

Upon being hired, Levine began inquiring about Nassar's productivity and billing practices. In late 2005, when referring to another doctor of Middle Eastern descent, Levine said in Nassar's presence, "Middle Easterners are lazy." In the spring of 2006, in reference to the hiring of that same doctor, Levine said they have "hired another one" in Keiser's presence. Keiser interpreted this comment as indicating that Parkland had hired another "dark skin[] Muslim like Nassar," and Keiser told Nassar what Levine had said. Keiser also informed Nassar that Levine scrutinized Nassar's productivity more than that of other doctors. When Keiser presented Levine with objective data demonstrating Nassar's high productivity, Levine began criticizing Nassar's billing practices. Her criticism did not take into account that Nassar's salary was funded by a Federal grant that precluded billing for most of his services.

During this same period, Levine suggested to Nassar that he consider applying for a promotion to become an Associate Professor. Nassar started the application process. While Nassar was soliciting recommendations for his promotion, Levine told Nassar that he was unlikely to be promoted because Dr. Mumford did not like him. Nassar later found out that Mumford was not on the Promotions and Tenure Committee ("the Committee") nor did he oppose Nassar being promoted. At another point, Levine told Nassar that he would need to switch from UTSW's "clinical scholars track" to its "clinician track" in

order to be promoted. Nassar did this. In reviewing Nassar's promotion application, the Committee and UTSW made a number of billing and productivity inquiries about Nassar and his work, which came back relatively positive but with a few criticisms about Nassar's frequent speaking engagements on behalf of pharmaceutical companies. Levine also asked Keiser why Nassar wanted to stay at UTSW instead of moving back to California, where his family was. Levine did, however, sign letters of recommendation composed by Keiser in support of Nassar's promotion. On March 1, 2006, the Committee decided to promote Nassar, effective September 1, 2006.

Despite the eventual promotion decision, Levine's harassment led Nassar to look for a way to continue working at the Clinic without being a UTSW faculty member subject to Levine's supervision. In 2005, Nassar began discussions with the Hospital about continuing his work in the Clinic as a Parkland staff physician rather than as UTSW faculty. On a number of occasions before April, 2006, Nassar met with Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's immediate superior, and complained that Levine and the Committee scrutinized his productivity and billing more than that of other doctors.

UTSW presented evidence indicating that longstanding practice and UTSW and Parkland's affiliation agreement obliged Parkland to fill its staff physician posts with UTSW faculty. Nassar disputed that interpretation of the agreement and contended that some of the Parkland doctors he worked with at

the Amelia Clinic were not UTSW faculty. In any event, Parkland staff told Nassar that if he would resign from his post at UTSW then Parkland would be able to hire him to work at the Amelia Clinic. On June 3, 2006, Parkland offered Nassar a job as a staff physician on Parkland's payroll, starting on July 10, 2006. Nassar resigned from UTSW on July 3, 2006, with a letter to Fitz and other UTSW faculty. In the letter, Nassar wrote:

> The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine. . . . I have been threatened with denial of promotion, loss of salary support and potentially loss of my job[.] . . . [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment.

Fitz opposed Parkland's hiring Nassar, asserting that UTSW had a right to fill Parkland doctor positions with UTSW faculty. The jury heard conflicting evidence regarding the timing and motivation of Fitz's opposition. There was some evidence that Fitz made his decision in April 2006. But Keiser testified that he spoke with Fitz two or three days after Nassar's resignation letter. According to Keiser, the letter shocked Fitz. Fitz felt that Levine should be publicly exonerated, so he resolved to stop Parkland from hiring Nassar. Whatever the terms of the affiliation agreement, Fitz's opposition prompted Parkland to withdraw the offer giving Nassar the

July 10 start date. Nassar then accepted a position at a smaller HIV/AIDS clinic in Fresno, California.

In August 2008, Nassar filed suit in the Northern District of Texas claiming that UTSW had constructively discharged and retaliated against him, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The jury trial was bifurcated into a liability phase and a damages phase. At the close of Nassar's case in the liability phase, UTSW moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), which the district court denied. The jury found that Nassar's resignation from UTSW was the result of constructive discharge, and that UTSW blocked Parkland from hiring Nassar in retaliation for Nassar's statements in the July 3 letter. Nassar moved for front pay to be included as part of his recovery. The district court denied that motion and proceeded with the damages phase of the trial.

Nassar's resignation from UTSW took effect September 1, 2006, and he took up his new position at the clinic in Fresno. That clinic is run by Central California Faculty Medical Group ("CCMFG"), whose physicians are given faculty appointments at the University of California San Francisco. In the following years his salary at CCMFG has varied from $180,000 to $165,000. Nassar was making $155,095 per year (including benefits) as a UTSW Assistant Professor. If he had stayed on through the effective date of his promotion, he would have made $166,395 (including benefits). As a staff physician on Parkland's payroll, Nassar's compensation would have been approximately $240,500 per year

(including benefits). The jury awarded Nassar $436,167.66 in back pay and over three million dollars in compensatory damages.

UTSW filed a renewed motion for judgment as a matter of law, a motion for new trial, and motion for remittitur.[1] The district court denied UTSW's motions for judgment as a matter of law and for a new trial. The district court did, however, grant UTSW's motion for remittitur because of Title VII's compensatory damages cap, which required reducing the compensatory damage award to $300,000.[2] Nassar moved for attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k), and the district court granted awarded $489,927.50 in fees plus court costs. UTSW timely appealed, raising challenges to the sufficiency of the evidence, the jury instructions, the back pay and compensatory damages awards, and the award of attorneys' fees. Nassar timely filed a cross-appeal challenging the district court's denial of front pay.

II. DISCUSSION

A. Sufficiency of the Evidence

We review de novo the denial of a motion for judgment as a matter of law, applying the same standard as the district court. *Travelers Casualty & Surety Co. of America v. Ernst & Young LLP*.[3] If the case has been tried to a jury, a motion for judgment as a matter of law "is a challenge to the legal

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[1] *See* FED. R. CIV. P. 50(b), 59(b), 59(e).

[2] *See* 42 U.S.C. § 1981a(b)(3)(D).

[3] 542 F.3d 475, 481 (5th Cir. 2008).

sufficiency of the evidence."[4] "[A] jury verdict must be upheld unless there is no legally sufficient evidentiary basis for the jury to do what the jury did."[5] In reviewing the sufficiency of the evidence, we "draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party."[6] "We reverse only if the evidence points so strongly and so overwhelmingly in favor of the moving party that no reasonable juror could return a contrary verdict." *Porter v. Epps*.[7]

UTSW claims that there was insufficient evidence for the jury to have found for Nassar on either his constructive discharge claim or his retaliation claim.

1. Constructive Discharge

To succeed on a constructive discharge claim, Nassar is required to show "'working conditions . . . so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'" *Aryain v. Wal-Mart Stores Tex. LP*.[8] Constructive discharge claims like the one Nassar

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[4] *Id.*

[5] *Id.* at 481-82 (internal quotation marks and citation omitted).

[6] *Id.* at 482 (internal quotation marks and citation omitted).

[7] 659 F.3d 440, 445 (5th Cir. 2011) (internal quotation marks citation and brackets omitted).

[8] 534 F.3d 473, 480 (5th Cir. 2008) (quoting *Penn. State Police v. Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342, 2342 (2004)).

brought are essentially hostile work environment claims but more extreme.[9] We therefore have required plaintiffs advancing constructive discharge claims to prove the existence of an aggravating factor. *Brown v. Kinney Shoe Corp.*[10] Such factors include:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibility; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.[11]

Nassar proved none of these factors with the possible exception of "badgering, harassment, and

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[9] *Suders*, 542 U.S. at 146, 124 S. Ct. at 2354; *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 444 (5th Cir. 2011) (A constructive discharge claim "requires a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." (internal quotation marks omitted)). In order to establish a hostile working environment claim, a plaintiff must prove (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

[10] 237 F.3d 556, 566 (5th Cir. 2001).

[11] *Dediol*, 655 F.3d at 444.

humiliation." In fact, UTSW approved Nassar's promotion to a position with a higher salary and more preferable employment terms. With respect to the harassment, when viewed in the light most favorable to the jury's verdict, Nassar proved that Levine racially harassed him, but his proof was no more than the "minimum required to prove a hostile work environment."[12] When considering the aggravating factors, it cannot be said that there was sufficient proof to show that Nassar's "working conditions were so intolerable that a reasonable employee would feel compelled to resign."[13]

2. Retaliation

The required proof for a Title VII retaliation claim is less demanding than constructive discharge. "It goes without saying that, when a race-discrimination claim has been fully tried, as has this one, this court need not parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext." *DeCorte v. Jordan.*[14] Our review is instead "to determine only whether the

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[12] *Id*. (internal quotation marks and citation omitted).

[13] *Brown*, 237 F.3d at 566 (internal quotation marks and citation omitted) (reversing a jury verdict on constructive discharge); *see also Brown v. Bunge Corp.*, 207 F.3d 776, 782–83 (5th Cir. 2000) (affirming summary judgment against constructive discharge claim where plaintiff was unfairly criticized, demoted, and given fewer job responsibilities).

[14] 497 F.3d 433, 437-38 (5th Cir. 2007) (internal quotation marks omitted).

record contains sufficient evidence for a reasonable jury to have made its ultimate finding that [the employer's] stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another motivating factor."[15]

Nassar's claim is that Fitz blocked his move to become a Parkland staff physician because he complained about harassment by Levine. UTSW has argued here and at trial that Fitz thwarted Nassar's prospective employment at Parkland as a routine application of UTSW's rights under the UTSW-Parkland affiliation agreement. Viewing the evidence in the light most favorable to the jury's verdict, Nassar offered sufficient proof that Fitz invoked UTSW's putative rights under the agreement in order to punish Nassar for his complaints about Levine. Keiser testified that Fitz told him that Nassar's complaints in the resignation letter were his reason for blocking the Parkland position. UTSW put on testimony indicating that Fitz made his decision before the letter and that he regarded the matter as a routine application of the agreement. The jury considered both parties' evidence and resolved the conflict against UTSW. Since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," we find no basis to upset the jury's verdict that UTSW retaliated

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[15] *Id.* at 438.

against Nassar because of his complaints of racial discrimination.[16]

B. Nassar's Monetary Recovery

UTSW challenges the award of back pay and compensatory damages, and Nassar challenges the denial of front pay. All of these decisions are reviewed for abuse of discretion.[17] We have found the jury's verdict as to constructive discharge insufficiently supported, and the jury's damage award did not separate the damages awarded to Nassar for the retaliation claim and the damages awarded for the constructive discharge claim. We will therefore remand the case to the district court for recalculation of damages. *See Neill v. Diamond M. Drilling Co.*[18] Nonetheless, the parties present legal issues relating to Nassar's monetary recovery that ought to be resolved now.

1. Back Pay and Compensatory Damages

UTSW argues that back pay should have been determined by comparing Nassar's compensation at UTSW and his compensation at CCMFG, and not, as the district court allowed, by comparing his

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[16] *Id.* at 437 (internal quotation marks and citation omitted). UTSW also urges error based on the jury having been instructed on a mixed-motive theory of retaliation. UTSW concedes that its argument is foreclosed by our decision in *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010). We therefore find no error in the jury instructions.

