SYLLABUS
EMPLOYMENT DISCRIMINATION - FALL, 2013
PROFESSOR HOWARD EGLIT

The casebook for this course is Friedman, THE LAW OF EMPLOYMENT DISCRIMINATION (9th ed.) We meet on Monday and Wednesday from 6:00 - 7:25 p.m.

Students are expected to abide by the Student Handbook requirements and the Student Code of Conduct. I specifically call your attention to Section 9.1, which provides as follows:

Each student is expected to attend all classes regularly and punctually, to be prepared, [to] participate in the discussion, and [to] remain throughout the session. An instructor may notify the class of reasonable attendance requirements and may deduct credit or award the grade of WP or Incomplete if a student fails to meet the requirements.

I interpret "expected" in the first line to mean "required." However, I understand that there will be times when a student legitimately cannot attend class, and so I interpret "all" to mean "substantially all." These two emendations, or interpretations, are consistent with the second sentence of section 9.1, which provides that an instructor "may notify the class of reasonable attendance requirements," and are my way of tempering the rigor of the first sentence. As the foregoing language allows, I reserve the right to reduce the grade or award a grade of WP or Incomplete in the case of a student who is excessively absent.

The final exam for this course, which is scheduled for Friday, December 13, will be a closed-book, closed-note exam. With regard to the grade for the course, class participation can be taken into account in situations where a student is just on the edge of a higher grade. In other words -- and by way of example -- a B+ may be raised to an A- where the B+ is a high B+ and class participation was particularly good.

My plan is to try to do 40 or so pages per class. Frankly, I have never yet been able to stick to a firmly defined schedule, and I don't really expect to do so this time around. But at least the following matrix gives you some direction. (Just because in a
particular week we do not get to the material supposedly to be addressed in that week, you should not assume (as some have in the past for reasons that escape me) that we will not do that material -- we pick up in class where we left off in the preceding class.)

Week 1 (8/26 - 8/28)

Significance of work; discussion of employment-at-will doctrine; read Balla and Jacobson cases (on TWEN and on my school website); discussion of various provisions of Title VII, which is in the casebook appendix

Week 2 (9/4, 9/4) (no classes)

Week 3 (9/9, 9/11):

Casebook pp. 18-36, 62-89, 101-110

Week 4 (9/16, 9/18) (no class on Monday):

Casebook pp. 110-141, 882-893

Week 5 (9/23, 9/25):

Casebook pp. 144n.4-155, 172-183, 157-172, 322-343

Week 6 (9/30, 10/2):

Casebook pp. 265-287, 317-322, 863-882

Week 7 (10/7, 10/9):

Casebook pp. 221-264; University of Texas Southwestern Medical Center v. Nassar (TWEN and my school website)

Week 8 (10/14, 10/16):

Casebook pp. 362-384, 44-60 (up to note 4), 384-392, 60-61, 392-406

Week 9 (10/21, 10/18):

Casebook pp. 406-420, 183-221, Vance v. Ball State University (TWEN and my website); casebook pp. 428-436

Week 10 (10/28, 10/30):
Casebook pp. 437-454 (up to note 5), 1105-1118, 458-527

**Week 11 (11/4, 11/6):**

Casebook pp. 605-679

**Week 12 (11/11, 11/13):**

Casebook pp. 690-703, 816-862, 897n.9-900 (up to n.14), 903-904 (up to Oscar Mayer)

**Week 13 (11/18, 11/20):**

Casebook pp. 916-997

**Week 14 (11/25):**

Catching up to where we should be)

**Week 15 (12/2, 12/4) (make up days for Labor Day, Rosh Hashanah):**

Catching up (to where we should be)
Balla v. Gambro, Inc., 584 NE 2d 104 - Ill: Supreme Court 1991 - Google Scholar

584 N.E.2d 104 (1991)
146 Ill.2d 492
164 Ill.Dec. 892

Roger J. BALLA, Appellee,
V.
GAMBRO, INC., et al., Appellants.

No. 70842.

Supreme Court of Illinois.


*105 Pedersen & Houpt, P.C., Chicago (Arthur B. Stemberg, of counsel) for appellants.

Robert P. Cummins, Jerry Kokolis and Donald K.S. Petersen, Blickel & Brewer, Chicago, for amicus curiae American Corporate Counsel Association.

Maurice E. Bone and Dennis A. Rendleman, Springfield, for amicus curiae Illinois State Bar Assoc.

Alan O. Arno & Associates, Chicago (Alan O. Arno and Marilyn Martin of counsel) for appellee.

Justice CLARK delivered the opinion of the court:

The issue in this case is whether in-house counsel should be allowed the remedy of an action for retaliatory discharge.

Appellee, Roger Balla, formerly in-house counsel for Gambro, Inc. (Gambro), filed a retaliatory discharge action against Gambro, its affiliate Gambro Dialysatoren, KG (Gambro Germany), its parent company Gambro Lundin, AB (Gambro Sweden), and the president of Gambro in the circuit court of Cook County (Gambro, Gambro Germany and Gambro Sweden collectively referred to as appellants). Appellee alleged that he was fired in contravention of Illinois public policy and sought damages for the discharge. The trial court dismissed the action on appellants' motion for summary judgment. The appellate court reversed. (203 Ill.App.3d 67, 148 Ill.Dec. 445, 500 N.E.2d 1043.) We granted appellant's petition for leave to appeal (134 Ill.2d R. 315) and allowed amicus curiae briefs from the American Corporate Counsel Association and Illinois State Bar Association.


Appellee, Roger J. Balla, is and was at all times throughout this controversy an attorney licensed to practice law in the State of Illinois. On March 17, 1983, appellant executed an employment agreement with Gambro which contained the terms of appellee's employment. Generally, the employment agreement provided that appellee would "be responsible for all legal matters within the company and for personnel within the company's sales office." Appellee held the title of director of administration at Gambro. As director of administration, appellee's specific responsibilities included, inter alia: advising, counseling and representing management on legal matters; establishing and administering personnel policies; coordinating and overseeing corporate activities to assure compliance with applicable laws and regulations; and preventing or minimizing legal or administrative proceedings; and coordinating the activities *106 of the manager of regulatory affairs. Regarding this last responsibility, under Gambro's corporate hierarchy, appellee supervised the manager of regulatory affairs, and the manager reported directly to appellee.

In August 1983, the manager of regulatory affairs for Gambro left the company and appellee assumed the manager's specific duties. Although appellee's original employment agreement was not modified to reflect his new position, his annual compensation was increased and Gambro's corporate organizational chart reflected appellee's position as "Dir. of Admin./Personnel; General Counsel; Mgr. of Regulatory Affairs." The job description for the position described the manager as an individual "responsible for ensuring awareness of and compliance with federal, state and local laws and regulations affecting the company's operations and products." Requirements for the position were a bachelor of science degree

and three to five years in the medical device field plus two years experience in the area of
government regulations. The individual in the position prior to appellant was not an attorney.

In July 1985 Gambro Germany informed Gambro in a letter that certain dialyzers it had
manufactured, the clearness of which varied from the package insert, were about to be
shipped to Gambro. Referring to these dialyzers, Gambro Germany advised Gambro:

"For acute patients risk is that the acute uremic situation will not be improved in
spite of the treatment, giving continuous high levels of potassium, phosphate
and uraemia. The chronic patient may note the effect as a slow
progression of the uremic situation and depending on the interval between
medical check-ups the medical risk may not be overlooked."

Appellee told the president of Gambro to reject the shipment because the dialyzers did not comply
with FDA regulations. The president notified Gambro Germany of its decision to reject
the shipment on July 12, 1985.

However, one week later the president informed Gambro Germany that Gambro would
accept the dialyzers and "sell [them] to a unit that is not currently our customer but who buys
only on price." Appellee contends that he was not informed by the president of the decision to
accept the dialyzers but became aware of it through other Gambro employees. Appellee
maintains that he spoke with the president in August regarding the company's decision to
accept the dialyzers and told the president that he would do whatever necessary to stop the
sale of the dialyzers.

On September 4, 1985, appellee was discharged from Gambro's employment by its
president. The following day, appellee reported the shipment of the dialyzers to the FDA. The
FDA seized the shipment and determined the product to be "adulterated within the meaning
of section 501(f) of the [Federal Act]."

On March 19, 1986, appellee filed a four-count complaint in tort for retaliatory discharge
seeking $22 million in damages. Counts III and IV for emotional distress were dismissed from
the action, as was the president in an order entered by the trial court on November 5, 1986.

On July 28, 1987, Gambro filed a motion for summary judgment. Gambro argued that
appellee, as an attorney, was precluded from filing a retaliatory discharge action in light of the
150 Ill. App.3d 21, 103 Ill. Dec. 322, 501 N.E.2d 343. Gambro Germany and Gambro Sweden
joined in Gambro's motion. Appellee argued that while the Herbst opinion declined to
extend the tort of retaliatory discharge to the plaintiff attorney before the court, the opinion did
not foreclose the possibility of extending the tort in the future. Appellee argued that the
plaintiff in Herbst was in-house counsel for a corporation whose duties were restricted to
legal matters (Herbst, 150 Ill. App.3d at 26, 103 Ill. Dec. 322, 501 N.E.2d 343), whereas he
served as the director of administration and personnel and manager of regulatory affairs as
well as general counsel for Gambro. Appellee argued that a question of fact existed as to
whether he was discharged "for the performance of a purely legal function.

On November 30, 1988, the trial court granted appellee's motion for summary judgment. In
its opinion, the trial court specifically stated that "the very ground [appellee's] claim
relies on the basis for retaliatory discharge all [sic] involves the decisions which he made applying
law to fact to determine whether these things complied with the federal regulations, and that is
clearly a legal work." Thus, the trial court concluded that the duties appellee was performing
which led to his discharge were "conduc[ing] clearly within the attorney-client relationship" and
that Gambro had the "absolute right" to discharge its attorney. On appeal, the court below held
that an attorney is not barred as a matter of law from bringing an action for retaliatory
discharge. (203 Ill.App.3d at 83, 148 Ill.Dec. 448, 560 N.E.2d 1043.) Rather, determination
of whether an attorney has standing to bring the action was based on the following three-part
test:

"(1) whether [the attorney's] discharge resulted from information he learned as a
"layman" in a nonlegal position; (2) whether [the attorney] learned the
information as a result of the attorney/client relationship, if so, whether the
information was privileged, and if it was privileged, whether the privilege was
waived; and (3) whether there were any countervailing public policies favoring
disclosure of privileged information learned from the attorney/client

The court remanded for a determination of these questions of fact.

We agree with the trial court that appellee does not have a cause of action against Gambro
for retaliatory discharge under the facts of the case at bar. Generally, this court accepts the
proposition that "an employer may discharge an employee-at-will for any reason or for no
reason [at all]." (Palillow v. City of Gary (1981), 142 Ill.2d 485, 555, 154 Ill. Dec. 649, 568
N.E.2d 1352.) However, in Kelso v. Motorola, Inc. (1978), 74 Ill.2d 272, 196 Ill. Dec. 559, 384
N.E.2d 353, this court first recognized the limited and narrow tort of retaliatory discharge. In
Kelso, an at-will employee was fired for filing a worker's compensation claim against her
employer. After examining the history and purpose behind the Workers' Compensation Act to
determine the public policy behind its enactment, this court held that the employee should
have a cause of action for retaliatory discharge. This court stressed that employers could
fire employees for filing workers' compensation claims, the public policy behind the enactment
of the Workers' Compensation Act would be frustrated.

Subsequently, in Palmeteer v. International Harvester Co. (1991), 85 Ill.2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876, this court again examined the tort of retaliatory discharge. In Palmeteer, an employee was discharged for informing the police of suspected criminal activities of a co-employee, and because he agreed to provide assistance in any investigation and trial of the matter. Based on the public policy favoring the investigation and prosecution of crime, this court held that the employee had a cause of action for retaliatory discharge. Further, we stated:

"All that is required to bring a cause of action for retaliatory discharge is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy."

