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The *Gross* Confusion Deep in the Heart of *University of Texas Southwest Medical Center v. Nassar*  

Brian S. Clarke*  

Chaos and confusion surround the issue of factual causation in employment discrimination disparate treatment doctrine. At the root of this confusion lies the Supreme Court’s decision in *Gross v. FBL Financial Services Inc.*¹ Scores of defendants² and numerous lower courts³ have...
interpreted this case to require that an employer’s desire to discriminate or retaliate against a plaintiff-employee be the sole cause-in-fact of the employer’s adverse action against the plaintiff-employee. This interpretation of Gross is, in fact, at the heart of University of Texas Southwest Medical Center v. Nassar, which is pending before the Court. In its Petition for Certiorari, the University of Texas Southwest Medical Center stated that it argued before the district court that “Nassar’s burden was to ‘show that [retaliation] is the sole motive of the defendant.’” Even the trial judge in Nassar referred to the applicable cause-in-fact standard as the “sole but for test.” Yet, sole causation is, as a leading employment law scholar recently put it, “too stupid to take seriously.” Logically, every occurrence has a virtually infinite number of factual causes—going all the way back to the Big Bang and the creation of the universe—without which the event at issue would not have occurred. Further, even if Congress had intended a sole causation standard despite its patent absurdity, it would have said so.

Although the level of confusion flowing from Gross may have been unintentional and unexpected, the Court presently has a golden opportunity to clarify Gross and explain the nature and scope of the cause-in-fact standard applicable in disparate treatment cases. In order to do so, the Court should look to what is, perhaps, an unexpected place: Price Waterhouse v. Hopkins. Although no court or commentator has recognized it before now, a majority of the Court in Price Waterhouse—a majority that included Justices Kennedy and Scalia—embraced a cutting-edge cause-in-fact standard in the disparate treatment context. This cause-in-fact standard is realistic because it accounts for the multiple causal factors inherent in employment decisions, leads to liability only where the protected trait was necessary to the employer’s adverse

4. 133 S. Ct. 978 (U.S. 2013) (order granting certiorari). Oral arguments in Nassar were heard on Wednesday, April 24, 2013.
6. Trial Transcript vol. 6 at 13, Nassar, No. 12-484 (U.S. Oct. 17, 2012). The trial judge ultimately concluded that Gross and its “sole but for test” did not apply to Title VII retaliation claims based on Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010).
7. Email from Charles A. Sullivan, Professor of Law, Seton Hall University School of Law, to Brian S. Clarke, Assistant Professor of Law, Charlotte School of Law (Oct. 26, 2012, 09:57 EST) (on file with author).
decision, and is consistent with the Court’s interpretation of factual cause in Gross.

This essay addresses three issues: (1) the causal confusion resulting from Gross; (2) the unrecognized view of cause-in-fact embraced by a majority (but not the majority) of the Court in Price Waterhouse; and (3) a plea for the Court to clarify Gross and reaffirm this clear, comprehensive and realistic cause-in-fact standard in Nassar.

I.
GROSSLY CONFUSING CAUSATION

At first blush, the Court’s opinion in Gross appears straightforward. First, the Court interpreted the phrase “because of” in the Age Discrimination in Employment Act (the “ADEA”) to mean but-for causation. Second, the Court concluded that the ADEA did not permit courts to shift the burden of disproving factual causation to the defendant in the form of the “same action” defense.

However, the Court’s articulation of the cause-in-fact standard in Gross was imprecise and superficial. The Court stated “that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.” In elaborating on the specifics of this standard, the Court reasoned that the ADEA only prohibited discrimination where “age was the ‘reason’ that the employer decided to act.” The Court offered no further discussion or explanation as to what it meant by but-for cause. Did it mean the traditional, strict version? The “significant factor” version from the Restatement (Second) of Torts? The necessary element of a sufficient set (“NESS”) version of but-for cause in the then-draft of the Restatement (Third) of Torts?