[17] *DeCorte*, 497 F.3d at 442 (compensatory damages); *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 489, 92 (5th Cir. 2001) (front pay and back pay).

[18] 426 F.2d 487, 491-92 (5th Cir. 1970).

prospective compensation at Parkland and his compensation at CCFMG. "A back pay award, as all damages awarded pursuant to Title VII, should make whole the injured party by placing that individual in the position he or she would have been in but for the discrimination." *Sellers v. Delgado Community College*.[19] By retaliating against Nassar and blocking his job with Parkland, UTSW deprived Nassar of the pay he otherwise would have earned there. Therefore, to make Nassar whole, the back pay ought to be measured against what Nassar would have made at Parkland. Title 42, United States Code, § 2000e-5(g) authorizes back pay awards. Unlawful retaliation can take the form of a former employer preventing a plaintiff from getting a job with another employer. *Robinson v. Shell Oil Co.*[20] Section 2000e-5(g) states that back pay is "payable by the employer . . . responsible for the unlawful employment practice." It does not require that the employer liable for back pay be the same entity for whom the plaintiff would have worked had he not suffered unlawful retaliation.

Nassar testified that he has suffered a decrease in his income in honoraria he receives for attending conferences and other speaking engagements. At his new post, his honoraria income is approximately one hundred thousand dollars less per year than when he

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[19] 839 F.2d 1132, 1136 (5th Cir. 1988). The district court can decide the amount of back pay on its own, or empanel an advisory jury. *Black v. Pan Am. Lab., L.L.C.*, 646 F.3d 254, 263 (5th Cir. 2011). But either party can demand a jury trial on compensatory damages. 42 U.S.C. § 1981a(c)(1).

[20] 519 U.S. 337, 346, 117 S. Ct. 843, 849 (1997).

had a UTSW affiliation. Nassar claimed that he lost approximately one hundred thousand dollars per year in honoraria. UTSW argues that it was error for the jury to have been able to consider honoraria as a part of its award of back pay. We agree. "Pay," used as a noun, means "something paid for a purpose and especially as a salary or wage."[21] Although Nassar would not have been able to obtain these honoraria without his job at UTSW, they were paid by third parties for services that were not required under the terms of his UTSW employment. Therefore, they are not akin to salary, wages, or benefits, the normal components of back pay.[22]

Compensatory damages available in a Title VII case cannot include back pay or front pay, 42 U.S.C. § 1981a(b)(2), but they do cover "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Id.* at § 1981a(b)(3). Nassar's lost honoraria income is thus awardable as compensatory damages to the extent the loss was caused by UTSW's blocking Nassar's position at Parkland rather than Nassar's decision to resign from UTSW. That factual question must be resolved on remand.

2. Front Pay and Attorneys' Fees

We will not address the front pay issue because we must remand for reconsideration of Nassar's

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[21] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 851 (10th ed. 1998).

[22] *See* 5 LEX K. LARSEN, LARSON ON EMPLOYMENT DISCRIMINATION § 92.06[2] (2d ed. 2011).

monetary compensation in light of our findings that there was insufficient evidence to support constructive discharge and that honoraria should not have been considered part of back pay. We believe that "it is prudent to remand the [attorneys'] fee award for reconsideration" as well. *Hitt v. Connell*.[23] We thus express no opinion on the district court's front pay decision or the fee award.

III. CONCLUSION

For the foregoing reasons, we VACATE the district court's judgment regarding UTSW's liability for constructive discharge, we AFFIRM the district court's judgment regarding liability for retaliation, and we REMAND the case for reconsideration, consistent with this opinion, of Nassar's monetary recovery and the award of attorneys' fees.

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[23] 301 F.3d 240, 251 (5th Cir. 2002).

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISIONS

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

September 16, 2010

FINAL JUDGMENT

Before the Court is the motion of Plaintiff, Naiel Nassar, M.D. ("Plaintiff" or "Dr. Nassar") for entry of final judgment (doc. 148). For the reasons set forth below, the Court finds that the jury's verdict is both legally and factually supported and that entry of final judgment is appropriate. Application of Title

VII's statutory cap on compensatory damages operates to reduce the jury's award of compensatory damages to $300,000. Accordingly, the Court **GRANTS** Plaintiff's motion in part and enters judgment on the jury's verdict, as properly limited by the statute. Plaintiff shall recover back pay and benefits in the amount of $438,167.66 and compensatory damages in the amount of $300,000.

I.

BACKGROUND

Dr. Nassar, a Muslim physician of Egyptian national origin, was an Assistant Professor of Medicine at Defendant University of Texas Southwestern Medical Center at Dallas ("Defendant" or "UT Southwestern") whose primary duty was to provide patient care at the Amelia Court HIV/AIDS clinic at Parkland Hospital ("Parkland"). Plaintiff's lawsuit is grounded in allegations that he faced discriminatory and harassing treatment at UT Southwestern that constituted constructive discharge, that he reported that treatment, and that in retaliation, UT Southwestern officials blocked his attempt to gain employment at Parkland.[1]

Plaintiff's Title VII claims for constructive discharge and retaliation were tried before a jury from May 17, 2010 to May 26, 2010. The trial was

[1] The relevant factual background is more fully described in the Court's rulings on summary judgment and Plaintiff's motion for attorneys' fees (docs. 99, 100, and 160) and the trial transcript and is set forth here only to the extent necessary to provide context for Plaintiff's motion and Defendant's objections.

bifurcated: after the jury rendered a verdict in Plaintiff's favor on liability on both the constructive discharge and retaliation claims (doc. 140), it heard evidence regarding damages. On May 26, 2010, the jury returned a damages verdict that declined Defendant's requested limitation on damages, and awarded Plaintiff back pay and benefits damages of $438,167.66 and compensatory damages of $3,187,500.00. (doc. 143).

Plaintiff promptly moved for entry of final judgment pursuant to Federal Rule of Civil Procedure 58. (doc. 148). Following trial, Defendant obtained new counsel, and the Court granted its motion to extend the response deadlines to allow Defendant to review the record so that its objections could be grounded in the record. (doc. 157). On August 13, 2010, Defendant filed its objections (doc. 170) arguing that the jury's verdicts on liability and damages were not supported by legally sufficient evidence. (doc. 170). Specifically, Defendant argues that the statutory damage cap applicable to Title VII cases precludes an award of compensatory damages in excess of $300,000. (doc. 170). Defendant further contends that the evidence is legally insufficient to support the remainder of the jury's back pay and compensatory damages award and argues that the Court should instead enter a take-nothing judgment. *Id.*

II.

ANALYSIS

Rule 58 requires a prompt entry of judgment in a separate document following a jury verdict. Fed. R.

Civ. P. 58(a). Defendant objects to entry of judgment on the grounds that the jury's verdict was excessive and not supported by legally sufficient evidence. (doc. 170 at 1). "A strong presumption exists in favor of affirming a jury award of damages." *Sanders v. Baucum*, 929 F.Supp. 1028, 1039 (N.D. Tex. 1996). An objection that the jury's award is excessive requires a "clear showing of excessiveness," and an "verdict is excessive only if it is 'contrary to right reason' or 'entirely disproportionate to the injury sustained.'" *Id.* (quoting *Caldarera v. E. Airlines, Inc.,* 705 F.2d 778, 784 (5th Cir. 1983)). Evaluation of Defendant's objections to the sufficiency of the evidence, whether related to liability or damages, similarly requires deference to the jury's findings; "the evidence is nevertheless sufficient if reasonable minds *could* make the challenged jury findings of fact based on specific evidence in the record." *Hooker v. Victoria's Secret Stores, Inc.*, 281 F.3d 1278, 2001 WL 1692436 at *2 (5th Cir. Nov. 21, 2001).[2] The Court will consider Defendant's objections to the jury's

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[2] There, the Fifth Circuit applied the "deferential 'sufficiency of the evidence' standard" to challenges brought under Rules 50 and 59 of the Federal Rules of Civil Procedure. It noted that the standard was also applicable to motions to alter or amend judgment. *Id.* (citing *Youmans v. Simon*, 791 F.2d 341, 349 (5th Cir. 1986). While Defendant's objections arise in the context of a motion to enter judgment, they are expressly grounded in the sufficiency of the evidence and will be evaluated under that standard. *See Paris v. Dallas Airmotive, Inc.*, No. 3:970-cv-208-L, 2001 WL 881278 at * 6 (N.D. Tex. July 30, 2001) (resolving evidentiary objections regarding liability and damages in a Title VII case prior to entry of judgment). Defendant's objections are briefed, replied to, and properly before the Court.

liability verdicts, compensatory damages, and back pay in turn.

A. *Defendant's Objections to Jury Verdict on Liability and Request for Take-Nothing Judgment*

At the conclusion of a Response largely devoted to issues regarding damages, Defendant lodged challenges to the sufficiency of the evidence in support of the jury's findings on liability. (doc. 170 at 8-9). Because an award of damages must necessarily rest on a foundation of liability, the Court will turn first to these objections.

Defendant first argues that "[t]here is legally insufficient evidence to support the jury's 'yes' answer to Question No. 1 of the liability verdict (doc. 140), in which the jury was asked whether Plaintiff was constructively discharged because of his race, national origin, or religious preference." (doc. 170 at 9). "To prove constructive discharge, a plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign." *Faruki v. Parsons*, 123 F.3d 315, 319 (5th Cir. 1997). "Whether a reasonable employee would feel compelled to resign depends on the facts of each case," an objective inquiry that considers a number of aggravating factors, including "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation." *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

Defendant's sufficiency challenge is rooted in its contention that "no such aggravating factors exist" in this case. (doc. 170 at 9). Defendant does not

challenge the sufficiency of evidence offered in support of the remaining elements of constructive discharge. The Court concludes that a reasonable jury could find that aggravating circumstances existed that were sufficient to establish a constructive discharge. Dr. Nassar testified and was rigorously cross-examined regarding the frequency, severity, and nature of derogatory and harassing comments made by Defendant's chief of the division of infectious diseases, Dr. Beth Levine. Dr. Levine offered a different view. The jury evaluated the conflicting testimony and credited Plaintiff's factual assertions. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *DeCorte v. Jordan*, 497 F.3d 433, 437 (5th Cir. 2007) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Further, the Court instructed the jury that "[a] plaintiff's generalized or conclusory testimony regarding his subjective belief that he was discriminated against on the basis of race, national origin, or religion is alone insufficient to constitute evidence of discrimination." (doc. 140 at 8). Dr. Nassar's testimony was largely corroborated by the testimony of Dr. Keiser and Ms. Moreno, which the jury could reasonably have credited over the conflicting testimony Defendant offered. Defendant's objections to entry of judgment on the jury's finding of constructive discharge are overruled.