Palmeteer. 85 Ill.2d at 134, 52 Ill. Dec. 13, 421 N.E.2d 876.

In this case it appears that Gambro discharged appellee, an employee of Gambro, in retaliation for his activities, and this discharge was in contravention of a clearly mandated public policy. Appellee allegedly told the president of Gambro that he would do whatever was necessary to stop the sale of the "misbranded and/or adulterated" dialyzers. In appellee's eyes, the use of these dialyzers could cause death or serious bodily harm to patients. As we have stated before, "[t]here is no public policy "108 more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." (See Palmeteer, 85 Ill.2d at 133, 52 Ill. Dec. 13, 421 N.E.2d 876.) Wheeler v. Caterpillar Tractor Co. (1985), 108 Ill.2d 602, 511, 92 Ill. Dec. 561, 485 N.E.2d 372.) Ill. Const. 1970, Preamble.) However, in this case, appellee was not just an employee of Gambro, but also general counsel for Gambro.

As noted earlier, in Herbst v. North American Co. for Life & Health Insurance (1986), 150 Ill.App.3d 21, 103 Ill. Dec. 322, 501 N.E.2d 343, our appellate court held that the plaintiff, an employee and chief legal counsel for the defendant company, did not have a claim for retaliatory discharge against the company due to the presence of the attorney-client relationship. (See Herbst, 150 Ill.App.3d at 30, 103 Ill. Dec. 322, 501 N.E.2d 343.) Under the facts of that case, the defendant company allegedly requested the plaintiff to destroy or remove discovery information which had been requested in lawsuits pending against the company. The plaintiff refused arguing that such conduct would constitute fraud and violate several provisions of the Illinois Code of Professional Responsibility. Subsequently, the defendant company discharged the plaintiff.

The appellate court refused to extend the tort of retaliatory discharge to the plaintiff in Herbst primarily because of the special relationship between an attorney and client. The court stated:

"The mutual trust, exchanges of confidence, reliance on judgment, and personal nature of the attorney-client relationship demonstrate the unique position attorneys occupy in our society."

(Herbst, 150 Ill.App.3d at 29, 103 Ill. Dec. 322, 501 N.E.2d 343.)

The appellate court recited a list of factors which make the attorney-client relationship special such as: the attorney-client privilege regarding confidential communications, the fiduciary duty an attorney owes to a client, the right of the client to terminate the relationship without notice, and the fact that a client has exclusive control over the subject matter of the litigation and a client may dismiss or settle a cause of action regardless of the attorney's advice. (See Herbst, 150 Ill.App.3d at 27-28, 103 Ill. Dec. 322, 501 N.E.2d 343.) Thus, in Herbst, since the plaintiff's duties pertained strictly to legal matters, the appellate court determined that the plaintiff did not have a claim for retaliatory discharge.

We agree with the conclusion reached in Herbst that, generally, in-house counsel do not have a claim under the tort of retaliatory discharge. However, we base our decision as much on the nature and purpose of the tort of retaliatory discharge, as on the effect on the attorney-client relationship that extending the tort would have. In addition, at this time, we caution that our holding is confided by the fact that appellee is and was at all times throughout this controversy an attorney licensed to practice law in the State of Illinois. Appellee is and was subject to the Illinois Code of Professional Responsibility (see the Rules of Professional Conduct which replaced the Code of Professional Responsibility, effective August 1, 1990), adopted by this court. The tort of retaliatory discharge is a limited and narrow exception to the general rule of at-will employment. (See Fellhauer, 142 Ill.2d at 505, 154 Ill. Dec. 549, 568 N.E.2d 870.) The tort seeks to achieve "a proper balance... among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out." (Fellhauer, 142 Ill.2d at 507, 154 Ill. Dec. 549, 568 N.E.2d 870, quoting Palmeteer, 85 Ill.2d at 129, 52 Ill. Dec. 13, 421 N.E.2d 876.) Further, as stated in Palmeteer, "[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy... " (Emphasis added.) Palmeteer, 85 Ill.2d at 133, 52 Ill. Dec. 13, 421 N.E.2d 876.

In this case, the public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel. "108 Appellee was required under the Rules of Professional Conduct to report Gambro's intention to sell the "misbranded and/or adulterated" dialyzers. Rule 1.8(b) of the Rules of Professional Conduct reads:

"A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury." (Emphasis added.) (154 Ill.2d R. 1.8(b)).

Appellee alleges, and the FDA's seizure of the dialyzers indicates, that the use of the

dialyzers would cause death or serious bodily injury. Thus, under the above-cited rule, appellee was under the mandate of this court to report the sale of these dialyzers.

In his brief to this court, appellee argues that not extending the tort of retaliatory discharge to in-house counsel would present attorneys with a "Horser's choice." According to appellee, in-house counsel would face two alternatives: either comply with the client/employer's wishes and risk both the loss of a professional license and exposure to criminal sanctions, or decline to comply with client/employer's wishes and risk the loss of a full-time job and the attendant benefits. We disagree. Unlike the employees in Kelsay who this court recognized would be left with the difficult decision of choosing between whether to file a workers' compensation claim and risk being fired, or retaining their jobs and losing their right to a remedy (see Kelsay, 74 Ill.2d at 162, 33 Ill. Dec. 599, 384 N.E.2d 593), in-house counsel plainly are not confronted with such a dilemma. In-house counsel do not have a choice of whether to follow their ethical obligations, as attorneys licensed to practice law, or follow the illegal and unethical demands of their clients. In-house counsel must abide by the Rules of Professional Conduct. Appellee had no choice but to report to the FDA Gambro's intention to sell or distribute these dialyzers, and consequently protect the aforementioned public policy.

In addition, we believe that extending the tort of retaliatory discharge to in-house counsel would have an undesirable effect on the attorney-client relationship that exists between these employers and their in-house counsel. Generally, a client may discharge his attorney at any time, with or without cause. (Rhoades v. Nordoff & Western Ry. Co. (1979), 78 Ill.2d 217, 228, 53 Ill. Dec. 685, 426 N.E.2d 398.) This rule applies equally to in-house counsel as it does to outside counsel. Further, this rule "recognizes that the relationship between an attorney and client is based on trust and that the client must have confidence in his attorney in order to ensure that the relationship will function properly." (Rhoades, 78 Ill.2d at 228, 53 Ill. Dec. 685, 426 N.E.2d 398; Miller v. Sobollem (1984), 48 Ill.App.2d 182, 190, 205 N.E.2d 680; Preckler v. First Trust & Savings Bank (1977), 59 Ill.App.3d 764, 783, 110 Ill.Dec. 385, 389.) As stated in Herbster, "the attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets, disclosures, and information that otherwise would not be divulged to third persons. This is particularly true when the attorney is a relative of a client." (Herbster, 150 Ill.App.2d at 377, 292, 501 Ill.Dec. 543.) We believe that if in-house counsel are granted the right to sue their employers for retaliatory discharge, employers might be less willing to be forthright and candid with their in-house counsel. Employers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit.

We recognize that under the Illinois Rules of Professional Conduct, attorneys shall reveal client confidences or secrets in certain situations (see 134 Ill.2d Rules 1.6(a), (b), (c), and (d)) and thus one might expect employers/clients to be naturally hesitant to rely on in-house counsel for advice regarding this potentially questionable conduct. However, the danger exists that attorneys might further limit their communication with their in-house counsel. As stated in Upjohn Co. v. United States (1981), 446 U.S. 345, 389, 101 S.Ct. 677, 682, 110 L.Ed.2d 564, 591, regarding the attorney-client privilege:

"Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." (Emphasis added.)

If extending the tort of retaliatory discharge might have a chilling effect on the communications between the employer/employee and the in-house counsel, we believe that it is more wise to refrain from doing so.

Our decision not to extend the tort of retaliatory discharge to in-house counsel also is based on other ethical considerations. Under the Rules of Professional Conduct, appellee was required to withdraw from representing Gambro if continued representation would result in the violation of the Rules of Professional Conduct by which appellee was bound, or if Gambro discharged the appellee. (See 134 Ill.2d Rules 1.16(a)(2), (a)(4).) In this case, Gambro did discharge appellee, and according to appellee's claims herein, his continued representation of Gambro would have resulted in a violation of the Rules of Professional Conduct. Appellee argues that such a choice of withdrawal is "simply a question of compassion, and is completely at odds with contemporary realities facing in-house attorneys." These contemporary realities apparently are the economic ramifications of losing one's position as in-house counsel. However difficult economically and perhaps emotionally it is for in-house counsel to continue representing an employer/employee, we refuse to allow in-house counsel to sue their employer/employee for damages because they obeyed their ethical obligations. In this case, appellee, in addition to being an employee at Gambro, is first and foremost an attorney bound by the Rules of Professional Conduct. These Rules of Professional Conduct hope to articulate in a concrete fashion certain values and goals such as defending the integrity of the judicial system, promoting the administration of justice and protecting the integrity of the legal profession. (See III. Const.1970, Preamble.) An attorney's obligation to follow these Rules of Professional Conduct should not be the foundation for a claim of retaliatory discharge.

We also believe that it would be inappropriate for the employer/employee to bear the economic costs and burdens of their in-house counsel's adhering to their ethical obligations under the Rules of Professional Conduct. Presumably, in situations where an in-house counsel chooses his or her ethical obligations and reveals certain information regarding the employer/employee, the attorney-client relationship will be irreversibly strained and the client will more than likely discharge his in-house counsel. In this scenario, if we were to grant the in-house counsel the right to sue the client for retaliatory discharge, we would be shifting the burden and costs of

obeying the Rules of Professional Conduct from the attorney to the employer/employee. The employer/client would be forced to pay damages to its former in-house counsel to essentially mitigate the financial harm the attorney suffered for having to abide by Rules of Professional Conduct. This, we believe, is impermissible for all attorneys know or should know that at certain times in their professional career, they will have to forgo economic gains in order to protect the integrity of the legal profession.

Our review of cases from other jurisdictions dealing with this issue does not persuade us to hold otherwise. In Willy v. Coastal Corp. (S.D.Tex.1988), 847 F.Supp. 116, the district court declined to extend the tort of retaliatory discharge to the wrongful termination of in-house counsel. In that case, the plaintiff, in-house counsel for the defendant company, alleged that he was fired because he required the defendant to comply with environmental laws. The court held that the ethical canons and disciplinary rules set forth the standards for attorneys to follow and that they require an attorney presentened with ethical conflicts to withdraw from representation. **111 (Willy, 847 F.Supp. at 116.) Further, once the client elects to terminate the relationship, "the attorney is required mandatorily to withdraw from any further representation of that client." (Emphasis in original.) Willy, 847 F.Supp. at 116.

Also, in Nordling v. Northern States Power Co. (Minn.App.1991), 465 N.W.2d 81, the appellate court of Minnesota, relying exclusively on our appellate court's decision in Herbster, held that the plaintiff's status as in-house counsel precluded not only a breach-of-contract claim against the defendant company, but also the plaintiff's retaliatory discharge claim. (Nordling, 465 N.W.2d at 86 n.1.) In Nordling, the court stated:

"The client's unfettered right to discharge an attorney is deemed necessary because of the confidential nature of the relationship between attorney and client and the evil that would be engendered by friction or distrust." (Nordling, 465 N.W.2d at 86.)

Since the relationship between the plaintiff and the defendant company required an atmosphere of continued mutual trust, the breakdown of that trust allowed the defendant to discharge the plaintiff without liability.

