

# *Experimental Evidence that Retaliation Claims Are Unlike Other Employment Discrimination Claims*

David Sherwyn and Zev J. Eigen

I love retaliation; it's in the Bible and people get it.\*

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## EXECUTIVE SUMMARY

**T**he type of discrimination claim that strikes fear in the hearts of all employers is the dreaded retaliation claim. While employers contend, and plaintiffs admit, that retaliation is different from other discrimination complaints, employee advocates have put forth legislation that would equalize retaliation with the other types of discrimination. This bill, Protecting Older Workers against Discrimination Act (POWADA), would expand the so-called mixed-motive jury instruction to age, and disability, as well as retaliation. Moreover, it would allow plaintiffs, not judges, to decide which types of instruction the jury would receive. In this article, the authors argue that retaliation claims should not receive the same treatment as other discrimination claims (including age and disability), because it's easy for juries to believe that retaliation is a factor, regardless of other facts. Once a fact-finding jury checks the box to indicate that an employer's motive might include retaliation, the employer will likely have to pay fees and costs, at minimum, regardless of the claim's final resolution.

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\* Wayne Outten, Managing Partner, Outten & Golden, LLP, Remarks at New York University's 62nd Annual Conference on Labor and Employment Law Initiatives and Proposals in the Obama Administration (June 5, 2009).

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We thank Professors Dawn Chutkow and Michael Heise, and Daniel Saperstein (Proskauer Rose, LLP), and Danielle Cara Newman (Cornell Law School, Class of 2015) for their input on earlier drafts and for outstanding research assistance.



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**P**roposed legislation in the U.S. Congress would add discrimination based on age and disability to the other categories which cannot be a motivation for an employer's hiring decision. However, the legislation also includes another cause, retaliation, which we argue is an entirely different type of situation. We further propose that including retaliation in this category will have the unanticipated outcome of forcing employers to avoid counseling or working with struggling employees. Generally, there should be little concern with employment legislation being passed, but there are two reasons why this general belief may no longer hold. First, there is political upheaval going on, and the rules of politics seem to be changing as we speak. Second, the legislation regarding retaliation is attached to a bill addressing age discrimination, in which the vast majority of Congress has a vested interest. The purpose of this paper is to explain the two types of discrimination standards and to demonstrate that retaliation should be treated differently from other claims.

After a series of Court cases and the Civil Rights Act of 1991, the law was clear: it is unlawful for sex, race, color, national origin, and religion to even *motivate* employment decisions, but motivation without the “but-for” cause—in which the discriminatory factor was the final straw that made a difference in the employer’s action—was not unlawful in age cases.<sup>1</sup> These rulings left open the question with regard to disability and retaliation. In *University of Texas Southwestern Medical Center v. Nassar*,<sup>2</sup> the Court held that retaliation is equated with age and implied disability and so should be treated similarly.<sup>3</sup> That is, while some level of employer discrimination based on age, disability, or retaliation is tolerated, no amount of employer discrimination based on the five other statutory protected classes is permitted.

Within weeks of the *Nassar* holding, a bipartisan group of lawmakers re-introduced parallel bills in the U.S. House of Representatives and the Senate, called the Protecting Older Workers against Discrimination Act (POWADA).<sup>4</sup> POWADA would expand the so-called mixed-motive jury instruction to age, retaliation, and disability, and would allow plaintiffs, not judges, to decide which types of instruction the jury would receive.<sup>5</sup> The argument in favor of supporting POWADA is that there is no reason to distinguish Title VII from the ADEA, ADA, and retaliation.

The difference is operationalized in two types of jury instructions: (1) the “pretext,” or “but-for” instruction, and (2) the “mixed-motive” or “motivating-factor” instruction.<sup>6</sup> Under the pretext instruction, juries are asked whether the employer would have made the decision “but for” the employee’s protected class. The mixed-motive jury instruction is a two prong test: (1) did the protected class motivate the employer; and (2) if so, would the employer have made the decision regardless of the protected class? The mixed-motive instruction arose out of the Supreme Court’s *Price Waterhouse v. Hopkins* decision.<sup>7</sup> The Civil Rights Act of 1991 codified the mixed-motive jury instruction, made it significantly more plaintiff friendly, and, for all intents and purposes, expanded its use so that mixed motive is now a misnomer and should be called “motivating-factor” instruction.<sup>8</sup>

<sup>1</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

<sup>2</sup> 133 S. Ct. 2517 (2013).

<sup>3</sup> *Nassar*, 133 S. Ct. at 2532–33.

<sup>4</sup> H.R. 2852, 113th Cong. (1st Sess. 2013).

<sup>5</sup> Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009).

<sup>6</sup> See, generally: 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, 905–915 (2010).

<sup>7</sup> 490 U.S. 228 (1989) (plurality opinion).

<sup>8</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 2 (1991) (codified as amended at 42 U.S.C. § 1981 (2008)) (“[T]he decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (2011) has weakened the scope and effectiveness of Federal civil rights protections.”).

Prior to the CRA of 1991, an employer motivated by race, color, sex, national origin, or religion, but who would have made the decision regardless of the protected class, is not guilty and is not liable for any damages. After the CRA of 1991, such an employer is liable for discrimination *and* associated attorneys’ fees and costs, but not any other damages.<sup>9</sup> Alternatively, an employer motivated by age, disability, or retaliation, but who would have made the decision anyway is still *not* liable for discrimination nor associated costs and fees. The question is whether retaliation in Title VII cases is different than underlying Title VII claims. This article contends that it is.

To test our claim we replicated and slightly modified a prior jury experiment conducted in 2010, by substituting a retaliation claim for a national origin employment discrimination claim in an otherwise unchanged employment discrimination fact pattern.<sup>10</sup> Just over 40 percent of the mock jurors in the 2010 study were persuaded by an employee’s claim that national origin motivated an employer’s adverse action.<sup>11</sup> In the instant experiment, almost 60 percent of the mock jurors were persuaded by a retaliation claim (holding constant the other salient parts of the fact pattern from the prior study).<sup>12</sup> Simply altering the *nature* of the employment discrimination claims (national origin versus retaliation) likely explains at least some of the observed increased likelihood of jurors’ concluding that the complaining employee successfully established a viable legal claim. If this is so, then extending mixed-motive jury instructions to include retaliation claims, as contemplated by POWADA, is unlikely to resolve key problems challenging employment law doctrine and, worse still, may exacerbate other problems.

In the next section, we discuss the law of employer retaliation and distinguish retaliation claims from those of other protected employee classes. Following that, we present the results of our jury study in which we seek to experimentally assess the consequences of applying the motivating-factor jury instruction in the employer retaliation context. Finally, we propose a possible solution for the burden-of-proof conundrum, as well as offer avenues for further productive empirical research in this area.

## Employer Retaliation

Retaliation cases have more than doubled in the last twenty years, and there are now more retaliation claims than any other cause of action relating to employment discrimination.<sup>13</sup> As most employers know and employees come to understand, employees may not file discrimination charges in federal court without first filing such charges with either the Equal Employment

<sup>9</sup> See: Sherwyn & Heise, *supra*, at 930.

<sup>10</sup> See: Sherwyn & Heise, *supra*, at 926–47.

<sup>11</sup> Sherwyn & Heise, *supra*, at 937, Table 5.

<sup>12</sup> See *infra*: Section IV.

<sup>13</sup> “Charge Statistics FY 1997 Through FY 2013,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

Opportunity Commission (EEOC) or an affiliated state agency, commonly referred to as Fair Employment Practices Agencies (FEPA).<sup>14</sup> As a result, tracking the percentages of claims alleging violations of anti-discrimination employment statutes may be accomplished by analyzing EEOC or FEPA charge filing statistics. In the 1980s and early 1990s, the EEOC and state FEPAs received about the same number of charges each year.<sup>15</sup> FEPA charge data are often difficult to find and may be incomplete. EEOC data, by contrast, are readily available and are more likely to be complete. For this reason, we rely on EEOC data regarding enforcement of Title VII, ADEA, ADA, and the Equal Pay Act. In the last twenty-one years, total employment discrimination charges filed with the EEOC have ranged from a low of 72,302 charges in 1992 to a high of 99,947 in 2011 (see Exhibit 1, overleaf).<sup>16</sup> In 2015, 89,385 charges were filed.<sup>17</sup>

Because of this year-to-year fluctuation, using the raw numbers to evaluate which claims are most prevalent is not informative. Instead, we analyze the percentage change in claims filed per year. The largest single year-to-year percentage change occurred in Americans with Disabilities (ADA) claims filed in 1992 and 1993.<sup>18</sup> Only 1.4 percent of the cases filed in 1992 were ADA cases, but that number exploded to 17.4 percent in 1993.<sup>19</sup> This jump can be attributed to the ADA taking effect in July 1992.<sup>20</sup> Beginning in 1993, the ADA cases have made up between 17.4 and 26.5 percent of EEOC filings.<sup>21</sup> Besides disability, the greatest fluctuation in any claim based on a protected class was the 7.2 percentage-point differential between ADEA cases filed in 1992 (27.1%) and the cases filed in 1995 (19.9 %).<sup>22</sup> In 2012, ADEA cases made up 23.0 percent of the total claims

<sup>14</sup> “Filing a Charge of Discrimination,” EEOC, [www.eeoc.gov/employees/lawsuitcharge.cfm](http://www.eeoc.gov/employees/lawsuitcharge.cfm) (last visited Jan. 4, 2014); “Filing a Lawsuit,” EEOC, [www.eeoc.gov/employees/lawsuit.cfm](http://www.eeoc.gov/employees/lawsuit.cfm) (last visited Feb. 15, 2014).