Defendant also argues that "[t]here is legally insufficient evidence to support the jury's 'yes' answer to Question No. 2 of the liability verdict (doc. 140), in which the jury was asked whether Plaintiff

had proved that UT Southwestern retaliated against him by blocking or objecting to his employment by Parkland Hospital because he engaged in protected activity." (doc. 170 at 9). It argues both that the retaliation claim was "not shown as a matter of law" and that the evidence was insufficient to establish any damages from that claim. *Id.* at 9, 7-8. To support his claim for retaliation, Dr. Nassar was required to present evidence that "(1) he participated in an activity protected by Title VII; (2) his employer took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse employment action." *McCoy v. City of Shreveport*, 492 F.3d 551, 556-57 (5th Cir. 2007) (citing *Banks v. E. Baton Rouge Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003)).

Challenging the jury's liability finding on retaliation, Defendant argues "[a]s the evidence conclusively showed, UT Southwestern did not oppose Plaintiff's accepting a COPC job with Parkland Hospital" and that the evidence conclusively showed that it would have opposed Plaintiff's employment at Amelia Court based on its contractual obligations even if Dr. Nassar had never engaged in protected activity. *Id.* at 7-8. Defendant's focus on a COPC job is not relevant and does not preclude the jury as a matter of law from determining that UT Southwestern retaliated by interfering with Dr. Nassar's application for a

position at Amelia Court, the Parkland position for which Dr. Nassar testified that he applied.[3]

Defendant's remaining arguments on liability and avoidance of damages essentially request the Court rule in its favor for reasons presented to and permissibly rejected by the jury. Plaintiff and Defendant presented conflicting testimony regarding the nature and timing of facts that relate to Dr. Nassar's report of discrimination and UT Southwestern's handling of his potential employment with Parkland. At trial, UT Southwestern presented testimony that it objected to Dr. Nassar's employment at Parkland prior to any report of discrimination or harassment and that its objection was based on its understanding of its contractual obligations. Dr. Nassar countered that evidence with his own testimony of at least one conversation prior to Defendant's objections on contractual grounds, and with testimony from Dr. Keiser suggesting that Defendant's objections were based in part on Dr. Nassar's report of discrimination. Resolution of these factual issues in the face of conflicting evidence necessarily turned on the jury's evaluation of witness

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[3] Defendant also argues that Parkland never "refused to hire Plaintiff." (doc. 170 at 8). This does not preclude UT Southwestern's liability for its own acts of interference with Plaintiff's attempt to gain employment at Parkland. *See* doc. 99 at 16-18. The jury could properly have found that Parkland did not execute its offer to hire Dr. Nassar as a result of UT Southwestern's objections. Dr. Nassar presented evidence that he was offered a position to begin on a date certain. When that date passed without any further action, Dr. Nassar could have reasonably concluded, as he did, that he should seek other opportunities.

credibility. *DeCorte,* 497 F.3d at 437. Defendant has not shown that Dr. Nassar's evidence, if believed, is legally insufficient as a matter of law to sustain a finding of liability for retaliation and an award of damages.[4] As a result, Defendant's objections will not preclude entry of judgment on the jury's liability verdict, nor do they require a finding as a matter of law that no damages resulted from the retaliation.

B. *Compensatory Damages*

The jury's damages verdict awarded compensatory damages in the amount of $3,187,500.00. (doc. 143). Defendant objects on the grounds that the statutory cap limits compensatory damages to $300,000. (doc. 170 at 2-3). Defendant further argues that compensatory damages should be reduced to zero on the grounds that the evidence presented was legally insufficient to support any compensatory damages. *Id.* at 3-4.

1. Statutory Cap on Compensatory Damages

Defendant's invocation of the statutory limit on compensatory damages has merit. 42 U.S.C. § 1981a(b)(3)(D) limits specified compensatory damages to $300,000. Where the jury returns a verdict in excess of the statutory limit, it is appropriate for the Court to enter a judgment that conforms to the statute. *See Thomas v. Tex. Dep't of Crim. Justice*, 297 F.3d 361, 370 n.10 (5th Cir. 2002) (noting "[t]he jury originally awarded $1,000,000, but

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[4] Defendant's argument that it would have objected on contractual grounds regardless of Dr. Nassar's engagement in protected activity was submitted to and rejected by the jury. (doc. 143 at 6-7, Question No. 2).

the district court correctly remitted the amount to $300,000 to conform with Title VII's statutory damage caps."). Plaintiff admits that the statutory cap applies and operates to limit the jury's recovery to a maximum of $300,000. (doc. 172 at 2). Accordingly, the Court will not enter judgment on the jury's compensatory damages verdict in an amount that exceeds the statutory limit of $300,000.

2. Sufficiency of Evidence in Support of Compensatory Damages

Defendant objects to entry of a judgment on the jury's verdict that includes any compensatory damages, and further moves that the Court reduce the award to zero. (doc. 170 at 3-4). The Court's review of the jury's damages award is deferential; "[t]he damage award may be overturned only upon a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice." *Eliand v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995). The Court "must be careful, however, not to substitute [its] view of a reasonable amount for the verdict of a jury." *Dixon v. Int'l Harvester* Co., 754 F.2d 573, 590 (5th Cir. 1985). "When deciding whether a jury award is excessive," the Court considers "the amount of the award after application of the statutory cap, not the amount given by the jury." *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 487, (5th Cir. 2001).

Defendant argues that Dr. Nassar's evidence of compensatory damages "is legally insufficient and too speculative to form the basis for the jury's award of compensatory damages." (doc 170 at 3). It argues that Dr. Nassar's testimony was general and

insufficient to provide the basis for calculating compensatory damages. *Id*. at 3-4. Dr. Nassar responds that a compensatory damages award of $300,000 is not clearly excessive, particularly in light of the jury's much larger determination, and that the award is properly supported by evidence. (doc. 172 at 9-13).

Title VII allows recovery of compensatory damages that include both future pecuniary losses and compensation for intangible injuries that are less susceptible to precise calculation. *See* 42 U.S.C. § 1981a(b)(3) (listing potential elements of compensatory damages, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"). The Court's instructions to the jury defined compensatory damages to only those components that had been timely and properly disclosed, and did not include language describing mental anguish or emotional pain and suffering, components which require a more particular evidentiary showing.[5]

Dr. Nassar's presentation hewed closely to the jury instructions and included testimony regarding intangible injuries and future pecuniary loss. Dr. Nassar described, among others, intangible injury in

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[5] The language was crafted in response to Defendant's objections and motions in limine. The Court also instructed the jury that its award must be limited to those compensatory damages that Dr. Nassar proved "were caused by 1) his constructive discharge because of his race, national origin, or religious preference and 2) retaliation because of his engagement in protected activity." (doc. 143 at 5).

the form of harm to his professional reputation resulting from working at a less prestigious institution, the stigma that followed his assertion of rights under Title VII, and the loss of satisfaction and enjoyment that accompanied his constructive discharge from a job and patients that he found satisfying. *See* doc. 172 at 9-13. He also testified to pecuniary losses associated with the reduced opportunity for lucrative speaking engagements.[6]

Defendant has not shown that any of this evidence was improperly considered by the jury. Further, the Court's evaluation of the jury's compensatory damages award is guided by the "maximum recovery rule," which requires the Court to remit an award only where it exceeds "the maximum amount a reasonable jury could have awarded." *Giles*, 245 F.3d at 488-89. The Court's jury instructions recognized that many elements of compensatory damages were intangible and not susceptible to precise calculation. (doc. 143 at 4-5). Dr. Nassar's testimony, while contested, was credible. *See Giles*, 245 F.3d at 487-88 (noting that courts "review with deference damage awards based on intangible harm, because the harm is subjective and evaluating it depends considerably on the demeanor of witnesses"). Defendant has not shown that the award is clearly excessive. Defendant's concern about the reliability of Dr. Nassar's long-term predictions of future pecuniary losses is not implicated given the Court's application of the

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[6] The consideration of honoraria Dr. Nassar received from third parties is further discussed *infra*, Part C.

statutory cap; Dr. Nassar's testimony about losses in the near term, together with his testimony regarding intangible factors adequately support an award of $300,000. The Court concludes that Dr. Nassar's damages testimony regarding future pecuniary losses and intangible injury could reasonably support a jury verdict in excess of $300,000 and declines to reduce the award based on Defendant's objections. Accordingly, Dr. Nassar is entitled to entry of judgment in the amount of $300,000. *See Reynolds v. Octel Commc'ns Corp.*, 924 F.Supp. 743, 746 (N.D. Tex. 1995) (applying statutory cap to entry of judgment on verdict where compensatory damages awarded by the jury exceeded the statutory allowance).

C. *Sufficiency of Evidence in Support of Back Pay Award*

The jury awarded back pay and benefits damages in the amount of $438,167.66. (doc. 143 at 7). Defendant objected to the jury's award on the grounds that it is excessive and not supported by the evidence. (doc. 170 at part II (C)(D)(E)).[7] Defendant argues that the jury improperly calculated back pay to include the difference in pay and benefits between Dr. Nassar's current position in California and the position he was offered at Parkland. *Id.* at 6-7. It argues that the proper measure would compare Dr.

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[7] In part II (A) of this memorandum order, the Court addressed Defendant's arguments that no damages should be awarded for Dr. Nassar's claims for discrimination and retaliation. Finding that the jury's liability determinations are supported by evidence, the Court turns to Defendant's arguments relating to the amount of back pay the jury awarded.

Nassar's current salary and benefits to what he would have received from UT Southwestern. *Id.* In addition to challenging the sufficiency of the evidentiary foundation for the jury's award, Defendant also objects to inclusion in the calculation of any honoraria, which it argues were paid by third parties and not UT Southwestern. *Id.* at 3-4. Plaintiff argues that the jury's verdict is properly supported, pointing principally to Dr. Nassar's testimony and admissions from Dr. Fitz. (doc. 172 at 5-9, 12). Dr. Nassar further contends that the evidence would support a back pay award of at least $750,860 and that the jury's verdict was not clearly excessive. *Id.* at 8.

The purpose of back pay is "to restore the plaintiff to the position he would have been in absent the discrimination." *Tyler v. Union Oil Co. Of Cal.*, 304 F.3d 379, 401 (5th Cir. 2002); *see also Pettaway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974) ("Under Title VII . . . the injured workers must be restored to the economic position they would have been but for the discrimination – their 'rightful place.'"); *Albermale Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (same). A plaintiff is required to mitigate his damages and an award of back pay is reduced by the amount he earned in the interim. *Floca v. Homcare Health Servs., Inc.*, 845 F.2d 108, 111 (5th Cir. 1988). Consistent with the statutory goal and the governing authority, the Court instructed the jury that "[t]he purpose of awarding financial damages is to restore a victim of discrimination or retaliation to the position he would have occupied but for the intervening discriminatory or retaliatory conduct of his employer." (doc. 143 at 3). The Court instructed

the jury that it "may consider only those economic losses caused by the discriminatory or retaliatory conduct of UT Southwestern." *Id.*[8] The Court also instructed the jury on Dr. Nassar's duty to mitigate his damages. *Id.* at 2-3. "The amount of back pay that will fairly compensate a successful Title VII plaintiff is a question of fact." *Pegues v. Miss. State Emp't. Serv.*, 899 F.2d 1449, 1456 (5th Cir. 1990).