In contrast to the two cases discussed above which specifically held that in-house counsel do not have a right to sue for retaliatory discharge, two other cases have allowed in-house counsel to sue their employer for wrongful termination. However, both cases are distinguishable from our holding. In Parker v. M & T Chemicals, Inc. (1989), 238 N.J.Super. 455, 568 A.2d 215, the superior Court of New Jersey construed that State's "Whistleblower Act" as compelling a retaliatory employer to pay damages to an employee-attorney who is wrongfully discharged or mistreated * * * for any reason which is violative of law, fraudulent, criminal, or incompatible with a clear mandate of New Jersey's public policy concerning public health, safety or welfare." (Parker, 238 N.J.Super. at 469, 568 A.2d of 220.) The court also noted in distinguishing the aforementioned Herbster and Willy opinions that they did not involve "whistle-blower" statutes, only the right of in-house counsel to maintain a cause of action for retaliatory discharge at common law. Parker, 238 N.J.Super. at 469, 568 A.2d at 220.

In Mourad v. Automobile Club Insurance Association (1991), 186 Mich.App. 715, 465 N.W.2d 398, the plaintiff, as in-house counsel for the defendant company, sued the defendant for, inter alia, breach of employment contract and retaliatory demotion. The appellate court of Michigan determined that the plaintiff had a cause of action for breach of a just-cause contract, but not for retaliatory demotion. The court distinguished the aforementioned Herbster, Willy and Parker cases as involving the issue of whether the "state will recognize a public policy exception to the typical employment-at-will contract." (Mourad, 186 Mich.App. at 725, 465 N.W.2d at 399.) In this case, however, the Michigan court stated that the defendant company's policy manual and pamphlets had created a contract to terminate for just cause. (Mourad, 186 Mich.App. at 720, 465 N.W.2d at 308.) Thus, plaintiff's claim for retaliatory demotion was an alternative theory of recovery from a breach of a just cause contract, and could not be sustained as an independent claim for recovery. (Mourad, 186 Mich.App. at 726, 465 N.W.2d at 400.) The Michigan court made no statements regarding the propriety of in-house counsel's bringing claims for retaliatory discharge.

In light of our decision that in-house counsel generally are not entitled to bring a cause of action for retaliatory discharge against their employer/employee, we must consider appellee's argument that he learned of the dialysis' defect and Gambro's noncompliance with FDA regulations in his role as manager of regulatory affairs at Gambro, and not as corporate counsel. Appellee argues that, if he did learn of Gambro's alleged violation of FDA regulations as manager of regulatory affairs, and acted pursuant to his duties as manager of regulatory affairs, he is merely an "employee" at Gambro and therefore should be entitled to bring a cause of action for retaliatory discharge. The appellate court in this matter *112 agreed with appellee and held that a question of fact exists as to whether "[appellee's] discharge resulted from information he learned he became a "layman" in a nonlegal position." 203 Ill.App.3d at 63, 148 Ill.Dec. 446, 560 N.E.2d 1043.

We disagree. A motion for summary judgment should be granted when the pleadings, depositions, and affidavits reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (See III.Rev.Stat.1989, ch. 110, par. 2-1005(c).) In this case, there is no issue of fact as to whether appellee learned of the Gambro's violations of FDA regulations as "layman," as opposed to general counsel for Gambro, for in exonerating the pleadings, exhibits and appellee's deposition testimony, we find that appellee was acting as Gambro's general counsel throughout this ordeal. As noted earlier, at the time of this controversy, appellee not only was acting as general counsel for Gambro, but also was its manager of regulatory affairs. Under the corporate hierarchy at

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Gambro, the corporate counsel supervised the manager of regulatory affairs. Thus, appellee "supervised" himself in his role as manager of regulatory affairs. More importantly, based on the official job descriptions supplied by Gambro, it is clear that the general counsel and the manager of regulatory affairs performed essentially the same roles with regards to FDA compliance. The job description for the director of administration, which defined the position of general counsel, required appellee to "coordinate[] and oversee[] corporate activities to assure compliance with applicable laws and regulations, and prevent[] or minimize[] [the] possibility of legal or administrative proceedings." Along the same vein, the job description for the manager of regulatory affairs required appellee to "establish programs and procedures to ensure compliance with applicable FDA laws and regulations." Thus, both roles had equivalent duties for ensuring compliance with FDA regulations.

Appellee's deposition testimony discredits his claim that he learned of the dialyzers in his role as manager of regulatory affairs. First, appellee conceded that the question of whether a medical device could be legally sold under an FDA regulation is essentially a legal question. Second, appellee admitted that he did not consciously change "frames of mind" when acting as general counsel or manager of regulatory affairs. Third, in response to a question of whether he had a legal opinion as to whether the dialyzers were "misbranded and/or adulterated," appellee stated that "as a private person and as an attorney, I was of the opinion that the dialyzers were misbranded and/or adulterated." Fourth, appellee stated that he was acting as corporate counsel when he advised the president of Gambro of the criminal penalties for the interstate shipment of "misbranded and/or adulterated" products. Lastly, appellee admitted that he was always an attorney licensed by the State of Illinois whenever he performed his duties as manager of regulatory affairs.

Appellee relies on the fact that previous managers of regulatory affairs at Gambro were not attorneys, and the position only required a bachelor of science degree and three to five years experience in the medical device field as evidence that his position is a nonlegal position. We disagree. Although previous managers evidently were not attorneys, the two roles appellee performed for Gambro were so intertwined and inextensively bound, we fail to see how appellee was not performing his general counsel functions in the matter. As support for our conclusion, we quote from the ABA Formal Opinion No. 328, which addressed the dual role situation appellee confronted:

"If the second occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law, the lawyer is considered to be engaged in the practice of law while conducting that occupation." (ABA Formal Opinion No. 328, at 65 (June 1972).)

In this case, as the trial court explained, appellee investigated certain facts, applied the law to those investigated facts and reached certain conclusions as to whether "113 these dialyzers complied with the FDA regulations. In that sense, appellee inescapably engaged in the practice of law. Consequently, although appellee may have been the manager of regulatory affairs for Gambro, his discharge resulted from information he learned as general counsel, and from conduct he performed as general counsel.

For the foregoing reasons, the decision of the appellate court is reversed, and the decision of the trial court is affirmed.

Appellee court reversed; circuit court affirmed.

Justice FREEMAN, dissenting:

I respectfully dissent from the decision of my colleagues. In concluding that the plaintiff attorney, serving as corporate in-house counsel, should not be allowed a claim for retaliatory discharge, the majority first reasons that the public policy implicated in this case, i.e., protecting the lives and property of Illinois citizens, is adequately safeguarded by the lawyer's ethical obligation to reveal information about a client as necessary to prevent acts that would result in death or serious bodily harm (113 Ill.2d R. 1.18(b)). I find this reasoning fatally flawed.

The majority's reasoning because as a matter of law, an attorney cannot even contemplate ignoring his ethical obligations in favor of continuing in his employment. I agree with this conclusion as a matter of law: However, to say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality. Specifically, it ignores that, as unfortunate for society as it may be, attorneys are no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families.

I would like to believe, as my colleagues apparently conclude, that attorneys will always "do the right thing" because the law says that they must. However, my knowledge of human nature, which is not much greater than the average layman's, and, sadly, the recent scandals involving the bench and bar of Illinois are more than sufficient to dispel such a belief. Just as the ethical obligations of the lawyers and judges involved in those scandals were inadequate to ensure that they would not break the law, I am afraid that the lawyer's ethical obligation to "blow the whistle" is likewise an inadequate safeguard for the public policy of protecting lives and property of Illinois citizens.

As reluctant as I am to concede it, the fact is that this court must take whatever steps it can, within the bounds of the law, to give lawyers incentives to abide by their ethical obligations, beyond the satisfaction inherent in their doing so. We cannot continue to delude ourselves and the people of the State of Illinois that attorneys' ethical duties, alone, are always sufficient

to guarantee that lawyers will "do the right thing." In the context of this case, where doing "the right thing" will often result in termination by an employer bent on doing "the wrong thing," I believe that the incentive needed is recognition of a cause of action for retaliatory discharge, in the appropriate case.

The majority also bases its holding upon the reasoning that allowing in-house counsel a cause of action for retaliatory discharge will have a chilling effect on the attorney-client relationship and the free flow of information necessary to that relationship. This reasoning completely ignores what is very often one of the basic purposes of the attorney-client relationship, especially in the corporate client-in-house counsel setting. More importantly, it gives preeminence to the public policy favoring an unfettered right to discharge an attorney, although "[t]here is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." Palmetto v. International Harvester Co. (1981), 86 Ill. 2d 124, 132, 52 Ill. Dec. 13, 421 N.E.2d 676 (citing, inter alia, Ill. Const. 1970, Preamble).

114 One of the basic purposes of the attorney-client relationship, especially in the corporate "114 client-in-house counsel setting, is for the attorney to advise the client as to, exactly, what conduct the law requires so that the client can then comply with that advice. Given that purpose, allowing in-house counsel a cause of action for retaliatory discharge would chill the attorney-client relationship and discourage a corporate client from communicating freely with the attorney only where, as here, the employer decides to go forward with particular conduct, regardless of advice that it is contrary to law. I believe that, just as in-house counsel might reasonably so assume, this court is entitled to assume that corporate clients will rarely so decide. As such, to allow a corporate employer to discharge its in-house counsel under such circumstances, without fear of any sanction, is truly to give the assistance and protection of the courts to scoundrels.

Moreover, to recognize and sanction the corporate employer's freedom (as opposed to its "right") to discharge its in-house counsel under such circumstances, by denying the in-house counsel a cause of action for retaliatory discharge, is to exalt the at-will attorney-client contractual relationship above all other considerations, including the most important and fundamental public policy of protecting the lives and property of citizens. Such a result manifestly ignores one of the fundamental rules of contract law, viz., that individuals are presumed to have contracted with knowledge of the existing law and such laws must be complied with and form part of their contract as fully as if they were expressly referred to and incorporated into its terms. (Scholes v. Jurell (1980), 87 Ill. App. 3d 624, 44 Ill. Dec. 267, 410 N.E.2d 267.) Additionally, this is not, strictly speaking, a contract construction case. However, where, as here, the court's holding in essence involves the construction of a contract and the impact of competing public policies thereon, the foregoing rule should not be ignored.

In holding as it does, the majority also reasons that an attorney's obligation to follow the Rules of Professional Conduct should not be the basis for a claim of retaliatory discharge.

Preliminarily, I would note that were an employee's desire to obey and follow the law an insufficient basis for a retaliatory discharge claim, Palmetto would have been decided differently. In this regard, I do not believe any useful purpose is served by distinguishing attorneys from ordinary citizens. It is incontrovertible that the law binds all men, kings and paupers alike. (See City of Chicago v. Weiss (1972), 51 Ill. 2d 119, 222, 281 N.E.2d 319, quoting Cora v. Louisiana (1955), 359 U.S. 546, 79 S.Ct. 471, 39 L.Ed. 469; 13 L.Ed.2d 467, 498 (""[t]here is a "positive duty and responsibility on the part of all citizens to obey all valid laws and regulations"").) An attorney should not be punished simply because he has ethical obligations imposed upon him over and above the general obligation to obey the law which all men have. Nor should a corporate employer be protected simply because the employee it has discharged for "blowing the whistle" happens to be an attorney. I find the majority's reasoning that an attorney's ethical obligations should not be the basis of a retaliatory discharge claim faulty for another reason. In so concluding, the majority ignores the employer's decision to persist in the questionable conduct which its in-house counsel advised was illegal. It is that conduct, not the attorney's ethical obligations, which is the predicate of the retaliatory discharge claim. That conduct is the true predicate of the claim because it is what required the attorney to act in compliance with his ethical obligations and thereby resulted in his discharge by the employer. As such, granting the attorney a claim for retaliatory discharge simply allows recovery against the party bent on breaking the law, rather than rewarding an attorney for complying with his ethical obligations.

Additionally, I cannot share the majority's solicitude for employers who discharge in-house counsel, who comply with their ethical obligations, by agreeing that they should not bear the economic burden which that compliance imposes upon the attorney. Unlike the majority, I do not believe that it is the attorney's compliance with his ethical obligations which imposes economic burdens "115 upon him. Rather, those burdens are imposed upon him by the employer's persistence in conduct the attorney has advised is illegal and by the employer's wrongful termination of the attorney once he advises the employer that he must comply with those obligations.