<sup>15</sup> “Charge Statistics FY 1997 Through FY 2012,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>16</sup> “Charge Statistics FY 1992 Through FY 1996,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); and “Charge Statistics FY 1997 Through FY 2012,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>17</sup> Press Release, EEOC, EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012 (Jan. 28, 2013), available at [www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm](http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm).

<sup>18</sup> “Charge Statistics FY 1992 Through FY 1996,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); and “Charge Statistics FY 1997 Through FY 2012,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>19</sup> “Charge Statistics FY 1992 Through FY 1996,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014).

<sup>20</sup> *Id.*

<sup>21</sup> “Charge Statistics FY 1992 Through FY 1996,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014); and “Charge Statistics FY 1997 Through FY 2012,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>22</sup> “Charge Statistics FY 1992 Through FY 1996,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014);

filed.<sup>23</sup> These fluctuations may be the result of random variability, and, in any event, little in the way of trends can be discerned in these statistics. There is, however, one cause of action that exhibited a dramatic linear increase that is almost certainly non-random—retaliation.

In 1993, retaliation claims made up 15.7 percent of the total cases brought.<sup>24</sup> By 2015, that percentage almost tripled to 44.5 percent.<sup>25</sup> In 2009, both retaliation and race accounted for 36 percent of the claims. Since 2010, retaliation cases have supplanted race as the most prevalent claim.<sup>26</sup> Moreover, unlike any other category, percentages for retaliation did not rise and fall throughout the time period in question. Instead, except for a slight drop from 2001 to 2002 (27.5% to 27.0%), retaliation cases, as a percentage of total cases filed, rose each year.<sup>27</sup>

The increase in the percentage of retaliation cases is not, as one would logically surmise, accompanied by a decrease in the percentages of other employment discrimination claims. The reason that the percentages can exceed 100 is that a single employee can allege discrimination under more than one cause of action.<sup>28</sup> For example, assume that a forty-five year old African-American woman, who is Jewish and blind, files a charge against a potential employer who failed to hire her. Based on a single incident, this individual can allege discrimination based on age, race, sex, religion, and disability. Each theory of discrimination would be tallied despite the fact that they arose from a single charge filed.

Between 1997 and 2012, the percentage of “cases” rose from 145.6 percent to 170.3 percent. Over the same time period, the percentage of retaliation cases rose 15.5 percent.<sup>29</sup> A large portion of the increase is likely fueled by what some refer to as “tack-on” cases. Retaliation tack-on cases are cases that allege a violation based on one of the seven protected classes with a retaliation case “tacked on.”

It should be noted that, according to EEOC data, the majority of cases filed do not have merit. In the last 19 years, resolutions deemed meritorious by the EEOC have seen a high of 22.9 percent and a low of 11 percent. A chief reason for the low percentage of meritorious cases is that employers need to address meritorious cases by settling them. Indeed, most em-

and “Charge Statistics FY 1997 Through FY 2012,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>23</sup> “Charge Statistics FY 1997 Through FY 2013,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>24</sup> “Charge Statistics FY 1992 Through FY 1996,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Feb. 15, 2014).

<sup>25</sup> “Charge Statistics FY 1997 Through FY 2013,” EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2014).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> For example in 2012 the total percentages of claims were 170.1%. *Id.*

<sup>29</sup> *Id.*

## EEOC charge statistics, FY 1997 Through FY 2015 (part 1)

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Total Charges	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768
Race	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238
	36.2%	36.2%	37.3%	36.2%	35.8%	35.4%	35.1%	34.9%	35.5%	35.9%
Sex	24,728	24,454	23,907	25,194	25,140	25,536	24,362	24,249	23,094	23,247
	30.7%	30.7%	30.9%	31.5%	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%
National Origin	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327
	8.3%	8.5%	9.2%	9.8%	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%
Religion	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541
	2.1%	2.2%	2.3%	2.4%	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%
Color	762	965	1,303	1,290	1,135	1,381	1,550	930	1,069	1,241
	0.9%	1.2%	1.7%	1.6%	1.4%	1.6%	1.9%	1.2%	1.4%	1.6%
Retaliation - All Statutes	18,198	19,114	19,694	21,613	22,257	22,768	22,690	22,740	22,278	22,555
	22.6%	24.0%	25.4%	27.1%	27.5%	27.0%	27.9%	28.6%	29.5%	29.8%
Retaliation - Title VII only	16,394	17,246	17,883	19,753	20,407	20,814	20,615	20,240	19,429	19,560
	20.3%	21.7%	23.1%	24.7%	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%
Age	15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	16,548
	19.6%	19.1%	18.3%	20.0%	21.5%	23.6%	23.5%	22.5%	22.0%	21.8%
Disability	18,108	17,806	17,007	15,864	16,470	15,964	15,377	15,376	14,893	15,575
	22.4%	22.4%	22.0%	19.9%	20.4%	18.9%	18.9%	19.4%	19.7%	20.6%
Equal Pay Act	1,134	1,071	1,044	1,270	1,251	1,256	1,167	1,011	970	861
	1.4%	1.3%	1.3%	1.6%	1.5%	1.5%	1.4%	1.3%	1.3%	1.1%
GINA										

employers are risk-averse and their lawyers are even more so. Fearing litigation costs, damages, and bad publicity, most employers will settle cases in which they are guilty, and their lawyers, who do not want to lose a case or a client, will push to settle non-meritorious cases that have “bad facts.”

On the other hand, non-meritorious cases leave employers in a quandary: (1) litigate and thus take on the often exorbitant cost of defense while risking an adverse verdict by a runaway jury; or (2) settle the case despite the lack of a violation. The

system the courts design should, in an ideal world, result in non-meritorious cases being dismissed and meritorious claims being found as such, with damages awarded. However, we contend that the risk of losing a non-meritorious case increases when the plaintiff tacks on a retaliation claim. When a case is ripe, both sides use whatever weapons they have.

Tacking on additional claims to a complaint is relatively inexpensive. The obvious benefit of tacking on claims is the cre-

EEOC charge statistics, FY 1997 through FY 2015 (concluded)

FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
82,792	95,402	93,277	99,922	99,947	99,412	93,727	88,778	89,385
30,510	33,937	33,579	35,890	35,395	33,512	33,068	31,073	31,027
37.0%	35.6%	36.0%	35.9%	35.4%	33.7%	35.3%	35.0%	34.7%
24,826	28,372	28,028	29,029	28,534	30,356	27,687	26,027	26,396
30.1%	29.7%	30.0%	29.1%	28.5%	30.5%	29.5%	29.3%	29.5%
9,396	10,601	11,134	11,304	11,833	10,883	10,642	9,579	9,438
11.4%	11.1%	11.9%	11.3%	11.8%	10.9%	11.4%	10.8%	10.6%
2,880	3,273	3,386	3,790	4,151	3,811	3,721	3,549	3,502
3.5%	3.4%	3.6%	3.8%	4.2%	3.8%	4.0%	4.0%	3.9%
1,735	2,698	2,943	2,780	2,832	2,662	3,146	2,756	2,833
2.1%	2.8%	3.2%	2.8%	2.8%	2.7%	3.4%	3.1%	3.2%
26,663	32,690	33,613	36,258	37,334	37,836	38,539	37,955	39,757
32.3%	34.3%	36.0%	36.3%	37.4%	38.1%	41.1%	42.8%	44.5%
23,371	28,698	28,948	30,948	31,429	31,208	31,478	30,771	31,893
28.3%	30.1%	31.0%	31.0%	31.4%	31.4%	33.6%	34.7%	35.7%
19,103	24,582	22,778	23,264	23,465	22,857	21,396	20,588	20,144
23.2%	25.8%	24.4%	23.3%	23.5%	23.0%	22.8%	23.2%	22.5%
17,734	19,453	21,451	25,165	25,742	26,379	25,957	25,369	26,968
21.4%	20.4%	23.0%	25.2%	25.8%	26.5%	27.7%	28.6%	30.2%
818	954	942	1,044	919	1,082	1,019	938	973
1.0%	1.0%	1.0%	1.0%	0.9%	1.1%	1.1%	1.1%	1.1%

ation of an additional basis from which to recover.<sup>30</sup> As explained below, even if the underlying claim fails, employees may nonetheless succeed on a retaliation claim. Retaliation claims may also augment the perceived legitimacy of underlying claims. Plaintiffs

<sup>30</sup> Joan M. Savage, Note, "Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a *Prima Facie* Case for Title VII Retaliation," 46 *B.C. L. Rev.* 215, 219 & n.36 (2004) ("Retaliation charges serve as independent legal claims, which do not depend on the validity of the underlying claim.").

alleging retaliation may be more likely to be regarded as having attempted to resolve a workplace problem without resorting to the courts. Such behaviors may appear reasonable to a fact finder, and they may undermine the employer's argument that the plaintiff is only attempting to extort money from an employer after the fact.

