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The Ins and Outs of Causation in Employment Discrimination Law

by

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A. Mixed Motives

Desert Palace, Inc. v. Costa, 539 U.S. 90, 91 FEP Cases 1569 (2003), held that circumstantial evidence is sufficient, and that direct evidence is not required, to trigger mixed-motives analysis in cases subject to § 107 of the Civil Rights Act of 1991, creating a new § 703(m) of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000e-(2)(m). The Court explicitly saw no need to address two of the questions raised: whether Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins* was the controlling opinion in that case, and whether her concurrence required direct evidence of discrimination. The Court's discussion of the significance of § 107 of the 1991 Act is described below in the section on "Applicability of § 107 of the Civil Rights Act of 1991."

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 49 FEP Cases 954 (1989), the Court held that a plaintiff could prevail in a case in which the employer had lawful as well as unlawful motives for its actions, if the employer could not prove that it would have taken the same action if it had been motivated solely by lawful considerations. The plurality described the Court's holding:

> We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

Id. at 258. Such proof is to be by a preponderance of the evidence, and the defendant is not

liable if it meets its burden. *Id.* at 252–53. The plurality stated that in most cases the defendant should be able to meet its burden by "some objective evidence," but it "may not . . . prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Id.* at 252. Moreover, it "must show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* Justice White stated that he did not think there should be any special requirement that the employer submit objective evidence, and that an employer which has denied an illegitimate motive nevertheless found by the court should have greater credibility than an employer which admitted such a reason in its assertion that it would have reached the same decision even in the absence of discrimination. *Id.* at 261.

Under *Price Waterhouse,* mixed-motive analysis is available only when the plaintiff proves that discrimination "played a motivating part in an employment decision." *Id.* at 258. The Court found that this requirement was satisfied by the circumstantial evidence of discrimination presented by the plaintiff, because this was enough to show "that the employer actually relied on her gender n making its decision." *Id.* at 251. The plurality summarized the evidence, *id.* at 251: "On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations."

The plurality did not refer explicitly to "direct evidence," but the concept of strong evidence seems embedded in its holding that the plaintiff must show that an impermissible motive played a "motivating part in an adverse employment decision," *id.* at 250, 252, 258. The remaining opinions also emphasized the strength of the evidence required to trigger mixed-motives analysis. Justice O'Connor's solitary concurrence emphasized the strong degree of proof required to shift the burden of persuasion to the defendant: "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276. She continued, *id.* at 277:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer. Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Justice Kennedy's dissent, joined by the Chief Justice and Justice Scalia, states "the Court makes clear that the Price Waterhouse scheme is applicable only in those cases where the plaintiff has

produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue." *Id.* at 290.

Price Waterhouse and its limitations were based on the Court's construction of § 703(a)(1) of the 1964 Act, 42 U.S.C. § 2000e-2(a)(1). 490 U.S. 228, 240–41 (plurality); 262, 275–76 (Justice O'Connor); 281, 286 (Justice Kennedy, joined by the Chief Justice and Justice Scalia, dissenting).

Previously, *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 287, 1 IER Cases 76 (1977), had set forth the respective burdens of persuasion in a "mixed motives" First Amendment case under 42 U.S.C. § 1983:

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

University of Texas Southwestern Medical Center v. Nassar, __ U.S. __, 133 S.Ct. 2517, 2522-23, 186 L.Ed.2d 503, 118 Fair Empl.Prac.Cas. (BNA) 1504 (2013), stated:

> An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. This principle is the result of an earlier case from this Court, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and an ensuing statutory amendment by Congress that codified in part and abrogated in part the holding in *Price Waterhouse*, see §§ 2000e–2(m), 2000e–5(g)(2)(B).

B. <u>"But For" Causation</u>

Gross v. FBL Financial Services, Inc., 557 U.S. 167, 106 FEP Cases 833 (2009), held that the Age Discrimination in Employment Act does not allow mixed-motives analysis. In a 5-4 decision, the Court held that an ADEA plaintiff must establish that age was the "but for" cause of the employment action at issue. The Court explained at 175-77:

> Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." . . . . The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

> The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason of, on account of " (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome " (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. *See Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. ----, ----, 128 S.Ct. 2131, 2141-2142, 170 L.Ed.2d 1012 (2008) (recognizing that the phrase, "by reason of," requires at least a showing of "but for" causation (internal quotation marks omitted)); Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 63-64, and n. 14, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (observing that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition" and that the statutory phrase, "based on," has the same meaning as the phrase, "because of" (internal quotation marks omitted)); cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it").
>
> It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. . . . And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is "silent on the allocation of the burden of persuasion," we "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." . . . We have no warrant to depart from the general rule in this setting.