Similarly, I do not believe that this case implicates any knowledge on an attorney's part that, in order to protect the integrity of the legal profession, he will have to forgo prospective economic gain. Plaintiff here did not merely forgo the prospect of economic gain in order to comply with his ethical obligations. Rather, he was wrongfully deprived of continued employment and its attendant benefits, economic and otherwise, simply because he sought to competently represent his client within the bounds of the law. 134 Ill. 2d 472, Rules of Professional Conduct.
In this same regard, it should be borne in mind that this case involves an attorney discharged from his employment, not one who has voluntarily resigned due to his ethical obligations. I believe the majority's reasoning, in general, and with respect to the question of who should bear the economic burdens of the attorney's loss of job, specifically, would be valid grounds for denying a cause of action to an attorney who voluntarily resigns, rather than is discharged. By focusing upon the immediate economic consequences of the discharge, the majority overlooks the very real possibility that in-house counsel who is discharged, rather than allowed to resign in accordance with his ethical obligations once the employer's persistence in illegal conduct is evident to him, will be stigmatized within the legal profession. That stigma and its apparent consequences, economic and otherwise, in addition to the immediate economic consequences of a discharge, also militate strongly in favor of allowing the attorney a claim for retaliatory discharge.

Finally, with respect to the foreign case law cited and discussed by the majority, suffice it to say that I do not find it as clearly one-sided as does the majority.

Of particular relevance is Park v. M & T Chemicals, Inc. (1989), 236 N.J. Super. 451, 568 A.2d 215. The majority distinguishes Park as involving the New Jersey "whistle-blower" statute, rather than a common law action for retaliatory discharge, like this case and Herbster v. North American Co. for Life & Health Insurance (1988), 190 Ill. App. 3d 21, 103 Ill. Dec. 322, 501 N.E.2d 243. In so doing, the majority ignores that the New Jersey Superior Court viewed the statute as a recognition by the New Jersey legislature of a preexisting common law tort cause of action for retaliatory discharge. (Park, 236 N.J. Super. at 459, 568 A.2d at 218.) It also ignores that the Park court specifically distinguished Herbster as not involving the constitutionality of a "whistle-blower" statute, rather than as merely involving a common law retaliatory discharge claim. 236 N.J. Super. at 459, 568 A.2d at 220.

Inasmuch as the "whistle-blower" statute being construed in Park recognized a preexisting common law tort cause of action for retaliatory discharge, the fact that Herbster and this case involve such actions is an insufficient ground upon which to distinguish Park. As such, the reasoning of the Park court in allowing an attorney a claim for retaliatory discharge, albeit on a statutory basis, should not be so blithely dismissed by the majority.

Ultimately, the court's decision in the instant case does nothing to encourage respect for the law by corporate employers nor to encourage respect by attorneys for their ethical obligations. (Cf. Park, 236 N.J. Super. at 460, 463, 568 A.2d at 220; 222 (the court recognized that its holding should discourage employers from inducing employee-attorneys to participate in or condone illegal schemes, encourage an attorney's resolve to resist such inducements because they would henceforth enjoy some specific statutory protections, and reinforce integrity and ethical professional practice).) Therefore, I must respectfully dissent.

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JUSTICE NICKELS delivered the opinion of the court:

We are asked here to consider the issue of whether an attorney who has been discharged by his law firm employer should be allowed the remedy of an action for retaliatory discharge. We hold that an attorney may not maintain such an action.

BACKGROUND

Plaintiff, Alan P. Jacobson, filed a one-count complaint in the circuit court of Cook County against the law firm of Knepper & Moga, P.C. (hereinafter, the firm), alleging that he had been wrongfully discharged in retaliation for reporting the firm's illegal practices to a principal partner of the firm. In his complaint, plaintiff made the following factual allegations. In July 1994, plaintiff was hired as an associate attorney of the firm. Shortly thereafter, plaintiff discovered that the firm was filing consumer debt collection actions in violation of the venue provisions of the Fair Debt Collection Practices Act (15 U.S.C. §1692i(a)(2)(B) (1988)) and the Illinois Collection Agency Act (225 ILCS 425/9(20) (West 1994)). Plaintiff spoke with James Knepper, one of the firm's principal partners, regarding the filing practice and was advised that the matter would be remedied.

In April 1995, plaintiff was given the responsibility of reviewing and signing all complaints filed by the firm in consumer debt collection cases. In this role, plaintiff learned that the firm continued to file actions in violation of the venue provisions of the above-referenced acts. Plaintiff reiterated his complaint to Knepper, who again assured plaintiff that the practice would be corrected. Shortly thereafter, plaintiff was relieved of the responsibility to review and sign complaints in consumer debt collection cases. Less than three months later, plaintiff discovered that the firm had not ceased the practice of filing complaints in the improper venue. Plaintiff approached Knepper regarding the matter for a third time. Approximately two weeks later, plaintiff was terminated.

Plaintiff's complaint alleged that he had been discharged in retaliation for his insistence that the firm cease its practice of filing consumer debt collection actions in the wrong venue. The firm filed a motion to dismiss the action pursuant to section 2-615(a) of the Code of Civil Procedure (735 ILCS 5/2-615(a) (West 1994)). Citing Balla v. Gambro, Inc., 145 Ill. 2d 492 (1991), and Herbstro v. North American Co. for Life & Health Insurance, 150 Ill. App. 3d 21 (1986), in support of its motion, the firm argued that Illinois courts have refused to extend the tort of retaliatory discharge to employees who are licensed...
attorneys.

The circuit court denied defendant's motion to dismiss. However, the circuit court certified the following question of law for interlocutory appeal, pursuant to Supreme Court Rule 308 (155 Ill. 2d R. 308):

"Do the holdings in [Herbster] and [Balla] prevent an attorney licensed to practice in the State of Illinois from maintaining a cause of action for the Tort of Retaliatory Discharge against his non-client law firm employer due to the pre-eminence of the Rules of Professional Conduct?"

The appellate court denied the firm's Rule 308 application for leave to appeal. The firm then filed a petition for leave to appeal to this court (166 Ill. 2d R. 315), which was denied. However, this court issued a supervisory order directing the appellate court to consider defendant's appeal on its merits (155 Ill. 2d R. 383). Subsequently, the appellate court held that plaintiff was not precluded from maintaining an action for retaliatory discharge against his employing firm. 293 Ill. App. 3d 565. We granted the firm's petition for leave to appeal. 166 Ill. 2d R. 315. We reverse.

ANALYSIS

Generally, an employer may fire an employee-at-will for any reason or no reason at all. *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 505 (1991); *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 525 (1985). Nevertheless, this court has recognized the limited and narrow tort of retaliatory discharge as an exception to the general rule of at-will employment. *Balla v. Gambro, Inc.*, 145 Ill. 2d 492, 498-99 (1991), citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978). To establish a cause of action for retaliatory discharge, a plaintiff must demonstrate that (1) he was discharged in retaliation for his activities; and (2) the discharge is in contravention of a clearly mandated public policy. *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 35 (1994).

While there is no precise definition of what constitutes clearly mandated public policy, a review of Illinois case law reveals that retaliatory discharge actions are allowed in two settings. The first situation is when an employee is discharged for filing, or in anticipation of the filing of, a claim under the Workers' Compensation Act (820 ILCS 305/1 et seq. (West 1992)). See *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526 (1988); *Kelsay*, 74 Ill. 2d 172. The second situation is when an employee is discharged in retaliation for the reporting of illegal or improper conduct, otherwise known as "whistle blowing." See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124 (1981). Here, it is plaintiff's contention that the enactment of the provisions of the Fair Debt Collection Practice Act and the Illinois Collection Agency Act, violations of which are alleged in the complaint, articulate a clearly mandated public policy. Plaintiff argues that, because he alleged that he was terminated in retaliation for his reporting of the firm's violations of these acts, his complaint states a cause of action.

The tort of retaliatory discharge is a limited cause of action which "seeks to achieve "a proper balance *** among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."" *Balla*, 145 Ill. 2d at 501, quoting *Fellhauer*, 142 Ill. 2d at 507, quoting *Palmateer*, 85 Ill. 2d at 129. In this case, the public policy to be protected, that of protecting the debtor defendants' property and ensuring them due process, is adequately safeguarded without extending the tort of retaliatory discharge to employee attorneys.

Plaintiff was a licensed attorney at all times throughout this controversy and, as such, he was subject to

the Illinois Rules of Professional Conduct (134 Ill. 2d Rs. 1.1 through 8.5). The firm's conduct of intentionally filing collection actions against debtors in a county in which it knows venue is improper clearly violates Rule 3.3 of the Rules of Professional Conduct. See 134 Ill. 2d R. 3.3(a)(1) (lawyer shall not make a statement of material fact or law to a tribunal which the lawyer knows or reasonably should know is false); see also ISBA Op. No. 86-10 (March 27, 1987) (clear violation of rules of conduct for lawyer to file a complaint which pleads that venue is proper when lawyer knows is not appropriate under the statute). Further, the Rules of Professional Conduct prohibit a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. 155 Ill. 2d R. 8.4(a)(4). Because plaintiff possessed unprivileged knowledge that the firm engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, he was required to report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. See 134 Ill. 2d R. 8.3(a); In re Himmel, 125 Ill. 2d 531, 541 (1988); ISBA Op. No. 89-9 (November 28, 1989).

Therefore, the attorney's ethical obligations serve to adequately protect the public policy established by the collection statutes. Because sufficient safeguards exist in this situation, it is unnecessary to expand the limited and narrow tort of retaliatory discharge to the employee attorney. As this court has previously observed, "[a]n attorney's obligation to follow these Rules of Professional Conduct should not be the foundation for a claim of retaliatory discharge." Balta, 145 Ill. 2d at 505. Although plaintiff attempts to limit the application of Balta to in-house counsel, the Balta court based its decision "as much on the nature and purpose of the tort of retaliatory discharge, as on the effect on the attorney-client relationship that extending the tort would have." Balta, 145 Ill. 2d at 501. Attorneys employed by law firms have the same ethical obligations as those imposed upon in-house counsel.

Thus, we hold that plaintiff, as a licensed attorney employed as such by the defendant law firm, cannot maintain a cause of action for retaliatory discharge because the ethical obligations imposed by the Rules of Professional Conduct provide adequate safeguards to the public policy implicated in this case. The circuit court certified the question of whether an attorney licensed to practice in the State of Illinois is prevented from maintaining a cause of action for the tort of retaliatory discharge against his nonclient law firm employer due to the preeminence of the Rules of Professional Conduct. For the foregoing reasons, we answer the certified question in the affirmative. Accordingly, we reverse the judgments of the appellate and circuit courts and remand this cause with directions that defendant's motion to dismiss be granted.

Certified question answered;
appellate court reversed;
circuit court reversed;
cause remanded with directions.

JUSTICE HARRISON took no part in the consideration or decision of this case.

CHIEF JUSTICE FREEMAN, dissenting:

I respectfully dissent.