On a more practical level, compared to discrimination, retaliation is easier for employees to identify and juries to un-

## EEOC charge outcomes, FY 1997 Through FY 2015 (part 1)

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Receipts	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428
Resolutions	106,312	101,470	97,846	93,672	90,106	95,222	87,755	85,259	77,352
Resolutions By Type									
Settlements	3,992	4,646	6,094	7,937	7,330	8,425	8,401	8,665	8,116
	3.8%	4.6%	6.2%	8.5%	8.1%	8.8%	9.6%	10.2%	10.5%
Withdrawals w/Benefits	3,635	3,219	3,593	3,753	3,654	3,772	3,700	3,827	4,072
	3.4%	3.2%	3.7%	4.0%	4.1%	4.0%	4.2%	4.5%	5.3%
Administrative Closures	30,077	27,118	23,570	19,156	18,636	19,633	15,262	15,416	12,659
	28.3%	26.7%	24.1%	20.5%	20.7%	20.6%	17.4%	18.1%	16.4%
No Reasonable Cause	64,567	61,794	58,174	54,578	51,562	56,514	55,359	53,182	48,079
	60.7%	60.9%	59.5%	58.3%	57.2%	59.3%	63.1%	62.4%	62.2%
Reasonable Cause	4,041	4,693	6,415	8,248	8,924	6,878	5,033	4,169	4,426
	3.8%	4.6%	6.6%	8.8%	9.9%	7.2%	5.7%	4.9%	5.7%
Successful Conciliations	1,041	1,343	1,578	2,040	2,365	1,940	1,432	1,217	1,319
	1.0%	1.3%	1.6%	2.2%	2.6%	2.0%	1.6%	1.4%	1.7%
Unsuccessful Conciliations	3,000	3,350	4,837	6,208	6,559	4,938	3,601	2,952	3,107
	2.8%	3.3%	4.9%	6.6%	7.3%	5.2%	4.1%	3.5%	4.0%
Merit Resolutions	11,668	12,558	16,102	19,938	19,908	19,075	17,134	16,661	16,614
	11.0%	12.4%	16.5%	21.3%	22.1%	20.0%	19.5%	19.5%	21.5%
Monetary Benefits (Millions)*	\$176.7	\$169.2	\$210.5	\$245.7	\$247.8	\$257.7	\$236.2	\$251.7	\$271.6

derstand.<sup>31</sup> In contrast, discrimination can be subtle and difficult to interpret. Employees may wonder whether the employer is basing a decision on the employee's protected class or because of a personal dislike or other non-discriminatory reason. Retaliation, by definition, follows a complaint or another clear action,<sup>32</sup> and the employee consequently feels confident in the reason for adverse treatment. In addition, lawyers report that juries are often skeptical about discrimination.<sup>33</sup> Without a "smoking gun" evidencing a specific employer action or pattern, it is often difficult to convince a jury that the employer's negative feelings about a protected class were so strong that the employer was willing to take a discriminatory action and thereby risk the time, money, and negative publicity associated with a discrimination lawsuit.<sup>34</sup> This is especially true in discharge cases, in which it is often difficult for juries to accept that an employer

hired a member of a protected class but then terminated the employee because of being a member of that very class. It may seem illogical for an employer to not discriminate at the time of hiring the plaintiff but then to discriminate at the time of the employee's discharge.

Alternatively, people tend to more readily appreciate that employers (and their agents) may become upset and angry when being accused of discrimination, whether falsely or fairly, and might therefore want to retaliate against the individual making those accusations. For these reasons, plaintiffs' lawyers, acting as rational, self-interested actors who must decide whether to invest their time and money in each case with which they are presented, are often more interested in retaliation cases than other types of discrimination cases, all else being equal.<sup>35</sup> A case in which the employee can identify unlawful actions based on an easily understandable unlawful motivation is more attractive to most jury members.<sup>36</sup> Finally, as explained below, when using the pretext standard, retaliation cases are easier to prove than traditional discrimination cases.

<sup>31</sup> See: B. Glenn George, "Revenge," 83 *Tul. L. Rev.* 439, 469 (2008) ("Because the juror can more easily project his or her own revenge or retaliation instinct in a similar situation, he or she may more easily conclude that retaliation played a role in the adverse decision made.").

<sup>32</sup> "Retaliation," EEOC, [www.eeoc.gov/laws/types/retaliation.cfm](http://www.eeoc.gov/laws/types/retaliation.cfm) (last visited Feb. 15 2014).

<sup>33</sup> See: *supra* note 102.

<sup>34</sup> See: *supra* note 102; see also: Norton *et al.*, *supra* note 53, at 37–38 (discussing why racial bias is a difficult thing to prove).

<sup>35</sup> See: *supra* note 102.

<sup>36</sup> See: George, *supra* note 139, at 469 ("Because the juror can more easily project his or her own revenge or retaliation instinct in a similar situation, he or she may more easily conclude that retaliation played a role in the adverse decision made.").

## EEOC charge outcomes, FY 1997 Through FY 2015 (concluded)

FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
75,768	82,792	95,402	93,277	99,922	99,947	99,412	93,727	88,778	89,385
74,308	72,442	81,081	85,980	104,999	112,499	111,139	97,252	87,442	92,641
8,500	8,834	8,831	8,634	9,777	10,234	9,524	8,625	7,411	8,221
11.4%	12.2%	10.9%	10.0%	9.3%	9.1%	8.6%	8.9%	8.5%	8.9%
4,052	4,122	4,790	4,892	5,391	5,689	5,438	5,497	5,162	5,301
5.5%	5.7%	5.9%	5.7%	5.1%	5.1%	4.9%	5.7%	5.9%	5.7%
12,298	12,865	16,615	16,189	17,330	18,053	16,459	15,456	14,748	15,440
16.6%	17.8%	20.5%	18.8%	16.5%	16.0%	14.8%	15.9%	16.9%	16.7%
45,500	42,979	47,152	52,363	67,520	74,198	75,511	64,159	57,376	60,440
61.2%	59.3%	58.2%	60.9%	64.3%	66.0%	67.9%	66.0%	65.6%	65.2%
3,958	3,642	3,693	3,902	4,981	4,325	4,207	3,515	2,745	3,239
5.3%	5.0%	4.6%	4.5%	4.7%	3.8%	3.8%	3.6%	3.1%	3.5%
1,141	1,137	1,128	1,240	1,348	1,351	1,591	1,437	1,031	1,432
1.5%	1.6%	1.4%	1.4%	1.3%	1.2%	1.4%	1.5%	1.2%	1.5%
2,817	2,505	2,565	2,662	3,633	2,974	2,616	2,078	1,714	1,807
3.8%	3.5%	3.2%	3.1%	3.5%	2.6%	2.4%	2.1%	2.0%	2.0%
16,510	16,598	17,314	17,428	20,149	20,248	19,169	17,637	15,318	16,761
22.2%	22.9%	21.4%	20.3%	19.2%	18.0%	17.2%	18.1%	17.5%	18.1%
\$229.9	\$290.6	\$274.4	\$294.2	\$319.4	\$364.7	\$365.4	\$372.1	\$296.1	\$356.6

## The Law of Employer Retaliation

After *Nassar*, to establish a case of retaliation under either clause, employees must prove that they engaged in a “protected activity,” that they were discriminated against, and that there is a link between the protected activity and the adverse employment action.<sup>37</sup>

A protected expression, for retaliation purposes, can occur under either the participation clause or the opposition clause.<sup>38</sup> An employee invokes the participation clause when he or she takes part (e.g., as a party or witness) in a Title VII, ADEA, or ADA proceeding (e.g., agency investigation or litigation).<sup>39</sup> The opposition clause applies to situations in which an employee complains that the employer violated a discrimination law.<sup>40</sup> The complaint did not come as part of a discrimination proceeding and is instead based on an internal complaint, other notification to management, or even the filing of a claim.<sup>41</sup> Regardless of which applies, it is important to note that the discrimination at

issue does not have to involve the complaining employee.<sup>42</sup> For example, a male employee who testifies at trial or complains to his employer that women are being sexually harassed has engaged in a protected expression under the participation or opposition clause. Still, what constitutes a protected expression is sometimes a challenging question.

In *Payne v. McLemore’s Wholesale and Retail Stores*,<sup>43</sup> the Fifth Circuit addressed the definition of a protected expression in opposition clause cases. Employee Payne believed that his employer refused to hire people of color into positions in which the employees would have to handle money.<sup>44</sup> Payne, who was temporarily laid off each summer, joined a civil-rights group that picketed in front of the employer’s store.<sup>45</sup> After the picketing occurred, the employer did not rehire Payne, who alleged retaliation under the opposition clause.<sup>46</sup> The employer argued that because Payne’s allegations of racial discrimination were

<sup>37</sup> See: *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998).

<sup>38</sup> *George*, *supra* note 139, at 446–51.

<sup>39</sup> *George*, *supra* note 139, at 446–47 & nn.27–30.

<sup>40</sup> *George*, *supra* note 139, at 447–50.

<sup>41</sup> *George*, *supra* note 139, at 447–51.

<sup>42</sup> *George*, *supra* note 139, at 447 (“[T]his protection extends not only to the employee who filed the complaint but also to anyone who testifies or otherwise participates in the investigation or hearing.”).

<sup>43</sup> 654 F.2d 1130 (5th Cir. 1981).

<sup>44</sup> *Id.* at 1135–36.

<sup>45</sup> *Id.* at 1134–35.