The Court concludes that jury could permissibly consider evidence of the amount Dr. Nassar would have earned at Parkland and from sources other than UT Southwestern. Defendant does not provide authority that necessarily limits an award of back pay to the amount of salary and benefits previously paid by the defendant or that categorically excludes compensation of the sort Dr. Nassar described. The focus of the inquiry, consistent with the statutory goal, must remain on the plaintiff and the identifiable financial injury he suffered as a result of unlawful employment actions. *See, e.g., Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971) ("Back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for tangible economic loss resulting from an unlawful employment practice.").[9] In a typical discrimination case, the back

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[8] In its instruction on Defendant's affirmative defense, the Court again emphasized that Dr. Nassar's damages were limited to that which he showed to be caused by UT Southwestern: "You may award damages only for injuries that Dr. Nassar proves were proximately caused by UT Southwestern's wrongful conduct." *Id.* at 5.

[9] The Court instructed the jury that "[y]ou may not award damages more than once for the same injury." (doc. 143 at 2). Nevertheless, Dr. Nassar is entitled to be made whole for all of

pay and benefits at issue are indisputably provided by the Defendant. This case also included a retaliation claim grounded in Defendant's interference with Plaintiff's offer of employment from Parkland. Dr. Nassar presented evidence, credited by the jury, that but for Defendant's retaliation, he would have been employed by Parkland and thus would be receiving greater salary and benefits than he received at either UT Southwestern or in his current position in California. (doc. 172 at 5-6). The jury was not precluded from considering this evidence in calculating damages simply because some of the disputed benefits would have been paid by Parkland rather than UT Southwestern. *See Pegues*, 899 F.2d at 1455-56 (affirming order that referral agency pay back pay based on value of earnings that potentially would have been paid by employers, rather than the defendant agency, where injuries would not have been sustained but for the agency's discrimination).

Similarly, the jury's consideration of the income Dr. Nassar received as honoraria from third parties need not be categorically excluded from the jury's consideration of back pay in this case. *See Floca*, 845 F.2d at 111 (analyzing request for back pay in light of the statutory purpose of making "persons whole for injuries suffered on account of unlawful employment discrimination") and *Pegues*, 899 F.2d at 1457 ("The measure of a back pay award is ordinarily the amount needed to make the victim whole."). The

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his injuries, and the Court further instructed the jury that "if different injuries are attributed to the separate claims, then you must compensate Dr. Nassar fully for all of his injuries." *Id.*

calculation of financial loss is necessarily case specific, and Dr. Nassar presented evidence and testimony that this income was closely related to his employment at UT Southwestern, that his employment agreement explicitly reserved the proceeds to him, and that a certain amount of speaking was encouraged and expected from physicians at an academic institution. (doc. 172 at 6-7). Dr. Nassar argued that proceeds from such activity were compensation to which he was entitled by virtue of his employment agreement with UT Southwestern and were a significant financial incentive offered to recruit and retain academic physicians. *Id.* Defendant argued that the income at issue was the subject of Dr. Nassar's dealings with third parties. (doc. 170 at 3). The parties presented conflicting evidence regarding the value of this income and the connection it had to Plaintiff's employment at UT Southwestern. The jury could permissibly conclude that certain earnings were elements of Dr. Nassar's compensation secured by his agreement with UT Southwestern and could determine to what extent their loss was caused by Defendant's actions.

Defendant's remaining objections relate to the sufficiency of the evidence to support the jury's award of $438,167.66. It contends that Dr. Nassar's testimony regarding his pay, benefits, and other income was unreliable and insufficient to support the jury's calculation. (doc. 170 at 3-5). The jury is afforded substantial discretion in its determination of damages, and will be found excessive only upon a clear showing that it is "contrary to reason" or "entirely disproportionate to the injury sustained."

Sanders, 929 F.Supp. at 1039. The jury's calculation of damages is a fact intensive exercise and requires evidentiary support, but "unrealistic exactitude is not required." *Pettaway*, 494 F.2d at 260. "Although the district court should defer to the jury's findings [on back pay], the court abuses its discretion when it enters judgment on a verdict unsupported by evidence." *Vaughn v. Sabine County,* 104 Fed. Appx. 980, 985 (5th Cir. 2004).

Dr. Nassar argues that a judgment should be entered on the jury's verdict because the verdict was "within the range shown by the evidence" and "there is a rational basis for its calculation." (doc. 172 at 8) (quoting *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990)). To support his conclusion, Plaintiff argues that the evidence would support a much larger judgment of $750,860. *Id.* Defendant argues that Dr. Nassar did not provide "reliable evidence of his earnings" and that the jury "awarded more than any possible calculation." (doc. 170 at 6-7).

The Court concludes that the jury's verdict reflects a permissible resolution of the contested factual issues that comprise the determination of back pay and benefits damages. Even foundational facts, such as the amount of money Dr. Nassar received in California and the value of certain benefits offered by Parkland were in dispute. Dr. Nassar testified and was extensively cross-examined regarding the basis for the figures he offered. His testimony, though contested, was grounded in his own experience and knowledge. In fixing a value of Dr. Nassar's economic loss, the jury necessarily

credited, at least in part, Dr. Nassar's testimony despite Defendant's challenges. *See Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 484 (5th Cir. 2007) (finding judgment on jury verdict proper where the timing of the adverse action, entitlement to certain income, and actions taken in mitigation were in dispute). The jury's award does not exceed Dr. Nassar's maximum earning capacity or appear to be based on evidence of non-recoverable damages. *See Vaughn*, 104 Fed. Appx. at 985 (finding jury's award unsupported where it inexplicably included an amount greater than the plaintiff's maximum earning capacity). While Dr. Nassar's calculation in his Reply (doc. 172) represents a generous view of the evidence and assumes all factual disputes break in Plaintiff's favor, it is tethered to admissible testimony and evidence.[10] The jury's verdict did not fully credit Dr. Nassar's factual assertions, and its finding reflects a permissible resolution of disputed facts and a discounting of claimed injury that it found not to be caused by UT Southwestern's unlawful acts. Accordingly, the Court concludes that Defendant's objections do not preclude entry of judgment in the amount awarded by the jury.

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[10] Dr. Nassar's calculations are based on his testimony regarding the salary offered by Parkland ($185,000 per year), the value of the benefits (30% of the value of the salary), a 3% annual cost of living adjustment, and the value of the lost honoraria ($100,000 per year). (doc. 172 at 5-7). During closing arguments, Plaintiff directed the jury to evidence amounting to $693,224. These figures, though contested, are taken from Dr. Nassar's testimony. Defendant argued that the lost income from honorariums totaled roughly $200,000 over the back pay period and implored the jury to look closely at causation.

IV.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiff's motion for entry of final judgment (doc. 148) in the amounts awarded by the jury, subject to the statutory limitation on compensatory damages.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant University of Texas Southwestern Medical Center at Dallas, having been found liable to Plaintiff Naiel Nassar, M.D., shall pay back pay and benefits in the amount of $438,167.66 and compensatory damages in the amount of $300,000.

SO ORDERED

SIGNED: September 16, 2010

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 26, 2010

VERDICT OF THE JURY

We, the jury, have answered the foregoing special issues in the manner indicated in this verdict form, and returned these answers into Court as our verdict.

Date 5/26/2010

/s/
FOREPERSON

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS,

Defendants.

May 26, 2010

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

I. General Instructions on Damages

Because you have found that UT Southwestern Medical Center is liable to Dr. Nassar for violation of both of Dr. Nassar's claims under Title VII, you must now determine whether UT Southwestern has caused Dr. Nassar damages and, if so, you must determine

the amount, if any, of those damages that is fair compensation.

Dr. Nassar must prove his damages by a preponderance of the evidence. The purpose of damages is to make a plaintiff whole -that is, to compensate Dr. Nassar for any injuries that he has suffered. You should consider the following elements of damages, and no others: (1) back pay and benefits; and (2) compensatory damages, which include future pecuniary losses, inconvenience, loss of enjoyment of life, and other nonpecuniary losses. Damages are not allowed as a punishment and cannot be imposed or increased to penalize UT Southwestern Medical Center.

The damages that you award must be fair compensation for all of Dr. Nassar's injuries, no more and no less. You must use sound discretion in fixing an award of damages, drawing reasonable inferences -where you find them appropriate -from the facts and circumstances in evidence. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Dr. Nassar prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must not award damages more than once for the same injury. For example, if Dr. Nassar establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he

has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate Dr. Nassar fully for all of his injuries.

Answer each question regarding damages separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what Dr. Nassar's ultimate recovery mayor may not be. The Court will determine any recovery by applying the law to your findings when judgment is entered. Do not add any amount for interest on any damages you find.

A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate -to avoid or minimize those damages.

If you find that Dr. Nassar has suffered damages, he may not recover for any item of damage which he could have avoided through reasonable effort. If you find by the preponderance of the evidence that Dr. Nassar unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny him recovery for those damages which he would have avoided had he taken advantage of the opportunity.

You are the sole judge of whether Dr. Nassar acted reasonably in avoiding or minimizing his damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages. However, he is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating his damages. UT Southwestern Medical

Center has the burden of proving the damages which Dr. Nassar could have mitigated. In deciding whether to reduce Dr. Nassar's damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied its burden of proving that the plaintiffs conduct was not reasonable.

II. Instructions for Determination of Damages

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

A. *Back Pay and Benefits*

The purpose of awarding financial damages is to restore a victim of discrimination or retaliation to the position he would have occupied but for the intervening discriminatory or retaliatory conduct of his employer. Thus you may consider only those economic losses caused by the discriminatory or retaliatory conduct of UT Southwestern.

Back pay and benefits include the amounts the evidence shows Dr. Nassar would have earned, including wages and employment benefits, if he had not been subjected to UT Southwestern's unlawful conduct minus the total amount of wages and employment benefits that Dr. Nassar received in the interim.

You have found that UT Southwestern discriminated against Dr. Nassar by constructively discharging Dr. Nassar because of his race, national origin, or religious preference and that UT

Southwestern retaliated against him for engaging in protected activity. You are to assess damages, if any, for the amount Dr. Nassar showed by the preponderance of the evidence that he would have earned, including wages and employment benefits from the date of the constructive discharge or retaliation until the date of trial. You must reduce any damages you find by the amount that UT Southwestern shows by the preponderance of the evidence that Dr. Nassar earned, including wages and employment benefits in the interim. That is, you must subtract the amount that Dr. Nassar earned from other employment, including wages and employment benefits, from the date of the constructive discharge or retaliation until the date of trial.

B. *Compensatory Damages*

You may award compensatory damages for injuries that Dr. Nassar proved were caused by UT Southwestern's discriminatory and or retaliatory conduct. Compensatory damages include future pecuniary losses as well as inconvenience, loss of enjoyment of life, and other nonpecuniary losses that Dr. Nassar shows he suffered as a result of UT Southwestern's discrimination or retaliation. Future pecuniary losses do not include lost future wages and benefits. No evidence of the value of intangible things has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate Dr. Nassar for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of

damage. Any award that you make should be fair in light of the evidence presented at trial.