(Footnote and citations omitted.)

University of Texas Southwestern Medical Center v. Nassar, __ U.S. __, 133 S.Ct. 2517, 186 L.Ed.2d 503, 118 Fair Empl.Prac.Cas. (BNA) 1504 (2013), held that Title VII retaliation claimants must show "but for" causation. The Court explained the general background of liability:

> This case requires the Court to define the proper standard of causation for Title VII retaliation claims. Causation in fact— i.e., proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim, see Restatement of Torts § 9 (1934) (definition of "legal cause"); § 431, Comment*2525 a (same); § 279, and Comment c (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). This includes federal statutory claims of workplace discrimination. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (In intentional-discrimination cases, "liability depends on

whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted)).

In the usual course, this standard requires the plaintiff to show "that the harm would not have occurred" in the absence of—that is, but for—the defendant's conduct. Restatement of Torts § 431, Comment a (negligence); § 432(1), and Comment a (same); see § 279, and Comment c (intentional infliction of bodily harm); § 280 (other intentional torts); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, and Comment b (2010) (noting the existence of an exception for cases where an injured party can prove the existence of multiple, independently sufficient factual causes, but observing that "cases invoking the concept are rare"). See also Restatement (Second) of Torts § 432(1) (1963 and 1964) (negligence claims); § 870, Comment l (intentional injury to another); cf. § 435a, and Comment a (legal cause for intentional harm). It is thus textbook tort law that an action "is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984). This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself. See *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003); *Carey v. Piphus*, 435 U.S. 247, 257–258, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

Id. at 2424-25. The Court examined the detailed text and structure of Title VII and concluded:

Respondent's final argument, in which he is not joined by the United States, is that even if § 2000e–2(m) does not control the outcome in this case, the standard applied by *Price Waterhouse* should control instead. That assertion is incorrect. First, this position is foreclosed by the 1991 Act's amendments to Title VII. As noted above, *Price Waterhouse* adopted a complex burden-shifting framework. Congress displaced this framework by enacting § 2000e–2(m) (which adopts the motivating-factor standard for status-based discrimination claims) and § 2000e–5(g)(2)(B) (which replaces employers' total defense with a remedial limitation). See *Gross*, 557 U.S., at 175, n. 2, 177, n. 3, 178, n. 5, 129 S.Ct. 2343. Given the careful balance of lessened causation and reduced remedies Congress struck in the 1991 Act, there is no reason to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage. Second, even if this argument were still available, it would be inconsistent with the *Gross* Court's reading (and the plain textual meaning) of the word "because" as it appears in both § 623(a) and § 2000e–3(a). See *Gross*, *supra*, at 176–177, 129 S.Ct. 2343. For these reasons, the rule of *Price Waterhouse* is not controlling here.

Id. at 2434.

C. The "But For" Standard Applies on Summary Judgment, Not Just at Trial

Harris v. Powhatan County School Bd., 543 Fed.Appx. 343, 346, 120 Fair Empl.Prac.Cas. (BNA) 694 (**4th Cir.** 2013), affirmed in part and vacated in part the grant of summary judgment to defendant. The court stated:

> To prevail on his ADEA claim, Harris must show that age was the "but for" cause of his termination. *See Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 177, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009) (rejecting "mixed motive" theory of liability for claims brought under the ADEA).FN3 . . .
>
> FN3. Harris' argument that the "but for" standard applies only at trial is meritless. Harris cites no authority for this proposition, and it is contradicted by numerous court decisions applying the "but for" standard at the summary judgment stage. *See, e.g., Sims v. MVM, Inc.*, 704 F.3d 1327, 1334 (11th Cir. 2013); *Billingslea v. Astrue*, 502 Fed.Appx. 300, 302–03 (4th Cir. 2012); *Rahlf v. Mo–Tech Corp., Inc.*, 642 F.3d 633, 637 (8th Cir. 2011).

