EVOLVING CAUSATION STANDARDS AND THEIR POST-*NASSAR* APPLICATION TO RETALIATION CLAIMS UNDER THE FALSE CLAIMS ACT

Andrew M. Witko[1]

A successful retaliation claim generally requires an employee to prove three elements: first, that the employee engaged in protected conduct; second, that the employer initiated an adverse employment action against the employee; and third that an impermissible relationship exists between the protected conduct and the adverse employment action. The focus of this paper is on this final element in claims of retaliation under the False Claims Act (FCA).[2] Specifically, the paper considers whether the courts should apply a "but–for" or "motivating factor" causation standard in cases arising under the FCA's anti–retaliation provision.

Section I provides the history and an overview of the FCA, from its enactment during the Civil War to the 1986 amendments and up to present day. Section II discusses the evolution of

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[1] Andrew Witko graduated *cum laude* from the University of Maryland School of Law in May 2014 and currently practices law at The Employment Law Group in Washington, D.C. He is the winner of The College of Labor and Employment Lawyers and American Bar Association Section of Labor and Employment Law's 2013–2014 Annual Law Student Writing Competition. Mr. Witko would like to thank The College and the ABA, Professor Marley Weiss from the University of Maryland, Scott Oswald and the Principals at The Employment Law Group, Amy Biegelsen from Outten & Golden LLP, and, most of all, his wife Claire for putting up with him while he was working full time during the day and commuting three hours to attend law school at night.

[2] *See* 31 U.S.C. § 3730(h) (2010).

the Supreme Court's jurisprudence regarding causation standards, primarily in the context of anti-discrimination and anti-retaliation statutes. In Section III, the paper returns to the FCA and discusses how lower courts are applying the Supreme Court's causation analysis in anti-discrimination cases to claims arising under the FCA's ant-retaliation provision. Finally, in light of the FCA's unique position at the intersection of whistleblower protection and employment discrimination, clear congressional intent at the time of the FCA's enactment and subsequent amendments, and the plain language of statute itself, Section IV argues that courts should apply a motivating factor causation standard rather than than the heightened but–for standard to employees' claims of retaliation. The paper concludes by theorizing that, despite a trend that would seem to favor the application of but–for causation, a recent Supreme Court decision in *Lawson v. FMR LLC* may actually provide a glimmer of hope for whistleblowers under the FCA.

I. HISTORY AND IMPORTANCE OF THE FALSE CLAIMS ACT

Widely recognized as the first whistleblower protection law, the False Claims Act was proposed by President Abraham Lincoln and enacted by the 37th United States Congress to protect the federal government from fraud and abuse by defense contractors during the Civil War.[3] Leading up to the FCA's enactment, opportunistic government contractors sold diseased mules[4] and munition crates full of sawdust to the Union Army.[5] As the Supreme Court observed,

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[3] S. Rep. No. 99–345 at 696-97 (1868).

[4] *False Claim Act Amendments: Hearings on H. R. 3334 Before the Subcomm. on Admin. Law & Gov't Relations of the House Comm. on the Judiciary*, 99th Cong. 1 (1986); *see also* Pamela H. Bucy, *Where to Turn in A Post-Punitive Damages World: The "Qui Tam" Provisions of the False Claims Act*, 58 Ala. Law. 356, 356 (1997).

[5] 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman).

"Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury."[6] The FCA sought to slow the tide of corruption by allowing private citizens to bring lawsuits on *behalf of* the federal government.[7]

Congress amended the FCA in 1986 to include a cause of action for employees whose employers initiated an adverse employment action "because of" the employee engaging in protected activity under the Act.[8] Since the adoption of the FCA's anti–retaliation provisions in 1986 through to June 2012, the government has recovered more than $33 billion in False Claims Act settlements and judgments.[9] In 2012 alone, the Department of Justice collected almost $5 billion prosecuting government contractor fraud.[10] It is difficult to imagine similar levels of

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6 *United States v. McNinch*, 356 U.S. 595, 599 (1958) (citing H.R. Rep. No. 2, pt. 1 (1868)).

7 Act of Mar. 2, 1868, ch. 67, 1968. 12 Stat. 696 (providing, "Such suit may be brought and carried on by any person, as well as for himself as for the United States.").

8 *See* 31 U.S.C. § 3730(h) (2010).