In determining an amount that is fair compensation for any of Dr. Nassar's damages, you may award him only those compensatory damages that he has proven were caused by 1) his constructive discharge because of his race, national origin, or religious preference and 2) retaliation because of his engagement in protected activity. The compensatory damages you award must be fair compensation for all of Dr. Nassar's damages (other than back pay and benefits contained in your answer to Question No. 3a) attributable to UT Southwestern's discrimination and/or retaliation, no more and no less.

C. *Affirmative Defense*

You may award damages only for injuries that Dr. Nassar proves were proximately caused by UT Southwestern's wrongful conduct. Defendant is not liable for damages for actions where it shows by a preponderance of the evidence that it would have taken the same action even if Defendant had not considered inappropriate factors. Thus, when considering what damages are appropriate for Dr. Nassar's constructive discharge claim, you may not assess damages for those actions which UT Southwestern proves by a preponderance of the evidence that it would have taken even if it had not considered Dr. Nassar's race, national origin, or religious preference. When considering what damages are appropriate for Dr. Nassar's retaliation claim, you may not assess damages for those actions which UT Southwestern proves by a preponderance

of the evidence that it would have taken even if it had not considered Dr. Nassar's protected activity.

III. Questions for Calculation of Damages

A. Questions Regarding Affirmative Defense

Question No. 1:

Has defendant proven by a preponderance of the evidence that it would have taken the same actions that gave rise to plaintiffs constructive discharge claim even if it had not considered plaintiffs race, national origin or religious preference?

Instruction: Defendant has the burden of proof. If it has met its burden, answer "Yes;" otherwise, answer "No."

ANSWER:

No

If you answered "Yes," then, in response to Question No. 3, you may not assess damages for those actions which Defendant proved it would have taken regardless of Plaintiffs race, national origin or religious preference.

Question No. 2:

Has defendant proven by a preponderance of the evidence that it would have taken the same actions that gave rise to plaintiffs retaliation claim even if it had not considered plaintiffs engaging in protected activity?

Instruction: Defendant has the burden of proof. If it has met its burden, answer "Yes;" otherwise, answer "No."

ANSWER:

No

If you answered "Yes;" then, in response to Question No. 3, you may not assess damages for those actions which Defendant proved it would have taken even if it had not considered Plaintiffs engaging in protected activity.

B. Assessment of Damages

Question No. 3:

What sum of money, if paid now in cash, would fairly and reasonably compensate the plaintiff for his damages, if any, that resulted from the defendant's unlawful discrimination or retaliation?

Instruction: Indicate the amount of each category of damages that would fully compensate Dr. Nassar for the injuries he suffered as a result of UT Southwestern's unlawful discrimination or retaliation.

a. Back Pay and Benefits

Answer in dollars and cents:

$ 438,167.66

b. Compensatory Damages:

Answer in dollars and cents:

$ 3,187,500.00

SO ORDERED.

SIGNED May 26,2010

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN
MEDICAL CENTER AT DALLAS,

Defendants.

May 24, 2010

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

* * *

Retaliation for engaging in activity protected by Title VII

42 U.S.C. § 2000 et seq. (Title VII)

In answering Question No.2, you are instructed as follows:

Plaintiff alleges that defendant retaliated against him, in violation of Title VII, by defendant's blocking or objecting to his employment by Parkland because he engaged in protected activity.

In order to establish this claim, plaintiff must prove each of the following essential elements:

> First, that he engaged in protected activity;
>
> Second, that the defendant objected to or blocked the plaintiffs employment at Parkland; and
>
> Third, that the defendant took that action against the plaintiff because of his engaging in protected activity.

Protected activity includes opposing an employment practice that is unlawful under Title VII, making a charge of discrimination, or testifying, assisting, or participating in any manner in an investigation proceeding, or hearing under Title VII.

Plaintiff does not have to prove that retaliation was the defendant's only motive, but he must prove that the defendant acted at least in part to retaliate.

It is not a violation of the law, however, for an employer to make an employment decision based on factors other than the plaintiffs protected activity. The fact that an employer's business judgment-including subjective business judgment--may or may not have been fair or wise in your opinion, or that you may disagree with defendant's position, does not mean defendant unlawfully discriminated.

QUESTION NO. 2:

Did plaintiff prove that defendant retaliated against him by blocking or objecting to his employment by Parkland because he engaged in protected activity?

> Instruction: Plaintiff has the burden of proof. If he has met his burden, answer "Yes;" otherwise, answer "No."

ANSWER: ____Yes___

* * *

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

March 23, 2011

ORDER

Before the Court is Defendant University of Texas Southwestern Medical Center's ("UT Southwestern") Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial or Remittitur, filed October 14, 2010 (doc. 187). Having considered the Motion, the Court finds no

new facts or arguments presented that change its analysis in the Final Judgment filed September 16, 2010 or the Court's other Orders and findings in this case. Accordingly, the Court finds that UT Southwestern's Motion should be and hereby is **DENIED**.

SO ORDERED.

SIGNED: MARCH 23, 2011

/s/

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

November 3, 2010

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff Naiel Nassar, M.D.'s ("Nassar") Motion for Relief from the Judgment or, in the Alternative, Motion to Amend or Alter the Judgment filed September 21, 2010 (doc. 178). Upon consideration of this Motion and University of Texas Southwestern Medical Center's ("UTSW") response

thereto, as well this Court's Final Judgment of September 16, 2010 (doc. 176), the Court finds that Nassar's Motion to Amend should be and hereby is **GRANTED IN PART** and **DENIED IN PART**. Nassar is awarded prejudgment interest on the award for back pay and benefits in the amount of $46,397.75. Nassar is also awarded post-judgment interest on the award for back pay and benefits and the award for compensatory damages at the rate of 0.26%, calculated from the date of Final Judgment on September 16, 2010. However, the Court's Order of October 4, 2010 (doc. 182) stayed execution of Final Judgment until the end of any appeal of this action. Accordingly, execution of the award of prejudgment and post-judgment interest is **STAYED** until the conclusion of any appeal.

I.

PROCEDURAL HISTORY

This Court entered its Final Judgement on September 16, 2010, awarding Nassar back pay and benefits in the amount of $438,167.66 and compensatory damages in the amount of $300,000. Final J. 15 (doc. 176). Nassar timely sought prejudgment and post-judgment interest in his First Amended Complaint and also in his Motion for Entry of Judgment. First Am. Compl. ¶ 26 (doc. 11); Pl.'s Mot. Entry Final J. 2 (doc. 148). However, the Court's Final Judgment inadvertently did not address prejudgment and post-judgment interest. In response, Nassar filed the instant Motion, which UTSW opposes.

II.

LEGAL STANDARDS AND ANALYSIS

A. *Prejudgment interest*

Prejudgment interest should be awarded in order to make the plaintiff whole, as a refusal to award prejudgment interest ignores the time value of money. *Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 373 (5th Cir. 2002). A prevailing plaintiff's request for an equitable award of prejudgment interest should be granted "in all but exceptional circumstances." *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1057 (5th Cir. 1996) (quoting *Am. Int'l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 541 (5th Cir. 1987)) (applying Texas law). Further, "[w]here an action arises under federal law, 'it is within the discretion of the district court to select an equitable rate of prejudgment interest.'" *Raspanti v. Caldera*, 2002 WL 494939, *3 (5th Cir. Mar. 15, 2002) (quoting *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 984 (5th Cir. 1991)). The Fifth Circuit has also "approved the imposition of the federal rate of interest in Title VII cases as making a plaintiff whole, but has not held that only the federal rate of interest is appropriate" for calculating prejudgment interest. *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 488 (5th Cir. 2000) (citing *Conway v. Electro Switch Corp.*, 825 F.2d 593, 600 (1st Cir. 1987)).

Nassar is entitled to prejudgment interest on his award of back pay and benefits. The Fifth Circuit has held that where a claim is governed by a federal statute and the statute is silent on the issue of

prejudgment interest, "state law is an appropriate source of guidance." *Hansen*, 940 F.2d at 984 (quoting *United States ex rel. Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987)); *see also Wesley v. Yellow Transp., Inc.*, 2010 WL 3606095, *2 (N.D. Tex. Sept. 16, 2010) (in Title VII case, "[i]n the absence of a federal statute that establishes the rate of prejudgment interest, state law guides the court's discretion in determining the interest rate"). Accordingly, the Court looks to Texas state law regarding prejudgment interest, as set forth in the Texas Finance Code Sections 304.003(a) and (c) of the Code provide that prejudgment interest shall accrue at the rate of 5% per year when the prime rate as published by the Board of Governors of the Federal Reserve System is less than 5%. *See Wesley*, 2010 WL 3606095, at *1 (applying 5% interest rate). The prime interest rate as of the date of Final Judgment, September 16, 2010, was 3.25%, and therefore an interest rate of 5% should accrue.[1] Under Texas law, the date a lawsuit is filed is a proper starting point for awarding prejudgment interest. *Wesley*, 2010 WL 3606095, at *1 n.5. The Court therefore calculates prejudgment interest computed as simple interest from August 4, 2008, when Nassar's complaint was filed, to the Court's Final Judgment on September 16, 2010. Using a 5% interest rate, interest on the back pay award of $438,167.66 is $60.02 per day,[2] and 773 days passed from the filing of the complaint

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[1] Federal Reserve Statistical Release, Selected Interest Rates, Release Date September 13, 2010, found at http://www.federalreserve.gov/releases/H15/20100913/.

[2] ($438,167.66 x 5%)/365 = $60.02

to the Final Judgment. Accordingly, Nassar is awarded $46,397.75[3] in prejudgment interest on the award of back pay and benefits.[4]

The Court, however, declines to award prejudgment interest on the award of compensatory damages. Prejudgment interest may be awarded only for past harms. *Thomas*, 297 F.3d at 373; *Boyle v. Pool Offshore Co.*, 893 F.2d 713, 719-20 (5th Cir. 1991). The jury instructions in this case as well as the Court's Final Judgment contemplate that compensatory damages in this case may include future pecuniary losses. Jury Instructions 4 (doc. 143); Final J. 8-10 (doc. 176); see also Mem. Op. and Order Sept. 16, 2010 at 6 (doc. 175) (lost honoraria or other compensation based on future speaking or lecturing engagements most appropriately viewed as compensatory damages as opposed to front pay). As such, the Court cannot discern what portion of the jury's compensatory damages award pertains to future harms. Given this inability, the Court declines

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[3] 773 x $60.02 = $46,397.75

[4] UTSW argues that the Court should not compute prejudgment interest from the date of Nassar's constructive discharge but should instead calculate it using a pro rata method. Def.'s Resp. 10-12. UTSW contends that calculating the amount of interest on the entire back pay award from the date of Nassar's constructive discharge is improper as "Plaintiff did not suffer $438,167.66 in damages on September 1, 2006," but rather over an almost four-year period. *Id.* at 12. Defendant cites no binding authority requiring a pro rata calculation. As the Court looks to Texas law for the calculation of prejudgment interest in this case, it calculates simple interest from the date of the filing of the complaint to the date of the Final Judgment. *Wesley*, 2010 WL 3606095, at *1 n.5.

to award prejudgment interest on the compensatory damages award.[5]

B. *Post-Judgment Interest*

Regardless of whether a cause of action is based on state law or federal law, federal law determines post-judgment interest. *See Boston Old Colony Ins. Co. v. Tiner Assoc., Inc.*, 288 F.3d 222, 234 (5th Cir. 2002)(noting that federal post-judgment interest applies even in diversity cases). The federal post-judgment interest rate ("federal rate") is governed by 28 U.S.C. § 1961(a), which sets the rate at the weekly average 1-year constant maturity Treasury yield for the calendar week preceding the date of judgment. For the week ending September 10, 2010, the federal rate is 0.26%.[6] Therefore, the Court awards post-judgment interest on the $438,167.66 award for back pay and benefits and on the $300,000 award for compensatory damages at the rate of 0.26%, calculated from the date of the entry of judgment on September 16, 2010.[7] The Court notes that this

[5] Defendant also argues that the Court may not award prejudgment interest on compensatory damages as that would result in an award in excess of the statutory cap. Def.'s Resp. 7-8. The Court does not reach this argument given that it declines to award prejudgment interest on compensatory damages based on its inability to ascertain what portion of the award for compensatory damages is attributable to future harms.