D. "Motivating Factor" Instruction Did Not Require Reversal of Jury Verdict Finding Retaliation Under Plain-Error Test

E.E.O.C v. A.C. Widenhouse, Inc., 576 Fed.Appx. 227, 231-32, 123 Fair Empl.Prac.Cas. (BNA) 668 (**4th Cir.** 2014), affirmed the jury verdict finding Title VII retaliation where the trial court gave a "motivating factor" instruction and the defendant did not object. The court held that review for plain error was available, but that defendant failed to carry its burden of showing that the erroneous instruction prejudiced its rights:

> Gill argues that although the instruction was erroneous, the error was not plain because at the time of the trial our precedent called for the application of the motivating factor standard to Title VII retaliation claims. This argument is unavailing. It is settled law that an error is plain for purposes of review when the challenged ruling is plainly erroneous at the time of direct appeal. *See Brickwood Contrs.*, 369 F.3d at 397; *see also Henderson v. United States*, —— U.S. ——, 133 S.Ct. 1121, 1127–29, 185 L.Ed.2d 85 (2013) (adopting a general "time of review" rule for all plain error claims in criminal proceedings). Gill does not claim that the challenged instruction, if given now, would be anything but plainly erroneous.
>
> Although the district court erred and the error was plain, Widenhouse is not entitled to a new trial because it cannot show that the error affected its substantial rights. For an error to affect substantial rights, it generally "must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. 1770. Unlike an error that is timely noticed, at the substantial rights stage of a plain error analysis, it is "the [appellant] rather than the [appellee] who bears the burden of persuasion with respect to prejudice," and in general, the appellant must make a specific showing of prejudice. *Id.* at 734–35, 113 S.Ct. 1770. Widenhouse has failed to make the requisite showing.

> Widenhouse's conclusory assertion that the district court's erroneous instruction on Gill's Title VII retaliation claim prejudicially affected the jury's consideration of all claims is wholly unsupported by the record.
>
> Nor has Widenhouse shown that the district court's erroneous instruction actually affected the outcome of the case with regard to Gill's Title VII retaliation claim itself. First, despite the improper instructions, it is not clear that the jury actually determined Widenhouse's liability under the incorrect standard. The jury's verdict sheet may constitute "evidence to the contrary" of our typical assumption that the jury followed the district court's instruction on this claim. *United States v. Hager*, 721 F.3d 167, 189 (4th Cir. 2013). On its verdict sheet, the jury found that Gill had proven "he was terminated from his employment by the defendant because of his opposition to activity made unlawful under Title VII." J.A. 2378 (emphasis added). Under *Nassar*, the use of "because of" indicates the existence of a but-for causal relationship. 133 S.Ct. at 2527–2528. Moreover, the jury also found that Widenhouse had not shown "that it would have terminated [Gill] for other reasons, even though his race and/or his protected opposition was a motivating factor." J.A. 2378. The jury's finding that there was no lawful reason for Gill's termination indicates that it could have concluded retaliation was a but-for cause of the adverse employment action.
>
> Second, Widenhouse cannot prove that the district court's Title VII retaliation instruction was actually prejudicial because the jury found it liable for exactly the same conduct in violation of § 1981. Finally, while it is impossible to determine the amount of damages the jury would have granted if Widenhouse had not been found liable for violating Title VII's retaliation provisions, Gill would have been eligible for, and might have received, the same compensatory and punitive damages on the basis of Widenhouse's liability for his remaining claims.
>
> Because Widenhouse has failed to show any actual prejudice as a result of the district court's improper instruction, its claim of plain error fails.

Id. at 231-32.

E. Gloss on *Gross* and *Nassar*

Burrage v. United States, __ U.S. __, 134 S.Ct. 881, 887-90, 187 L.Ed.2d 715, 122 Fair Empl.Prac.Cas. (BNA) 237 (2014)

> The Controlled Substances Act does not define the phrase "results from," so we give it its ordinary meaning. See Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). A thing "results" when it "[a]rise[s] as an effect, issue, or outcome from some action, process or design." 2 The New Shorter Oxford English Dictionary 2570 (1993). "Results from" imposes, in other words, a requirement of actual causality. "In the usual course," this requires proof "'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. ——, ——, 133 S.Ct. 2517, 2525, 186 L.Ed.2d 503 (2013) (quoting Restatement of Torts § 431, Comment a (1934)).

The Model Penal Code reflects this traditional understanding; it states that "[c]onduct is the cause of a result" if "it is an antecedent but for which the result in question would not have occurred." § 2.03(1)(a). That formulation represents "the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result." . . .

Thus, "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." LaFave 467–468 (italics omitted). The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived. . . .

This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.

Where there is no textual or contextual indication to the contrary, courts regularly read phrases like "results from" to require but-for causality. Our interpretation of statutes that prohibit adverse employment action "because of" an employee's age or complaints about unlawful workplace discrimination is instructive. Last Term, we addressed Title VII's antiretaliation provision, which states in part:

> "It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a) (2006 ed.) (emphasis added).