9 Stuart F. Delery, Acting Assistant Attorney Gen., Dep't of Justice, Speech at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), http:// www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html.

10 *See* Press Release, Department of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), http://www.justice.gov/opa/pr/2012/July/12-civ-842.html.

success without those company insiders who "may be the only [people] who can bring the information forward."[11]

II. THE CAUSATION EVOLUTION: FROM *MCDONNELL DOUGLAS* TO *NASSAR*

A. THE SUPREME COURT ANNOUNCES A BURDEN SHIFTING FRAMEWORK AND ADOPTS MOTIVATING FACTOR CAUSATION.

In *McDonnell Douglas Corporation v. Green*, the Supreme Court announced a new regime for analyzing Title VII discrimination cases.[12] Specifically, the Court required the plaintiff to carry the initial burden of establishing a *prima facie* case of discrimination, and where a plaintiff was able to meet such a burden, "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[13] The plaintiff is then provided "a fair opportunity to show that [employer's] stated reason for [the adverse action] was in fact pretext."[14]

Mt. Healthy City School District Board of Education v. Doyle was the first in a line of cases to address the causation standard to be applied in employment disputes. Doyle alleged that his school violated the First and Fourteenth Amendments' prohibitions on restricting speech by refusing to renew his teaching contract after he called a radio station and made critical remarks about the school's dress code policy.[15] The District Court found that while the school may have had other legitimate reasons to fire Doyle,[16] his comments were protected by the Constitution

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11 S. Rep. No 99-345, at 23 (1986).

12 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

13 *Id.*

14 *Id.* at 804.

15 *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 573 (1977).

16 *Id.*

and played "a substantial part" in the school's decision to terminate him. The District Court entered judgment for Doyle.[17] The Supreme Court took issue with the District Court's apparent lack of consideration for the employer's legitimate reasons and stated:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and *that this conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor*" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[18]

This decision not only reaffirmed a burden shifting framework, it implicitly authorized a plaintiff to allege mixed motive theories of retaliation.

B. *PRICE WATERHOUSE* ILLUSTRATES THE DIVIDE AMONG THE JUSTICES ON THE ISSUE OF BURDEN SHIFTING.

In *Price Waterhouse v. Hopkins,* the Court sought to determine "the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[19] But as the fractured decision demonstrates, the justices found very little common ground. The case produced a four–justice plurality, two single–justice concurrences, and a three–justice dissent.

The plurality focused on what, precisely, Congress meant in using "because of" when linking an individual's protected status with an adverse employment decision.[20] Noting that "'because of' does not mean '*solely*' because of," the plurality concluded that when an employer

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17 *Id.* at 284.

18 *Id.* at 287.

19 *Price Waterhouse*, 490 U.S. at 232.

20 *See* 42 U.S.C. §§ 2000e–2(a) (1991).

considers legitimate factors *and also considers the employee's protected status*, the decision reached is, indeed, "because of" the employee's protected status —a mixed–motive standard. Recognizing the employer's right to make decisions about its workforce, the Court went on to provide that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person"[21] by a preponderance of the evidence.[22]

As will become critical in understanding later Supreme Court decisions, the *Price Waterhouse v. Hopkins* Court refused to conceptualize "mixed–motive" and "but–for" as inherently contradictory causation standards. To this point, the Court concluded:

> [O]nce the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." *A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a "but–for" cause of the employment decision*.[23]

Thus, for the plurality, a plaintiff could still satisfy a so–called but–for standard by showing that the protected conduct was a motivating factor in the employment action. As will come into sharp relief later, the Court did not draw bright lines between but–for and motivating factor causation standards. This point is underscored by Justice Byron White's concurrence in which, relying heavily on *Mt. Healthy City School District Board of Education v. Doyle,* he notes that a plaintiff is "not required to prove that the illegitimate factor was the only, principal, or true

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21 *Id.* at 242.

22 *Id.* at 253.