The Court cited two cases and one treatise in support of its holding that could, at least theoretically, provide interpretive guidance as to the exact meaning of but-for cause in Gross. Unfortunately, these sources provide mixed

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12. Id. at 180.
13. With the “same action” or “same decision” defense, an employer can either completely avoid liability or at least limit the remedies available to the plaintiff by proving that it would have made the same decision to terminate the plaintiff’s employment even if it had not considered the plaintiff’s sex, race or other protected trait. See Price Waterhouse, 490 U.S. at 242, 252 (Brennan, J. plurality) (recognizing the “same decision” defense as a complete defense to liability in mixed motive cases under Title VII); id. at 260 (White, J., concurring) (same); id. at 261 (O’Connor, J., concurring) (same); 42 U.S.C. § 2000e-5(g)(2)(b) (partially overruling Price Waterhouse and codifying the “same action” defense as a limitation on the remedies recoverable by a plaintiff in mixed-motive cases under Title VII).
15. Id. at 176 (emphasis added).
messages. First, the Court cited Hazen Paper Co. v. Biggins,\textsuperscript{16} highlighting the statement that an ADEA claim “cannot succeed unless the employee’s protected trait actually played a role in [the employer’s decision-making] process and had a determinative influence on the outcome.”\textsuperscript{17} Unfortunately, this statement is barely more instructive on factual causation than using the term but-for cause. At most, it indicates that factual causation exists where age was the factor that mattered in the employer’s decision. This appears to be slightly less strict than the traditional but-for test, although it is not entirely clear. Next, the Court cited Safeco Insurance Co. of America v. Burr\textsuperscript{18} for the general proposition that “based on” is the equivalent of a but-for causal relationship.\textsuperscript{19} Safeco itself provides a bit more guidance than the Court’s parenthetical suggests. There, the insurance company defendant argued that “based on” in the Fair Credit Reporting Act meant that “consideration of the [impermissible factor] must [have been] a necessary condition” for the adverse action.\textsuperscript{20} The Court agreed.\textsuperscript{21} This “necessary condition” language—though simplistic—mirrors language in the Restatement (Third)’s NESS standard. Third, the Court cited to the basic statement of the traditional but-for cause test in the fifth edition of Prosser & Keeton on Torts.\textsuperscript{22} In short, these materials offer little interpretive guidance as they range from the traditional but-for test (Prosser & Keeton) to something NESS-like (Safeco) and something in between (Hazen Paper).

Given the absence of textual guidance in Gross, one is left with the plain meaning of the words the Court used. The Court held that the protected trait must be “the but for cause”\textsuperscript{23} of the decision and “the reason”\textsuperscript{24} for the decision. The Court’s use of the definite article “the” indicates a specific, single cause or single reason (whereas the indefinite article would indicate the possibility of more than one cause or reason).\textsuperscript{25} By contrast, the dissent in

\begin{itemize}
  \item \textsuperscript{16} 507 U.S. 604 (1993).
  \item \textsuperscript{17} Gross, 557 U.S. at 176 (citing Hazen Paper, 507 U.S. at 610).
  \item \textsuperscript{18} 551 U.S. 47 (2007).
  \item \textsuperscript{19} Gross, 557 U.S. at 176 (citing Safeco, 551 U.S. at 63-64).
  \item \textsuperscript{20} Safeco, 551 U.S. at 63.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Gross, 557 U.S. at 176-77 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS at 265 (5th ed. 1984)).
  \item \textsuperscript{23} Id. at 176, 180 (emphasis added).
  \item \textsuperscript{24} Id. at 176.
  \item \textsuperscript{25} See Rapanos v. United States, 547 U.S. 715, 732 (2006) (relying on use of direct article “the” as evidence that the statute narrowed the type of “waters” at issue); Rumsfeld v. Padilla, 542 U.S. 426, 434–35 (2004) (relying on use of the definite article “the” as evidence there was “generally only one proper respondent to a given prisoner’s habeas petition”); Noel Canning v. N.L.R.B., 705 F.3d 490, 500 (D.C. Cir. 2013) (holding that the definite article “the” denotes “a particular thing” and suggests specificity, thus the use of “the Recess” in the Appointments Clause of the Constitution indicates a single recess, not multiple recesses); Shum v. Intel Corp., 629 F.3d 1360, 1367 (Fed. Cir. 2010) (determining that use of the definite article “the” in Fed. R. Civ. Proc. 54(d)(1) indicates that what follows, “prevailing party,” is specific and limited to a single party); WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1222 (1989); BLACK’S LAW DICTIONARY 1477 (6th ed. 1990); see also Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 69-77
Price Waterhouse, discussed below, was very explicit that Title VII required only that the protected trait “be a cause of the decision.”26 The critical difference, of course, is the use of the indefinite article “a” in Price Waterhouse versus the definite article “the” in Gross. Given this plain language, one is left to conclude that the Court was either profoundly sloppy with its word choice in Gross (which would be ironic considering that it was a case about the meaning of words), or the Court intended to adopt the most restrictive version of but-for cause available.