Given the ordinary meaning of the word "because," we held that § 2000e–3(a) "require[s] proof that the desire to retaliate was [a] but-for cause of the challenged employment action." *Nassar*, *supra*, at ——, 133 S.Ct., at 2528. The same result obtained

in an earlier case interpreting a provision in the Age Discrimination in Employment Act that makes it "unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Relying on dictionary definitions of "[t]he words 'because of' "—which resemble the definition of "results from" recited above—we held that "[t]o establish a disparate-treatment claim under the plain language of [§ 623(a)(1)] ... a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). FN4

FN4. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), is not to the contrary. The three opinions of six Justices in that case did not eliminate the but-for-cause requirement imposed by the "because of" provision of 42 U.S.C. § 2000e–2(a), but allowed a showing that discrimination was a "motivating" or "substantial" factor to shift the burden of persuasion to the employer to establish the absence of but-for cause. See *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. ——, ——, 133 S.Ct. 2517, 2525–2527, 186 L.Ed.2d 503 (2013). Congress later amended the statute to dispense with but-for causality. Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)).

Our insistence on but-for causality has not been restricted to statutes using the term "because of." We have, for instance, observed that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship," . . . and that "the phrase, 'by reason of,' requires at least a showing of 'but for' causation," *Gross*, *supra*, at 176, 129 S.Ct. 2343 . . . . See also *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 265–268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (explaining that a statute permitting recovery for injuries suffered " 'by reason of' " the defendant's unlawful conduct "require[s] a showing that the defendant's violation ... was," among other things, "a 'but for' cause of his injury"). . . .

In sum, it is one of the traditional background principles "against which Congress legislate[s]," *Nassar*, 570 U.S., at ——, 133 S.Ct., at 2525, that a phrase such as "results from" imposes a requirement of but-for causation. The Government argues, however, that distinctive problems associated with drug overdoses counsel in favor of dispensing with the usual but-for causation requirement. Addicts often take drugs in combination, as Banka did in this case, and according to the National Center for Injury Prevention and Control, at least 46 percent of overdose deaths in 2010 involved more than one drug. See Brief for United States 28–29. This consideration leads the Government to urge an interpretation of "results from" under which use of a drug distributed by the defendant need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force (such as mixed-drug intoxication) that is itself a but-for cause of death.

In support of its argument, the Government can point to the undoubted reality that courts have not always required strict but-for causality, even where criminal liability is at issue. The most common (though still rare) instance of this occurs when multiple

sufficient causes independently, but concurrently, produce a result. See *Nassar*, *supra*, at ——, 133 S.Ct., at 2525; see also LaFave 467 (describing these cases as "unusual" and "numerically in the minority"). To illustrate, if "A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head ... also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds," A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event). Id., at 468 (italics omitted). We need not accept or reject the special rule developed for these cases, since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death. No expert was prepared to say that Banka would have died from the heroin use alone.

F. Proximate Cause

Staub v. Proctor Hospital, __ U.S. __, 131 S.Ct. 1186, 190 L.R.R.M. (BNA) 2257, 111 Fair Empl.Prac.Cas. (BNA) 993 (2011) (Scalia, J.), reversed the Seventh Circuit's decision reported at 560 F. 3d 647 (7th Cir. 2009). The case involved a termination challenged under USERRA, where there was clear evidence of anti-military bias by plaintiff's first- and second-level supervisors, Janice Mulally and Michael Korenchuk, and clear evidence that they wanted to get rid of him, and a clueless decisionmaker, Linda Buck, who was the Vice-President of Human Resources. Ms. Buck relied on the representations of the supervisors, a complaint about plaintiff from a co-worker, Angie Day, and a review of plaintiff's personnel file. Ms. Buck did nothing to check the facts, even after plaintiff filed an internal complaint that the reasons for his termination had been fabricated. The question presented was the "cat's paw" question. As Justice Scalia put it for the Court: "We consider the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision." *Id.* at 1189. The Court set out the Seventh Circuit's rationale for overturning the jury verdict for plaintiff:

> The Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law. . . . The court observed that Staub had brought a "'cat's paw' case," meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. . . . It explained that under Seventh Circuit precedent, a "cat's paw" case could not succeed unless the nondecisionmaker exercised such " 'singular influence' " over the decisionmaker that the decision to terminate was the product of "blind reliance." . . . It then noted that "Buck looked beyond what Mulally and Korenchuk said," relying in part on her conversation with Day and her review of Staub's personnel file. . . . The court "admit[ted] that Buck's investigation could have been more robust," since it "failed to pursue Staub's theory that Mulally fabricated the write-up." . . . But the court said that the "'singular influence'" rule "does not require the decisionmaker to be a paragon of independence": "It is enough that the decisionmaker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision." . . . Because the undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally, the court held that Proctor was entitled to judgment. . . .