23 *Id.* at 249 (citing *Mt. Healthy*, 249 U.S. at 287).

reason for petitioner's action. Rather… her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action."[24]

C. THE SUPREME COURT ADDRESSES THE 1991 AMENDMENTS TO TITLE VII IN *DESERT PALACE.*

In 1991, Congress passed the Civil Rights Act of 1991, which adopted the plurality's "motivating factor" standard articulated in *Price Waterhouse.* To wit:

> "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[25]

A second statutory provision provided that, if a plaintiff can prove a violation under 42 U.S.C. §2000e–2(m), the employer can "demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor," and thus restrict the remedies available to the plaintiff to injunctive relief and attorney's fees.[26] In *Desert Palace, Inc. v. Costa,* the Supreme Court construed the 1991 amendments for the first time, and sought to determine whether, a plaintiff needed to introduce direct evidence of discrimination in order to receive a mixed–motive jury instruction in Title VII discrimination cases.[27] Relying on the language of the 1991 Act, the Court unanimously concluded that courts could provide a mixed motive jury instruction even where a plaintiff did not offer direct evidence of discrimination.[28]

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24 *Id.* at 259 (White, J. concurring).

25 42 U.S.C. § 2000e–2(m) (1991).

26 42 U.S.C. § 2000e–5(g)(2)(B) (1991).

27 *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).

28 *Id*. at 92.

D. *GROSS* AND *NASSAR* REJECT *PRICE WATERHOUSE'S* APPLICATION TO ADEA AND TITLE VII RETALIATION CASES.

In 2009 and in 2013, the Supreme Court heard *Gross v. FBL Financial Services, Inc.*[29] and *University of Texas Southwestern Medical Center v. Nassar.*[30] The former involved a claim arising under the Age Discrimination in Employment Act (ADEA) in which Jack Gross, a fifty–four year–old claims director employed by FBL Financial Services, Inc., alleged that his demotion to a manager position was "because of" his age.[31] The latter concerned a physician's allegation that his constructive discharge was in retaliation for having complained of religious and racial harassment.[32] Rather than carrying forward the "motivating factor" standard articulated by the *Price Waterhouse v. Hopkins* plurality and adopted by Congress in the 1991 amendments to Title VII's anti–discrimination provisions, the decisions in *Gross v. FBL Financial Services, Inc.*[33] and *University of Texas Southwestern Medical Center v. Nassar* embrace the "but–for" standard advanced by the *Price Waterhouse v. Hopkins* dissent.

i. The *Gross* Court relieves Defendants of their burden.

In *Gross v. FBL Financial Services, Inc.,* a five justice majority concluded that, at all times, the plaintiff had to carry the burden of persuasion, that the burden never shifted to the defendant, and that under no circumstances was a plaintiff entitled to a mixed–motive jury

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29 *Gross*, 557 U.S. at 167.

30 *Nassar*, 133 S. Ct. 2517.

31 *Gross*, 557 U.S. at 170-71.

32 *Nassar*, 133 S. Ct. at 2524

33 *Gross*, 557 U.S. at 167.

instruction in a claim arising under the ADEA.[34] The majority began by noting the fact that Congress amended Title VII in 1991 to explicitly authorize mixed–motive claims and to adopt the plurality's burden shifting framework discussed in *Price Waterhouse v. Hopkins*.[35] The Court reasoned that Congress's failure to make similar changes to the ADEA, however, meant that it implicitly rejected such mixed–motive claims in age discrimination cases.[36] Turning to the text of the statute, the majority determined that the words "*because of* such an individual's age" meant that the "plaintiff retains the burden of persuasion to establish that age was the but–for cause of the employer's adverse action,"[37] and that "the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[38] Thus, from 1989 to 2009, the Court's definition of "because of" change dramatically. In *Price Waterhouse v. Hopkins*, the words "because of" (in the context of Title VII) allowed a plaintiff to demonstrate that the plaintiff's protected class motivated an employment decision and then required the defendant to carry the burden of persuasion. Twenty years later, the *Gross v. FBL Financial Services, Inc*. Court, relying on the very same words "because of," held that the burden of persuasion *never* shifted to the defendant.[39]

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34 *Id.*

35 *Id.* at 174-75.

36 *Id.*

37 *Id.* at 177.

38 *Id.* at 180.

39 *See Id.* at 177-78 (providing "[T]he burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment

ii. The *Nassar* Court applies *Gross's* but–for standard to Title VII retaliation claims.