The majority concludes that an attorney's obligation to follow the Rules of Professional Responsibility should not be the foundation for a claim of retaliatory discharge. I note that, in resolving this issue, the majority relies primarily on our 1991 decision in *Balla v. Gambro, Inc.*, 145 Ill. 2d 492 (1991), which involved an in-house attorney's attempt to sue his corporate employer for retaliatory discharge after the attorney advised his employer that it failed to comply with certain federal regulations promulgated by the Federal Food and Drug Administration. I dissented in *Balla*, arguing, *inter alia*, that the court's confidence in the Rules' existence as a shield from an employer's illegal acts was unwise and misplaced. I warned then that the court's decision did "nothing to encourage respect for the law by corporate employers nor [did it] encourage respect by attorneys for their ethical obligations." *Balla*, 145 Ill. 2d at 516 (Freeman, J., dissenting). Seven years later, these concerns unfortunately still ring true, as the facts in this case sadly demonstrate. Nevertheless, my colleagues today now extend the *Balla* holding to law firms and their employee attorneys. Thus, one class of employees in this state, attorneys, has been stripped of a remedy which Illinois clearly affords to all other employees in such "whistle-blowing" situations. Today's opinion serves as yet another reminder to the attorneys in this state that, in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Responsibility. For this reason, and the reasons expressed in my dissent in *Balla*, I would answer the certified question in the negative and would affirm the judgments of both the appellate and circuit courts.
(Slip Opinion) 

OCTOBER TERM, 2012

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER v. NASSAR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12–484. Argued April 24, 2013—Decided June 24, 2013

Petitioner, a university medical center (University) that is part of the University of Texas system, specializes in medical education. It has an affiliation agreement with Parkland Memorial Hospital (Hospital), which requires the Hospital to offer vacant staff physician posts to University faculty members. Respondent, a physician of Middle Eastern descent who was both a University faculty member and a Hospital staff physician, claimed that Dr. Levine, one of his supervisors at the University, was biased against him on account of his religion and ethnic heritage. He complained to Dr. Fitz, Levine’s supervisor. But after he arranged to continue working at the Hospital without also being on the University’s faculty, he resigned his teaching post and sent a letter to Fitz and others, stating that he was leaving because of Levine’s harassment. Fitz, upset at Levine’s public humiliation and wanting public exoneration for her, objected to the Hospital’s job offer, which was then withdrawn. Respondent filed suit, alleging two discrete Title VII violations. First, he alleged that Levine’s racially and religiously motivated harassment had resulted in his constructive discharge from the University, in violation of 42 U. S. C. §2000e–2(a), which prohibits an employer from discriminating against an employee “because of such individual’s race, color, religion, sex, and national origin” (referred to here as status-based discrimination). Second, he claimed that Fitz’s efforts to prevent the Hospital from hiring him were in retaliation for complaining about Levine’s harassment, in violation of §2000e–3(a), which prohibits employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge." The jury found for respondent on both claims. The Fifth Circuit va-
cated as to the constructive-discharge claim, but affirmed as to the retaliation finding on the theory that retaliation claims brought under §2000e–3(a)—like §2000e–2(a) status-based claims—require only a showing that retaliation was a motivating factor for the adverse employment action, not its but-for cause, see §2000e–2(m). And it found that the evidence supported a finding that Fitz was motivated, at least in part, to retaliate against respondent for his complaints about Levine.

Held: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lesserened causation test stated in §2000e–2(m). Pp. 5–23.

(a) In defining the proper causation standard for Title VII retaliation claims, it is presumed that Congress incorporated tort law’s causation in fact standard—i.e., proof that the defendant’s conduct did in fact cause the plaintiff’s injury—absent an indication to the contrary in the statute itself. See Meyer v. Holley, 537 U. S. 280, 285. An employee alleging status-based discrimination under §2000e–2 need not show “but-for” causation. 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 for the decision. This principle is the result of Price Waterhouse v. Hopkins, 490 U. S. 228, and the ensuing Civil Rights Act of 1991 (1991 Act), which substituted a new burden-shifting framework for the one endorsed by Price Waterhouse. As relevant here, that Act added a new subsection to §2000e–2, providing that “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,” §2000e–2(m).

Also relevant here is this Court’s decision in Gross v. FBL Financial Services, Inc., 557 U. S. 167, 176, which interprets the Age Discrimination in Employment Act of 1967 (ADEA) phrase “because of . . . age,” 29 U. S. C. §623(a)(1). Gross holds two insights that inform the analysis of this case. The first is textual and concerns the proper interpretation of the term “because” as it relates to the principles of causation underlying both §623(a) and §2000e–3(a). The second is the significance of Congress’ structural choices in both Title VII itself and the 1991 Act. Pp. 5–11.

(b) Title VII’s antiretaliation provision appears in a different section from its status-based discrimination ban. And, like §623(a)(1), the ADEA provision in Gross, §2000e–3(a) makes it unlawful for an employer to take adverse employment action against an employee “because” of certain criteria. Given the lack of any meaningful textual difference between §2000e–3(a) and §623(a)(1), the proper conclusion is that Title VII retaliation claims require proof that the desire
to retaliate was the but-for cause of the challenged employment action. Respondent and the United States maintain that §2000e–2(m)'s motivating-factor test applies, but that reading is flawed. First, it is inconsistent with the provision's plain language, which addresses only race, color, religion, sex, and national origin discrimination and says nothing about retaliation. Second, their reading is inconsistent with the statute's design and structure. Congress inserted the motivating-factor provision as a subsection within §2000e–2, which deals only with status-based discrimination. The conclusion that Congress acted deliberately in omitting retaliation claims from §2000–2(m) is reinforced by the fact that another part of the 1991 Act, §109, expressly refers to all unlawful employment actions. See EEOC v. Arabian American Oil Co., 499 U.S. 244, 256. Third, the cases they rely on, which state the general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who oppose that discrimination, see, e.g., CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452–453; Gómez-Perez v. Potter, 553 U.S. 474, do not support the quite different rule that every reference to race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for "retaliation," especially in a precise, complex, and exhaustive statute like Title VII. The Americans with Disabilities Act of 1990, which contains seven paragraphs of detailed description of the practices constituting prohibited discrimination, as well as an express antiretaliation provision, and which was passed only a year before §2000e–2(m)'s enactment, shows that when Congress elected to address retaliation as part of a detailed statutory scheme, it did so clearly. Pp. 11–17.

(c) The proper interpretation and implementation of §2000e–3(a) and its causation standard are of central importance to the fair and responsible allocation of resources in the judicial and litigation systems, particularly since retaliation claims are being made with ever-increasing frequency. Lessening the causation standard could also contribute to the filing of frivolous claims, siphoning resources from efforts by employers, agencies, and courts to combat workplace harassment. Pp. 18–20.

(d) Respondent and the Government argue that their view would be consistent with longstanding agency views contained in an Equal Employment Opportunity Commission guidance manual, but the manual's explanations for its views lack the persuasive force that is a necessary precondition to deference under Skidmore v. Swift & Co., 323 U.S. 134, 140. Respondent's final argument—that if §2000e–2(m) does not control, then the Price Waterhouse standard should—is foreclosed by the 1991 Act's amendments to Title VII, which dis-
674 F. 3d 448, vacated and remanded.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 12-484

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PETITIONER v. NAIEL NASSAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts. This case requires the Court to define those rules in the context of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers.

Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor. This opinion discusses the causation rules for two categories of wrongful employer conduct prohibited by Title VII. The first type is called, for purposes of this opinion, status-based discrimination. The term is used here to refer to basic workplace protection such as prohibitions against employer discrimination
On the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like. See §2000e–2(a). The second type of conduct is employer retaliation on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination. See §2000e–3(a).

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 (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). The question the Court must answer here is whether that lessened causation standard is applicable to claims of unlawful employer retaliation under §2000e–3(a).

Although the Court has not addressed the question of the causation showing required to establish liability for a Title VII retaliation claim, it has addressed the issue of causation in general in a case involving employer discrimination under a separate but related statute, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §623. See Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009). In Gross, the Court concluded that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct. The holding and analysis of that decision are instructive here.

I

Petitioner, the University of Texas Southwestern Medi-
Opinion of the Court

cal Center (University), is an academic institution within the University of Texas system. The University specializes in medical education for aspiring physicians, health professionals, and scientists. Over the years, the University has affiliated itself with a number of healthcare facilities including, as relevant in this case, Parkland Memorial Hospital (Hospital). As provided in its affiliation agreement with the University, the Hospital permits the University's students to gain clinical experience working in its facilities. The agreement also requires the Hospital to offer empty staff physician posts to the University's faculty members, see App. 361–362, 366, and, accordingly, most of the staff physician positions at the Hospital are filled by those faculty members.

Respondent is a medical doctor of Middle Eastern descent who specializes in internal medicine and infectious diseases. In 1995, he was hired to work both as a member of the University's faculty and a staff physician at the Hospital. He left both positions in 1998 for additional medical education and then returned in 2001 as an assistant professor at the University and, once again, as a physician at the Hospital.

In 2004, Dr. Beth Levine was hired as the University's Chief of Infectious Disease Medicine. In that position Levine became respondent's ultimate (though not direct) superior. Respondent alleged that Levine was biased against him on account of his religion and ethnic heritage, a bias manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that "Middle Easterners are lazy." 674 F. 3d 448, 450 (CA5 2012). On different occasions during his employment, respondent met with Dr. Gregory Fitz, the University's Chair of Internal Medicine and Levine's supervisor, to complain about Levine's alleged harassment. Despite obtaining a promotion with Levine's assistance in 2006, respondent continued to believe that she was biased
against him. So he tried to arrange to continue working at the Hospital without also being on the University's faculty. After preliminary negotiations with the Hospital suggested this might be possible, respondent resigned his teaching post in July 2006 and sent a letter to Dr. Fitz (among others), in which he stated that the reason for his departure was harassment by Levine. That harassment, he asserted, "‘stems from . . . religious, racial and cultural bias against Arabs and Muslims.'" 7 Id., at 451. After reading that letter, Dr. Fitz expressed consternation at respondent's accusations, saying that Levine had been "publicly humiliated by th[e] letter" and that it was "very important that she be publicly exonerated." App. 41.

Meanwhile, the Hospital had offered respondent a job as a staff physician, as it had indicated it would. On learning of that offer, Dr. Fitz protested to the Hospital, asserting that the offer was inconsistent with the affiliation agreement's requirement that all staff physicians also be members of the University faculty. The Hospital then withdrew its offer.

After exhausting his administrative remedies, respondent filed this Title VII suit in the United States District Court for the Northern District of Texas. He alleged two discrete violations of Title VII. The first was a status-based discrimination claim under §2000e-2(a). Respondent alleged that Dr. Levine's racially and religiously motivated harassment had resulted in his constructive discharge from the University. Respondent's second claim was that Dr. Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Dr. Levine's harassment, in violation of §2000e-3(a). 674 F. 3d, at 452. The jury found for respondent on both claims. It awarded him over $400,000 in backpay and more than $3 million in compensatory damages. The District Court later reduced the compensatory damages award to $300,000.
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On appeal, the Court of Appeals for the Fifth Circuit affirmed in part and vacated in part. The court first concluded that respondent had submitted insufficient evidence in support of his constructive-discharge claim, so it vacated that portion of the jury’s verdict. The court affirmed as to the retaliation finding, however, on the theory that retaliation claims brought under §2000e–3(a)—like claims of status-based discrimination under §2000e–2(a)—require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its but-for cause. See id., at 454, n. 16 (citing Smith v. Xerox Corp., 602 F. 3d 320, 330 (CA5 2010)). It further held that the evidence supported a finding that Dr. Fitz was motivated, at least in part, to retaliate against respondent for his complaints against Levine. The Court of Appeals then remanded for a redetermination of damages in light of its decision to vacate the constructive-discharge verdict.

Four judges dissented from the court’s decision not to rehear the case en banc, arguing that the Circuit’s application of the motivating-factor standard to retaliation cases was “an erroneous interpretation of [Title VII] and controlling caselaw” and should be overruled en banc. 688 F. 3d 211, 213–214 (CA5 2012) (Smith, J., dissenting from denial of rehearing en banc).

Certiorari was granted. 568 U. S. ___ (2013).

II

A

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 a (same); §279, and Comment c (intentional infliction of physical harm); §280 (other intentional torts); §281(c) (negligence). This in-
cludes federal statutory claims of workplace discrimination. *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 610 (1993) (In intentional-discrimination cases, “liability depends on whether the protected trait...actuated 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 (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 (2003); *Carey v.*
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B

Since the statute's passage in 1964, it has prohibited employers from discriminating against their employees on any of seven specified criteria. Five of them—race, color, religion, sex, and national origin—are personal characteristics and are set forth in §2000e–2. (As noted at the outset, discrimination based on these five characteristics is called status-based discrimination in this opinion.) And then there is a point of great import for this case: The two remaining categories of wrongful employer conduct—the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination—are not wrongs based on personal traits but rather types of protected employee conduct. These latter two categories are covered by a separate, subsequent section of Title VII, §2000e–3(a).