Id. at 1190 (citations omitted). The Court emphasized USERRA's similarity to Title VII, in using a "motivating factor" basis of liability. The Court held that Congress created a "federal tort" by enacting USERRA. Discussing the "motivating factor" test, the Court stated:

> In approaching this question, we start from the premise that when Congress creates a federal tort it adopts the background of general tort law. See *Burlington N. & S.F.R. Co. v. United States*, 556 U.S. ----, ---- (2009) (slip op., at 13-14); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68-69, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Intentional torts such as this, "as distinguished from negligent or reckless torts, ... generally require that the actor intend 'the consequences ' of an act,' not simply 'the act itself.'" *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998).

Id. at 1191. The Court held that animus of nondecisionmakers cannot simply be assumed to be causally related to the adverse action unless the nondecisionmakers intended the adverse action. To do otherwise would be to conflate the two required elements of liability, animus and adverse action. *Id.* at 1191-92. In a paragraph certain to lead to a great deal of litigation, the Court stated:

> Proctor, on the other hand, contends that the employer is not liable unless the de facto decisionmaker (the technical decisionmaker or the agent for whom he is the "cat's paw") is motivated by discriminatory animus. This avoids the aggregation of animus and adverse action, but it seems to us not the only application of general tort law that can do so. Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA. And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that are too remote, purely contingent, or indirect." . . . FN2 We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent." The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. . . . Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable." . . .
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> ---
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> FN2. Under the traditional doctrine of proximate cause, a tortfeasor is sometimes, but not always, liable when he intends to cause an adverse action and a different adverse action results. See Restatement (Second) Torts §§ 435, 435B and Comment a (1963 and 1964). That issue is not presented in this case since the record contains no evidence that

Mulally or Korenchuk intended any particular adverse action other than Staub's termination.

Id. at 1192.

G. Independent Judgment Is Not a Superseding Cause

Staub v. Proctor Hospital, __ **U.S**. __, 131 S.Ct. 1186, 190 L.R.R.M. (BNA) 2257, 111 Fair Empl.Prac.Cas. (BNA) 993 (2011) (Scalia, J.), reversed the Seventh Circuit's decision reported at 560 F. 3d 647 (7th Cir. 2009). The case involved a termination challenged under USERRA, where there was clear evidence of anti-military bias by plaintiff's first- and second-level supervisors, Janice Mulally and Michael Korenchuk, and clear evidence that they wanted to get rid of him, and a clueless decisionmaker, Linda Buck, who was the Vice-President of Human Resources. Ms. Buck relied on the representations of the supervisors, a complaint about plaintiff from a co-worker, Angie Day, and a review of plaintiff's personnel file. Ms. Buck did nothing to check the facts, even after plaintiff filed an internal complaint that the reasons for his termination had been fabricated. The Court rejected the argument that defendant was immunized from liability because the decisionmaker had exercised independent judgment:

> Moreover, the approach urged upon us by Proctor gives an unlikely meaning to a provision designed to prevent employer discrimination. An employer's authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors. Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.

Id. at 1192-93.

H. An Independent Investigation Is Not a Superseding Cause

Staub v. Proctor Hospital, __ **U.S**. __, 131 S.Ct. 1186, 190 L.R.R.M. (BNA) 2257, 111 Fair Empl.Prac.Cas. (BNA) 993 (2011) (Scalia, J.), reversed the Seventh Circuit's decision reported at 560 F. 3d 647 (7th Cir. 2009). The case involved a termination challenged under USERRA, where there was clear evidence of anti-military bias by plaintiff's first- and second-level supervisors, Janice Mulally and Michael Korenchuk, and clear evidence that they wanted to get rid of him, and a clueless decisionmaker, Linda Buck, who was the Vice-President of Human Resources. Ms. Buck relied on the representations of the supervisors, a complaint about plaintiff from a co-worker, Angie Day, and a review of plaintiff's personnel file. Ms. Buck did nothing to check the facts, even after plaintiff filed an internal complaint that the reasons for his termination had been fabricated. The Court rejected the argument that defendant was immunized from liability because the decisionmaker had conducted an independent investigation:

> Proctor suggests that even if the decisionmaker's mere exercise of independent judgment does not suffice to negate the effect of the prior discrimination, at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so. We decline to adopt such a hard-and-fast rule. As we have already acknowledged, the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause. . . . Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.