[6] The applicable post-judgment interest rate for the week ending on September 10, 2010 is found at http://www.txnd.uscourts.gov/publications/interest/rate_2010_2014.html#2010.

[7] Post judgment-interest shall be compounded annually. 28 U.S.C. § 1961(b).

award is unopposed by Defendant UTSW. Def.'s Opp'n at 5 n.2.[8]

III.

CONCLUSION

For the reasons stated above, Plaintiff Nassar's Motion for Relief from the Judgment or, in the Alternative, Motion to Amend or Amend or Alter the Judgment is **GRANTED IN PART** and **DENIED IN PART**. Nassar is awarded $46,397.75 in prejudgment interest on the award of back pay and benefits. Nassar is also awarded post-judgment interest on both his award of back pay and benefits and his award of compensatory damages at the applicable federal rate of 0.26%. These awards are **STAYED** until the end of any appeal pursuant to this Court's Order of October 4, 2010. The Court declines to award pre-judgment interest on Nassar's award of compensatory damages.

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[8] Plaintiff Nassar requests that the Court use its discretion to award post-judgment interest in excess of the federal rate. Pl.'s Mot. 6. While it is clear that the Court does have the authority to award post-judgment interest in excess of the federal rate, *see*, *e.g.*, *Raspanti*, 2002 WL 494939, at *2-*3, it is not required, and the Court declines to exercise its discretion in such manner.

SO ORDERED.

SIGNED: November 3, 2010

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10338

NAIEL NASSAR, MD,

Plaintiff - Appellee Cross-Appellant

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Defendant - Appellant Cross-Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion March 8, 2010, 5 Cir., 2012, 674. F.3d 448)

Before: REAVLEY, ELROD, and HAYNES, Circuit Judges

Filed July 19, 2012

PER CURIAM:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, the Petition for Rehearing En Banc is also DENIED.

In the en banc poll, 6 judges voted in favor of rehearing (Jones, Jolly, Smith, Garza, Clement, and Owen), and 9 judges voted against rehearing (Davis, Stewart, Dennis, Prado, Elrod, Southwick, Haynes, Graves, and Higginson). Judge King did not participate in consideration of the rehearing en banc.

Joining in Judge Smith's dissent are Chief Judge Jones, Judge Jolly, and Judge Clement.

ENTERED FOR THE COURT

/s/ Thomas M. Reavley
THOMAS M. REAVLEY
United States Circuit Judge

JENNIFER WALKER ELROD, Circuit Judge Concurring:

I concur in the denial of rehearing en banc. I write separately to address the waiver issue that was not necessary to the panel decision but is dispositive of my decision to join the denial of the rehearing en banc. Before the panel, the parties conceded that *Smith v. Xerox Corporation*, 602 F.3d 320, 330 (5th Cir. 2010), foreclosed the University of Texas Southwestern Medical Center's ("Texas Medical") objection to the district court's motivating factor jury instruction. Therefore, the panel did not address whether that argument was waived. Texas Medical's own proposed jury instruction included the motivating factor instruction language used by the district court. On the Friday before trial, the district court held an all-afternoon hearing to entertain objections to the jury instructions, after which it admonished the parties: "I'm telling you now, no new objections." When Texas Medical raised its objection on Monday morning just before the jury came in, the district court commented that it was "unprofessional" and the argument was "probably ... waived." Moreover, Texas Medical did not argue to the district court that *Smith* was incorrect after *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009)

I agree with the district court that Texas Medical waived the argument. As such, Texas Medical cannot prevail on its argument at this stage of the case. *See Jimenez v. Wood Cnty*, 660 F.3d 841, 846 (5th Cir. 2011) (en banc) (holding that a party that failed to preserve jury instruction error by raising a proper objection could not show plain error even where the

objection would have been futile in light of controlling precedent). Therefore, I concur in the denial of rehearing en banc.

JERRY E. SMITH, Circuit Judge, Dissenting from denial of rehearing en banc:

This court should not decide cases for undisclosed reasons or determine dispositive issues *sub silentio*. Because this panel has done both, I respectfully dissent from the denial of rehearing en banc. I dissent also because *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), is wrongly decided and presents a question of exceptional importance in employment law. This case is a good vehicle for fixing that mistake.

I.

In its initial brief on appeal, the employer, University of Texas Southwestern Medical Center ("UTSW"), squarely raised the following issue: "The district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation." Counsel fulfilled his duty of candor as an officer of the court by acknowledging the following:

> The Medical School prefaces this argument by conceding that this Court's majority opinion in *Smith v. Xerox Corporation*, 602 F.3d 320 (5th Cir. 2010), held that a mixed motive framework can be appropriate for a Title VII retaliation claim. The Medical School respectfully disagrees with *Smith* and desires to reserve this point for further review, realizing that a panel of this Court cannot overturn *Smith*.

That acknowledgement was followed by several paragraphs of argument.

In his brief, the employee, Naiel Nassar, asserted that "UTSW's jury charge complaint has been waived." He supported that contention with a full page of argument that the objection was not timely and adequately raised. In its reply brief, UTSW refuted the waiver claim in a footnote.

Issue was thus properly joined on whether UTSW waived its objection to the mixed-motive charge. Despite having been presented with the waiver question, however, the panel ignored it, dispensing with the mixed-motive issue on the merits in a footnote that observed only that the issue was foreclosed by *Smith*. *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012). There is no way to tell—because the panel does not say—whether it (1) overlooked the waiver question or (2) decided there was no waiver and therefore addressed the merits or (3) determined that waiver did not matter because the substantive issue was foreclosed by *Smith*.

UTSW filed a petition for panel rehearing and a petition for rehearing en banc. At the court's direction, Nassar filed a response to the en banc petition in which, in two pages, he once again claimed that "UTSW's jury charge complaint has been waived." UTSW obtained leave to reply and, in three pages, explained its view that there was no waiver.

In its order denying panel rehearing and rehearing en banc, the panel gives no clue whether it has even considered the thoroughly briefed waiver claim. That remains a secret. To her credit, Judge Elrod now takes a position on the waiver question,

stating in a panel concurrence that she views the issue as having been waived and that that is the reason she opposes en banc rehearing. The rest of the panel is silent.

Judge Elrod says that the reason the panel opinion did not address waiver was that it "was not necessary" because the question is foreclosed anyway. That is not completely accurate. The reason the panel needed (and still needs) to decide waiver is that UTSW specifically announced its desire to preserve the mixed-motive issue "for further review," meaning review by the en banc court (which could and should overrule *Smith*) or by the Supreme Court (which could do the same). Because UTSW is not entitled to raise a waived claim—even just to preserve it—it very much matters whether there was waiver, and both Nassar and UTSW are entitled to have this court decide the waiver question. For whatever reason, however, the panel has declined that opportunity, and the court has unwisely rejected the request to rehear the case en banc.

Even in the wake of a failed en banc poll, the waiver issue can be fixed. The panel is presented with a petition for panel rehearing and could use that vehicle to deny panel rehearing but, in the process, to declare whether the issue was waived or whether, instead, UTSW has preserved it "for further review." The panel does not explain why it declines that opportunity.[1]

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[1] I respectfully part company with Judge Elrod's careful conclusion that UTSW waived the mixed-motive issue. At least, UTSW presents a strong argument for why it was not waived.

As UTSW points out, under Federal Rule of Civil Procedure 51(b) and (c), an objection to a jury instruction is properly made and preserved by presenting it to the district court on the record, before the instructions are read to the jury, and before closing arguments. UTSW did so. It notified the district court of its objection to the mixed-motive instruction before the jury charge and arguments. The court then resolved UTSW's objection on the record.

Moreover, along with its proposed instruction, UTSW emphasized its objection to a mixed-motive instruction by including a detailed presentation on the conflicting state of the law, citing authority supporting a but-for causation standard. Having lodged that objection, UTSW's attorneys, as officers of the court, also complied with Smith by tendering a jury instruction that treated but-for causation as an affirmative defense.

UTSW raised its objection during both portions of the charge conference. During the first portion, on Friday, it argued that "the plaintiff must show that [retaliation] is the sole motive of the defendant." The court then acknowledged that UTSW took "the position it's a but-for" standard and that, if a mixed-motive analysis were not the correct state of the law, the mixed-motive instruction the court later gave to the jury would be incorrect.

The parties further considered the issue during the continuation of the charge conference on Monday. Although the court questioned whether the issue had been raised during the Friday conference, the court ruled on the merits, not on waiver, and relied on this court's analysis in Smith.

The waiver question is not by itself worthy of en banc consideration. The main point now is not whether there was waiver, but whether the panel should have addressed it. I present UTSW's arguments opposing waiver for the purpose of showing that it is a substantial, threshold question that the panel should have decided—and still has the option to decide—one way or the other.

II.

The panel decision in *Smith* should be overruled. It is an erroneous interpretation of the statute and controlling caselaw and created an unnecessary circuit split. The problems wrought by the *Smith* panel majority are convincingly explained in Judge Jolly's panel dissent, to which I defer. *See Smith v. Xerox Corp.*, 602 F.3d 320, 336-40 (5th Cir. 2010) (Jolly, J., dissenting). Unfortunately, shortly after the panel issued its majority opinion and dissent, and before a petition for en banc rehearing was filed, the parties settled. That mooted the case and deprived the en banc court of the chance to correct the error in the panel's misapplication of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

This court's refusal now to reconsider *Smith* en banc is confounding. We will never know—because the court does not say—whether that refusal is because the waiver issue is seen as distracting from the en banc worthy mixed-motive question. In any event, the failure to take the case en banc is serious error from which I respectfully dissent.

Appendix I

29 U.S.C. § 623

Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An

employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101–239, title VI, §6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this

paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D)[2] of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such

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[1] So in original.