<sup>46</sup> *Id.* at 1135.

unfounded, there could not be a protected expression.<sup>47</sup> The employer asserted that employees could not succeed on a retaliation claim unless they proved that the underlying claim of employment discrimination did, in fact, occur.<sup>48</sup>

In rejecting the employer's argument, the court held that the employee engaged in a protected expression even if the underlying claim failed and the employer had not, in fact, violated the law.<sup>49</sup> Instead, the court explained, the employee need only have a good faith reasonable belief that the subject of the complaint was true.<sup>50</sup> An expression is considered to be held in good faith if the employee truly believes the alleged conduct occurred.<sup>51</sup> An employee has a reasonable belief if there is a basis on which to believe that the alleged conduct did occur, and if true, the conduct would violate the law.<sup>52</sup>

The participation clause protects an employee who participates in any Title VII procedure regardless of the extent of such participation.<sup>53</sup> In fact, the EEOC guidelines state that protection under the participation clause applies to testifying, assisting, and preparing affidavits in conjunction with a proceeding or investigation under Title VII, ADEA, ADA, or EPA.<sup>54</sup> These present broad parameters on which to base a claim. For instance, an employee who files an EEOC charge or who assists another in filing or preparing such a charge qualifies as being in a protected class. This is the case even if the charge is not true, not reasonable, or not even brought in good faith.<sup>55</sup> As the Second Circuit noted in *Deravin v. Kerik*, the participation clause "is expansive and seemingly contains no limitations."<sup>56</sup> No case

illustrates this point more clearly than *Merritt v. Dillard Paper Company*.<sup>57</sup> There, the Eleventh Circuit held that a company could not discharge an employee for his admitted sexual harassment when the admission occurred as part of testimony proffered in a Title VII case.<sup>58</sup> Since the employee was testifying in a Title VII case, the content of the testimony was protected and could not be the basis for a termination decision even though Merritt admitted violating company policy and the law.

The application of the opposition and participation clauses makes sense: not requiring an opposing plaintiff to prove the truth of the underlying claim prevents the chilling effect of possible dismissal for speaking up. If employees are protected only when they can prove that their employer violated the law, employees will be reluctant to use company harassment policies or otherwise complain about discrimination. Because the Supreme Court, numerous lower courts, and commentators consistently contend that the key to ending discrimination is employee complaints followed by swift employer action, this chilling effect needs to be curbed.<sup>59</sup> Similarly, employees should not fear participating in EEOC investigations or litigation because of their perceptions that unlawful employer activity may not constitute violations of the discrimination law and they could thus be terminated for such testimony. The competing incentives make it difficult to craft bright-line parameters that toe the line in this area without tipping the balance and yielding undesirable results in either direction.

## The Supreme Court's Characterization of Employer Retaliation

In the five years prior to *Nassar*, the Supreme Court issued three "employee friendly" retaliation decisions that made it easier for employees to prove retaliation. What makes these cases relevant to the discussion here is that in two of the cases the Supreme Court expanded retaliation to include types of harm and classes of plaintiffs not protected in other statutes. In *Burlington Northern & Santa Fe Railway Company v. White*,<sup>60</sup> the Court held that, unlike the other protected classes, a plaintiff in a retaliation case did not have to suffer an adverse employment action.<sup>61</sup> Instead, an employee simply had to prove that the employer's response to a complaint of discrimination was one that would dissuade a

<sup>47</sup> *Id.* at 1137.

<sup>48</sup> *Id.*

<sup>49</sup> *Payne*, 654 F.2d at 1137.

<sup>50</sup> See: *Id.* at 1140; and note 11.

<sup>51</sup> See, e.g.: *Little v. United Techs., Carrier Transcold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) ("[A] plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. ... A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented."). The court referred to a good faith belief as one that is "honest and bona fide." *Id.*

<sup>52</sup> *Payne*, 654 F.2d at 1140-41. *Payne* reasonably believed McLemore's hiring and promotional practices violated Title VII. *Id.* at 1141. The minority position requires the plaintiff to hold a good-faith belief that the employer violated the law. See: *Ficus v. Triumph Grp. Operations, Inc.*, 24 F. Supp. 2d 1229, 1241 (D. Kan. 1998).

<sup>53</sup> EEOC, Directives Transmittal, EEOC Compliance Manual, Vol. 2 § 8-II(C)(1), 8-8-8-9, available at: [www.eeoc.gov/policy/docs/retal.pdf](http://www.eeoc.gov/policy/docs/retal.pdf).

<sup>54</sup> *Id.* at 8-2.

<sup>55</sup> See, e.g.: *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) ("The participation clause...has accordingly been interpreted as shielding recourse to the EEOC, regardless of the ultimate resolution of the underlying claim on its merits.").

<sup>56</sup> 335 F.3d 195, 203 (2d Cir. 2003).

<sup>57</sup> 120 F.3d 1181 (11th Cir. 1997).

<sup>58</sup> *Id.* at 1182.

<sup>59</sup> See, e.g.: *Wilson v. Moulison N. Corp.*, 639 F.3d 1, 8 (1st Cir. 2011) ("[T]he company's response was both swift and appropriate. After hearing the plaintiff's complaint, [the company's chief executive and owner] immediately looked into it, concluded that the misconduct had occurred, and reprimanded [the plaintiff's coworkers] in very strong terms."

<sup>60</sup> 548 U.S. 53 (2006).

<sup>61</sup> *Id.* at 67-70.

reasonable person from complaining in the future.<sup>62</sup> The theory underwriting the ruling seemed to accord with the principle that the best way to eradicate discrimination is to encourage employees to complain and, further, that most impediments to such ability to complain would undermine this goal and should therefore be considered unlawful retaliation.<sup>63</sup> After *Burlington Northern*, allegations of retaliation included conduct such as receiving the “cold shoulder” (being ignored),<sup>64</sup> a poor performance evaluation,<sup>65</sup> and issuance of a performance improvement plan.<sup>66</sup> The Court’s decisions, taken together, imply that retaliation is different from the other protected classes.

In *Thompson v. North American Stainless*,<sup>67</sup> the Court took the application of this principle one step further by holding that a retaliation plaintiff need not even engage in a protected expression.<sup>68</sup> In *Thompson*, the employer terminated the complaining employee’s fiancé.<sup>69</sup> The Court applied the so-called “zone of interest” protection under which a complaining employee’s fiancé (and, we presume, spouse) is protected from retaliation.<sup>70</sup> Whether this logic similarly extends to siblings, parents, children, boyfriends, girlfriends, best friends, roommates, or other relationships will likely form the basis of litigation. By expanding the definition of protected expression and discrimination, the retaliation trilogy—*Burlington Northern*, *Crawford v. Metropolitan Government*,<sup>71</sup> and *Thompson*—made retaliation claims even more attractive to plaintiffs and plaintiffs’ lawyers because both stand-alone and tack-on retaliation cases are significantly easier to get to a jury. Again, these cases stand for the principle that retaliation is different than other forms of unlawful employment discrimination.

### Why Retaliation Claims Are Different

Similar to the Supreme Court, we also contend that retaliation differs from other causes of employment discrimination actions, for two key reasons. First, a truly innocent employer can not

<sup>62</sup> *Id.* (“[T]o retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination”).

<sup>63</sup> See: *Id.*

<sup>64</sup> *Johnson v. Weld Cnty.*, 594 F.3d 1202 (10th Cir. 2010).

<sup>65</sup> *Weber v. Battista*, 494 F.3d 179 (D.C. Cir. 2007).

<sup>66</sup> *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584 (6th Cir. 2007).

<sup>67</sup> 131 S. Ct. 863 (2011).

<sup>68</sup> *Id.* at 870. (“We know of no other context in which the words carry this artificially narrow meaning.”).

<sup>69</sup> *Id.* at 867.

<sup>70</sup> *Id.* at 870.

<sup>71</sup> In *Crawford v. Metro. Gov’t.*, 555 U.S. 271 (2009), the third Supreme Court retaliation case, the Court held that an employee who, during an in-house investigation, stated that she had seen sexual harassment was opposing discrimination, despite the fact that she never complained and did not express any horror or even disgust.

only have its business and reputation destroyed, but the law also forces the employer to continue to employ the person who seriously damaged the company. An examination of the Payne case illustrates this point.<sup>72</sup> Assume for the sake of illustration that Payne’s allegation was false, even though Payne believed it to be true. Assume further that the employer in *Payne* offered the money-related job in question to its two most senior employees, both of whom were individuals of color. Assume that the two employees of color turned down the job. The employer is disappointed but believed it was the employees’ decision to make and thus offered the position to the third-most-senior employee, a white employee, who accepts the job. Payne, however, has no way of knowing how the hiring decision was made. Instead, Payne observes no people of color in positions in which employees handle money and jumps to a logical, albeit erroneous, conclusion that the two most senior employees, both of whom were African American, were passed over for the open position in favor of a white employee. Payne notifies the company and the EEOC of his belief that the employer violated the law (thus activating the opposition clause). The EEOC investigates and soon the local newspaper publishes a front-page story about the investigation. A protest ensues outside the employer’s front door, and people hold signs accusing the employer of being a racist. Online media pick up the story too. The employer’s business suffers, the owners’ standing in the community is diminished, and the owners’ families are attacked due to the false accusation. Furious at being maligned, the owners do not wish to continue to employ the individual whose false accusations caused all of this pain and suffering. They could not tolerate continuing to pay someone whose judgment they did not trust and someone whom they feel stabbed the company in the back.