Id. at 1193 (citation omitted).

I. Intervening Cause

Vaughn v. Vilsack, 715 F.3d 1001, 1008 (**7th Cir.** 2013), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that adverse actions against plaintiff shortly after he settled his discrimination claims were actually caused by the settlement the defendant had just reached with the female employee who had filed repeated sexual harassment claims against plaintiff, obtained a state-court injunction against him for his admitted stalking and repeated compulsive contacting her.

J. "But-for Cause" is Not the Same as "Sole Cause"

The courts of appeals have generally held that a plaintiff can show "but for" causation without needing to show that a forbidden motive was the sole cause of the challenged employment action:

a) *Zann Kwan v. Andalex Group LLC*, 737 F.3d 834, 846, 120 Fair Empl.Prac.Cas. (BNA) 1805, 57 Employee Benefits Cas. 1833 (**2d Cir.** 2013) ("However, 'but-for' causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive.") (footnote omitted);

b) *Leal v. McHugh*, 731 F.3d 405, 415, 120 Fair Empl.Prac.Cas. (BNA) 44, 97 Empl. Prac. Dec. P 44,918 (**5th Cir.** 2013) ("By dismissing Appellants' complaint on the basis that they 'have asserted a mixed-motive case, which is prohibited,' the district court misread *Gross*, since 'but-for cause' does not mean 'sole cause.'");

c) *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339, 115 Fair Empl.Prac.Cas. (BNA) 845 (**6th Cir.** 2012) ("The intermediate employee's actions need not be the sole cause of

the adverse action; '[t]he decisionmaker's exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes.'") (citation to *Staub* omitted);

d) *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1278, 110 Fair Empl.Prac.Cas. (BNA) 4 (**10th Cir.** 2010) ("Accordingly, *Gross* does not disturb longstanding Tenth Circuit precedent by placing a heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action.")

K. "Sole Cause" Under the ADA?

Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 26 A.D. Cases 389 (6th Cir. 2012) (*en banc*), overruled several prior decisions and held that an ADA plaintiff does not need to show that disability discrimination was the sole cause of the challenged action. The court stated at 314-15:

> In adopting the company's proposed instruction, the district court did not walk alone. For the past seventeen years, our court has required district courts to instruct juries that ADA claimants may win only if they show that their disability was the "sole" reason for any adverse employment action against them. The term crept into our ADA jurisprudence in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir.1995), which involved claims under the ADA *and* the Rehabilitation Act of 1973, a happenstance that may explain why we blurred the distinction between the laws in the first place. . . . Relying on these similarities between the two laws (but neglecting to mention the differences between their causation standards), *Maddox* applied the Rehabilitation Act's causation standard to both claims because "[t]he ADA parallels the protection of the Rehabilitation Act." *Id.* at 846 n. 2.
>
> Consistent with *Maddox*, we used the "solely" standard in an ADA-only claim a year later . . . and before long that became the standard for relief under the ADA in this circuit . . . .
>
> The longer we have stood by this standard, the more out of touch it has become with the standards used by our sister circuits. At this point, no other circuit imports the "solely" test into the ADA. . . .
>
> Our interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong. . . .

(Citations omitted.)

L. "Sole Cause" Under § 501 of the Rehabilitation Act of 1973?

Pinkerton v. Spellings, 529 F.3d 513, 20 A.D. Cases 1095 (5th Cir. 2008) (*per curiam*), held that both the ADA and § 501—which covers Federal government employees—were subject to the "but-for" causation standard, not the "sole cause" standard of § 504 of the Rehabilitation Act. The opinion confusingly uses the term "motivating factor" to describe "but for" causation.

M. "Sole Cause" Under § 504 of the Rehabilitation Act of 1973?

The first sentence of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), is:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

(Emphasis supplied.) The courts have generally held that this means what it says.