Under the status-based discrimination provision, it is an "unlawful employment practice" for an employer "to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." §2000e–2(a). In its 1989 decision in Price Waterhouse, the Court sought to explain the causation standard imposed by this language. It addressed in particular what it means for an action to be taken "because of" an individual's race, religion, or nationality. Although no opinion in that case commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a "motivating" or "substantial" factor in the employer's decision. 490 U. S., at 258 (plurality opinion); id., at 259 (White, J., concurring in judgment); id., at 276 (O'Connor, J., concurring in judgment). If the plaintiff made that showing, the burden of persuasion would shift
to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus. *Id.*, at 258 (plurality opinion); *id.*, at 259–260 (opinion of White, J.); *id.*, at 276–277 (opinion of O'Connor, J.). In other words, the employer had to show that a discriminatory motive was not the but-for cause of the adverse employment action.

Two years later, Congress passed the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071. This statute (which had many other provisions) codified the burden-shifting and lessened-causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree. The legislation first added a new subsection to the end of §2000e–2, i.e., Title VII's principal ban on status-based discrimination. See §107(a), 105 Stat. 1075. The new provision, §2000e–2(m), states:

"[A]n 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."

This, of course, is a lessened causation standard.

The 1991 Act also abrogated a portion of *Price Waterhouse*'s framework by removing the employer's ability to defeat liability once a plaintiff proved the existence of an impermissible motivating factor. See *Gross*, 557 U. S., at 178, n. 5. In its place, Congress enacted §2000e–5(g)(2), which provides:

"(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and [the employer] demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court—

"(i) may grant declaratory relief, injunctive relief . . ."
and [limited] attorney’s fees and costs . . .; and
“(ii) shall not award damages or issue an order
requiring any admission, reinstatement, hiring, promo-
tion, or payment . . . .”

So, in short, the 1991 Act substituted a new burden-
shifting framework for the one endorsed by Price Water-
house. Under that new regime, a plaintiff could obtain
declaratory relief, attorney’s fees and costs, and some
forms of injunctive relief based solely on proof that race,
color, religion, sex, or nationality was a motivating factor
in the employment action; but the employer’s proof that it
would still have taken the same employment action would
save it from monetary damages and a reinstatement
order. See Gross, 557 U. S., at 178, n. 5; see also id., at
175, n. 2, 177, n. 3.

After Price Waterhouse and the 1991 Act, considerable
time elapsed before the Court returned again to the mean-
ing of “because” and the problem of causation. This time it
arose in the context of a different, yet similar statute, the
the Title VII statute in Price Waterhouse, the relevant
portion of the ADEA provided that “[i]t shall be unlawful
for an employer . . . to fail or refuse to hire or to dischar-
g any individual or otherwise discriminate against any
individual with respect to his compensation, terms, condi-
tions, or privileges of employment, because of such indi-
vidual’s age.” 557 U. S., at 176 (quoting §623(a)(1);
emphasis and ellipsis in original).

Concentrating first and foremost on the meaning of the
phrase “because of . . . age,”” the Court in Gross explained
that the ordinary meaning of “‘because of’” is “‘by reason
of’” or “‘on account of.’” Id., at 176 (citing 1 Webster’s
Third New International Dictionary 194 (1966); 1 Oxford
English Dictionary 746 (1933); The Random House Dic-
tionary of the English Language 132 (1966); emphasis in
original). Thus, the “requirement that an employer took adverse action ‘because of’ age [meant] that age was the
‘reason’ that the employer decided to act,” or, in other
words, that “age was the ‘but-for’ cause of the employer’s
adverse decision.” 557 U. S., at 176. See also Safeco Ins.
Co. of America v. Burr, 551 U. S. 47, 63–64, and n. 14
(2007) (noting that “because of” means “based on” and
that “‘based on’ indicates a but-for causal relationship”);
Holmes v. Securities Investor Protection Corporation, 503
U. S. 258, 265–266 (1992) (equating “by reason of” with
“but for’ cause”).

In the course of approving this construction, Gross
decided to adopt the interpretation endorsed by the plu-
rality and concurring opinions in Price Waterhouse. Not-
ing that “the ADEA must be ‘read ... the way Congress
wrote it,’” 557 U. S., at 179 (quoting Meacham v. Knolls
Atomic Power Laboratory, 554 U. S. 84, 102 (2008)), the
Court concluded that “the textual differences between
Title VII and the ADEA” “prevent[ed] us from applying
Price Waterhouse . . . to federal age discrimination claims,”
557 U. S., at 175, n. 2. In particular, the Court stressed
the congressional choice not to add a provision like
§2000e–2(m) to the ADEA despite making numerous other
changes to the latter statute in the 1991 Act. Id., at 174–
175 (citing EEOC v. Arabian American Oil Co., 499 U. S.
244, 256 (1991)); 557 U. S., at 177, n. 3 (citing 14 Penn
Plaza LLC v. Pyett, 556 U. S. 247, 270 (2009)).

Finally, the Court in Gross held that it would not be
proper to read Price Waterhouse as announcing a rule that
applied to both statutes, despite their similar wording and
near-contemporaneous enactment. 557 U. S., at 178, n. 5.
This different reading was necessary, the Court concluded,
because Congress’ 1991 amendments to Title VII, includ-

ing its “careful tailoring of the ‘motivating factor’ claim”
and the substitution of §2000e–5(g)(2)(B) for Price Water-
house’s full affirmative defense, indicated that the moti-
vating-factor standard was not an organic part of Title VII and thus could not be read into the ADEA. See 557 U.S., at 178, n. 5.

In Gross, the Court was careful to restrict its analysis to the statute before it and withhold judgment on the proper resolution of a case, such as this, which arose under Title VII rather than the ADEA. But the particular confines of Gross do not deprive it of all persuasive force. Indeed, that opinion holds two insights for the present case. The first is textual and concerns the proper interpretation of the term “because” as it relates to the principles of causation underlying both §623(a) and §2000e–3(a). The second is the significance of Congress’ structural choices in both Title VII itself and the law’s 1991 amendments. These principles do not decide the present case but do inform its analysis, for the issues possess significant parallels.

III

A

As noted, Title VII’s antiretaliation provision, which is set forth in §2000e–3(a), appears in a different section from Title VII’s ban on status-based discrimination. The antiretaliation provision states, in relevant part:

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . 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.”

This enactment, like the statute at issue in Gross, makes it unlawful for an employer to take adverse employment action against an employee “because” of certain criteria. Cf. 29 U. S. C. §623(a)(1). Given the lack of any meaningful textual difference between the text in this
statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. See *Gross*, supra, at 176.

The principal counterargument offered by respondent and the United States relies on their different understanding of the motivating-factor section, which—on its face—applies only to status discrimination, discrimination on the basis of race, color, religion, sex, and national origin. In substance, they contend that: (1) retaliation is defined by the statute to be an unlawful employment practice; (2) §2000e–2(m) allows unlawful employment practices to be proved based on a showing that race, color, religion, sex, or national origin was a motivating factor for—and not necessarily the but-for factor in—the challenged employment action; and (3) the Court has, as a matter of course, held that “retaliation for complaining about race discrimination is ‘discrimination based on race.’” Brief for United States as Amicus Curiae 14; see id., at 11–14; Brief for Respondent 16–19.

There are three main flaws in this reading of §2000e–2(m). The first is that it is inconsistent with the provision’s plain language. It must be acknowledged that because Title VII defines “unlawful employment practice” to include retaliation, the question presented by this case would be different if §2000e–2(m) extended its coverage to all unlawful employment practices. As actually written, however, the text of the motivating-factor provision, while it begins by referring to “unlawful employment practices,” then proceeds to address only five of the seven prohibited discriminatory actions—actions based on the employee’s status, i.e., race, color, religion, sex, and national origin. This indicates Congress’ intent to confine that provision’s coverage to only those types of employment practices. The text of §2000e–2(m) says nothing about retaliation claims.
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Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope. Gardner v. Collins, 2 Pet. 58, 93 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words"); see Sebelius v. Cloer, 569 U.S. ___, ___ (2013) (slip op., at 8).

The second problem with this reading is its inconsistency with the design and structure of the statute as a whole. See Gross, 557 U.S., at 175, n. 2, 178, n. 5. Just as Congress’ choice of words is presumed to be deliberate, so too are its structural choices. See id., at 177, n. 3. When Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within §2000e–2, which contains Title VII’s ban on status-based discrimination, §§2000e–2(a) to (d), (l), and says nothing about retaliation. See 1991 Act, §107(a), 105 Stat. 1075 (directing that “§2000e–2 . . . [be] further amended by adding at the end the following new subsection . . . (m)”). The title of the section of the 1991 Act that created §2000e–2(m)—“Clarifying prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices”—also indicates that Congress determined to address only claims of status-based discrimination, not retaliation. See §107(a), id., at 1075.

What is more, a different portion of the 1991 Act contains an express reference to all unlawful employment actions, thereby reinforcing the conclusion that Congress acted deliberately when it omitted retaliation claims from §2000e–2(m). See Arabian American Oil Co., 499 U.S., at 256 (congressional amendment of ADEA on a similar subject coupled with congressional failure to amend Title VII weighs against conclusion that the ADEA’s standard applies to Title VII); see also Gross, supra, at 177, n. 3. The relevant portion of the 1991 Act, §109(b), allowed
certain overseas operations by U.S. employers to engage in "any practice prohibited by section 703 or 704," i.e., §2000e–2 or §2000e–3, "if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located." 105 Stat. 1077.

If Congress had desired to make the motivating-factor standard applicable to all Title VII claims, it could have used language similar to that which it invoked in §109. See Arabian American Oil Co., supra, at 256. Or, it could have inserted the motivating-factor provision as part of a section that applies to all such claims, such as §2000e–5, which establishes the rules and remedies for all Title VII enforcement actions. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). But in writing §2000e–2(m), Congress did neither of those things, and "[w]e must give effect to Congress' choice." Gross, supra, at 177, n. 3.

The third problem with respondent's and the Government's reading of the motivating-factor standard is in its submission that this Court's decisions interpreting federal antidiscrimination law have, as a general matter, treated bans on status-based discrimination as also prohibiting retaliation. In support of this proposition, both respondent and the United States rely upon decisions in which this Court has "read [a] broadly worded civil rights statute . . . as including an antiretaliatory remedy." CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452–453 (2008). In CBOCS, for example, the Court held that 42 U.S.C. §1981—which declares that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"—prohibits not only racial discrimination but also retaliation against those who oppose it. 553 U.S., at 445. And in Gómez-Pérez v. Potter, 553 U. S. 474 (2008), the Court likewise read a bar on retaliation into the broad wording of the federal-employee provi-

These decisions are not controlling here. It is true these cases do state the general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who oppose that discrimination, even where the statute does not refer to retaliation in so many words. What those cases do not support, however, is the quite different rule that every reference to race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for "retaliation." For one thing, §2000e–2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII. The cases cited by respondent and the Government do not address rules of this sort, and those precedents are of limited relevance here.

The approach respondent and the Government suggest is inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII. As noted, the laws at issue in *CBOCS, Jackson*, and *Gómez-Pérez* were broad, general bars on discrimination. In interpreting them the Court concluded that by using capacious language Congress expressed the intent to bar retaliation in addition to status-based discrimination. See *Gómez-Pérez, supra* at 486–488. In other words, when Congress' treatment of the subject of prohibited discrimination was both broad and brief, its omission of any specific discussion of retaliation was unremarkable.
If Title VII had likewise been phrased in broad and general terms, respondent’s argument might have more force. But that is not how Title VII was written, which makes it incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation. Unlike Title IX, §1981, §1982, and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme. This statute enumerates specific unlawful employment practices. See §§2000e–2(a)(1), (b), (c)(1), (d) (status-based discrimination by employers, employment agencies, labor organizations, and training programs, respectively); §2000e–2(l) (status-based discrimination in employment-related testing); §2000e–3(a) (retaliation for opposing, or making or supporting a complaint about, unlawful employment actions); §2000e–3(b) (advertising a preference for applicants of a particular race, color, religion, sex, or national origin). It defines key terms, see §2000e, and exempts certain types of employers, see §2000e–1. And it creates an administrative agency with both rulemaking and enforcement authority. See §§2000e–5, 2000e–12.