The owners want to terminate the employee but do not do so because the law prohibits it. Several months after the complaint and the accompanying fallout, employee Payne violates company policy by providing his company discount to a friend. The company has a strict policy of terminating employees who engage in such action and can prove that it has terminated several other employees who engaged in such conduct but had never complained about discrimination and were not part of the same protected class as Payne. At trial the plaintiff’s attorney asks one of the company’s owners if the accusation of discrimination angered her and whether she was relieved to have Payne off the payroll. Regardless of how she answers, given the facts, we propose that most juries would infer that the owner was angry and is now relieved. In fact, we contend that even if there was little fall out, most employers would not wish to continue to employ an individual who accused the company of reprehensible behavior, and thus, would be relieved at the opportunity to legitimately terminate such an individual’s employment. This is a perfect cross-examination question because no matter how

<sup>72</sup> See: *supra* notes 151–66 and accompanying discussion.

the witness responds, the case is made for the plaintiff. Either the jury will believe that the witness is lying if she says that she harbored no ill will towards Payne for accusing her of being a racist because that seems so implausible, or if the witness says she did harbor ill will towards Payne, the jury will think that the witness admitted having a retaliatory motive. This illustrates our central point that retaliation claims are different than other employment discrimination claims. No analogous Scylla and Charybdis cross-examination question like this one exists in other discrimination contexts; however, it is not clear whether and to what extent the hypothetical juror reaction posited here is empirically valid.

It is likely that jurors will be quicker to infer retaliation than other protected classifications as motivating employer conduct. This is because, as human beings, most people can relate to being motivated to retaliate against someone who wrongs you. That instinct likely predates the Bible<sup>73</sup> and may be a part of innate human nature across cultures.<sup>74</sup> This obviously cannot be said of other motives for discrimination. Particularly, as some have come to regard racial discrimination as becoming less prevalent, it is even more likely that individuals will be slower to impute racial motives to employer actions in the absence of direct evidence of discrimination.<sup>75</sup> If a white employer failed to promote a Hispanic employee, how frequently would a jury infer that discrimination was a motivating factor? Conversely, all things equal, if an employer failed to promote an employee who complained that other employees were being racially discriminated and sexually harassed, how much more or less frequently would a jury infer that retaliation was a motivating factor? Keeping the facts almost identical, this is what we sought to find out by repeating the 2010 mock jury study but modifying the national original fact pattern used in 2010 to a claim of unlawful retaliation. Before discussing the results from our 2013 retaliation study, we briefly describe our prior national origin study.

## Experimental Evidence of the Impact of Burdens of Proof on Juror Decision Making

Do employees alleging retaliation fare better at trial than employees alleging discrimination based on other protected classes? General methodological limits and problems specific to jury instruction research limit our ability to answer this question as

<sup>73</sup> See: Christopher Boehm, “Retaliatory Violence in Human Prehistory,” 51 *Brit. J. Criminology* 518 (2011).

<sup>74</sup> See, e.g.: Simon Gächter & Benedikt Herrmann, “Reciprocity, Culture and Human Cooperation: Previous Insights and a New Cross-Cultural Experiment,” 364 *Phil. Transactions of the Royal Soc’y: Biological Sci.* 791 (2009); and Karl Sigmund, “Punish or Perish? Retaliation and Collaboration among Humans,” 22 *Trends in Ecology & Evolution* 593 (2007); see also: Janice Nadler & Mary R. Rose, “Victim Impact Testimony and the Psychology of Punishment,” 88 *Cornell L. Rev.* 419 (2003) (discussing the retributive psychology of punishment and experimentally testing this in a laboratory setting).

<sup>75</sup> See: Jonathon Hunyor, “Skin-deep: Proof and Inferences of Racial Discrimination in Employment,” 25 *Sydney L. Rev.* 535, 551–54 (2003).

definitively as we would like. First, selection bias lurks, as not all litigated legal cases are reported,<sup>76</sup> and the stream of cases that are reported is non-random.<sup>77</sup> Second, the overwhelming majority of cases settle and, increasingly, settlements are confidential.<sup>78</sup> Third, even if all employment discrimination lawsuits went to trial (did not settle) and generated published legal opinions, the factual, legal, and contextual variations across cases complicate efforts to generalize.

Our prior research focused on whether the “motivating-factor” versus the “but-for” jury instruction influences case outcomes.<sup>79</sup> Using an experimental mock jury research design, our results demonstrated how jury instruction variations in the employment discrimination context can inform case outcomes.<sup>80</sup> Assuming facts that could support the claim as much as deny it, employers have a substantially equal chance of prevailing in pretext and motivating-factor cases, but we found a “non-trivial chance that a motivating-factor instruction will result in costs and fees being awarded.”<sup>81</sup> Consequently, we suggested that employers are better off with a pretext instruction than a motivating factor instruction.<sup>82</sup>

To be sure, the finding that differing burdens of proof generate different results does not by itself imply a problem. If legitimate rationales support different proof burdens, different results would not only be acceptable, they would be desirable. In fact, as an economic matter, burdens of proof should be constructed in civil litigation this way.<sup>83</sup> Regrettably, however, this is not the case. After *Costa* and prior to *Gross*, there was no clear standard as to when courts would apply the motivating factor instruction and not the pretext instruction. After *Gross* and *Nassar*, this problem remains in Title VII cases. POWADA endeavors to

<sup>76</sup> See: Ruth Colker, “Winning and Losing Under the Americans with Disabilities Act,” 62 *Ohio St. L.J.* 239, 246 (2001) (“The most important caveat that emerges from these [methodological] considerations is that appellate investigations in the employment discrimination area reflect a selection bias.”)

<sup>77</sup> For example, the U.S. Courts of Appeals publish opinions only selectively, and the circuits follow different rules regarding unpublished opinions. Ruth Colker, “The Americans with Disabilities Act: A Windfall for Defendants,” 34 *Harv. C.R.-C.L. L. Rev.* 99, 104–05 (1999) (noting the problems of statistical representation inherent in empirical analysis of appellate court decisions); see also: Colker, *supra* note 184, at 244–47.

<sup>78</sup> The few exceptions include settlement agreements for class actions, claims filed by a governmental plaintiff, such as the EEOC, and, in some states, claims against a governmental defendant regarding public records. See Scott A. Moss, “Illuminating Secrecy: A New Economic Analysis of Confidential Settlements,” 105 *Mich. L. Rev.* 867, 869–70 & nn.3–17 (2007).

<sup>79</sup> See: Sherwyn & Heise, *supra* note 11 at 931–44.

<sup>80</sup> *Id.*

<sup>81</sup> Sherwyn & Heise, *supra* note 11 at 937.

<sup>82</sup> *Id.* at 937–38 (“Both [the motivating factor] without the affirmative defense option and the full motivating factor option]...are less desirable than the pretext jury instruction for employers.”).

<sup>83</sup> Bruce L. Hay & Kathryn E. Spier, “Burdens of Proof in Civil Litigation: An Economic Perspective,” 26 *J. Legal Stud.* 413, 418–22 (1997).

provide equity for all protected classes by overturning *Gross* and *Nassar* and allowing employees to select their preferred method of proof in all discrimination cases.<sup>84</sup> While the statute solves the problem of judicial inconsistency (i.e., judges deciding when to allow the motivating-factor instruction or not) and statutory inconsistency (that is, treating age and disability differently than the other five protected classes), there are three problems that the statute either does not address or exacerbates. First, should jurors *unwittingly* award thousands of dollars in costs and fees to plaintiffs? Second, should employers that render legitimate business decisions be penalized for *perceived* illegitimate motivations? In other words, should Congress penalize an employer if a jury (correctly or incorrectly) infers motivation based on the decision maker's race, sex, or religion but agrees that the decision would have been made *regardless* of the protected class? The third question—and the focus of this study—involves whether retaliation should be included with other protected classes when it comes to the motivating factor jury instructions. Below, we posit that it should not.

## Experimental Mock Jury Studies

We selected an experimental research design with a mock jury as the best available methodology to address the empirical challenges noted above. Although mock jury studies are increasingly common in legal scholarship, the method warrants a brief discussion. Mock jury studies endeavor to gain the benefits of experimental research (such as manipulating key variables) while minimizing problems of ecological validity.<sup>85</sup> When reviewing mock jury research, researchers have noted a variety of issues in which mock jury experiments were instrumental—juror characteristics, the effects of prejudicial pretrial news coverage, the use of impermissible information, jurors' ability to understand standards of proof and instructions on the law, and deliberation phenomena, to name a few.<sup>86</sup> Two experiments are described in detail below to illustrate the process.

Mock jury experiments provide important advantages over post-trial jury interviews and quantitative analyses of trial

outcomes. Notably, the ability to change one variable at a time permits researchers to gain a purchase on mechanisms and relations among variables that are often otherwise unobservable using other empirical methodologies.<sup>87</sup> Nonetheless, the experimental approach is not without important limitations, mostly with the consequence of reduced external validity. Standard problems include the following: **(1)** mock jurors are often students rather than a more representative general population sample; **(2)** facts are presented in writing or by video or audio recording rather than through a live trial; **(3)** verdicts lack real-world consequences; and most often **(4)** there is no group (jury room) deliberation.<sup>88</sup>

The degree to which student mock jurors attenuate external validity is unclear. For example, studies examining the use of students have found “little or no difference in...verdicts by student and adult jury-eligible respondents for the same cases.”<sup>89</sup> A meta-analysis of twenty years of jury simulations found no conclusive differences between student and non-student participants.<sup>90</sup> Where infrequent differences arose, students demonstrated a slight preference against criminal conviction and for defendant civil liability.<sup>91</sup>

## Jury Instruction Studies of Employment Discrimination

In an effort to enhance external validity, our experiment used case statements constructed (and used) by experienced employment discrimination specialists at a leading New York City law firm.<sup>92</sup> Before describing our experimental design, we first describe the jury instructions and special verdict sheets used in our study.