N. Practical Problems with a "Sole Cause" Standard

Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113, 8 A.D. Cases 725 (3d Cir. 1998), involved an ADA Title III, Rehabilitation Act § 504, and whistleblower plaintiff who claimed two causes for his loss of medical staff privileges: his disability and his whistleblowing activities. The court stated at 124:

> Many courts, including our own, have opined as to the meaning of the causation requirement embodied in the phrase "solely by reason of" an individual's disability. The Second Circuit Court of Appeals, for example, held that the "solely by reason of" language was "designed to weed out section 504 claims where an employer can point to conduct or circumstances that are causally unrelated to the plaintiff's handicap." *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511, 515 (2d Cir.1991). We have previously stated that a plaintiff stating a claim under section 504 need not allege an intent to discriminate on the part of the employer. *See W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir.1995). Where the complaint alleges intentional discriminatory conduct, a plaintiff may make a prima facie case of causation if he was denied a benefit for which he was qualified "and was rejected under circumstances indicating discrimination on the basis of an impermissible factor." *Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir.1990) (quoting *Doe v. New York Univ.*, 666 F.2d 761, 766 (2d Cir.1981)); *see also Prewitt v. United States Postal Serv.*, 662 F.2d 292, 305 (5th Cir.1981).

Thus, "sole cause" does not always require discriminatory intent. The court went on to find that plaintiff did not in fact plead himself out of court by alleging a whistleblowing motive, because the allegations suggested that the Medical Center did not care about those complaints:

> . . . On the other hand, the complaint, at times, would allow a contrary inference that the hospital suspended appellant's staff privileges because of various whistle blowing activities. *Id.* ¶ 21, App. at 13-14 ("[B]ased on dissatisfaction with plaintiff's repeated articulated concerns regarding omissions in medical care at PMMC, defendant[ ] PMMC ... accused plaintiff of allegedly inappropriate behavior unrelated to the quality of patient care rendered by plaintiff."). Yet, that inference is undermined by the fact that Menkowitz had criticized hospital practices for over twenty years without suffering adverse consequences. *Id.* ¶ 20, App. at 13.

O. Special Problem of Causation in Constructive Discharge Cases

A number of courts have held that plaintiffs must prove, as an essential element of their constructive discharge claims, that the employer intended to force the employee to resign. Often, that is the case. However, it is also often the case that an employer creating a hostile working environment would prefer that the employee remain around, so that the employer can continue tormenting, or trying to seduce, the employee in question. I therefore believe that the cases so holding are wrongly decided.

1. Courts Requiring Proof of Employer's Intent to Force the Employee to Resign

Laster v. City of Kalamazoo, 746 F.3d 714, 727-28, 121 Fair Empl.Prac.Cas. (BNA) 1734 (**6th Cir.** 2014), affirmed in part and reversed in part the grant of summary judgment to the Title VII and Michigan Civil Rights Act defendant. The court stated the elements of a constructive-discharge claim:

> "A constructive discharge occurs when the employer, rather than acting directly, 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'" . . . To demonstrate a constructive discharge, Plaintiff must adduce evidence to show that 1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person, and 2) the employer did so with the intention of forcing the employee to quit. . . .
>
> In . . . we formally adopted the Fifth Circuit's approach to determining whether the first prong of the constructive discharge inquiry has been met, counseling that:
>
> > Whether a reasonable person would have [felt] compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.
>
> . . . (quoting *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir.2000)).

The court held that plaintiff had not shown enough evidence to show that defendant deliberately tried to get him to quit. Plaintiff actually resigned because of bad information, but an inadvertent error was responsible for the error. Nevertheless, the court agreed with the Seventh Circuit that there was an additional way to show a constructive discharge: "In other words, constructive discharge also occurs where, based on an employer's actions, 'the handwriting was on the wall and the axe was about to fall.'" *Id.* at 728 (citations omitted). The court held that plaintiff could not meet this standard either, because the employee who told him of the statements he had heard had no involvement with the decision and made clear he was guessing.

Ames v. Nationwide Mut. Ins. Co., 747 F.3d 509, 121 Fair Empl.Prac. Cas. (BNA) 1729 (**8th Cir.** 2014), affirmed the grant of summary judgment to the constructive discharge defendant. The court stated at 512-13:

> "To prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." . . . "In addition, an employee must give her employer a reasonable opportunity to resolve a problem before quitting." . . . "Evidence of the employer's intent can be proven 'through direct evidence or through evidence that the employer could have reasonably foreseen that the employee would quit as a result of its actions.'" . . .