[2] See references in Text note below.

regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(10) Special rules relating to age.—

(A) Comparison to similarly situated younger individual.—

(i) In general.—A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) Similarly situated.—For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period

of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) Disregard of subsidized early retirement benefits.—In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) Accrued benefit.—For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) Applicable defined benefit plans.—

(i) Interest credits.—

(I) In general.—An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of

return that is equal to the greater of a fixed or variable rate of return.

(II) Preservation of capital.—An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) Market rate of return.—The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of title 26), a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if

such rate or method does not violate any other requirement of this chapter.

(ii) Special rule for plan conversions.—If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) Rate of benefit accrual.—Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of—

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) Special rules for early retirement subsidies.—For purposes of clause (iii)(I), the plan shall credit the accumulation account or

similar amount[3] with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) Applicable plan amendment.—For purposes of this subparagraph—

(I) In general.—The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) Special rule for coordinated benefits.—If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) Multiple amendments.—The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph

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[3] So in original. Probably should be "similar account"

through the use of 2 or more plan amendments rather than a single amendment.

(IV) Applicable defined benefit plan.—For purposes of this subparagraph, the term "applicable defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) Termination requirements.—An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan—

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) Certain offsets permitted.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of title 26.

(D) Permitted disparities in plan contributions or benefits.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of title 26 are met.

(E) Indexing permitted.—

(i) In general.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) Protection against loss.—Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) Indexing.—For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by

means of the application of a recognized investment index or methodology.

(F) Early retirement benefit or retirement-type subsidy.—For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1054(g)(2)(A) of this title.

(G) Benefit accrued to date.—For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(*l*) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(i) an employee pension benefit plan (as defined in section 1002(2) of this title)

provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that—

(i) is maintained by—

(I) a local educational agency (as defined in section 7801 of title 20,[4] or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c)(5) or (6) of title 26 and exempt

[4] So in original. A closing parenthesis probably should follow "20".

from taxation under section 501(a) of title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits

provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-

urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of

an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

42 U.S.C. § 1981a

Damages in Cases of Intentional Discrimination in Employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate

impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 2000e-3(a)

Other Unlawful Employment Practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

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

42 U.S.C. § 2000e-5(g)

Enforcement Provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex,

or national origin or in violation of section 2000e–3(a) of this title.

(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).

42 U.S.C. § 12112(a)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2007)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12203(a)

Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Appendix J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 3, 2010

PROPOSED JURY CHARGE

GENERAL INSTRUCTIONS FOR THE JURY[1]

MEMBERS OF THE JURY:

* * *

SECOND CLAIM – RETALIATION[7]

Plaintiff claims he was retaliated against for engaging in activity protected by Title VII – namely, that UT Southwestern objected to his employment by Parkland and Parkland refused to hire him because he reported being subject to discrimination in his resignation letter. UT Southwestern and Parkland deny Plaintiff's claims and contend that each had legitimate, non-retaliatory reasons for their actions, which were wholly unrelated to Plaintiff's claim of discrimination in his resignation letter. It is unlawful for an employer to retaliate against an employee for engaging in activity protected by Title VII. To prove unlawful retaliation with respect to each Defendant, Plaintiff must prove by a preponderance of the evidence (1) that UT Southwestern objected to Plaintiff's employment by Parkland because of his complaints of discrimination in his resignation letter

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[1] Unless otherwise stated, these instructions are based on the Fifth Circuit Pattern Jury Instructions – Civil (2006). Defendant is the University of Texas Medical Center at Dallas since the claims against the individually-named defendants, Dr. J. Gregory Fitz and Dr. Beth Levine, have been dismissed by order of this Court. *See* Doc. # 99.

[7] Plaintiff's proposed jury charge correctly omits retaliation as a claim since the Court's order granting summary judgment for Parkland Hospital effectively extinguishes recovery on this same claim against Defendant. *See* Doc. # 100at 9-10, finding no "adverse employment action."

and (2) that Parkland refused to hire Plaintiff for the same reason. Plaintiff does not have to prove that unlawful retaliation was the sole reason for Defendant's actions. If you find Plaintiff's complaints of discrimination was a motivating factor in Defendants' actions, even though other considerations were factors, then you must determine whether Defendants proved by a preponderance of the evidence they would have taken the same actions even if Plaintiff had not complained of discrimination. [*BUT SEE* ED. NOTE BELOW RE MIXED MOTIVE IN RETALIATION CASES.[8]][9]

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[8] ED. NOTE: There is an argument that this instruction conflicts with Fifth 8 Circuit law regarding causation in Title VII retaliation claims, but the law is unsettled, with conflicting unpublished opinions. *Compare Newsome v.Collin County Community College Dist.*, 189 Fed. Appx. 353, 355 (5th Cir. 2006) ("The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision. Even if retaliation was a motivating factor in [plaintiff's] termination, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct.'") (quotations and citations omitted), *with Block v. Kelly Servs., Inc.*, 197 Fed. Appx. 346, 348-49 (5th Cir.2006) (stating mixed-motives analysis applies to retaliation cases). Furthermore, in its published opinions, the Fifth Circuit has not expressly extended the "mixed motive" analysis applicable in Title VII discrimination claims to retaliation claims, s*ee Staten v. New Palace Casino*, *LLC*, 187 Fed. Appx. 350, 362 (5th Cir. 2006), and has found fundamental error with jury instructions that use the "motivating factor" language, although in a case where the parties agreed that mixed-motive did not apply. *See Septimus v. Univ. Houston*, 399 F.3d 601, 607 n.7, 608-09 (5th Cir. 2005). However, opinions from the Northern District of Texas have held that the mixed motive theory can apply in Title VII retaliation cases and have allowed jury instructions to that

Question No. 3a

Did UT Southwestern object to Plaintiff's employment by Parkland because he reported being subject to discrimination in his resignation letter? Answer "Yes" or "No." If your answer is "Yes," proceed to Question 3b. If your answer is "No," do not answer the next question.

Question No. 3b

Has UT Southwestern proven that it would have objected to Plaintiff's employment with Parkland even if he had not reported being subject to discrimination in his resignation letter? Answer "Yes" or "No."

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effect. *See Smith v. Xerox Corp.*, 584 F.Supp.2d 905, 912 (N.D. Tex. 2008).

[9] The Fifth Circuit Pattern Jury Instructions recommend the following instruction here: "If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [ultimate employment action] Plaintiff because [he/she] engaged in protected activity." This instruction is contrary to Fifth Circuit law by suggesting that the jury may infer retaliatory intent without any supporting evidence. *See Memberu v. Allright Parking Systems Inc.*, 93 Fed. Appx. 603, 610 (5th Cir. 2004) ("While it is true that a jury could disbelieve [defendant's] witnesses, this does not relieve [plaintiff] of his burden of proffering evidence from which a reasonable jury could infer intentional discrimination.") (§1983 discrimination claim); *Pineda v. United Parcel Service, Inc.*, 360 F.3d 483,487 (5th Cir. 2004) ("the plaintiff must offer 'some evidence ... that permits the jury to infer that the proffered explanation was a pretext for discrimination. The trier of fact may not simply choose to disbelieve the employer's explanation in the absence of any evidence showing why it should do so.'") (quoting *Swanson v. General Services Admin.*, 110 F.3d 1180, 1185 (5th Cir.1997))

Question No. 4a

Did Parkland refuse to hire Plaintiff's because he reported being subject to discrimination in his resignation letter? Answer "Yes" or "No." If your answer is "Yes," proceed to Question 4b. If your answer is "No," do not answer the next question.

Question No. 4b

Has Parkland proven that it would have refused to hire Plaintiff even if he had not reported being subject to discrimination in his resignation letter? Answer "Yes" or "No."

* * *

Appendix K

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 24, 2010

JURY TRIAL

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

Transcribed by: Shawnie Archuleta,
TX CCR No. 7533
1100 Commerce Street Dallas, Texas 75242

Proceedings reported by mechanical stenography, transcript produced by computer.

* * *

(In open court.)

THE COURT: Good morning. We are here to look one more time at the charge and make some final conclusions. We made the changes we talked about Friday, and so let me call on the plaintiff first.

MR. WALKER: We had no additional changes.

THE COURT: And I apologize, for the record, your last name is?

MR. WALKER: Brent Walker.

THE COURT: Mr. Walker, thank you very much. Mr. Gibson, come around, please.

MR. GIBSON: Thank you, Your Honor. Since Friday, we have had a little bit of time to go and look a little more closely into some case law and just have a few additional comments on the charge.

THE COURT: Take me to the pages when you get to the arguments

MR. GIBSON: The first comment is the mixed motive defense for both constructive discharge and retaliation --

THE COURT: On page?

MR. GIBSON: -- which we would add -- on page 8 -- at the end of the constructive discharge claim and on page 10 at the end of the retaliation claim.

* * *

MR. GIBSON: Your Honor, if I may, Kanida v. Gulf Coast Medical Personnel, 363 F.3d 568, 5th Circuit 2004, quotes: This court has consistently held that district courts should not frame jury instructions based upon the intricacies of the McDonnell Douglas burden shifting analysis.

Your Honor, if I may, I think this is exactly the burden shifting. It talks about a motivating factor, and then it talks about whether or not the employee articulates a reason, and then whether or not the plaintiff has proved that that is merely a pretext.

If it's not the burden shifting analysis, maybe I'm confused and the Court can explain where this instruction comes from.

THE COURT: This is your time to talk. Tell me what you want.

MR. GIBSON: Yes, Your Honor. Those two paragraphs should be stricken.

THE COURT: Okay. Before we go any further with that -- and I am somewhat more than dismayed that we were here from 1:15 until 5:30 on Friday, and you had every opportunity to bring this up, and you spent the weekend now researching. It's 8:30, and the jury is going to be here, and now we are hearing a whole new list or litany of things that you want in this charge. It's somewhat a little bit more than

dismaying. I don't want to hear from you, I just want to hear from Mr. Walker on his position.

MR. WALKER: Your Honor, our position on that is I believe it goes to the pattern jury charge. And beyond that, I agree with the Court that, after the charge conference on Friday, to change the metrics of the case, the case is going to be argued to the jury here in the next 30 minutes, and to change those at this point in time is late and, quite frankly, prejudicial to us, to bring up these new cases at the last moment and arguing something in the pattern jury charge of something that's not supposed to be in front of the jury.

THE COURT: All right. I will take a look at the pattern. My position is, one, that you probably have waived this; but assuming you haven't waived it, if it's part of the pattern, it's going to stay in. Now, if you would, one more time, is there anything else on this page that you are asking to have changed, Mr. Gibson?

MR. GIBSON: Your Honor, if I may very quickly.

THE COURT: Yes or no.

MR. GIBSON: Yes, the addition of the affirmative defense.

THE COURT: Read that for me.

MR. GIBSON: If you find plaintiff's race, religion or national origin was a motivating factor in the defendant's conduct, even though other considerations were factors in those actions, then you must determine whether the defendant proved by a preponderance of the evidence it would have engaged

in the same conduct even if the defendant had not considered plaintiff's race, religion or national origin.

THE COURT: All right. Is there anything else on page 8?

MR. GIBSON: To be fair, Your Honor, I think we made these objections last week.