The Court’s word choice in Gross, combined with its limited explanation of the parameters of the cause-in-fact standard it adopted, opened the door for interpreting factual causation in the disparate treatment context as sole cause. It is even the most natural interpretation of the Court’s plain language. Nevertheless, it is absurd and unrealistic.

II.
THE OVERLOOKED CAUSE-IN-FACT STANDARD IN PRICE WATERHOUSE

In contrast to the imprecise and simplistic statements in Gross, the various opinions in Price Waterhouse contain a realistic, highly nuanced discussion of factual causation which sought to deal with the simultaneous interplay of multiple causal factors in a single challenged employment decision.

Justice Brennan’s plurality opinion, which was joined by Justices Marshall, Blackmun and Stevens, sought to deal with the complexity of multiple causal factors by shifting the burden of proving factual causation to the defendant, reasoning that the defendant was in the best position to prove why it made the challenged employment decision.27 The plurality vigorously opposed the dissent’s assertion that the phrase “because of” in Title VII referred to a “but for” factual causation standard. However, by allowing the defendant to escape liability if it proved that it would have made the same decision even if it had not considered the protected trait, the plurality actually adopted a but-for standard.

The plurality’s resistance to the term “but-for causation” stemmed from shortcomings in the traditional but-for standard, which is ineffective in a number of situations. Justice Brennan focused specifically on the shortcomings of but-for causation in “overdetermined” multiple causation cases using the following example: “Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object.”28 Under the traditional but-for test, neither of these forces was a but-for cause because the object would have moved regardless. “Events that are causally overdetermined, in other words, may not have any ‘cause’ at all.”29

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27. Id. at 244-45.
28. Id. at 241.
29. Id.
Recognizing the absurdity of this result, Justice Brennan sought to explain how the plurality’s factual cause standard worked in the face of multiple causal factors. The plurality focused the inquiry on “whether [a protected trait] was a factor in the employment decision at the moment it was made,” reasoning that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. It described its approach as “seek[ing] to determine the content of the entire set of reasons for [the adverse] decision” and attaching liability only where the employer’s consideration of the protected trait was necessary to the outcome.

The dissent, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Scalia, disagreed with the other members of the Court primarily on the appropriateness of shifting the burden of persuasion on causation to the defendant. On the cause-in-fact standard embodied in the “because of” language of Title VII, the disagreement between the dissent and the plurality was more semantic than real. Like the plurality, the dissent was concerned with the shortcomings of the strict, traditional but-for standard. However, unlike the plurality, the dissent did not reject the but-for label. Instead, it explained what it meant by but-for cause. According to the dissent, its but-for cause standard was satisfied whenever discrimination was “a cause of the decision,” meaning that discrimination was “a necessary element of the set of factors that caused the decision.”

The plurality and the dissent described the applicable factual causation standard in strikingly similar terms. The plurality’s standard was satisfied when discrimination was part of the “set of reasons for [the adverse] decision” and was necessary to the outcome. The dissent’s standard was satisfied whenever discrimination was “a necessary element of the set of factors that caused the decision.” These descriptions were uniquely specific, consistent and cutting edge, describing a then-new articulation of factual causation in the tort context.

The vision of factual causation stated by both the plurality and the dissent is unmistakably the “Necessary Element of a Sufficient Set” or NESS standard first fully articulated in 1985 by Professor Richard Wright. The NESS

30. Id. (emphasis added).
31. Id. at 250 n.13 (emphasis added)
32. Id. at 286 (Kennedy, J. dissenting).
33. Id. at 284. Contrast Justice Kennedy’s use of “a cause” here with the Court’s use of “the reason” and “the but-for cause” in Gross, 557 U.S. at 176, 180.
34. Id. at 284 (emphasis added).
35. Id. at 250 n.13 (Brennan, J., plurality) (emphasis added)
36. Id. at 284 (Kennedy, J. dissenting) (emphasis added).
37. Richard W. Wright, Causation in Tort Law, 73 CALIF. L. REV. 1735, 1790 (1985) (articulating the NESS standard as follows: “[a] particular condition is a [factual] cause of . . . a specific consequence if . . . it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence”). Professor Wright’s “NESS” standard was ultimately incorporated into the Restatement (Third) of Torts: Physical and Emotional Harm as the primary standard for factual causation. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND
standard, which holds that a condition is a factual cause of a specific consequence if it is a “necessary element of a set of” conditions that are sufficient for the occurrence of the consequence, was specifically designed to deal, in a realistic way, with multiple causal factors. Although NESS was developed in the tort context, it is particularly well-suited for disparate treatment cases, given the complex, multifactor nature of employment decision making. Justice Kennedy explicitly made this connection in the dissent, as did Justice Brennan in the plurality opinion. Putting aside labels like “but-for,” the plurality’s and the dissent’s respective descriptions of the factual causation required for liability under Title VII show that at least seven of the nine justices agreed that an adverse employment action was “because of” an employee’s protected trait if that protected trait was a necessary element of the set of reasons on which the employer relied in making its decision.