One problem with studying jury instructions is the variation in real-world jury instructions used by judges. In some jurisdictions, judges are permitted to develop their own proprietary jury instructions, as long as they accord with settled law. Judges typically ask each party to draft proposed jury instructions and then choose one of the two proposals or draft a third version themselves. Other jurisdictions have established model jury in-

<sup>84</sup> See: Appendix B

<sup>85</sup> See, generally: David De Cremer and Daan Van Knippenberg, “How Do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness,” 87 *J. Applied Psychol.* 858 (2002) [Attribution Error: Does not discuss mock jury studies]; Robert J. MacCoun, “Comparing Legal Factfinders: Real and Mock, Amateur and Professional,” 32 *Fla. St. U. L. Rev.* 511 (2005); and Shari Seidman Diamond, “Illuminations and Shadows from Jury Simulations,” 21 *Law & Hum. Behav.* 561 (1997).

<sup>86</sup> See: Shari Seidman Diamond *et al.*, “Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency,” 48 *DePaul L. Rev.* 301 (1999); and Michael J. Saks, “What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?,” 6 *S. Cal. Interdisc. L.J.* 1, 9–44 (1997). Mock jury studies have also been used to lend insight on important questions of how well decision makers understand certain kinds of evidence commonly presented to jurors. See, e.g.: D.H. Kaye and Jonathan J. Koehler, “Can Jurors Understand Probabilistic Evidence?,” 154 *J. Royal Stat. Soc.* 75 (1991).

<sup>87</sup> Seidman Diamond *et al.*, *supra* note 194, at 302–03; and Samuel R. Sommers and Phoebe C. Ellsworth, “How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research,” 78 *Chi.-Kent L. Rev.* 997, 1002–03 (2003).

<sup>88</sup> See: Saks, *supra* note 194, at 7.

<sup>89</sup> Robert J. MacCoun, “Experimental Research on Jury Decision-Making,” 244 *Sci.* 1046, 1046 (1989).

<sup>90</sup> Brian H. Bornstein, “The Ecological Validity of Jury Simulations: Is the Jury Still Out?,” 23 *Law & Hum. Behav.* 75, 77–80 (1999).

<sup>91</sup> *Id.* at 80.

<sup>92</sup> Founded in 1875, Proskauer, Rose LLP is a full-service law firm with offices in New York, New Jersey, Florida, Los Angeles, Boston, Chicago, New Orleans, Washington D.C., and throughout the world. Proskauer, “About Us,” [www.proskauer.com/about/](http://www.proskauer.com/about/) (last visited Feb. 1. 2014).

structions that are routinely employed.<sup>93</sup> These jury instructions are accompanied by “special jury verdict sheets.” This study exploits sample discrimination jury instructions and special verdict sheets that the Northern District of Illinois made publicly available. Appendix A contains the jury instructions and special verdict sheets used in this study.<sup>94</sup>

## Experimental Evidence on Employer Retaliation

We argue that disability and age should fall under the same standard as sex, race, color, national origin, and religion,<sup>95</sup> but we contend that retaliation is different. Since most discrimination cases are discharge cases, there is a strong argument that the protected class is irrelevant, or at least less relevant. We begin from the truism that a company may not discharge an employee who is a member of a protected class (e.g., gender, race, or religious group) without having hired this employee in the first instance. So, before any additional facts are added, on its face, it is difficult to explain why an employer would offer employment to an employee in a protected class at some expense, risking liability, and then take an adverse employment action against that person with animus against him because of the protected class some time later. At least, one may say that the logic may seem inconsistent and the explanation for the adverse employment action may not be obvious on its face. Such logic, of course, has critical limitations. For example, the actors making hiring decisions are not necessarily those responsible for the subsequent employment actions, or certain protected groups could be judged under different standards. Still, absent evidence to support the plaintiff, it seems unlikely that juries will more often than not presume that the protected class “motivated” the employer.

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<sup>93</sup> See, e.g.: *Lopez v. Mendez*, 432 F.3d 829, 835 (8th Cir. 2005) (finding no error in the trial court’s determination that an applicable Arkansas Model Jury Instruction stated Arkansas law correctly); *Gatlin v. Cooper Tire & Rubber Co.*, 481 S.W. 2d 338, 340–41 (Ark. 1972) (finding error where the trial court substituted its own instruction for an applicable Arkansas Model Jury Instruction without stating the basis for refusal); *Irwin v. Omar Bakeries, Inc.*, 198 N.E.2d 700, 704–05 (Ill. App. Ct. 1964) (finding no error where the trial court did not use a specific Illinois Pattern Jury Instruction that the court determined was inapplicable); *Means v. Sears, Roebuck & Co.*, 550 S.W. 2d 780, 786–87 (Mo. 1977) (finding no error where the trial court modified the Missouri Approved Jury Instruction to apply it to the case facts); and *Anderson v. Welsh*, 527 P.2d 1079, 1086–87 (N.M. Ct. App. 1974) (finding non-prejudicial error where the trial court gave not only the applicable Uniform Jury Instruction but additional inapplicable Uniform Jury Instructions).

<sup>94</sup> *Fed. Civ. Jury Instructions of the Seventh Cir.*, § 3.01 & cmt. c (Comm. on Pattern Civ. Jury Instructions of the Seventh Cir., Draft, Oct. 2004), available at [http://web.archive.org/web/20050120184720/www.ca7.uscourts.gov/Rules/pjury\\_civil\\_draft.pdf](http://web.archive.org/web/20050120184720/www.ca7.uscourts.gov/Rules/pjury_civil_draft.pdf).

<sup>95</sup> See, generally: Sherwyn & Heise, *supra* note 11.

Conversely, we propose that a person terminated or denied a promotion after making a complaint of discrimination is in a different position. Retaliation plaintiffs’ status changes during employment. By engaging in protected expression, such plaintiffs land in a protected class they were not in upon hire. In such a context, we suggest the possibility that juries will likely find that retaliation motivated the employer. Results from our study support this suggestion.

To substantiate our hypothesis, we needed to compare retaliation against a Title VII allegation. In our 2010 study we used a national origin case and tested the effects of the different jury instructions on findings of the participants. In the 2013 study, we used a retaliation case instead of a national origin case. To do this we altered the name of the plaintiff so that it sounded more similar (or familiar) to the decision makers (employer). We also slightly modified the fact pattern so that the plaintiff, a senior employee, engaged in a protected expression by accusing a supervisor of sexually harassing and racially discriminating against employees. We, of course, also altered the jury instructions and the special jury verdict sheet to reflect the employee’s retaliation claim.

Since we were comparing the two studies, we needed to enhance replicability and thus, our current study otherwise matches our past study. In both studies, the subjects were Cornell University undergraduate students, with the vast majority enrolled in a management program. The statement of the case was delivered by associates from a New York City law firm, and the subjects reviewed the materials under conditions similar to the prior study. This time, however, we did not vary the kind of jury instructions that the subjects reviewed. Instead, all participants received the motivating-factor instruction. Below, we discuss the key results of the two studies.

## The Experiment

Senior litigation associates from Proskauer Rose’s New York City office developed a standard employment discrimination scenario in which a plaintiff alleged that his employer retaliated against him by denying him a promotion for complaining about sexual harassment and racial discrimination in the workplace. One hundred twenty-eight Cornell University undergraduate students, mostly from the School of Hotel Administration, served as mock jurors. All subjects received an identical presentation of the case statement. At two different times, participants watched the case statements on large video screens in a lecture hall. We showed the plaintiff’s statement first and then immediately showed the defendant’s statement. Subjects were then provided a motivating factor jury instruction. After hearing the jury instructions, participants were randomly assigned into groups

**EXHIBIT 3**

**Respondents' summary statistics**

	%	(N)
All Respondents		128
<i>Gender:</i>		94
Female	54.3	
<i>Race or Ethnicity:</i>		92
White	68.5	
Non-White	31.5	
Hispanic	1.1	
Mixed	9.8	
Asian	18.5	
Black	1.1	
[other]	1.1	
<i>Annual Family Income:</i>		93
\$50K or less	5.4	
\$51K-\$100K	9.7	
\$101K-\$150K	9.7	
\$151K-\$200K	14.0	
\$201K-\$250K	10.8	
More than \$250K	50.5	
Prior work experience	98.9	93
<i>Interaction:</i>		93
White-highest income	35.5	

of six and provided special jury verdict sheets. They were given twenty minutes to deliberate. After concluding their deliberations, subjects were asked to fill out individual verdict forms.<sup>96</sup>

As shown in Exhibit 3, just over one-half of the respondents were women. Most were white, and the majority of the remaining students were Asian. Moreover, just over one-half of the subjects came from households in which reported annual family income exceeded \$250,000. White subjects from homes with the highest annual family income (in excess of \$250,000) constituted 35.5 percent of the respondent panel.

<sup>96</sup> To minimize underreporting and esteem-based influences, the experiment was conducted in a large auditorium classroom. Special jury verdict forms were completed anonymously.