(Citations omitted.) The court held that defendant's efforts to accommodate plaintiff negated any intention to make her quit. Moreover, the court held that plaintiff failed to give the defendant a reasonable opportunity to resolve her problems. The court stated at 514: "By not attempting to return to Hallberg's office to determine the availability of a wellness room or to contact human resources, Ames acted unreasonably and failed to provide Nationwide with the necessary opportunity to remedy the problem she was experiencing. We thus conclude that Ames has not met her burden of demonstrating constructive discharge." The court refused to adopt the alternative approach used in the Seventh Circuit.

2. <u>Courts Not Stating This Condition</u>

Freeman v. Dal-Tile Corp., 750 F.3d 413, 425, 122 Fair Empl.Prac.Cas. (BNA) 995 (**4th Cir.** 2014), recognized the utility of proof that an employer was trying to force the plaintiff to quit, but did not include this in its statements of the essential elements of a constructive-discharge claim:

> . . . An employee is considered constructively discharged "if an employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit." *Honor v. Booz–Allen & Hamilton, Inc.*, 383 F.3d 180, 186–87 (4th Cir.2004) (quoting *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353–54 (4th Cir.1995)) (internal quotation marks and citations omitted). Freeman must prove two elements to demonstrate constructive discharge: "(1) the deliberateness of [Dal–Tile's] actions, motivated by racial bias, and (2) the objective intolerability of the working conditions." *Id.* at 186–87.
>
> Here, Freeman did not present sufficient evidence to create a question of fact as to whether Dal–Tile deliberately attempted to induce her to quit, nor that her working conditions at the time she resigned were objectively intolerable. Rather, the evidence shows that within weeks from returning from a two month medical leave, Freeman voluntarily resigned from her position. She had had no contact with Koester for months, nor had he even been in the building at the same time as her since she had returned from leave. Freeman presented no evidence that Koester's harassment was still creating an objectively hostile work environment at the time she resigned, nor that Dal–Tile was allowing him to harass her in a deliberate attempt to force her to quit. Therefore, we affirm the district court's grant of summary judgment to Dal–Tile on the constructive discharge claim.

Sanders v. Lee County School Dist. No. 1, 669 F.3d 888, 893, 114 Fair Empl.Prac.Cas. (BNA) 705 (**8th Cir.** 2012), was a racial discrimination lawsuit brought by a white plaintiff. The court rejected defendants' argument that the offer of a new position barred a constructive discharge claim, stating that "[m]erely offering a different job to an employee does not necessarily shield an employer from liability for constructive discharge [.]" "If an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge." *Id.* (citations omitted).

P. Causation of Emotional Distress

Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 50 Fair Empl.Prac.Cas. (BNA) 742 (11th Cir. 1989) (subsequent history omitted), was a racial harassment case under 42 U.S.C. § 1981. "The jury returned a verdict for the plaintiff awarding $42,000 for past lost wages and benefits, $500,000 for future lost wages, $500,000 for mental distress, emotional harm or humiliation, $3,700 for medical expenses, and $2.5 million in punitive damages." *Id.* at 1508. The court held that the damages were excessive, including emotional distress damages, and ordered a new trial. It raised the question of the causation of plaintiff's damages: "Although the plaintiff produced evidence that she did suffer from stress caused by the hostile environment at the workplace, the trial judge correctly noted that there were many other unpleasant factors in her life which almost certainly contributed to her mental distress." *Id.* at 1516. The Eleventh Circuit cited the decision of the district court on that point, reported at 672 F.Supp. 1408, 1416 (M.D.Fla. 1987). The district court's opinion at the cited page said:

> Plaintiff had the burden of proving that the alleged discrimination by the Defendant caused the stress that resulted in her alleged emotional harm or humiliation. *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Plaintiff produced evidence that she did suffer from stress; however, the evidence she produced also showed that the majority of the stress she suffered was not created by Defendant. For example, Plaintiff was having trouble with her spouse because he had been named in a paternity suit by another woman. Moreover, Plaintiff had been in an automobile accident, had been having financial problems, had dietary problems, and had suffered with the illnesses and deaths of members of her family. In view of all of the evidence surrounding Plaintiff's non-job related stress, she did not prove with sufficient certainty that the alleged discrimination by Defendant caused her emotional harm. *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir.1985).

The case was retried, and the second jury "awarded Vance about a million dollars in compensatory and punitive damages on her section 1981 claim." *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1575, 61 Fair Empl.Prac.Cas. (BNA) 925 (11th Cir. 1993), *cert. denied*, 513 U.S. 1155 (1995). The Eleventh Circuit reversed, because of the Supreme Court's limitation of § 1981 to pre-formation conduct in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). However, the principle requiring proof of causation of damages is sound.