This incredibly important area of agreement has escaped commentators and courts for twenty-four years. Nevertheless, it is there. If previously recognized, it would have made many years of struggle with factual causation in disparate treatment doctrine less onerous and confusing. Now that this agreement on factual causation is apparent, it is critical to bring coherence to factual causation in the disparate treatment doctrine in Nassar.

III. NASSAR AS THE VEHICLE FOR CAUSAL CLARIFICATION AND COHERENCE

The question presented in Nassar focuses on the propriety of burden shifting and whether the plaintiff must prove the presence of but-for cause (as stated in Gross) or whether the defendant must prove its absence (as in the controlling rule from Price Waterhouse). Either way, but-for causation will play a central role in the Court’s decision. In light of the confusion engendered
by *Gross* as to what but-for cause means in the disparate treatment context, it is
critical that the Court use *Nassar* to explain *Gross*. In order to do so, the Court
needs to look no further than the unrecognized area of agreement in *Price Waterhouse*.

As succinctly stated by Justice Kennedy, but-for causation in the disparate
treatment context is established when the employer’s consideration of a
protected trait was “a necessary element of the set of factors that caused the
decision.”42 This cause-in-fact standard is realistic, in that it accounts for the
multiple causal factors inherent in employment decisions. It is consistent with
the plain language of Title VII and each of the other disparate treatment
statutes, as well as with the Court’s interpretation of that language in *Gross*.43
It is far simpler than other conceptions of but-for cause because it asks the jury
to determine only whether the employer considered the plaintiff’s protected
trait in making its decision and whether that consideration was necessary to the
employer’s decision.44 This cause-in-fact standard is fairer, as it eliminates
windfalls to employers who engaged in discrimination, but also had other
reasons for their adverse actions. It is consistent with the remedial purposes of
the disparate treatment statutes and the corrective-justice vision of the law,
within which a wrongdoer who causes (in a common or moral sense) harm to
another is required to make amends.45 Further, applying this standard
uniformly in disparate treatment doctrine would allow Congress and the Court
to develop and evolve disparate treatment law with the critical issue of cause-
"in-fact at its core, instead of being continually distracted and side-tracked by
creating and tinkering with proof schemes.46

42. *Id.* at 284 (Kennedy, J. dissenting) (emphasis added); *see also id.* at 250, 250 n.13
(Brennan, J. plurality).
43. As it is unlikely the Court would simply overrule *Gross*, a rule that is consistent with and
merely a clarification of *Gross* is the only one that seems likely to garner support from a majority of
the Court.
44. In the traditional “but for” cause scenario, a jury must determine—hypothetically and
retrospectively—whether the plaintiff would have suffered the same harm absent the defendant’s
action or inaction. This is often a fairly straightforward determination in the tort context where the
cause(s) of an event are often physical and observable. For example, where defendant failed to stop at
a red light and, as a result, hit the plaintiff’s car, it is easy to see that if the defendant had not run the
red light, he would not have struck the plaintiff’s car. However, in the disparate treatment context, in
order to engage in this same analysis, the jury would have to remove the consideration of race or sex
from the decision-maker’s mind and try to predict what would have happened next. This is, at best, a
45. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §26
Reporter’s Note cmt. b (reasoning that its approach to cause-in-fact is consistent with the corrective
justice vision of tort law and citing JULES L. COLEMAN, RISKS AND WRONGS 374–382 (1992);
Michael S. Moore, *Causation and Responsibility*, SOC. PHIL. & POL’Y, Summer 1999, at 1, 4; Richard
W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL
STUD. 435 (1985)).
46. *See* Clarke, *supra* note 9, manuscript at 54.
CONCLUSION

By explicitly acknowledging and reaffirming the incorporation of the NESS standard of factual causation in disparate treatment doctrine, the Court can quickly and easily eliminate the causal confusion that followed Gross and replace it with causal coherence. Nassar provides the perfect opportunity to accomplish this. The Court should take it.