**EXHIBIT 4**

**Subjects' jury verdicts: Plaintiff established retaliation claim**

	Yes	No	Sig.	(N)
Total	76	52	*	128
<i>Gender:</i>				
Female	23	28		51
Male	26	17		43
<i>Race:</i>				
White	30	33		63
Non-white	17	12		29
<i>Family Income:</i>				
Less than \$250K	24	22		46
More than \$250K	24	23		47
<i>Interactions:</i>				
White-highest income	16	17		33
Non-white-highest income	32	28		60

Note: \*  $p < 0.05$ .

**Results and Discussion**

More than 59 percent of the jurors agreed that the plaintiff (employee) successfully established that retaliation due to the plaintiff's complaints about sexual and racial discrimination in the workplace was a motivating factor in the employer's failure to promote the plaintiff (see Exhibit 4). The difference between jurors' yes (76) and no (52) votes is statistically significant.<sup>97</sup> Moreover, only 9.3 percent (12/128) of jurors found that the employer failed to prove that it would have made the same decision regardless of retaliation (see Exhibits 4 and 6). Overall, our results, while merely descriptive and experimental, illustrate how the two-question motivating-factor instruction results in

<sup>97</sup>  $p = 0.041$  (two-tailed binominal distribution test).

### Subjects' jury verdicts (part 1): *Plaintiff established employment discrimination claim*

	(1) National Origin (2010)	(2) Retaliation (2013)
Yes	40.1%	59.4%
No	59.9%	40.6%
(N)	142	128

Notes: Values in column 1 derive from our 2010 study of jury instructions' influence in a national origin employment discrimination claim. Values in column 2 come from row 1 in Exhibit 4. Source: 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, 905-915 (2010).

the majority of jurors awarding the plaintiff attorneys' fees and litigation costs even when the jurors believe that the plaintiff did *not* deserve damages.

Just to be sure that jurors' background characteristics did not inform their assessment of the plaintiff's retaliation claim, our statistical tests found that respondents' gender, race, and family income had no statistically significant association with juror decision rendering. We grant that an assessment of various juror sub-pools reduces statistical power, but it is still worth addressing this issue.

To provide additional context, we compared our main result in Exhibit 4 with results from prior research on a similar, though distinct, issue. Over a two-year period in the early 2000s we ran a similar experiment drawing from the same pool of subjects (undergraduate students attending Cornell University) that focused on an employee's claim that national origin discrimination was the reason that his employer failed to promote the plaintiff.<sup>98</sup> In that study, jurors were provided with either: (1) the full motivating-factor jury instruction and special jury verdict sheet; (2) the motivating-factor instruction without the second question (i.e., the employer's affirmative defense that it would have made the same decision regardless of national origin); or (3) the so-called "but-for" jury instruction and special verdict jury sheet. The purpose of that study was to determine whether the different instructions affected outcomes. We found that there was no statistically significant difference between the full motivating-factor instruction and the "but-for" instruction when it came to the ultimate question of whether the employee was entitled to damages. We did find, however, that there was a significant difference between the first question in the

<sup>98</sup> See: Sherwyn & Heise, *supra* notes 6 and 11.

motivating-factor special jury verdict sheet and the one and only "but-for" question. Because answering the first question in the motivating-factor scheme results in costs and fees, the difference was not only statistically different, but it also carried important practical legal consequences.

In the study presented here, we explored whether simply changing the employment discrimination claim from national origin to retaliation would influence juror results. By replicating the general nature of the factual case and using a similar panel of respondents, we sought to control the influence of salient background variables. On the ultimate question of whether the employee was entitled to damages, we did not expect a major change in how jurors ruled. Results on the employee damages question generally corresponded to our expectations. While the percentage of jurors awarding full damages to the complaining employee increased (from 6.3 percent to 9.3 percent), such an increase strikes us as *de minimus* (though suggestive). Insofar as we feel the underlying nature of employee retaliation claims fundamentally differs from that of national origin claims, we expected to find different juror outcomes. Results from our two studies comport with these expectations.

We compare the two separate studies in Exhibit 5, which illustrates the important difference regarding how the mock jurors answered the motivating-factor question. In 2010, just over 40 percent of the mock jurors concluded that the employee successfully established that discrimination based on national origin motivated the employer. In 2013, however, almost 60 percent of the mock jurors concluded that the employee established that retaliation motivated the employer. While it is true that a few years separate these two experiments, there is little, if any, reason to expect that students drawn from the same underlying population would behave differently in the two experiments. We are unaware of any material changes in terms of the composition of Cornell University undergraduates over these years. Rather, differences in the nature of the employment discrimination claims (national origin versus retaliation) more likely account for the increase in jurors concluding that the complaining employee successfully established its legal claim (from 40.1 percent to 59.4 percent).

We excused the fifty-two mock jurors who concluded that the plaintiff failed to establish that retaliation was a motivating factor, but we had another question for the remaining seventy-six respondents, who had concluded that the plaintiff successfully established that retaliation motivated the employer. This second question asked whether the defendant (employer) successfully established that its decision not to promote the employee was made independently of the employee's sexual and racial workplace harassment claims. As the results in Exhibit 6 make clear, sixty-four of these seventy-six jurors agreed with the employer's claim that the firm would have made the same decision regardless of retaliation. Similar to the results in question 1,

the difference between jurors' "yes" and "no" votes in question 2 is statistically significant.<sup>99</sup> Again, similar to the results in question 1, none of the respondents' demographic characteristics shows a statistically significant association with their decision.

We note that one might expect this panel of mock jurors to side with management, due to their personal situation. Insofar as all but one of our respondents already benefit from employment experience and all are enrolled in a management preparation program, one could argue that our sample drawn from a population of undergraduate students might represent a relatively traditional management perspective. Moreover, while the experienced New York City employment lawyers who drafted the factual scenario used in both of our studies attempted to make the case a legal close call, they had represented the employer in the actual case and thus had developed and lived with the employer's strategies and theories of the case. Thus, it is likely that both the sample of mock jurors and the source of the scenario would be predisposed to side with management. Despite a likely net bias favoring the employer, however, almost 60 percent of our jurors awarded either full damages or at least costs and fees to the employee.

These results reinforce the three concerns articulated above. First, employers are penalized for their thoughts, not their actions. An employer who would not have promoted the hypothetical plaintiff regardless of his complaints is still found liable for costs and fees. Congress determined that even being motivated by race, sex, color, religion, or national origin is unlawful and worthy of declaratory judgment, as well as costs and fees. It seems that Congress wants to create a world in which these protected characteristics do not even cross an employer's mind. This is a laudable goal, and we agree that the world would be a better place if this lack of prejudice became standard behavior.

However, we contend that this is not the case in retaliation. As noted above, retaliation is a biologically engrained human response to negative stimuli. Is it reasonable to suggest that humans have evolved to the point where a plaintiff's good faith and reasonable, but false, accusation of reprehensible behavior (like sexual harassment or racial discrimination) will not factor into a decision maker's motives? Is this a goal that we should pursue so that those who do not let such actions be a "but-for" cause, but who do let it play a role in a decision, are guilty of discrimination and need to suffer financial and social consequences?

A second issue is that the jury does not know that checking a jury verdict-sheet box for a motivating factor means that the employer will pay costs and fees, which can greatly exceed any theoretical back pay. In fact, several students remarked that "yes/yes = no." In terms of damages, it does. Thus, this kind of special jury verdict sheet can functionally mislead jurors. This is particularly problematic given the likely way in which jurors endogenously consider damage awards with their determination

<sup>99</sup>  $p < 0.001$  (two-tailed binominal distribution test).

## EXHIBIT 6

### Subjects' jury verdicts (part 2): Defendant established no plaintiff promotion despite plaintiff discrimination claim

	Yes	No	Sig.	(N)
Total	64	12	**	76
<i>Gender</i>				
Female	17	6		23
Male	24	2		26
<i>Race:</i>				
White	27	3		30
Non-white	12	5		17
<i>Family Income:</i>				
Less than \$250K	19	5		24
More than \$250K	21	3		24
<i>Interactions:</i>				
White-highest income	15	1		16
Non-white-highest income	25	7		32

Note: \*\*  $p < 0.01$ .

of the merits of a case. For instance, Hans and Reyna posit that jurors first make a categorical "gist judgment" that money damages are warranted and then make an ordinal judgment ranking the damages deserved as low, medium, or high.<sup>100</sup> If this is the case, the findings in this study are even more problematic.<sup>101</sup>

This issue is not limited to retaliation, but our third concern shows that retaliation exacerbates the problem. In the 2010 study, 40 percent of the mock jurors found that national origin motivated the employer.<sup>102</sup> With an almost identical fact pattern, the 2013 study saw an increase to 60 percent of the mock jurors finding that retaliation motivated the employer. In addition, 50 percent of the mock jurors found that even though retaliation motivated the employer, it would have made the same decision regardless. In our 2010 study, only 34 percent of the jurors ruled

<sup>100</sup> Valerie P. Hans & Valerie F. Reyna, "To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards," 8 *J. Empirical Legal Stud.* 120, 120 (2011).

<sup>101</sup> Another recent article suggests that this result is problematic because it belies the extent to which fact-finders try to establish "the truth, rather than a statistical surrogate of the truth, while securing the appropriate allocation of the risk of error." Ronald J. Allen and Alex Stein, "Evidence, Probability, and the Burden of Proof," 55 *Ariz. L. Rev.* 557, 557-602 (2013).

<sup>102</sup> Sherwyn & Heise, *supra* note 11, at 934, Table 1.

the same way.<sup>103</sup> The stark contrast in these numbers supports our contention that retaliation differs in important ways from other protected employee classes. The fact that our sample of mock jurors likely skews in a direction that favors employers only deepens the concerns. If POWADA passes, it seems highly likely that the vast majority of retaliation plaintiffs will successfully obtain costs and fees—at the very least. If so, this should stimulate employee retaliation claims, particularly from employees uneasy with their job security. By pushing retaliation claims, employees can strategically exploit employers’ aversion to increased legal uncertainty and exposure. Moreover, this might also prompt judges to look more favorably on employers’ summary judgment motions owing to fears—real or perceived—about cost and fee awards. Judges may also increasingly deny costs and fees despite jury findings.

In reality, employers faced with retaliation claims will settle a greater percentage of cases and for higher amounts. These settlements will, in turn, fuel further litigation. To dampen the likely tide of retaliation claims, employers could reduce avenues to complain of discrimination, as such complaints will be too costly, or seek to create a more homogeneous workforce in which complaints will carry less weight. Fewer complaints and an incentive to avoid diversity will perpetuate discrimination. This is an admittedly pessimistic vision of an unfortunate vicious cycle.

### Conclusion: Start Making Sense

We suggest three fixes to the challenges outlined above flowing from POWADA’s proposal to extend the mixed-motive jury instruction in employer retaliation discrimination cases. First, Congress could return to the *Price Waterhouse* holding and not award costs and fees for motivations that do not pass the “but-for” causation test. This is a value judgment of whether motivations that do not really affect employers’ decisions should be unlawful. If so, should the plaintiffs’ lawyers be compensated for bringing cases in which protected categories form non-determinative motivations in adverse employment actions? Second, juries should be informed that checking the motivating-factor

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<sup>103</sup> Sherwyn & Heise, *supra* note 11, at 934, and Tables 1 & 2.

box will lead to awarding plaintiffs costs and fees. At least then jurors will be aware of the consequences of their decisions. That approach raises an important policy concern, however. That is whether decision makers should be aware of the monetary consequences of their fact finding determination, or whether they should assess facts without knowing the ramifications of their finding, and leave to judges the consequences of those findings. The third option is to simply accept that retaliation is equal, but that some kinds of employment claims are less equal than others and to exclude it from POWADA.

While we contend that either of the first two steps would resolve the problems we have identified, neither is necessary. To begin with, smoking-gun evidence supporting discrimination claims is less common now. It is difficult to prove discrimination, and thus, the motivating-factor scheme provides plaintiffs a reasonable chance to prevail in their complaints. This is not the case with retaliation, however. The motivating-factor scheme will unduly increase the prospects for costs and fees awarded employees. Even now, employment lawyers warn employers not to try to “save” a struggling employee.<sup>104</sup> Once the employee receives a performance improvement plan, the employee knows it is time to file a claim and buy six to eight months of fear-based employment.<sup>105</sup> This occurs when the employer fears the costs of termination more than the costs of an unproductive or disruptive employee. From a social standpoint, this not a positive development, because people often need coaching in how to perform a job. POWADA would further discourage employers to help poor performing employees (rather than simply dismiss them). The potential negatives outweigh the benefit of penalizing employers for retaliatory impulses.

In sum, we propose that the categories of age and disability be treated like all other protected classes. There is neither a statutory nor logical basis to distinguish age and disability from other traditionally protected employee classes. In contrast, employer retaliation is different and, as such, should be treated differently by employment discrimination doctrine. ■

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<sup>104</sup> Gregg A. Gilman, Partner, Davis & Gilbert LLP, Remarks at 6th Annual HR in Hospitality Conference, Las Vegas, Nevada (Mar. 2013).

<sup>105</sup> *Id.*

## Appendix A

Special Verdict Sheet:

\_\_\_\_\_X

Dennis Ferguson,

Plaintiff,

- against -

SPECIAL VERDICT FORM

ROCHESTER DAILY NEWS, INC.,

Defendant.

\_\_\_\_\_X

1. Did plaintiff Dennis Ferguson establish by a preponderance of the evidence that retaliation for his complaints of sexual harassment and racial discrimination was a motivating factor in the decision by defendant, Rochester Daily News, Inc., not to offer him a promotion in December 2009?

Yes \_\_\_\_ No \_\_\_\_

You should answer the next question only if you answered "yes" to Question 1. If you answered Question 1 "no," you should not answer any further questions but sign this special verdict form and return the form to the clerk.

2. Did defendant establish by a preponderance of the evidence that the defendant would have treated plaintiff the same way even if retaliation for plaintiff's complaints of sexual harassment and racial discrimination had not played any role in the employment decision?

Yes \_\_\_\_ No \_\_\_\_

If you answered "yes" to Question 2, sign the special verdict form on the last page. If you answered "no" to Question 2, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is \$75,000. Check the box below to signify that the plaintiff is entitled to damages of \$75,000 and then sign the special verdict form.

Plaintiff is entitled to back pay in the amount of \$75,000. \_\_\_\_\_

SIGNED:

Please answer the following questions:

1. Gender: M F
2. Race / National Origin:
3. Have you worked for an employer?: Y N
4. Family Income:
  - a. Under \$50,000
  - b. \$51,000-\$100,000
  - c. \$101,000-150,000
  - d. \$151-\$200,000
  - e. \$201,000-\$250,000
  - f. over \$250,000

## Appendix B

### Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009). Full text:

#### Section 1. Short Title.

This Act may be cited as the “Protecting Older Workers Against Discrimination Act”.

#### Sec. 2. Findings and Purpose.

(a) Findings.—Congress finds the following:

- (1) In enacting the Age Discrimination in Employment Act of 1967, Congress intended to eliminate discrimination against individuals in the workplace based on age.
  - (2) In passing the Civil Rights Act of 1991, Congress correctly recognized that unlawful discrimination is often difficult to detect and prove because discriminators do not usually admit their discrimination and often try to conceal their true motives.
  - (3) Congress has relied on a long line of court cases holding that language in the Age Discrimination in Employment Act of 1967, and similar antidiscrimination and antiretaliation laws, that is nearly identical to language in title VII of the Civil Rights Act of 1964 would be interpreted consistently with judicial interpretations of title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991. The Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents.
  - (4) The holding of the Supreme Court in *Gross*, by requiring proof that age was the “but for” cause of employment discrimination, has narrowed the scope of protection intended to be afforded by the Age Discrimination in Employment Act of 1967, thus eliminating protection for many individuals whom Congress intended to protect.
  - (5) The Supreme Court’s holding in *Gross*, relying on misconceptions about the Age Discrimination in Employment Act of 1967 articulated in prior decisions of the Court, has significantly narrowed the broad scope of the protections of the Age Discrimination in Employment Act of 1967.
  - (6) Unless Congress takes action, victims of age discrimination will find it unduly difficult to prove their claims and victims of other types of discrimination may find their rights and remedies uncertain and unpredictable.
- (b) Purpose.—The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991.

#### Sec. 3. Standard of Proof.

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding after subsection (f) the following:

“(g)(1) For any claim brought under this Act or any other authority described in paragraph (5), a plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that—

“(A) an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice; or

“(B) the practice complained of would not have occurred in the absence of an impermissible factor.

“(2) On a claim in which a plaintiff demonstrates a violation under paragraph (1)(A) and a defendant demonstrates that the defendant would have taken the same action in the absence of the impermissible motivating factor, the court—

“(A) may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under paragraph (1); and

“(B) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.

“(3) In making the demonstration required by paragraph (1), a plaintiff may rely on any type or form of admissible circumstantial or direct evidence and need only produce evidence sufficient for a reasonable trier of fact to conclude that a violation described in subparagraph (A) or (B) of paragraph (1) occurred.

“(4) Every method for proving either such violation, including the evidentiary framework set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), shall be available to the plaintiff.

“(5) This subsection shall apply to any claim that the practice complained of was motivated by a reason that is impermissible, with regard to that practice, under—

“(A) this Act, including subsection (d);

“(B) any Federal law forbidding employment discrimination;

“(C) any law forbidding discrimination of the type described in subsection (d) or forbidding other retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law); or

“(D) any provision of the Constitution that protects against discrimination or retaliation.

“(6) This subsection shall not apply to a claim under a law described in paragraph (5)(C) to the extent such law has an express provision regarding the legal burdens of proof applicable to that claim.

“(7) In any proceeding, with respect to a claim described in paragraph (5), the plaintiff need not plead the existence of this subsection.

“(8) In this subsection, the term ‘demonstrates’ means meet the burdens of production and persuasion.”.

#### Sec. 4. Application.

This Act, and the amendments made by this Act, shall apply to all claims described in section 4(g)(4) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(g)(4)) pending on or after June 17, 2009.

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*Cornell Hospitality Report*  
Vol. 16, No. 19 (August 2016)

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*Cornell Hospitality Report* is produced for the benefit of the hospitality industry by The Center for Hospitality Research at Cornell University.

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*Cornell Hospitality Labor and Employment Report*

Vol. 16, No. 19 (August 2016)

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Cornell Labor and Employment Reports are produced for the benefit of the hospitality industry by The Cornell Institute for Hospitality Labor and Employment Relations at Cornell University.

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*Published in conjunction with*

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School of Hotel Administration

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Ithaca, NY 14853

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