In *University of Texas Southwestern Medical Center v. Nassar*, the Court turned its attention to claims of retaliation under Title VII. Specifically, the Court sought to determine whether the burden ever shifted to the defendant and, consequently, whether mixed motive jury instructions were proper. Again, and in conflict with *Price Waterhouse v. Hopkins*, the majority in *University of Texas Southwestern Medical Center v. Nassar* found that "because of" in Title VII's anti–retaliation provision[40] precluded a plaintiff from prevailing on a mixed motive theory. As with *Gross v. FBL Financial Services, Inc.,* the Court reached this conclusion by referring to the 1991 amendments and noted that Congress failed to expressly include the "motivating factor" language in 42 U.S.C. §2000–3(a) that it did in 42 U.S.C. §2000e–2(m).[41]

iii. The *Gross* and *Nassar* decisions have led to perverse consequences.

The Court's decisions in *Gross v. FBL Financial Services, Inc*. and in *University of Texas Southwestern Medical Center v. Nassar* reflect a perverse irony. The Court used Congress's 1991 attempt to *strengthen* Title VII's anti–discrimination provision to *weaken* the anti–discriminations protections in other major employment statutes. More specifically, the Court attributes to Congress an intent to give meaning to a dichotomy between "but–for" and "motivating factor" standards that, at the time Congress borrowed the language from the *Price Waterhouse v. Hopkins* plurality, did not exist—the concepts were, at the time, still intertwined.

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action. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the " but-for" cause of the challenged employer decision.").

40 42 U.S.C. § 2000-3(a) (1991).

41 *Nassar*, 133 S. Ct. at 2528-29.

Had Congress not amended Title VII's anti–discrimination provision in 1991, the Court would have had little upon which to hang its hat in redefining the words "because of" in the ADEA and Title VII retaliation contexts. Indeed, Congress's changes to Title VII's anti–discrimination provision seem to be the primary driver behind the Court's rationale. Had Congress *not* taken steps to strengthen Title VII's prohibitions against discrimination under title VII, the Supreme Court likely would have been obliged to follow the burden shifting framework as set forth in *Price Waterhouse v. Hopkins*, where the "because of" and "motivating factors" aspects of the causation standard were still intertwined.[42] In other words, despite Congress finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace,"[43] the majority's view seems to be that Congress only meant discrimination based on "race, color, religion, sex, or national origin" and, inexplicably, that it actually sought to *weaken* the protections afforded to those plaintiffs who allege age discrimination or retaliation for disclosing discrimination.

III. RETALIATION UNDER THE FALSE CLAIMS ACT

Generally, the FCA imposes liability upon an individual who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.[44] To the extent that an employer retaliates against an employee for disclosing a violation of the FCA, the statute provides that any employee experiencing retaliation "because of" the protected activity is entitled

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42 *See Gross*, 557 U.S. at 167-68 (stating, "Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.").

43 *See* Civil Rights Act of 1991, § 2, 105 Stat. 1079 (1991).

44 31 U.S.C. § 3729(a)(1)(A) (emphasis added).

to relief. The Supreme Court has yet to articulate the appropriate causation standard in an FCA retaliation case. As a result, most circuits have developed their own three–part tests for determining whether an employer is liable to an employee for retaliation. Generally, for a plaintiff to prevail, he must demonstrate that (i) he engaged in protected conduct, (ii) that the employer knew the plaintiff engaged in protected conduct, and (iii) that an impermissible relationship exists between the employee's protected conduct and the employer's adverse action.[45]

The First Circuit recently held that the *McDonnell Douglas* burden–shifting framework applies to retaliation cases under the FCA.[46] In so holding, the First Circuit went on to discuss the familiar elements of the *McDonnell Douglas* framework: Employees must first make their *prima facie* case as set forth above. The employer then must proffer a legitimate, non–retaliatory reason for the adverse employment action. Finally, if the employer is able to produce evidence of a non–retaliatory reason for the employment action, the employee must demonstrate "that the employer's proffered reason is a pretext masking retaliation."[47]

Since *University of Texas Southwestern Medical Center v. Nassar*, at least one district court has applied the Supreme Court's interpretation of but-for causation to retaliation under the

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45 *See, e.g.*, *Brandon v. Anesthesia & Pain Mgmt Assocs., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002).

46 *Harrington v. Aggregate Indus. Ne. Region, Inc.*, 668 F.3d 25, 30 (1st Cir. 2012) (stating "We hold, therefore, that the FCA's anti-retaliation provision is amenable to the use of the McDonnell Douglas framework.").

47 *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 827 (1st Cir. 1991).

FCA.[48] In *United States ex rel. Schweizer v. Oce North America*, Schweizer, a Contracts Administrator, alleged that Océ terminated her for disclosing the company's noncompliance and potential fraud associated with the terms of a contract that it held with the General Services Administration.[49] She filed a lawsuit in the United States District Court of the District of Columbia alleging retaliation under the False Claims Act.[50] Relying on *University of Texas Southwestern Medical Center v. Nassar*, the District Court noted that a plaintiff must demonstrate retaliation by the employer "because of" the plaintiff's protected activity.[51] Stating that there was "some confusion as to the nature of the causation requirement," the District Court concluded "a plaintiff must show that retaliation for protected activities was a 'but–for' cause of the adverse action."[52] To reach this conclusion, the District Court relied heavily upon what it deemed a "text–driven interpretation of Title VII's anti–retaliation provision," as employed in *University of Texas Southwestern Medical Center v. Nassar* and *Gross v. FBL Financial Services, Inc*.[53] The District Court reasoned:

> The combined lesson of *Nassar* and *Gross* is clear: where Congress has given plaintiffs the right to sue employers for adverse actions taken against them by their employers "because of" X, plaintiffs may succeed only by showing that X was a "but–for" cause of the adverse action, not merely one of several "motivating factors." Notwithstanding the circuit's statements to the contrary in

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48 *United States ex rel. Schweizer v. Oce N. Am.,* CIV. 06-648 RCL, 2013 WL 3776260 (D.D.C. July 19, 2013) (hereinafter, "*Schweizer II")*.

49 *United States ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1229 (D.C. Cir. 2012).

50 *Id.* at 1231.

51 *Schweizer II.*, 2013 WL 3776260 at 10.

52 *Id.* at 11.

53 *Id.*

> this case, because the False Claims Act's retaliation provision includes the same key language as the Title VII retaliation provision recently interpreted by the Supreme Court in *Nassar*, and the ADEA discrimination provision interpreted in *Gross*, the Court must apply the same heightened causation standard here.[54]

Though Schweizer's claim of retaliation survived Océ's motion for summary judgment,[55] the District Court's opinion looms as a specter that haunts would–be whistleblowers alleging retaliation under the False Claims Act.

IV. ARGUMENT FOR "MOTIVATING FACTOR" CAUSATION IN FCA RELALIATION CASES

As discussed by the District Court in *United States ex rel. Schweizer v. Oce North America,* an argument to apply a but–for causation standard in FCA retaliation cases is tempting. Logically, the argument proceeds under the theory that the FCA's anti–retaliation language is similar to that of Title VII and of the ADEA. Each statute, arguably, deals with employment disputes and each uses the "because of" language to link the adverse action with the protected status or activity. An argument could be made that the same causation standards should apply. Such an argument is appealing on the surface, but the legislative history of the FCA, its purpose, and a review of analogous legislation render it overly simplistic and untenable.

A. WHISTLEBLOWER PROTECTION STATUTES ARE INHERENTLY DIFFERENT FROM ANTI–DISCRIMINATION STATUTES.

i. The stakes are higher in whistleblower cases and an increased incentive to retaliate should give rise to stronger protections for employees.

Aside from the markedly different subject matter at issue in an FCA and, for example, a Title VII case, it is important to note the dramatically different consequences that a defendant

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54 *Id.*

55 *Id.* at 15.

faces in each. Putting aside large class action suits, if employees complain of discriminatory acts by their manager, the company's potential liability extends no further than the employee who made the disclosure or the employees (or class of employees) who experienced the discrimination. Moreover, Title VII punitive damages are capped at $300,000 for an employer with more than five hundred employees, with smaller companies subject to even lower damage ceilings.[56]

Damages arising under the FCA, however, are significantly more expansive. First, unlike Title VII, the anti-retaliation provisions under the FCA do not provide a cap on damages, and successful plaintiffs are entitled to "2 times the amount of back pay." The real issue, however, is the scope of the defendant's liability should a court find a violation of 31 U.S.C. § 3729—the underlying fraud on the government that the whistleblower was trying to reveal. Settlements in FCA cases have reached into the *billions* of dollars[57] and can lead to debarment proceedings against a contractor, leaving them ineligible to receive federal funding in the future. Either would likely be a death sentence for all but the largest contracting companies. By contrast, one of the largest judgments ever in a discrimination case came in the context of a 5,600 plaintiff class action suit against Novartis Pharmaceuticals Corporation in which a jury awarded $250 million in punitive damages. [58] The case was eventually settled for $175 million.[59]

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56 *See* 42 U.S.C. § 1981a (1991).

57 *See* Press Release, Department of Justice, GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Allegations and Failure to Report Safety Data (July 2, 2012), http://www.justice.gov/opa/pr/2012/July/12-civ-842.html.

58 *Novartis Class Action Settlement in Gender Discrimination Class Action Lawsuit*, CLASS ACTION LAWSUITS IN THE NEWS (July 14, 2010), http://classactionlawsuitsinthenews.com/class-

ii. The False Claims Act is designed to protect against fraud, and its anti–retaliation provisions should be read so as to promote that goal.

For the last 150 years, the purpose of the False Claims Act has been to protect the United States government from fraud. Recognizing that it could not do this without help from company insiders who "may be the only [people] who can bring the information forward,"[60] Congress enacted §3730(h) as an *ancillary* provision to the False Claims Act to ensure that its primary purpose of preventing fraud could be fulfilled. It did not seek to provide protections *only* to those employees whose performance was so impeccable that they could blow the whistle on suspected wrongdoing without fear of reprisal. It wanted to protect anyone who disclosed information related to fraud against the government. What of the employee with substandard performance evaluations? If he suspects fraud should he remain silent? Application of the but-for standard and a plaintiff's inability to avail himself of a mixed motive jury instruction will inevitably chill would–be whistleblowers from disclosing what they know and will hinder the enforcement of the FCA.

To this same point, it is proper to place the burden of persuasion upon the employer to prove that its motives were non–retaliatory. To be clear, absent this burden shift and a mixed–motive instruction, the employee whose motive is to assist the government, must carry the day and prove but–for causation. On the other hand, the employer, the one actually suspected of defrauding the government and silencing whistleblowing attempts, will never be required to

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action-lawsuit-settlements/novartis-class-action-settlement-in-gender-discrimination-class-action-lawsuit/.

59 *Id.*

60 S. Rep. 99-345, at 23 (1986).

affirmatively demonstrate that he did not discharge an employee for investigating a false claims violation.[61]

B. AT THE TIME OF THE 1986 AMENDMENT TO THE FCA, CONGRESS DID NOT INTEND FOR COURTS TO APPLY A "BUT–FOR" CAUSATION STANDARD TO FCA RETALIATION CLAIMS.

As discussed, Congress enacted an amendment to the False Claims Act in 1986 "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[62] Further, the 1986 Senate Report states that, "The proposed legislation seeks… to encourage any individual knowing of Government fraud to bring that information forward."[63] To this end, Congress introduced a private cause of action for whistleblowers who experience retaliation under 31 U.S.C. § 3734.[64] Through the amendment, Congress sought to "make whole" anyone who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against by his employer due to his involvement with a false claims disclosure."[65] In discussing the causation element, Congress provided:

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61 *See Transp. Mgmt. Corp.,* 462 U.S. at 403 (concluding that "It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing").

62 S. Rep. 99-345, at 1 (1986).

63 *Id*. at 2.

64 The current formulation of the FCA's anti-retaliation provisions is now found at 31 U.S.C. § 3730(h) (2010).

65 S. Rep. 99-345, at 34 (1986).

> Under *other Federal whistleblower statutes*, the 'because' standard has developed into a two–pronged approach. One, the whistleblower must show the employer had knowledge the employee engaged in 'protected activity' and, two, *the retaliation was motivated, at least in part, by the employee's engaging in protected activity*. Once these elements have been satisfied, the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.[66]

The above quoted passage contains several important takeaways. First, it makes clear that Congress understood "the because standard" to embrace a so–called "mixed–motive" theory of retaliation. In other words, a plaintiff's claim could stand where he alleged that retaliation by an employer was motivated by both permissible and non–permissible reasons, and it would be up to the defendant to demonstrate that an employee's disclosures did not contribute to the adverse employment action. The "at least in part" language of the Senate Report clearly prescribes a "motivating factor" and not what has become a "but–for" causation standard.

Undergirding this point is the second important takeaway—the fact that Congress relied upon "other federal whistleblower statutes" in its crafting and understanding of the causation standard in the FCA's anti–retaliation provision. Indeed, in the preceding paragraphs, the committee specifically identified eight other statutes upon which it relied in developing the FCA's protections from retaliation.[67] The statutory language dealing the causation element of each of these whistleblower statutes varies between "by reason of"[68] and "because,"[69] yet, even

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66 *Id.* at 35.

67 *Id.*

68 30 U.S.C. § 1293 (1977), 33 U.S.C. § 1367 (1972), 42 U.S.C. § 9610 (1980), 15 U.S.C. § 2622 (1976); *see also Gross,* 557 U.S. at 176 (equating "by reason of" with "because").

69 42 U.S.C. § 5851 (1978), 42 U.S.C. § 7622 (1977), 42 U.S.C. § 300j–9 (1974).

still, cases interpreting this language routinely ascribed a "motivating factor" meaning to the terms.[70]

C. RECENT CONGRESSIONAL AND JUDICIAL ACTION SUGGESTS A DESIRE TO BROADEN, NOT CONTRACT, WHISTLEBLOWER PROTECTIONS.

i. The 2009 FERA Amendments provided strong protections for whistleblowers under the False Claims Act.

On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act (FERA).[71] FERA's purpose was "to improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes."[72] Section 4 of the FERA amendment significantly expanded the scope of FCA liability for individuals and entities that receive government funds. Moreover, FERA extended the FCA's protections to permit contractors and agents to file suit for retaliation under § 3730(h) and provided a broader view of protected activity.[73] Through the Act's passage, Congress sent the message that it wanted to enhance protections available to whistleblowers and to provide more expansive liability for those seeking to defraud the government.

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70 *See, e.g., Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980); *Consol. Edison Co. of New York v. Donovan*, 673 F.2d 61, 62 (2d Cir. 1982).

71 Fraud Enforcement and Recovery Act of 2009 (FERA), PL 111-21, May 20, 2009, 123 Stat 1617 (2009).

72 *Id.*

73 The revised language permits a plaintiff to sue for retaliation as a result of "lawful acts done… in furtherance of other efforts to stop 1 or more violations of this subchapter."

The timing of FERA's enactment is also significant. President Obama signed the law into effect in May 2009, a month before the Supreme Court decided *Gross* and determined that "because of," in an employment context, required a showing of but–for causation. Congress cannot be expected to have predicted that the Supreme Court would overturn years of precedent and increase the causation standard for would–be plaintiffs in employment cases.

ii. In *Lawson v. FMRC LLC,* a plurality of the Supreme Court indicated that, in SOX whistleblower cases, it is willing to examine Congress's intent.

Recent Supreme Court jurisprudence recognizes Congress's intent to provide broad protections for would–be whistleblowers. In *Lawson v. FMR LLC*,[74] a majority of the Supreme Court determined that the Sarbanes Oxley Act of 2002's (SOX) whistleblower protections extended beyond just employees and to contractors of publically traded companies. [75] In so finding, the Court relied upon "the text of § 1514A, *the mischief to which Congress was responding, and earlier legislation Congress drew upon*."[76] The divide amongst the justices provides a glimmer of hope that the Court may recognize a distinction between whistleblower and traditional employment cases.

Based on the split in *University of Texas Southwest Medical Center. v. Nassar* and in *Lawson v. FMR LLC,* it seems reasonable to predict that when the Supreme Court analyzes retaliation claims under the FCA, Justices Ruth Bader Ginsburg, Sonia Sotomayor, Stephen Breyer, and Elena Kagan will look to congressional intent and apply the motivating factor

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74 *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014).

75 18 U.S.C.A. § 1514A (2002).

76 *Lawson*, 134 S. Ct. at 1161 (emphasis added).

standard to whistleblowers under the FCA. Likewise, one would expect that Justices Antonin Scalia, Anthony Kennedy, Samuel Alito, and Clarence Thomas will follow the more text–driven approach as articulated in *Gross v. FBL Financial Services, Inc.* and *University of Texas Southwest Medical Center. v. Nassar.* Though Chief Justice John Roberts applied the but–for standard to Title VII retaliation claims as part of the majority in *University of Texas Southwest Medical Center. v. Nassar*, he joined a plurality in *Lawson v. FMR LLC* that explicitly relied upon congressional intent and analogous legislation in coming to its decision. This suggests that the Court could come down on the side of employees when deciding cases under the FCA based on Congress's goal of expanding whistleblower protection.

D. CONGRESS'S CHOICE OF WORDS FOR 31 U.S.C. 3730(H) PERMITS A STANDARD OTHER THAN "BUT–FOR" CAUSATION.

To reach an analysis of congressional intent, however, there will likely need to be some modicum of textual ambiguity upon which the more conservative members of the Supreme Court can hang their proverbial hats. Indeed, the Supreme Court has stated that it will first look at the explicit language of a statute to determine its meaning before making any attempt to otherwise discern congressional intent.[77] If, as with *Gross v. FBL Financial Services, Inc.* and *University of Texas Southwest Medical Center. v. Nassar*, the Court wishes to engage in a strictly textualist interpretation of § 3730(h), the statutory language itself will permit the Court to look to congressional intent to determine the propriety of a motivating factor standard.

In *Burlington Northern & Santa Fe Railway Company v. White*,[78] the Court sought to determine whether Title VII's "antiretaliation provision forbids only those employer actions and

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77 *See, e.g.*, *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

78 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

resulting harms that are related to employment or the workplace."[79] The Court examined the substantive provision of Title VII and compared its language to that contained within the statute's antiretaliation provision. Distinguishing between the limiting language of the substantive provision[80] and the lack of limiting language within the antiretaliation provision,[81] the Court found that the differing purposes of the provisions "justif[ied] the difference of interpretation."[82] Moreover, the Court opined that, "We normally presume that, *where words differ as they differ here*, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[83]

> Returning to the FCA's anti–retaliation provision, the statute reads as follows:
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> (1) In general.— Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *because of* lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.
>
> (2) Relief.— Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had *but–for* the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees...[84]a

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79 *Id.* at 61.

80 *See* 42 U.S.C.A. § 2000e-2(a) (1991).

81 *See* 42 U.S.C.A. § 2000e-3(a) (1991).

82 *Burlington N.,* 548 U.S. at 67.

83 *Id.* at 62 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (emphasis added).

84 31 U.S.C. § 3730(h) (2010) (emphasis added).

Similar to interpretive issue in *Burlington Northern & Santa Fe Railway Company v. White*, these two provisions have markedly different purposes. 31 U.S.C. § 3730(h)(1) lays the foundation for the elements that a plaintiff must prove to state a claim of retaliation. 31 U.S.C. § 3730(h)(2) governs the relief to which a prevailing plaintiff is entitled. It is instructive that Congress expressly used the phrase "but for" in discussing the relief to be provided to the successful plaintiff but not in identifying the elements that a plaintiff must prove to state a claim. When faced with a statute that employs both phrases, the Court should assume that Congress's choice of words is deliberate[85] and look to the FCA's history and purpose to determine congressional intent—an intent that demands application of a motivating factor standard.

V. CONCLUSION

The role of private citizens in defending the United States from fraud by contractors cannot be overstated. For more than 150 years, individuals have put their jobs and livelihood on the line to protect the government from unscrupulous contractors. The law should protect employees from retaliation when they assist the government with its enforcement efforts by allowing them to rely upon mixed motive theories of causation. Unfortunately, the Supreme Court's jurisprudence is trending toward a heightened but–for causation standard in employment cases, and the language of the opinions suggests that the Court may require whistleblowers under the False Claims Act to make the same showing — a requirement clearly in conflict with congressional intent. Fortunately, the plurality opinion in *Lawson v. FMR LLC* suggests that the Court may look beyond the mere statutory language and to the purpose of the FCA. Through the military's increasing reliance on defense contractors and expansive government programs like

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85 *Nassar*, 133 S. Ct. at 2529.

the Affordable Care Act,[86] the risk of fraud against the federal government is, perhaps, at its all-time high. A "motivating factor" standard is necessary to ensure that potential whistleblowers are not afraid to come forward and aid the government in its efforts to combat fraud.

[86] Patient Protection and Affordable Care Act, Pub. Law No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. Law No. 111-152, 124 Stat. 1029 (2010).