This fundamental difference in statutory structure renders inapposite decisions which treated retaliation as an implicit corollary of status-based discrimination. Text may not be divorced from context. In light of Congress’ special care in drawing so precise a statutory scheme, it would be improper to indulge respondent’s suggestion that Congress meant to incorporate the default rules that apply only when Congress writes a broad and undifferentiated statute. See Gómez-Pérez, supra, at 486–488 (when construing the broadly worded federal-sector provision of the ADEA, Court refused to draw inferences from Congress’ amendments to the detailed private-sector provisions); Arabian American Oil Co., 499 U. S., at 256; cf. Jackson, supra, at 175 (distinguishing Title IX’s “broadly written general prohibition on discrimination” from Title VII’s
"greater detail [with respect to] the conduct that constitutes discrimination").

Further confirmation of the inapplicability of §2000e–2(m) to retaliation claims may be found in Congress' approach to the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327. In the ADA Congress provided not just a general prohibition on discrimination "because of [an individual's] disability," but also seven paragraphs of detailed description of the practices that would constitute the prohibited discrimination, see §§102(a), (b)(1)–(7), id., at 331–332 (codified at 42 U.S.C. §12112). And, most pertinent for present purposes, it included an express antiretaliation provision, see §503(a), 104 Stat. 370 (codified at 42 U.S.C. §12203). That law, which Congress passed only a year before enacting §2000e–2(m) and which speaks in clear and direct terms to the question of retaliation, rebuts the claim that Congress must have intended to use the phrase "race, color, religion, sex, or national origin" as the textual equivalent of "retaliation." To the contrary, the ADA shows that when Congress elected to address retaliation as part of a detailed statutory scheme, it did so in clear textual terms.

The Court confronted a similar structural dispute in Lehman v. Nakshian, 453 U.S. 156 (1981). The question there was whether the federal-employment provisions of the ADEA, 29 U.S.C. §633a, provided a jury-trial right for claims against the Federal Government. Nakshian, 453 U.S., at 157. In concluding that it did not, the Court noted that the portion of the ADEA that prohibited age discrimination by private, state, and local employers, §626, expressly provided for a jury trial, whereas the federal-sector provisions said nothing about such a right. Id., at 162–163, 168. So, too, here. Congress has in explicit terms altered the standard of causation for one class of claims but not another, despite the obvious opportunity to do so in the 1991 Act.
The proper interpretation and implementation of §2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. EEOC, Charge Statistics FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (as visited June 20, 2013, and available in Clerk of Court’s case file). Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race. See ibid.

In addition lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. Cf. Vance v. Ball State Univ., post, at 9–
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11. It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent. See Brief for National School Boards Association as Amicus Curiae 11–22. Yet there would be a significant risk of that consequence if respondent's position were adopted here.

The facts of this case also demonstrate the legal and factual distinctions between status-based and retaliation claims, as well as the importance of the correct standard of proof. Respondent raised both claims in the District Court. The alleged wrongdoer differed in each: In respondent's status-based discrimination claim, it was his indirect supervisor, Dr. Levine. In his retaliation claim, it was the Chair of Internal Medicine, Dr. Fitz. The proof required for each claim differed, too. For the status-based claim, respondent was required to show instances of racial slurs, disparate treatment, and other indications of nationality-driven animus by Dr. Levine. Respondent's retaliation claim, by contrast, relied on the theory that Dr. Fitz was committed to exonerating Dr. Levine and wished to punish respondent for besmirching her reputation. Separately instructed on each type of claim, the jury returned a separate verdict for each, albeit with a single damages award. And the Court of Appeals treated each claim separately, too, finding insufficient evidence on the claim of status-based discrimination.

If it were proper to apply the motivating-factor standard to respondent's retaliation claim, the University might well be subject to liability on account of Dr. Fitz's alleged desire to exonerate Dr. Levine, even if it could also be shown that the terms of the affiliation agreement precluded the Hospital's hiring of respondent and that the University would have sought to prevent respondent's hiring in order to honor that agreement in any event. That
result would be inconsistent with the both the text and purpose of Title VII.

In sum, Title VII defines the term “unlawful employment practice” as discrimination on the basis of any of seven prohibited criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination. The text of §2000e–2(m) mentions just the first five of these factors, the status-based ones; and it omits the final two, which deal with retaliation. When it added §2000e–2(m) to Title VII in 1991, Congress inserted it within the section of the statute that deals only with those same five criteria, not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices. And while the Court has inferred a congressional intent to prohibit retaliation when confronted with broadly worded antidiscrimination statutes, Title VII’s detailed structure makes that inference inappropriate here. Based on these textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

IV

Respondent and the Government also argue that applying the motivating-factor provision’s lessened causation standard to retaliation claims would be consistent with longstanding agency views, contained in a guidance manual published by the EEOC. It urges that those views are entitled to deference under this Court’s decision in Skidmore v. Swift & Co., 323 U. S. 134 (1944). See National Railroad Passenger Corporation v. Morgan, 536 U. S. 101,
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110, n. 6 (2002). The weight of deference afforded to agency interpretations under Skidmore depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U. S., at 140; see Vance, post, at 9, n. 4.

According to the manual in question, the causation element of a retaliation claim is satisfied if "there is credible direct evidence that retaliation was a motive for the challenged action," regardless of whether there is also "[e]vidence as to [a] legitimate motive." 2 EEOC Compliance Manual §8-II(E)(I), pp. 614:0007–614:0008 (Mar. 2003). After noting a division of authority as to whether motivating-factor or but-for causation should apply to retaliation claims, the manual offers two rationales in support of adopting the former standard. The first is that "[c]ourts have long held that the evidentiary framework for proving [status-based] discrimination . . . also applies to claims of discrimination based on retaliation." Id., at 614:0008, n. 45. Second, the manual states that "an interpretation . . . that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism." Ibid.

These explanations lack the persuasive force that is a necessary precondition to deference under Skidmore. See 323 U. S., at 140; Vance, post, at 9, n. 4. As to the first rationale, while the settled judicial construction of a particular statute is of course relevant in ascertaining statutory meaning, see Lorillard v. Pons, 434 U. S. 575, 580–581 (1978), the manual's discussion fails to address the particular interplay among the status-based discrimination provision (§2000e–2(a)), the antiretaliation provision (§2000e–3(a)), and the motivating-factor provision (§2000e–2(m)). Other federal antidiscrimination statutes do not have the structure of statutory subsections that
control the outcome at issue here. The manual’s failure to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, call the manual’s conclusions into serious question. See Kentucky Retirement Systems v. EEOC, 554 U. S. 135, 149–150 (2008).

The manual’s second argument is unpersuasive, too; for its reasoning is circular. It asserts the lessened causation standard is necessary in order to prevent “proven retaliation” from “go[ing] unpunished.” 2 EEOC Compliance Manual §8–II(E)(1), at 614:0008, n. 45. Yet this assumes the answer to the central question at issue here, which is what causal relationship must be shown in order to prove retaliation.

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. 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. For these
Opinion of the Court

reasons, the rule of Price Waterhouse is not controlling here.

V

The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under §2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. The University claims that a fair application of this standard, which is more demanding than the motivating-factor standard adopted by the Court of Appeals, entitles it to judgment as a matter of law. It asks the Court to so hold. That question, however, is better suited to resolution by courts closer to the facts of this case. The judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–484

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PETITIONER v. NAIEL NASSAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2013]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., makes it an “unlawful employment practice” to “discriminate against any individual ... because of such individual’s race, color, religion, sex, or national origin.” §2000e–2(a) (emphasis added). Backing up that core provision, Title VII also makes it an “unlawful employment practice” to discriminate against any individual “because” the individual has complained of, opposed, or participated in a proceeding about, prohibited discrimination. §2000e–3(a) (emphasis added). This form of discrimination is commonly called “retaliation,” although Title VII itself does not use that term. The Court has recognized that effective protection against retaliation, the office of §2000e–3(a), is essential to securing “a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.” Burlington N. & S. F. R. Co. v. White, 548 U. S. 53, 63 (2006) (Burlington Northern). That is so because “fear of retaliation is the leading reason why people stay silent” about the discrimination they have encountered or observed. Crawford v. Metropolitan Government of Nashville and Davidson Cty., 555 U. S. 271, 279 (2009) (internal quotation marks and brackets omitted).
Similarly worded, the ban on discrimination and the ban on retaliation against a discrimination complainant have traveled together: Title VII plaintiffs often raise the two provisions in tandem. Today’s decision, however, drives a wedge between the twin safeguards in so-called “mixed-motive” cases. To establish discrimination, all agree, the complaining party need show only that race, color, religion, sex, or national origin was “a motivating factor” in an employer’s adverse action; an employer’s proof that “other factors also motivated the [action]” will not defeat the discrimination claim. §2000e–2(m). But a retaliation claim, the Court insists, must meet a stricter standard: The claim will fail unless the complainant shows “but-for” causation, i.e., that the employer would not have taken the adverse employment action but for a design to retaliate.

In so reining in retaliation claims, the Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it. Indeed, this Court has explained again and again that “retaliation in response to a complaint about [proscribed] discrimination is discrimination” on the basis of the characteristic Congress sought to immunize against adverse employment action. *Jackson v. Birmingham Bd. of Ed.*, 544 U. S. 167, 179, n. 3 (2005) (emphasis added; internal quotation marks omitted).

The Court shows little regard for the trial judges who will be obliged to charge discrete causation standards when a claim of discrimination “because of,” e.g., race is coupled with a claim of discrimination “because” the individual has complained of race discrimination. And jurors will puzzle over the rhyme or reason for the dual standards. Of graver concern, the Court has seized on a provision, §2000e–2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation.
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I

Dr. Naiel Nassar is of Middle Eastern descent. A specialist in the treatment of HIV/AIDS, Nassar was a faculty member of the University of Texas Southwestern Medical Center (UTSW) from 1995 until 2006, save for a period during which he left his employment to continue his education. UTSW is affiliated with Parkland Hospital and, like other faculty members at the University, Nassar also worked as a physician at the Hospital. Beginning in 2001, Nassar served as Associate Medical Director of the Hospital’s Amelia Court Clinic.

Until 2004, Dr. Phillip Keiser, Medical Director of the Clinic, was Nassar’s principal supervisor. In that year, UTSW hired Dr. Beth Levine to oversee the Clinic and to supervise Keiser. Before Levine commenced her employment at UTSW, she interviewed her potential subordinates. Meeting with other Clinic doctors for only 15 to 20 minutes, Levine spent an hour and a half with Nassar, engaging in a detailed review of his resume and reading from a list of prepared questions. Record 2926–2928.

Once Levine came on board, she expressed concern to Keiser about Nassar’s productivity and questioned his work ethic. Id., at 2361–2362. According to Keiser, Levine “never seemed to [be] satisfied” with his assurances that Nassar was in fact working harder than other physicians. Id., at 2362. Disconcerted by Levine’s scrutiny, Nassar several times complained about it to Levine’s supervisor, Dr. Gregory Fitz, Chair of Internal Medicine. App. to Pet. for Cert. 4.