THE COURT: You did not make this Friday afternoon, Mr. Gibson. This is new language, a new request. If it wasn't, I don't know why you would be bringing it up this morning, because I thought we covered everything in detail Friday afternoon. Don't talk while I'm talking. Do you understand me?

MR. GIBSON: Yes, Your Honor.

THE COURT: Okay. I don't want to hear that. I just want to hear what you want. Don't try to defend that you are not bringing up new things. If you are not, why are you bringing it up? Tell me what else you have on page 8.

MR. GIBSON: The only other comment I would have on page 8 is, the end of the last paragraph, we would strike the last few words, or to prove pretext, because we think that should be -- the context of pretext should be stricken from the charge.

THE COURT: What paragraph are you on?

MR. GIBSON: The final paragraph prior to Question 1 on page 8.

THE COURT: You want the whole paragraph out?

MR. GIBSON: No, Your Honor, I apologize. It's the last four words of the paragraph, which are, or to prove pretext.

THE COURT: All right. Let's move to your next request.

MR. GIBSON: On page 9, this is a comment we made last week. Just restating it, we would request that the line that says: First, that he engaged in protected activity, that that be qualified and that it state that he engaged in protected activity on or after April 27, 2006.

THE COURT: You have covered that objection. It's overruled.

MR. GIBSON: Thank you, Your Honor.

THE COURT: Don't repeat the objections from Friday. Today is just to see if you have something new. All right?

What else do you have that's different from Friday, because I ruled on those.

MR. GIBSON: The same two paragraphs, starting on the bottom of page 9 -- the last full paragraph on the bottom of the page on 9: Plaintiff may prove the defendant, that paragraph and the following paragraph are, again, the discussion of the McDonnell Douglas burden shifting, which we would argue should not be in the charge. THE COURT: And what case do you have that supports this position that you are giving me this morning?

MR. GIBSON: Yes, Your Honor.

THE COURT: What case?

MR. GIBSON: The Kanida case. Should I give you the cite?

THE COURT: I think you have given it to me.

MR. GIBSON: And the Walther v. Lone Star Gas Company, 952 F.2d 119, 5th Circuit 1992. 5th Circuit stating, quote, instructing the jury on the elements --

THE COURT: I just need the cites.

MR. GIBSON: Yes, Your Honor.

THE COURT: Tell me what else you've got.

MR. GIBSON: Finally, we would request that the blocking or objected to language should be changed to opposed or opposing.

THE COURT: Tell me where you are.

MR. GIBSON: Yes, Your Honor. Page 10 and the question.

THE COURT: Yes. And you brought this up Friday, did you not?

MR. GIBSON: Yes, I did, Your Honor.

THE COURT: Okay.

MR. GIBSON: I think those are our only additional comments.

THE COURT: Mr. Hagen, do you support this new theory on objections here 20 minutes before the jury is supposed to be here? We spent Friday afternoon, from 1:15 until 5:30, going over these objections. Do you support this, coming in here the last minute and pulling the rug out from under us? This could take me another hour, hour and a half to get this done and make that jury wait.

MR. HAGEN: Your Honor, I have to stand by the request that the defendant is making.

THE COURT: It's unprofessional, in my view, that you are pulling this on us Monday morning after we planned and worked on this all Friday afternoon, Mr. Gibson. That's all I need. Just take a seat, and I will tell you where I stand on this.

I haven't heard anyone cite yet the Smith v. Xerox Corporation case, 602 F.3d 320. In that particular case, the 5th Circuit came out with a opinion supporting Judge Godbey in part on this issue of motivating factor versus sole but for test; in addition, addressed the issue of pretext versus mixed motive. In conclusion and to summarize, the court found that the mixed motive analysis still applies in a Title VII retaliation case, distinguishing the Gross case and the other cases, in some part at least, because they were based on the ADEA, which the text of the statute seems to bear some distinction or the court has found some distinction in that type -- in that statutory language versus the language in the Title VII.

The specific language that I think supports the jury instructions as they are is at page 333: The choice of jury instruction depends simply on a determination of whether the evidence supports a finding that the just one or more than one factor actually motivated the challenge decision. Put another way, if the district court has before it substantial evidence supporting a conclusion that both legitimate and illegitimate more than one motive may have played a role in the challenged employment action, the Court may give a mixed motive instruction.

In this particular case, the overwhelming theory of both cases and the way this case has been presented is that one side believes that these actions that they allege were illegitimate were taken on the basis of the race and national origin and otherwise of the plaintiff.

The defense has put forth a strong defense with regard to the fact that it was some legitimate reason, primarily, at least, it appears, based upon this affiliation agreement. And so I think it's very clear -- and I could probably spend a day going through the different pieces of evidence that establish these two competing theories of the case that clearly I think make this case fall within the mixed motive as opposed to pretext case.

So anything that's been requested by the defense by way of pretext, relying upon Rachid or Septimus, is not, I think, well-founded in the law at this point, at least based upon the Xerox case. And it remains to be seen what the Supreme Court does with this mixed motive issue once they look at it in the context of a Title VII, but they haven't.

What I am going to do is spend some time looking at the new objections by the defense and making a decision if it should be -- the jury charge should be changed or not, and I will let you all know as soon as I figure that out, and I will let you know if we have to make the jury wait.

* * *

(Jury enters courtroom)

THE COURT: Ladies and gentlemen we are going to pass out the jury instructions, and I will read those to you as soon as everyone gets a copy.

(Jury instructions read to the jury)

THE COURT: I have the original jury charge here that is signed in blue ink, and that's the one I will ask you to sign. I need to get actually the verdict form back to you on this original, and I will do that.

Ladies and gentlemen, the case is now yours. Please follow the instructions on the deliberations. Wait until you are all back there. You just go back and elect your foreperson, let us know, and I'm going to be making sure we have all the exhibits exactly as they were admitted, ready and organized to send back to you. That may take me a few minutes. Let us know what your lunch schedule might be so I will know who needs to be here when. And when we take a break is obviously when you guys take a break. With that, good luck.

(Jury leaves courtroom)

* * *

Appendix L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PARKLAND HEALTH & HOSPITAL SYSTEM, BETH LEVINE, M.D., AND J. GREGORY FITZ, M.D.

Defendants.

May 21, 2010

JURY TRIAL

Before: The Honorable Jane J. Boyle
United States District Judge

CERTIFIED TRANSCRIPTION

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

/s/

July 30, 2010

Transcribed by: Shawnie Archuleta,
TX CCR No. 7533
1100 Commerce Street Dallas, Texas 75242

Proceedings reported by mechanical stenography, transcript produced by computer.

* * *

MR. HAGEN: I understand that. Thank you for the clarification as to the denial of that request. And if the Court does see fit to include the specifically or the objecting to by the University, I think that can help the jury understand what it is that they are being asked to decide whether or not was, you know, an adverse employment action.

THE COURT: And I'm going to put that in there.

MR. HAGEN: The other thing on this question, then, is, I think we are entitled to an affirmative defense on this retaliation theory. And I think it says, essentially, would the defendant have objected to the plaintiff's job change or job application to work at Amelia Court Clinic for Parkland even in spite of the conversation on or about April 27 with Greg Fitz.

THE COURT: What case are you relying upon for this? Is this this pretext-plus line of cases, Septimus and Rachid?

MR. HAGEN: I think if an affirmative defense is pled for retaliation, I think we are just entitled to it.

THE COURT: Well, I am not -- I will look at this. And I know that Septimus has some language about following a prior panel decision and pretext plus does, but I'm not sure the way you are phrasing it

that it is correct as a matter of law. Here, it is a motivating factor. We say, because of it the law is a motivating factor. It doesn't have to be the sole reason, it doesn't have to be but for. Everyone I think agrees on that.

So what you are telling me is that you want some language in there that indicates that, if you find they would have done it anyway, which goes way back to Price Waterhouse, and I'm not sure it is a correct statement of the law because -- I'll look at it.

MR. HAGEN: I think in the absence of an affirmative defense, then, Septimus, I think, says it's clear error -

THE COURT: I know what it says.

MR. HAGEN: -- to omit something that says essentially sole cause.

THE COURT: Well, I think we answer that by putting in there only motive. It does not have to prove retaliation was the only motive, but must prove the defendant acted at least in part to retaliate.

MR. HAGEN: But that is -- that gives them leeway as opposed to the defendant a sort of a exclusivity entitlement there.

THE COURT: How do the two square?

MR. HAGEN: Well, I think the -- well, I think that the defendant -- the plaintiff must show that it is the sole motive of the defendant. Well, under but for language, I'm wondering in the language of Septimus, I think that it's something more confining, it's something more stringent than motivating factor.

THE COURT: All right. I understand what you are asking for, and I will look at the law on this and make sure this is correct. But my understanding is, we are still at motivating factor for retaliation. If that wasn't the case, then, this instruction that says, plaintiff doesn't have to prove that retaliation was the only motive, would be incorrect.

MR. HAGEN: Correct. And --

THE COURT: You're taking the position it's a but-for.

MR. HAGEN: Yes, we are, under Septimus. And as for constructive discharge, I think we've covered the main points for retaliation.

* * *

THE COURT: Couple of things: I moved the language on the business judgment to where everyone agreed to move it. Just with regard to Mr. Gibson, your points on this being a pretext case and somehow warranting this kind of but for causation under Septimus, I deny those requests. I don't think that this is what we would define as a pretext case. In any event, I don't think it's the defense's call to describe a case as a pretext case or not. This has been tried as a mixed motive case.

There is a very helpful case that I think really clears up the confusion -- and there's plenty of it under Septimus and Rachid on this point -- and that is written by Judge Godbey. It is probably one of the most well-written opinions on these points that I have found. Smith v. Xerox, 584 F.Supp.2d 905, and he cites to an unpublished 5th Circuit case. It's much

more slim than his, Block v. Kelly Services, and that's 2006 Westlaw 2571012.

The bottom line is that the would have done it anyway defense has been completely taken out of the statute -- I mean of the case authority, the Supreme Court case authority, as intended by the changes to the statute. To the extent that it's in the case -- it's not in this case, and this case is a mixed motive retaliation case, which calls for -- and I think has been verified by the 5th Circuit and certainly as explained by Judge Godbey in this case -- calls for a motivating factor; that the discriminatory intent is a motivating factor, it doesn't have to be the sole motivating factor.

Therefore, you wouldn't be entitled to this would have done it anyway type of defense or sole motivating factor type of defense that you have asked for, so I am denying that request.

I want to make sure I have covered most of the objections, because I want to get started at 9:00.

* * *

Appendix M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:08-CV-1337-B

NAIEL NASSAR, MD,

Plaintiff,

v.

UT SOUTHWESTER HEALTH SYSTEM ET AL.,

Defendants.

May 24, 2010

RESPONSE TO JURY NOTE # 1

Members of the Jury:

Members of the Jury, I received the following note (No. 1) signed by your Foreperson,

We are looking for an email from Dr. Nassar to Dr. Fitz when he first complained about discrimination or being treated differently.

Thank you

Randy Cole

Response:

All of the exhibits admitted during the trial have been delivered to the jury room for your deliberations.

SIGNED: May 24, 2010.

/s/

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE