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Evaluating Causation in NMHRA Retaliation Claims After Nassar: Why New Mexico Courts Should Adopt a Motivating Factor Causation Standard

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EVALUATING CAUSATION IN NMHRA RETALIATION CLAIMS AFTER *NASSAR*: WHY NEW MEXICO COURTS SHOULD ADOPT A MOTIVATING FACTOR CAUSATION STANDARD

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New Mexico courts apply a federal burden-shifting test to decide employment retaliation claims brought under the New Mexico Human Rights Act (NMHRA). In New Mexico courts' application of this test, it is unclear whether the employee has to initially show whether the protected activity she engaged in—such as filing a discrimination complaint—was the "but-for" cause of the adverse employment action against her, or if it is sufficient for her to show that the protected activity was one motivating factor—among other potentially lawful or non-discriminatory factors—that contributed to the employer's retaliatory acts against her. In light of the recent United States Supreme Court case that requires a but-for causation standard for employment retaliation claims brought under federal law, it is critical that New Mexico courts clarify the causation standard that plaintiffs must satisfy in employment retaliation claims brought under the NMHRA. This Comment argues that New Mexico courts should adopt a motivating factor causation standard in NMHRA retaliation claims. A motivating factor causation standard best comports with the purpose of the federal burden-shifting framework; New Mexico caselaw on state-based discrimination and retaliation claims; the statutory structure of the NMHRA; and the ultimate anti-discriminatory purpose of the NMHRA.

I. INTRODUCTION

Retaliation in the workplace is difficult to prove. An employer's retaliation against a worker is rarely supported by direct evidence. An employer is unlikely to declare, "I am demoting you only because you filed a race discrimination complaint against me." So, courts have had to adopt an alternative methodology to resolve employment retaliation disputes when indirect evidence is all that is available. In New Mexico, there is an extra wrinkle in the courts' methodology for retaliation claims brought under the New Mexico Human Rights Act (NMHRA).[1] New Mexico courts have not held which causation standard, "but-for" causation or "motivating factor" causation, an employee must satisfy in a retaliation claim. To satisfy but-for

1. N.M. STAT. ANN. §§ 28-1-1 to -15 (2020).

causation, a plaintiff must show "'that the harm would not have occurred' in absence of—that is, but for—the defendant's conduct."[2] To satisfy motivating factor causation (sometimes called "mixed motives" causation), the plaintiff must show that unlawful retaliatory or discriminatory intent was *a* factor that motivated the employer's action, even if other factors also motivated the action.[3]

Employment retaliation claims brought under federal law require the "but-for" causation standard, meaning an employee must prove that had she had not taken a protected action (such as filing a complaint of discrimination or harassment), then the employer's adverse action against her would not have occurred.[4] Other state-based employment retaliation laws only require that an employee prove that her protected activity was a motivating factor (among other permissible factors) driving an employer's retaliation against an employee.[5]

New Mexico courts should adopt a motivating factor causation standard for retaliation claims brought under the NMHRA for three reasons. First, New Mexico is not bound by the but-for causation standard required in retaliation claims brought under federal law. Second, the analytical framework that New Mexico courts have applied for decades in discrimination and retaliation cases, the *McDonnell Douglas* framework, requires a motivating factor causation standard. Third, courts should apply a motivating factor causation standard to ensure that the NMHRA serves its ultimate purpose to protect employees from unlawful retaliation.

Workplace retaliation claims often involve conflicting and imbalanced evidence that is difficult to evaluate. Even if an employer provides a non-retaliatory reason for terminating an employee, retaliatory animus could still have also motivated the employer's action. The NMHRA should not allow an employer to be excused from unlawful retaliation simply because other factors also contributed to the employer's retaliatory action. The fact finder must have the freedom to evaluate the employee's claim and the employer's counterclaim in a nuanced and holistic way

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2. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013).

3. 42 U.S.C.A. §§ 2000e-2(m) (West).

4. Although, technically, there could be more than one "but-for" cause driving an employer's adverse action, the but-for causation standard is "deterministic and it struggles to account for multiple causes." *See* Alexandra D. Lahav, *Why Justice Gorsuch was Wrong About Causation in* Comcast, 23 GREEN BAG 205, 207 (2020). *But see* Bostock v. Clayton Cnty., 140 S.Ct. 1731, 1739 (2020) ("When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.").

5. *See, e.g.*, Hernandez v. Grey Wolf Drilling, L.P., 350 S.W.3d 281, 285 (Tex. App. 2011) (holding discrimination claims brought under the Texas Commission on Human Rights Act require a motivating factor causation standard); Smith v. Anchorage Sch. Dist., 240 P.3d 834, 842 (Alaska 2010) (holding that plaintiff can bring mixed-motive age discrimination claim under Alaska Human Rights Act); Harris v. City of Santa Monica, 294 P.3d 49, 55 (Cal. 2013) (holding California Fair Employment and Housing Act discrimination claims require substantial factor causation standard); W. Va. Am. Water Co. v. Nagy, No. 101229, 2011 WL 8583425, at *20 (W. Va. June 15, 2011) (holding West Virginia Human Rights Act discrimination claims require motivating factor causation standard); Bennett v. Health Mgmt. Sys., Inc., 936 N.Y.S.2d 112, 121 (App. Div. 2011) (holding New York City Administrative Code discrimination claims required mixed motive causation standard); *see also* Kevin J. Koai, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763, 778–85 (2019) (synthesizing state caselaw that has declined to apply a but-for causation standard in discrimination and retaliation claims brought under state law).

to reach a fair determination. But-for causation does not provide that necessary freedom.

This Comment first summarizes two state and federal statutes governing retaliation in the workplace. Second, it turns to the federal burden-shifting test that New Mexico courts apply to decide discrimination and retaliation claims brought under the NMHRA and the issue of causation within that framework. Third, it turns to the United States Supreme Court case that has applied a but-for causation standard to retaliation claims arising under federal law. Finally, this Comment argues that, in light of this recent federal holding, New Mexico should officially establish a motivating factor causation standard in employment retaliation claims brought under the NMHRA.

II. BACKGROUND

A. New Mexico Human Rights Act and Title VII of the Civil Rights Act of 1964.

The New Mexico Human Rights Act ("NMHRA" or "the Act") was enacted in 1969 "for the primary purpose of providing administrative and judicial remedies for unlawful discrimination in the workplace."[6] Under NMSA 1978, Section 28-1-7 (2020), "Unlawful discriminatory practice," the Act forbids both status-based discrimination[7] and retaliation. The Act defines retaliation as "any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act."[8] If an individual suffers an unlawful discriminatory practice under the statute, she must first exhaust her administrative remedies by filing a complaint with the New Mexico Human Rights Board or the Equal Employment Opportunity Commission ("EEOC") before taking her claim to district court.[9] This Comment only examines those retaliation claims that have made it to the courts after the employee completed the administrative process.[10]

6. Lobato v. State Env't Dep't, 2012-NMSC-002, ¶ 8, 267 P.3d 65, 67.

7. N.M. STAT. ANN. § 28-1-7(A) (2020) ("It is an unlawful discriminatory practice for: A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age.").

8. N.M. STAT. ANN. § 28-1-7(I)(2) (2020).

9. Luboyeski v. Hill, 1994-NMSC-032, ¶ 7, 117 N.M. 380, 872 P.2d 353, 382.

10. Retaliation claims make up 38% of the total claims filed with the Human Rights Board between 2008 and 2020. The New Mexico Department of Workforce Solutions does not have available data about how many New Mexico Human Rights Board decisions are later appealed to district court. (E-mail from Department of Workforce Solutions, Office of the General Counsel, to author (Sept. 27, 2020, 1:23 MST) (on file with author)).

The New Mexico legislature modeled the NMHRA after its federal analogue, Title VII of the Civil Rights Act of 1964.[11] Title VII also prohibits status-based discrimination and retaliation in the workplace.[12] The NMHRA's language closely tracks the language in the federal statute, with some important differences. First, the status-based discrimination provision of the NMHRA is in the same section of the statute as the retaliation provision (Section 28-1-7). In Title VII, the provisions are in different sections of the statute (Section 2000e-2 and Section 2000e-3). Second, the status-based discrimination section of Title VII explicitly states the required causation standard, indicating, "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."[13] Congress codified this motivating factor causation standard for status-based discrimination claims in 1991.[14] New Mexico did not adopt the motivating factor statutory language that Congress added to the statute. There is no causation standard in the retaliation section of Title VII, nor in the analogous status-based discrimination and retaliation provisions of the NMHRA.

These differences between the NMHRA and Title VII are important to understand why the federal, judicially created but-for causation standard for Title VII retaliation claims should not apply to state-based retaliation claims in New Mexico, discussed below in Part III.D.

B. *McDonnell Douglas* Burden-Shifting Framework: Purpose and Causation.

New Mexico's state and federal courts apply the same analytical framework to determine both status-based discrimination and retaliation claims brought under both the NMHRA and Title VII. Following the Tenth Circuit's approach, the New

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11. *See* JOHN E. SANCHEZ AND ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 19:19 (Nov. 2020) ("Most states and a host of municipalities have enacted fair employment practices acts, modeled on Title VII, that afford broader protection than federal law. Title VII plainly allows states to enact such anti-discrimination statutes so long as they do not conflict with the federal law.").

12. 42 U.S.C.A. § 2000e-2 (West) (defining status-based discrimination as "an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin"); 42 U.S.C.A. § 2000e-3 (West) (defining retaliation as "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

13. § 2000e-2 (emphasis added).

14. §§ 2000e-2(m), 2000e-5(g)(2)(B) (West); *see also* Prince Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989) (holding motivating factor causation standard required for Title VII retaliation claims, which was later codified in the United States Code in 1991).

Mexico Supreme Court adopted the burden-shifting framework from *McDonnell Douglas Corporation v. Green* to decide discrimination and retaliation claims brought under the NMHRA.[15] The *McDonnell Douglas* framework includes three steps: (1) the employee establishes a prima facie discrimination or retaliation case; (2) the employer then provides a non-discriminatory or non-retaliatory reason for its "adverse employment action"; and (3) the employee rebuts the employer's offered reason by showing that it is "pretextual or otherwise inadequate."[16]

1. Step-by-Step Analysis of the McDonnell Douglas Framework.

The *McDonnell Douglas* framework provides a "method of proving causation" when there is no "direct proof" of an employer's discriminatory intent.[17] But, the framework does not actually provide a causation standard (such as "but-for" or "motivating factor").[18] That is, the Court in *McDonnell Douglas* did not explicitly hold whether the employee must demonstrate that the protected activity she engaged in was the but-for cause of the employer's retaliation or whether it is sufficient for an employee to show that the protected activity was a motivating factor—among other potentially lawful or non-retaliatory factors—that drove the employer's adverse action against the employee.

New Mexico courts have applied the *McDonnell Douglas* framework since 1990.[19] In its application of the *McDonnell Douglas* test, the New Mexico Supreme Court held that only motivating factor causation was required for discrimination claims brought under the NMHRA.[20] But, New Mexico courts have not explicitly held which causation standard should apply to NMHRA retaliation claims.

Causation is at issue for the employee's claim at two steps of the *McDonnell Douglas* test: at the initial prima facie stage and in the final stage of the test when the employee bears the ultimate burden of persuasion. A closer look at the three steps of the analysis and the interaction between the steps supports a finding that New

15. The United States Supreme Court originally designed the *McDonnell Douglas* framework to determine discrimination cases brought under the Civil Rights Act of 1964 for instances when there was no "direct proof" of an employer's discriminatory intent. Since there is rarely direct proof of such intent, courts usually apply this framework to discrimination and retaliation claims. *See* Gonzalez v. N.M. Dep't of Health, 2000-NMSC-029, ¶ 2, 129 N.M. 586, 11 P.3d 550, 553; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973).

16. Juneau v. Intel Corp., 2006-NMSC-002, ¶ 9, 139 N.M. 12, 127 P.3d 548, 551; McDonnell Douglas Corp., 411 U.S. at 802–05.

17. Smith v. FDC Corp., 1990-NMSC-020, ¶¶ 9, 10, 109 N.M. 514, 787 P.2d 433, 436, 437.

18. Joss Teal, *A Survivor's Tale: McDonnell Douglas in a Post-Nassar World*, 55 SAN DIEGO L. REV. 937, 965 (2018).

19. *See* Smith, 1990-NMSC-020. (earliest application of the *McDonnell Douglas* framework in New Mexico).

20. *See* Nava v. City of Santa Fe, 2004-NMSC-039, ¶ 8, 136 N.M. 647, 103 P.3d 571, 574 ("Thus, it appears under federal law that an employee is not required to prove that his or her sex was the sole or primary motivation for the suffered harassment. The employee must only establish that the adverse employment action was motivated in part by an illegitimate factor, such as sex."); *cf.* UJI 13-2304 NMRA (Retaliatory Discharge Uniform Jury Instruction states: "In determining whether (employee) was discharged because [he] [she] [insert conduct court has determined is protected by public policy], you must determine whether that conduct was a motivating factor in the decision to discharge [him][her]. A motivating factor is a factor that plays a role in the decision to discharge. It need not be the only reason, nor the last nor latest reason, for the discharge.").

Mexico courts should apply a motivating factor causation standard to retaliation claims brought under the NMHRA. To make its determination, the fact finder must use a holistic approach that requires the court to evaluate all relevant factors and context in a way that cannot be done using a but-for causation standard.

In the first step of the *McDonnell Douglas* test, an employee must establish a prima facie retaliation claim by proving, by a preponderance of evidence, that "(1) she engaged in a protected activity, (2) she was subject to adverse employment action, and (3) a causal connection existed between the protected activity and the adverse employment action."[21] An adverse employment action, for purposes of this analysis under the NMHRA, "refers broadly to 'threats, reprisals or discrimination.'"[22] If an employee establishes a prima facie case, then she establishes a presumption that the employer's adverse action against her was unlawfully discriminatory.[23]

In the second step of the *McDonnell Douglas* analysis, the employer must rebut this presumption.[24] The employer bears a relatively light burden: it must only "raise a genuine issue of fact as to whether the defendant acted in a discriminatory manner against the plaintiff."[25] The employer must only offer a "clear and reasonably specific" explanation for its adverse employment action or "[produce] evidence of legitimate non-discriminatory reasons."[26] The employer does not need to persuade the court that it had "convincing, objective reasons" for its adverse employment action.[27] The fact finder relies on fact-specific, circumstantial evidence to determine whether the employer presented sufficient evidence to show non-retaliatory motive.[28] The fact finder must use circumstantial evidence because there is rarely documentation of "retaliatory motive."[29] The fact finder may evaluate the temporal proximity between an employee's protected action and the employer's act.[30] The fact finder must also determine if written warnings or reprimands—when available—were solely related to work performance or if the circumstances indicate the employer issued the documents with retaliatory intent.[31]

In the third step of the *McDonnell Douglas* framework, the employee bears the ultimate "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff."[32] The fact finder may infer that the employer acted with discriminatory intent if the plaintiff provided sufficient evidence to

21. Gonzalez v. N.M. Dep't. of Health, 2000-NMSC-029, ¶ 22, 129 N.M. 586, 11 P.3d 550, 558.

22. *Id.* ¶ 23, 11 P.3d at 558.

23. Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981).

24. *Id.* at 255.

25. *See* Teal, *supra* note 18; *see also* Burdine, 450 U.S. at 248.

26. Burdine, 450 U.S. at 256, 257 ("[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.").

27. *Id.* at 256–57.

28. Juneau v. Intel Corp., 2006-NMSC-002, ¶ 22, 139 N.M. 12, 127 P.3d 548, 554.

29. *Id.* ¶ 23, 127 P.3d at 555.

30. *Id.* ¶ 22, 127 P.3d at 554.

31. *Id.* ¶ 25, 127 P.3d at 555.

32. Gonzalez v. N.M. Dept. of Health, 2000-NMSC-029, ¶ 21, 129 N.M. 586, 11 P.3d 550, 557 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)); *see also* Burdine, 450 U.S. at 255 (1981).

challenge the employer's non-discriminatory motivations.[33] Both the plaintiff's rebuttal—showing that the employer's alternative reason for its action was pretextual or insufficient—and the employee's initial prima facie case shape the fact finder's final determination.[34] The fact finder comes to its ultimate finding by considering all relevant details that could have contributed to the employer's action against an employee. The New Mexico Supreme Court has even considered evidence of the employer's actions against the employee *before* the employee filed a discrimination complaint with the EEOC.[35] The court asserted that the preliminary facts provided necessary context to evaluate the retaliation claim.[36]

2. Purpose of the McDonnell Douglas Framework.

The *McDonnell Douglas* approach aspires to fairness in the absence of direct evidence.[37] The United States Supreme Court stated: "The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly" to a determination of discrimination or retaliation.[38] The *McDonnell Douglas* approach upholds—or at least, tries to uphold—the anti-discriminatory purpose of Title VII and the NMHRA, while also accounting for the messy reality of workplace discrimination and retaliation. An employer's retaliatory animus is not always obvious, and it is not always direct. Behind every employer-employee interaction is a unique history, shaped by different subjectivities and power differences.

In this uncertain context, the *McDonnell Douglas* framework was designed to ensure that employees have their day in court.[39] In New Mexico, an at-will employee "may be discharged at any time for any reason or for no reason at all," barring an exception.[40] Moreover, an employee does not always have access to an employer's business records and other "objective" proof, such as a written warning or demerit, which a fact finder may find more convincing than an employee's collection of anecdotes about an abusive boss.[41] The *McDonnell Douglas* framework tries to account for these and other potential workplace imbalances. It provides an employee the opportunity to establish a presumption of discrimination or retaliation and an opportunity to rebut an employer's counterclaim, if it is indeed only pretext

33. Sonntag v. Shaw, 2001-NMSC-015, ¶ 27, 130 N.M. 238, 22 P.3d 1188, 1197.

34. *Id.*; Juneau, 2006-NMSC-002, ¶ 25, 127 P.3d at 555.

35. Juneau, 2006-NMSC-002, ¶ 14, 127 P.3d at 552.

36. *Id.*

37. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

38. Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

39. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure the plaintiff has his day in court despite the unavailability of direct evidence.").

40. UJI 13–2301 NMRA; *see also* William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1041 (2014).

41. *See* Maria Greco Danaher, *Plaintiff Bears the Ultimate Burden of Proving Retaliatory Motive*, 11 NO. 5 LAWS. J. 2, 10 ("[O]bjective and complete documentation of a company's business decision is integral to a favorable result in a claim related to that decision.").

for discrimination or retaliation. It also extends fairness to the employer in the second step of the framework, where the employer only has a burden to produce a reasonable explanation for its actions without actually having the final burden to persuade the fact finder.[42] The framework ultimately provides a mechanism for the fact finder to evaluate the totality of the circumstances surrounding an alleged retaliatory incident.

3. McDonnell Douglas and Causation.

Application of the *McDonnell Douglas* framework does not prove but-for causation.[43] When the fact finder carries through the *McDonnell Douglas* test to the third step, the fact finder eliminates one non-discriminatory reason for the adverse employment action: the employer's proffered justification. But, the framework "does not eliminate all potential non-discriminatory reasons" for the employer's action.[44] Other non-discriminatory reasons may also exist. No single inference, fact, or factor must be the but-for cause of the retaliation using the *McDonnell Douglas* framework.[45] The fact finder reaches its ultimate determination by evaluating the totality of the circumstances—not by eliminating every non-discriminatory reason for an employer's adverse action against a worker. So, the fact finder evaluates the evidence presented at the three steps of the analysis; the ways in which those pieces of evidence interact; and which are ultimately more convincing.

To reach a fair and equitable outcome, the *McDonnell Douglas* approach requires a holistic evaluation of messy, conflicting, imbalanced facts. That type of evaluation requires the fact finder to use a motivating factor causation standard. But-for causation does not provide the necessary balance and nuance that this evaluation of workplace conflict requires. Multiple factors could have motivated an employer's retaliation. But the action, ultimately, could still have been retaliatory. The anti-discriminatory purpose of Title VII and the NMHRA can be enforced fairly and equitably if the fact finder incorporates a motivating factor causation standard in its *McDonnell Douglas* analysis.

C. *University of Texas Southwestern Medical Center v. Nassar* and But-For Causation in Title VII Retaliation Claims.

But, in its 2013 decision, *University of Texas Southwestern Medical Center v. Nassar*, the United States Supreme Court did not find that Title VII retaliation claims required a motivating factor causation standard. In *Nassar*, a physician brought suit against his employer, alleging his employer retaliated against him by not hiring him for a higher position after he made complaints of race- and religion-based harassment.[46] Without a single reference to *McDonnell Douglas*, the Court held that a but-for causation standard was required for employment retaliation claims brought under Title VII of the Civil Rights Act of 1964.[47] The Court stated that employees must prove that their complaints or opposition to discrimination in the

42. Burdine, 450 U.S. at 257.

43. *See* Teal *supra* note 18, at 963.

44. Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 134 (2007).

45. *Id.*

46. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 345 (2013).

47. *Id.* at 352.

workplace—the protected activity—was the but-for cause of the retaliation they suffered.[48]

The Court in *Nassar* drew from its holding and reasoning in *Gross v. FBL Financial Services*.[49] In *Gross*, the Court held that, in claims brought under the Age Discrimination in Employment Action (ADEA), an employee must prove her protected activity was the but-for cause of the adverse employment action.[50] In *Nassar*, the Court adopted the definition of "because" implemented by the Court in *Gross*.[51] The Court interpreted the word "because" in the anti-retaliation provision of Title VII to mean that the employer's retaliation would not have occurred but-for, or in absence of, the employee's protected complaint or other action against workplace discrimination.[52]

Even though Title VII specifically requires that employees prove status-based discrimination claims using a motivating factor causation standard under Section 2000e-2, the Court in *Nassar* found that the Legislature did not intend for that standard to apply to retaliation claims under Section 2000e-3.[53] The Court found that the motivating factor standard explicitly stated in the statute should not apply to retaliation claims brought under Title VII because the anti-retaliation provision of the law was in a separate section from the status-based discrimination provision.[54] The Court noted, "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."[55] The Court indicated that if Congress had intended for the motivating factor test to apply to the retaliation provision of the law, then it would have placed the test in another section that applied to the "rules and remedies for all Title VII enforcement actions," not just the section that applied to status-based discrimination actions.[56]

The Court reasoned that a higher but-for causation standard is necessary in cases of retaliation to prevent "frivolous claims" and "unfounded charges" of discrimination leading to false retaliation claims after an employee suffers an "undesired change in employment circumstances."[57] According to the Court, a lessened causation standard would "be inconsistent with the structure and operation of Title VII" because it would raise costs, "both financial and reputational," for innocent employers.[58] The Court did not address the required administrative process that may block frivolous and unfounded retaliation claims from reaching a district court.

The Court in *Nassar* never mentioned *McDonnell Douglas*'s burden-shifting framework. There is no indication that the Court had the intention of doing

48. *Id.*
49. *Id.* at 343.
50. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009).
51. Nassar, 570 U.S. at 352.
52. *Id.*
53. *Id.* at 355.
54. *Id.* at 353.
55. *Id.*
56. *Id.* at 354.
57. *Id.* at 358.
58. *Id.*

away with the decades-old framework altogether, either.[59] This omission left the door open for the lower courts to interpret how to incorporate the *Nassar* holding into the *McDonnell Douglas* framework. There is disagreement between the circuit courts about whether or not but-for causation applies to the first stage—when the employee makes a prima facie Title VII retaliation claim—of the framework after *Nassar*.[60] There is also disagreement among state courts (and federal courts interpreting state law) about whether the but-for causation standard should apply to retaliation claims brought under state laws, like the NMHRA.[61]

III. ANALYSIS

A. *Nassar* Does Not Govern the Causation Standard for NMHRA Retaliation Claims.

After *Nassar*, New Mexico state courts have not held whether they adopt or reject a but-for causation standard for NMHRA retaliation claims. New Mexico federal courts have explicitly noted the state courts' silence on this matter.[62] Still, since *Nassar,* New Mexico courts continue to apply the burden-shifting framework to employment retaliation claims without specifying the required causation standard.

Even in a post-*Nassar* world, New Mexico courts should continue to apply the widely accepted *McDonnell Douglas* burden-shifting framework to NMHRA retaliation claims, with a motivating factor causation requirement. Even though New Mexico courts have looked to federal law to decide how to analyze employment-based retaliation and discrimination claims, New Mexico courts have also repeatedly asserted that they are not bound by the federal approach and are free to depart from it.[63] Here, New Mexico courts should distinguish their approach from the federal one.

Generally, as discussed in Part II.B.3. above, a fair and holistic application of the *McDonnell Douglas* framework requires a motivating factor causation

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59. Foster v. Univ. of Maryland-E. Shore, 787 F.3d 243, 251 (4th Cir. 2015) ("Had the *Nassar* Court intended to retire *McDonnell Douglas* and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect.").

60. *Id.* at n.10 (listing cases that make up the circuit split).

61. Koai, *supra* note 5 (stating that Kentucky, Florida, Louisiana, Idaho, and Illinois have applied the but-for causation standard to discrimination and retaliation claims brought under state law after *Nassar*. Texas, New York, West Virginia, Alaska, and California have declined to apply the but-for causation standard to discrimination and retaliation claims brought under state law after *Nassar*.).

62. *See* Hernandez v. City of Sunland Park, No. 12-CV-00176 MCA/WPL, 2013 WL 12329160, at *5 (D.N.M. Sept. 30, 2013) ("Plaintiff points out that *Nassar* is not directly controlling as to her claim under the New Mexico Human Rights Act . . . Given significant differences in the language employed by Congress, 42 U.S.C. § 2000e-3(a) and the New Mexico Legislature, NMSA 1978, § 28-1-7(J), it is not at all clear that the New Mexico Supreme Court would adopt the reasoning of the United States Supreme Court in Nassar."); Lobato v. New Mexico Env't Dep't, 733 F.3d 1283, 1297 (10th Cir. 2013) ("The Supreme Court recently established that for a Title VII retaliation claim, a plaintiff must establish that the defendant would not have taken the adverse employment action "but for" the impermissible motive . . . The New Mexico Supreme Court has yet to interpret the New Mexico Human Rights Act as also imposing this standard.").

63. Gonzalez v. N.M. Dep't. of Health, 2000-NMSC-029, ¶ 20, 129 N.M. 586, 11 P.3d 550, 593 (quoting Smith v. FDC Corp., 1990-NMSC-020, ¶ 9, 109 N.M. 514, 517, 787 P.2d 433, 436); Sonntag, 2001-NMSC-015, ¶ 24, 22 P.3d 1188, 1196; Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶ 23, 68–69; Goodman v. OS Restaurant Services, LLC, 2020-NMCA-019, ¶ 22, 461 P.3d 906, 913.

standard. Specifically, New Mexico caselaw; the statutory construction of the NMHRA; and the NMHRA's purpose all support a motivating factor causation standard.

1. New Mexico Caselaw.

a. *Behrmann v. Phototron Corporation*: Combined Jury Instructions on Motivating Factor Causation and *McDonnell Douglas* are Compatible.

In 1990, the New Mexico Supreme Court found that two jury instructions—one instructing the jury on motivating factor causation and the other on the *McDonnell Douglas* framework—were correctly given together in an NMHRA discrimination claim. In *Behrmann v. Phototron Corporation*, a female salesperson sued her employer after she was allegedly fired because she was pregnant.[64] Her employer alleged that she was terminated because of "economic reorganization."[65] But, her supervisor also told her, "You'll probably not want to come back to work anyway. Having a baby will really change you," and proceeded to hire a new, higher-paid male employee to replace her.[66]

The trial court in *Behrmann* rejected the employer's proposed jury instruction that included a but-for causation standard, which stated, "If you find that Phototron had a non-discriminatory business reason for discharging plaintiff, you must find for Phototron."[67] The trial court then instructed the jury to find for the employee in a sex discrimination case if the jury found that the employer laid off the employee "with an improper motive based on pregnancy."[68] The trial court's instruction was a mixed motives or motivating factor instruction because it allowed for the jury to find the employer liable for discrimination when it acted with discriminatory motive, even if the employer also had other non-discriminatory reasons for terminating the employee. The jury also received an instruction on the *McDonnell Douglas* burden-shifting framework. The employer argued that these two instructions were contradictory and should not have been issued together.[69] The New Mexico Supreme Court disagreed. The court found that "the evidence supported both instructions and the court was justified in giving both instructions."[70]

b. *Nava v. City of Santa Fe*: NMHRA Discrimination Claims Already Require Motivating Factor Causation Standard.

In its 2004 decision, *Nava v. City of Santa Fe*, the New Mexico Supreme Court held that a motivating factor causation standard should apply to an employee's NMHRA discrimination claim. In *Nava*, the City of Santa Fe appealed a female police officer's sex-based discrimination claim against her sergeant after he "raised

64. Behrmann v. Phototron Corp., 1990-NMSC-073, ¶ 1, 110 N.M. 323, 795 P.2d 1015, 1016.
65. *Id.*
66. *Id.* ¶¶ 1–2, 795 P.2d at 1016.
67. *Id.* ¶ 5, 795 P.2d at 1016.
68. *Id.* ¶ 4, 795 P.2d at 1016.
69. *Id.* ¶ 13, 795 P.2d at 1018.
70. *Id.* ¶ 15, 795 P.2d at 1018.

his voice to her, denied her many of the same privileges male officers were afforded, followed her to her house to monitor how long she took on bathroom breaks, [and] assigned rape calls to her even when other officers were closer to the scene of the crime."[71] At trial, the judge had instructed the jury that it only needed to find that the "plaintiff's sex was a motivating factor in the treatment of the plaintiff" to satisfy the causation standard in the discrimination case.[72] The instruction did not require the jury to find that "sex was the [Defendant's] . . . sole motivation or even the primary motivation" for the employer's adverse action against the plaintiff.[73]

On appeal, the City of Santa Fe in *Nava* argued that the jury should have been given a but-for causation instruction.[74] The court disagreed. The court held that the trial court correctly issued a motivating factor jury instruction for a sex-based discrimination claim brought under the NMHRA.[75] The court turned to the federal approach to discrimination claims at the time to make its determination. Federal law only required that an employee prove that "the adverse employment action was motivated in part by the illegitimate factor" and not "to prove that [the illegitimate factor] was the sole or primary motivation" for the adverse employment action suffered.[76]

Even though the court in *Nava* drew from the federal approach at the time to make its determination, the New Mexico Supreme Court ultimately looked to the New Mexico-specific context and state-specific legislative intent to make its final determination that the trial court properly issued the motivating factor jury instruction. The court found that, since the purpose of the NMHRA is to "prohibit all forms of sexual harassment," the legislature did not intend for the statute to provide relief to an employer in a discrimination claim "simply because other factors aside from sex contributed to making the employee's work environment hostile and abusive."[77]

Nava is still good law. The court in *Nava* reasoned the NMHRA required a motivating factor causation standard to "prohibit all forms" of sex discrimination even when "other factors aside from sex" contributed to the discrimination.[78] The same reasoning should apply to retaliation claims: the NMHRA requires a motivating factor causation standard to prohibit all forms of retaliation, even when other factors contributed to the employer's action. Without "prohibiting all forms" of retaliation with the aid of a motivating factor causation standard, the anti-retaliation provision of the NMHRA would not serve its ultimate purpose of preventing unlawful discrimination—and subsequent retaliation—in the workplace.

71. Nava v. City of Santa Fe, 2004-NMSC-039, ¶ 2, 136 N.M. 647, 103 P.3d 571, 573.
72. *Id.* ¶ 7, 103 P.3d at 574.
73. *Id.*
74. *Id.*
75. *Id.* ¶ 9, 103 P.3d at 575.
76. *Id.* ¶ 8, 103 P.3d at 574.
77. *Id.* ¶ 9, 103 P.3d at 575.
78. *Id.* ¶ 8, 103 P.3d at 574.

c. *Juneau v. Intel Corp.*: New Mexico is Not Bound by the Federal Approach to Causation.

It is undeniable that New Mexico courts draw from federal statutory construction and federal analytical frameworks in their own analyses of state law. For example, New Mexico courts adhere to the federal *McDonnell Douglas* framework and draw from federal interpretation of Title VII in their statutory interpretation of the NMHRA. But, New Mexico courts have also repeatedly asserted that "we are not binding New Mexico law to interpretations made by the federal courts of the federal statute."[79] The New Mexico Supreme Court acted on this assertion in its 2006 decision, *Juneau v. Intel Corporation*. The court declined to adopt the Tenth Circuit's inference of causation it applied in retaliation claims.[80] In 1996, the Tenth Circuit adopted an inference of causation when there was "temporal proximity" between the employee's protected action and the employer's adverse employment action in a Title VII retaliation claim.[81] In *Juneau*, the New Mexico Supreme Court found that "the fact-finder should be free to consider timing and proximity, along with all the other facts and circumstances, in deciding the ultimate issue of causation."[82] The court declined to hold what amount of time was required between a protected activity and an employer's negative act to establish an inference of causation between the two actions in an NMHRA retaliation claim.[83]

New Mexico courts declined to adopt the temporal proximity approach of the Tenth Circuit. So, New Mexico courts should also adopt an independent approach to causation in NMHRA retaliation claims.[84] Because the fact finder must evaluate the totality of the circumstances to determine retaliation under the NMHRA, the evaluation requires a motivating factor causation standard. The standard accounts for the way that different "facts and circumstances" interact and overlap to create retaliatory animus and illegal retaliatory effects.[85] New Mexico courts should follow their own independent construction of the NMHRA, like the New Mexico Supreme Court did in *Juneau*, and break away from the federal but-for causation standard that the Tenth Circuit applies in Title VII retaliation claims.[86]

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79. Gonzalez v. N.M. Dep't. of Health, 2000-NMSC-029, ¶ 20, 129 N.M. 586, 11 P.3d 550, 593 (quoting Smith v. FDC Corp., 1990-NMSC-020, ¶ 9, 109 N.M. 514, 517, 787 P.2d 433, 436); Sonntag v. Shaw, 2001-NMSC-015, ¶ 24, 130 N.M. 238, 22 P.3d 1188, 1196; Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶ 23, 135 N.M. 539, 91 P.3d 58, 68–69; Goodman v. OS Restaurant Services, LLC, 2020-NMCA-019, ¶ 22, 461 P.3d 906, 913.

80. Juneau v. Intel Corp., 2006-NMSC-002, ¶ 22, 139 N.M. 12, 127 P.3d 548, 554 (declining to adopt inference stated in Marx v. Schnuck Markets, Inc., 76 F.3d 324, 328 (10th Cir. 1996)).

81. Marx, 76 F.3d at 328.

82. Juneau, 2006-NMSC-002, ¶ 22, 127 P.3d at 554.

83. *Id.*

84. A jury could apply different causation standards to federal and state claim brought together. Juries already have to understand the different causation standards when federal status-based claims are brought with federal retaliation claims. *See* Koai, *supra* note 5, at 793–94.

85. *See* Juneau, 2006-NMSC-002, ¶ 22, 127 P.3d at 554.

86. *See* Ward v. Jewell, 772 F.3d 1199, 1203 (10th Cir. 2014) (holding that the plaintiff's prima facie retaliation claim must meet but-for causation standard).

d. *Slusser v. Vantage Builders:* But-For Causation Renders *McDonnell Douglas* meaningless.

A year before the United States Supreme Court decided *Nassar*, the District Court of New Mexico applied a but-for causation standard to an age discrimination claim that an employee brought under the NMHRA.[87] In *Slusser v. Vantage Builders*, the District Court of New Mexico cited the United States Supreme Court's but-for requirement in *Gross v. FBL Financial Services* (the case that the *Nassar* Court later relied on to reach its holding that Title VII retaliation claims required but-for causation).[88] The District Court found the federal *Gross* standard "applicable to age claims under the New Mexico Human Rights Act."[89]

By the time *Slusser* reached the New Mexico Court of Appeals, the United States Supreme Court had already decided *Nassar*. Still, the New Mexico court made no reference to *Nassar*. On appeal, the New Mexico Court of Appeals declined to decide whether New Mexico should adopt a but-for causation standard for age discrimination claims brought under the NMHRA.[90] In its analysis of the caselaw, the New Mexico Court of Appeals in *Slusser* described a but-for causation standard and the *McDonnell Douglas* burden-shifting approach as mutually exclusive, contrary approaches.[91] In its brief analysis of the issue, the New Mexico Court of Appeals distinguished the *Gross* but-for approach from the New Mexico Supreme Court's approach in an age discrimination claim in *Cates v. Regents of the N.M. Institute of Mining and Technology*.[92] In *Gross*, according to the court, the but-for cause analysis eliminated the burden-shifting analysis: the employer's discrimination was either the sole cause of the employer's adverse action or it was not.[93] In *Cates*, the New Mexico Supreme Court applied the burden-shifting approach to an age discrimination claim.[94] In its brief parenthetical explanation of the "*Cates* method of proof," the Court in *Slusser* did not describe the causation standard that it thought the court used in *Cates*.[95]

In *Slusser*, the New Mexico Court of Appeals showed that but-for causation undermined the fairness interests underlying the *McDonnell Douglas* framework; but-for causation and the *McDonnell Douglas* framework are mutually exclusive. With but-for causation, the burden of production would rarely shift to the employer and back to the employee in a retaliation case.[96] If an employee did make it to the

87. Slusser v. Vantage Builders, Inc., No. D202CV200811310, 2011 WL 12525466, at *1 (N.M. Dist. Jan. 24, 2011).

88. *Id.*

89. *Id.*

90. Slusser v. Vantage Builders, Inc., 2013-NMCA-073, ¶ 25, 306 P.3d 524, 534 ("[W]e leave for another day the decision regarding the application of the *Cates* method of proof in light of *Gross*.").

91. *Id.*

92. *Id.*

93. *Id.*

94. Cates v. Regents of the N.M Inst. of Mining & Tech., 1998-NMSC-002, ¶¶ 17–21, 124 N.M. 633, 954 P.2d 65, 70–71.

95. Slusser, 2013-NMCA-073, ¶ 25, 306 P.3d at 534.

96. *See* Foster v. Univ. of Maryland-E. Shore, 787 F.3d 243, 251 (4th Cir. 2015) ("If plaintiffs can prove but-for causation at the prima facie stage, they will necessarily be able to satisfy their ultimate burden of persuasion without proceeding through the pretext analysis. Conversely, plaintiffs who cannot

third step, the pretext stage of the analysis, it would only be after she could show that the protected action she took was the "actual," "only," or "but-for" reason for the employer's retaliation against her.[97] Given the lack of direct evidence in employment retaliation cases, this would be difficult to do. Further, if an employee were able to show but-for causation in the first step of the three-step analysis, that employee would not need the third pretext stage at all. In *McDonnell Douglas*, the United States Supreme Court indicated that the third step in the burden-shifting framework is necessary to afford an employee "a fair opportunity" to demonstrate that the employer's reasons given were pretext or "discriminatory in its application."[98] A but-for causation standard renders the *McDonnell Douglas* framework meaningless.

e. Jury Instructions and *Goodman v. OS Restaurant Services*: No Causation Standard Leads to Jury Confusion.

Jury instructions for retaliation claims brought under the NMHRA are inconsistent. The instructions do not specify the causation standard that the jury should apply to determine if the employer retaliated against its employee for a protected reason. A 2013 jury instruction for an NMHRA race discrimination and retaliation claim simply restated the language in the Act, without further clarification or interpretation of the statutory elements.[99] In a 2015 case, an employee filed an NMHRA retaliation claim after filing gender and ethnicity-based discrimination complaints.[100] The jury instruction in that case indicated that there must be a "causal connection between the protected activity and the adverse employment action."[101] The jury instruction did not contain any elaboration on what causation standard was required to establish a "causal connection."[102] The retaliation instruction also explained the burden-shifting between the employee and employer and that the "Plaintiff has the burden of proving that the retaliation was a cause of damages."[103] The instruction did not specify what causation standard was required to establish "a cause of damages."

In *Goodman v. OS Restaurant Services*, the New Mexico District Court instructed the jury that the employee had to show that "retaliation was a cause of the

satisfy their ultimate burden of persuasion without the support of pretext evidence would never be permitted past the prima facie stage to reach the pretext stage.").

97. *Id.* at 251.

98. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

99. Jury Instruction, Granados v. Bd. of Cnty. Comm'rs of Dona Ana County, No. D307CV201101404, 2013 WL 9776869, at *1 (N.M. Dist. June 21, 2013) ("In this case you must determine whether Dona Ana County violated a statute known as the New Mexico Human Rights Act. 1. An employer violates the New Mexico Human Rights Act if it fires or discriminates in matters of compensation terms, conditions, or privileges of employment against an otherwise qualified person based on national origin. 2. An employer violates the New Mexico Human Rights Act if it engages in any form of threat, retaliation, or discrimination against any person who has opposed any unlawful discriminatory practice.").

100. Ortega v. City of Albuquerque, No. CV 2013-04709, 2015 WL 2441649 (N.M. Dist. Mar. 20, 2015).

101. Jury Instruction, Ortega v. City of Albuquerque, No. CV 2013-04709, 2015 WL 2441649 (N.M. Dist. Mar. 20, 2015).

102. The record does not indicate whether the court provided a separate jury instruction on causation.

103. Jury Instruction, Ortega, 2015 WL 2441649.

injuries and damages" he incurred, after he suffered a workplace injury; filed a Workers' Compensation claim; and then was terminated.[104] Although not at issue, the jury instruction did not contain a specific causation standard.[105] On appeal, the jury instruction's meaning and contents were disputed and scrutinized.[106] The employer argued that the jury instruction was improperly given because it was unclear whether the retaliation claim was based on the employee's physical handicap or because of his Workers' Compensation claim.[107] Ultimately, the court upheld the jury's findings because the employer had not preserved its objection to the jury instructions.[108]

The confusion and disagreement over the jury instruction in *Goodman* were not explicitly about the causation standard. But, the confusion in *Goodman* could have been avoided if the court had provided the jury an instruction with a specific causation standard. A jury instruction with an explicit causation standard must point to the reasons for the retaliation that the employee suffered. Here, a causation standard in the jury instruction would have clarified whether the worker's injury, his Workers' Compensation claim, or both, were reasons for the employer's retaliation. A jury instruction with an explicit causation standard would also give the jury precise language and a workable mechanism to use in its deliberation of the facts.

New Mexico already has Uniform Jury Instructions on causation that could be applied to or adapted for NMHRA retaliation claims. First, UJI 13-305 NMRA, "Causation," explains what proximate cause means for a tort case. Cause is defined as follows: "an injury or damage is caused, or contributed to, by an act or a failure to act when the act or failure to act played any part, no matter how small, in bringing about the injury or damage."[109]

Second, UJI 13-2304 NMRA, the Uniform Jury Instruction on retaliatory discharge in violation of public policy, explicitly states a motivating factor causation standard. The instruction states that, in its determination of whether an employee was terminated because she engaged in protected conduct, "[the jury] must determine whether that conduct was a motivating factor in the decision to discharge [him] [her]. A motivating factor is a factor that plays a role in the decision to discharge. It need not be the only reason, nor the last nor latest reason, for the discharge."[110]

Jury instructions from *Goodman* and other New Mexico District Court cases demonstrate the confusion that the lack of a causation standard can create. For a fact finder to accurately determine whether the plaintiff met her "ultimate burden of persuading the court" in the third step of the *McDonnell Douglas* test, the required causation standard must be explicitly stated.[111] New Mexico trial courts may draw

104. Jury Instruction, Goodman v. OS Rest. Servs, LLC, No. CV-2012-1188, 2015 WL 13840352 (N.M. Dist. June 10, 2015).

105. The record does not indicate whether the court provided a separate jury instruction on causation.

106. Goodman v. OS Rest. Servs. LLC, 2020-NMCA-019 ¶¶ 36–38, 461 P.3d 906, 917–18.

107. *Id.* ¶ 9, 461 P.3d at 910.

108. *Id.* ¶ 40, 461 P.3d at 919.

109. UJI 13-915 NMRA.

110. UJI 13-2304 NMRA.

111. *See* Bovee v. State Highway. and Transp. Dep't, 2003-NMCA-025, ¶ 14, 133 N.M. 519, 65 P.3d 254, 259.

from existing Uniform Jury Instructions to provide jury instructions on causation for NMHRA retaliation cases.

f. New Mexico Caselaw Supports a Motivating Factor Causation Standard for NMHRA Retaliation Claims.

In sum, the reasoning of New Mexico courts outlined above supports a motivating factor causation standard in NMHRA retaliation claims. The New Mexico Supreme Court has already found that combined jury instructions on motivating factor causation and *McDonnell Douglas* are complementary and may be issued together.[112] The court has also explicitly held that NMHRA discrimination claims require a motivating factor causation standard.[113] Even though Title VII retaliation claims require a but-for causation standard, New Mexico courts are not bound by the federal approach in their own analyses of NMHRA retaliation claims.[114] If New Mexico courts did apply a but-for causation standard to NMHRA retaliation claims, such an analysis would render the well-established *McDonnell Douglas* framework meaningless.[115] New Mexico should explicitly adopt a motivating factor causation standard in NMHRA retaliation claims to avoid jury confusion and to further the reasoning and objectives established by decades of New Mexico caselaw.

2. Statutory Construction of NMHRA Supports Motivating Factor Causation Standard for NMHRA Retaliation Claims.

The structural differences between Title VII and the NMHRA outlined in Part II.A., above, support a finding that New Mexico courts should apply a motivating factor causation standard to NMHRA retaliation claims. Unlike Title VII's status-based discrimination provision, the NMHRA provision on status-based discrimination does not contain an explicit motivating factor causation requirement. The New Mexico Supreme Court in *Nava* determined that status-based discrimination claims brought under the NMHRA should be determined using motivating factor causation. Now, it is up to the courts to determine whether the same motivating factor causation standard should apply in NMHRA retaliation claims.

The same motivating factor causation standard that applies to NMHRA discrimination claims should apply to NMHRA retaliation claims because of two statutory construction principles. First, a statutory scheme must be interpreted in a way "to make the whole consistent."[116] Implementing the same causation standard for NMHRA discrimination and retaliation claims would make the courts' reading of the NMHRA consistent. Second, "a legislatively enacted section heading may be useful in determining legislative intent in a statute which is ambiguously drafted."[117]

112. *See* Behrmann v. Phototron Corp., 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

113. *See* Nava v. City of Santa Fe, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

114. *See* Juneau v. Intel Corp., 2006-NMSC-002, 139 N.M. 12, 127 P.3d 548.

115. *See* Slusser v. Vantage Builders, Inc., 2013-NMCA-073, 306 P.3d 524.

116. Reed v. Styron, 1961-NMSC-119, ¶ 23, 69 N.M. 262, 365 P.2d 912, 917.

117. Serrano v. State, Dep't of Alcoholic Beverage Control, 1992-NMCA-015, ¶ 12, 113 N.M. 444, 827 P.2d 159, 162; *see also* State *ex rel.* Sedillo v. Sargent, 1918-NMSC-042, ¶ 10, 24 N.M. 333, 171 P. 790, 792 ("In construing statutes, if the meaning thereof is doubtful, the title, if expressive, may have the

Under the NMHRA, both status-based discrimination and retaliation are listed under the section heading, "Section 28-1-7, 'Unlawful discriminatory practice.'" Further, the Act's grievance procedure in Section 28-1-10 applies to both status-based discrimination claims and retaliation claims. The complaint procedure is the same and is administered by the same agencies. The legislature's choice to include both provisions (status-based discrimination and retaliation) under the same section heading, governed by the same grievance procedure and administrative processes, may indicate that the legislature intended for both provisions to be considered together, with the same analytical framework and causation standard.

Since the NMHRA includes the status-based discrimination and retaliation provisions in the same section, *Nassar*'s statutory construction argument does not apply to the NMHRA.[118] The United States Supreme Court in *Nassar* argued that the motivating factor standard explicitly stated in the status-based discrimination section of Title VII should not apply to the anti-retaliation provision of Title VII because it is in a separate section of the statue from the status-based discrimination provision.[119] That is not the case in the NMHRA. As noted above, the Court in *Nassar* stated, "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."[120] The same reasoning applies here: just as the New Mexico legislature's choice of words is presumed to be deliberate, so too are its structural choices.

3. Motivating Factor Causation Standard in NMHRA Retaliation Claims Supports the Purpose of the NMHRA.

The purpose of the NMHRA is to protect employees from unlawful discrimination and retaliation in the workplace.[121] The NMHRA is designed to prevent all forms of retaliation, even if other factors aside from retaliatory animus contributed to an employer's adverse action against a worker.[122] A motivating factor causation standard accounts for unlawful discriminatory and retaliatory animus, even when the employer can offer alternative reasons for its actions against an employee. Further, the New Mexico Human Rights Act provides broader rights and protections

effect to resolve the doubts by extension of the purview or by restraining it, or to correct an obvious error.").

118. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 355 (2013).

119. *Id.* at 353.

120. *Id.*

121. Lobato v. State Env't Dep't, 2012-NMSC-002, ¶ 8, 267 P.3d 65, 67; *cf.* Alexandra Zabinski, *Surviving the "Pretext" Stage of McDonnell Douglas: Should Employment Discrimination and Retaliation Plaintiffs Prove "Motivating Factors" or But-For Causation?* 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 280, 302 (2019) ("The legislature's broad language—'freedom from discrimination' and 'without . . . discrimination'—implies that discriminatory decision making is intolerable even if a discriminatory decision could be justified on other grounds. 'Freedom from discrimination' means freedom from discriminatory processes, not just discriminatory outcomes.").

122. *Cf.* Nava v. City of Santa Fe, 2004-NMSC-039, ¶ 9, 136 N.M. 647, 103 P.3d 571, 575 ("The purpose behind the NMHRA is to prohibit all forms of employment sexual harassment. . . . Given this purpose, we believe the Legislature did not intend for an employer to be relieved from an otherwise valid hostile work environment claim simply because other factors aside from sex contributed to making the employee's work environment hostile and abusive.").

than its federal analogue.[123] When the federal approach to employment retaliation law has become less accessible to plaintiffs, it is up to the states to provide greater protections to employees to ensure that viable claims are heard.

Fair and efficient enforcement of the NMHRA is a difficult task. New Mexico courts have adopted the *McDonnell Douglas* framework to strive for just that. The United States Supreme Court in *Nassar* reasoned that a motivating factor causation standard for Title VII retaliation claims would lead to employees bringing "frivolous" and "unfounded" claims.[124] But, the United States Supreme Court failed to account for the exhaustive administrative process that an employee must complete before even bringing a claim to district court.[125] The required administrative process together with the *McDonnell Douglas* analysis would effectively block any potential frivolous claims, before a fact finder applied a motivating factor causation standard to an NMHRA retaliation claim.

The procedural differences between status-based discrimination claims and retaliation claims do not warrant a different causation standard either. New Mexico courts undergo the same *McDonnell Douglas* analysis for both types of claims. Status-based discrimination claims arise when an employer commits an adverse employment action based on an employee's personal traits, including race, color, religion, sex, and national origin.[126] Retaliation claims arise when an employer commits an adverse employment action against an employee based on "protected employee conduct," such as filing a complaint against the employer for discrimination.[127] Both claims arise from similarly situated, illegal conduct that can be evaluated using the same standard of causation. Further, the anti-retaliation and anti-discrimination portions of the NMHRA share the same purpose of securing anti-discrimination protections for employees. Anti-retaliation laws make it so that employees feel that they can safely file a discrimination complaint. Without effective protection against retaliation, anti-discrimination laws would be rendered useless to employees.[128]

4. CONCLUSION

New Mexico courts should apply a motivating factor causation standard to NMHRA retaliation claims. *Nassar* does not govern the causation standard for state-based retaliation claims in New Mexico. The *McDonnell Douglas* framework works most fairly and efficiently for all parties involved (employer, employee, and the court) when the fact finder follows a motivating factor causation standard. New Mexico's caselaw also favors this approach to *McDonnell Douglas.* Ultimately, if a fact finder has the opportunity to carefully evaluate *all* factors—retaliatory and non-

123. *E.g.*, Lobato, 2012-NMSC-002, ¶ 8, 267 P.3d at 67 ("Unlike the Civil Rights Act, the NMHRA permits unlawful discrimination claims against individuals.").

124. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013).

125. Luboyeski v. Hill, 1994-NMSC-032, ¶ 7, 117 N.M. 380, 872 P.2d 353, 355 ("Individual defendants cannot be sued in district court under the Human Rights Act unless and until the complainant exhausts her administrative remedies against them.").

126. Nassar, 570 U.S. at 347.

127. *Id.*

128. *See id.* at 368 (Ginsburg, J., dissenting).

retaliatory—in its retaliation determination, then the NMHRA is more likely to serve its intended function: to ensure a tolerant, hospitable, and accommodating work environment for every New Mexican.