In 2005, Levine opposed hiring another physician who, like Nassar, was of Middle Eastern descent. In Keiser’s presence, Levine remarked that “Middle Easterners are lazy.” Id., at 3. When that physician was hired by Parkland, Levine said, again in Keiser’s presence, that the Hospital had “hired another one.” Ibid. See also Record 2399–2400. Keiser presented to Levine objective data
demonstrating Nassar's high productivity. Levine then began criticizing Nassar's billing practices. Her criticism did not take into account that Nassar's salary was funded by a federal grant that precluded billing for most of his services. App. to Pet. for Cert. 3.

Because of Levine's hostility, Nassar sought a way to continue working at the Clinic without falling under her supervision. To that end, Nassar engaged in discussions with the Hospital about dropping his affiliation with UTSW and retaining his post at Parkland. Although he was initially told that an affiliation agreement between UTSW and Parkland obliged Parkland to fill its staff physician posts with UTSW faculty, talks with the Hospital continued. Eventually, Parkland verbally offered Nassar a position as a staff physician. See App. 67–71, 214–216, 326–330.

In July 2006, Nassar resigned from his position at UTSW. "The primary reason [for his] resignation," Nassar wrote in a letter to Fitz, "[was] the continuing harassment and discrimination . . . by . . . Dr. Beth Levine." App. to Pet. for Cert. 5 (internal quotation marks omitted). According to Keiser, Nassar's letter shocked Fitz, who told Keiser that, because Levine had been "publicly humiliated," she should be "publicly exonerated." App. 41. Fitz's opposition to Parkland's hiring Nassar prompted the Hospital to withdraw the offer to engage him. App. to Pet. for Cert. 5–6.

After accepting a position at a smaller HIV/AIDS clinic in Fresno, California, Nassar filed a complaint with the Equal Employment Opportunity Commission (EEOC). The agency found "credib[le] testimonial evidence," that UTSW had retaliated against Nassar for his allegations of discrimination by Levine. Brief for Respondent 8 (citing Pl. Trial Exh. 78). Nassar then filed suit in District Court alleging that UTSW had discriminated against him, in violation of Title VII, on the basis of his race, religion, and
national origin, see §2000e–2(a), and had constructively discharged him. App. to Pet. for Cert. 6; Complaint ¶23. He further alleged that UTSW had retaliated against him for complaining about Levine’s behavior. App. to Pet. for Cert. 6.

On the retaliation claim, the District Court instructed the jury that Nassar “[d]id not have to prove that retaliation was [UTSW's] only motive, but he [had to] prove that [UTSW] acted at least in part to retaliate.” Id., at 47. The jury found UTSW liable for both constructive discharge and retaliation. At the remedial phase, the judge charged the jury not to award damages for “actions which [UTSW] prove[d] by a preponderance of the evidence . . . it would have taken even if it had not considered . . . Nassar’s protected activity.” Id., at 42–43. Finding that UTSW had not met its proof burden, the jury awarded Nassar $438,167.66 in backpay and $3,187,500 in compensatory damages. Id., at 43–44.1

The Court of Appeals for the Fifth Circuit affirmed in part.2 Responding to UTSW’s argument that the District Court erred in instructing the jury on a mixed-motive theory of retaliation, the Fifth Circuit held that the instruction conformed to Circuit precedent. 674 F. 3d 448, 454, n. 16 (2012) (citing Smith v. Xerox Corp., 602 F. 3d 320, 330 (2010)).3

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1The District Court reduced compensatory damages to $300,000, the statutory cap under Title VII. See 42 U. S. C. §1981a(b)(3)(D).

2The Court of Appeals found the evidence insufficient to support the claim of constructive discharge and reversed the District Court’s judgment to that extent. See App. to Pet. for Cert. 8–10. That ruling is not contested here.

This Court has long acknowledged the symbiotic relationship between proscriptions on discrimination and proscriptions on retaliation. Antidiscrimination provisions, the Court has reasoned, endeavor to create a workplace where individuals are not treated differently on account of race, ethnicity, religion, or sex. See Burlington Northern, 548 U.S., at 63. Antiretaliation provisions “see[k] to secure that primary objective by preventing an employer from interfering . . . with an employee’s efforts to secure or advance enforcement of [antidiscrimination] guarantees.” Ibid. As the Court has comprehended, “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.” Id., at 67. “[E]ffective enforcement,” therefore, can “‘only be expected if employees . . . [feel] free to approach officials with their grievances.”’ Ibid. (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)). See also Crawford, 555 U.S., at 279.

Adverting to the close connection between discrimination and retaliation for complaining about discrimination, this Court has held, in a line of decisions unbroken until today, that a ban on discrimination encompasses retaliation. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969), the Court determined that 42 U.S.C. §1982, which provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,” protected a white man who suffered retaliation after complaining of discrimination against his black tenant. Jackson v. Birmingham Board of Education elaborated on that holding in the context of sex discrimination. “Retaliation against a person because [he] has complained of sex discrimination,” the Court found it inescapably evident, “is another form of intentional sex discrimination.” 544 U.S., at 173. As the
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Court explained:

"Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subject to differential treatment. Moreover, retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." Id., at 173–174 (citations omitted).

Jackson interpreted Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681(a). Noting that the legislation followed three years after Sullivan, the Court found it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with Sullivan and . . . expected its enactment of Title IX to be interpreted in conformity with it." 544 U.S., at 176 (internal quotation marks and alterations omitted).


III

A

The Title VII provision key here, §2000e–2(m), states that "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.” Section 2000e–2(m) was enacted as part of the Civil Rights Act of 1991, which amended Title VII, along with other federal antidiscrimination statutes. See 105 Stat. 1071. The amendments were intended to provide “additional protections against unlawful discrimination in employment,” id., §2(3), and to “repon[d] to a number of . . . decisions by [this Court] that sharply cut back on the scope and effectiveness” of antidiscrimination laws, H.R. Rep. No. 102–40, pt. II, pp. 2–4 (1991) (hereinafter House Report Part II) (citing, inter alia, Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989)).

Among the decisions found inadequately protective was Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). A plurality of the Court in that case held that the words “because of” in §2000e–2(a) encompass claims challenging an employment decision attributable to “mixed motives,” i.e., one motivated by both legitimate and illegitimate factors. See id., at 240–242. A Title VII plaintiff, the plurality concluded, need show only that a prohibited factor contributed to the employment decision—not that it was the but-for or sole cause. Id., at 240–244. But see id., at 281–282 (KENNEDY, J., dissenting). An employer would not be liable, however, if it could show by a preponderance of the evidence that it would have taken the same action absent the illegitimate motive. Id., at 244–245.

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4 Justices White and O'Connor separately concurred and would have required the Title VII plaintiff to show that protected characteristics constituted a substantial motivating factor in the adverse employment decision. See Price Waterhouse v. Hopkins, 490 U.S. 228, 259 (1989) (White, J., concurring in judgment); id., at 265 (O'Connor, J., concurring in judgment).
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Congress endorsed the plurality's conclusion that, to be actionable under Title VII, discrimination must be a motivating factor in, but need not be the but-for cause of, an adverse employment action. See House Report Part II, at 18. Congress disagreed with the Court, however, insofar as the Price Waterhouse decision allowed an employer to escape liability by showing that the same action would have been taken regardless of improper motive. House Report Part II, at 18. See also H.R. Rep. No. 102–40, pt. I, pp. 45–48 (1991) (hereinafter House Report Part I). "If Title VII's ban on discrimination in employment is to be meaningful," the House Report explained, "victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions." House Report Part II, at 18.

Superseding Price Waterhouse in part, Congress sought to "restore" the rule of decision followed by several Circuits that any discrimination "actually shown to play a role in a contested employment decision may be the subject of liability." House Report Part II, at 18. See also House Report Part I, at 48. To that end, Congress enacted §2000e–2(m) and §2000e–5(g)(2)(B). The latter provides that an employer's proof that an adverse employment action would have been taken in any event does not shield the employer from liability; such proof, however, limits the plaintiff's remedies to declaratory or injunctive relief, attorney's fees, and costs.

Critically, the rule Congress intended to "restore" was not limited to substantive discrimination. As the House Report explained, "the Committee endor[ed] ... the decisional law" in Bibbs v. Block, 778 F. 2d 1318 (CA8 1985) (en banc), which held that a violation of Title VII is established when the trier of fact determines that "an unlawful motive played some part in the employment decision or decisional process." Id., at 1323; see House Report Part I, at 48. Prior to the 1991 Civil Rights Act,
Bibbs had been applied to retaliation claims. See, e.g., Johnson v. Legal Servs. of Arkansas, Inc., 813 F. 2d 893, 900 (CA8 1987) ("Should the court find that retaliation played some invidious part in the [plaintiff's] termination, a violation of Title VII will be established under Bibbs."). See also EEOC v. General Lines, Inc., 865 F. 2d 1555, 1560 (CA10 1989).

B

There is scant reason to think that, despite Congress' aim to "restore and strengthen . . . laws that ban discrimination in employment," House Report Part II, at 2, Congress meant to exclude retaliation claims from the newly enacted "motivating factor" provision. Section 2000e–2(m) provides that an "unlawful employment practice is established" when the plaintiff shows that a protected characteristic was a factor driving "any employment practice." Title VII, in §2000e–3(a), explicitly denominates retaliation, like status-based discrimination, an "unlawful employment practice." Because "any employment practice" necessarily encompasses practices prohibited under §2000e–3(a), §2000e–2(m), by its plain terms, covers retaliation.

Notably, when it enacted §2000e–2(m), Congress did not tie the new provision specifically to §§2000e–2(a)–(d), which proscribes discrimination "because of" race, color, religion, gender, or national origin. Rather, Congress added an entirely new provision to codify the causation standard, one encompassing "any employment practice." §2000e–2(m).

Also telling, §2000e–2(m) is not limited to situations in which the complainant's race, color, religion, sex, or national origin motivates the employer's action. In contrast, Title VII's substantive antidiscrimination provisions refer to the protected characteristics of the complaining party. See §§2000e–2(a)(1)–(2), (c)(2) (referring to "such individu-
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al’s” protected characteristics); §§2000e–2(b), (c)(1), (d) (referring to “his race, color, religion, sex, or national origin”). Congress thus knew how to limit Title VII’s coverage to victims of status-based discrimination when it was so minded. It chose, instead, to bring within §2000e–2(m) “any employment practice.” To cut out retaliation from §2000e–2(m)’s scope, one must be blind to that choice. Cf. Jackson, 544 U.S., at 179, n. 3 (omission of reference to the complaining party’s sex in Title IX supports the conclusion that the statute protects a male plaintiff from retaliation in response to complaints about sex discrimination against women).

C

From the inception of §2000e–2(m), the agency entrusted with interpretation of Title VII and superintendence of the Act’s administration, the EEOC, see §2000e–5, has understood the provision to cover retaliation claims. Shortly after Congress amended Title VII to include the motivating-factor provision, the EEOC issued guidance advising that, “[a]lthough [§2000e–2(m)] does not specify retaliation as a basis for finding liability whenever it is a motivating factor for an action, neither does it suggest any basis for deviating from the Commission’s longstanding rule that it will find liability . . . whenever retaliation plays any role in an employment decision.” EEOC, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, p. 20, n. 14 (July 14, 1992) (hereinafter EEOC Guidance), available at http://www.eeoc.gov/policy/docs/disparat.html (as visited June 21, 2013, and in Clerk of Court’s case file). As the EEOC’s initial guidance explained, “if retaliation were to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination.” Ibid.

In its compliance manual, the EEOC elaborated on its
conclusion that “[§2000e–2(m)] applies to retaliation.” 2 EEOC Compliance Manual §8–II(E)(7), p. 614:0008, n. 45 (May 20, 1998) (hereinafter EEOC Compliance Manual). That reading, the agency observed, tracked the view, widely held by courts, “that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation.” Ibid. “[A]n interpretation of [§2000e–2(m)] that permit[ted] proven retaliation to go unpunished,” the EEOC noted, would “undermin[e] the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism.” Ibid.

The position set out in the EEOC’s guidance and compliance manual merits respect. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Federal Express Corp. v. Holoweccki, 552 U.S. 389, 399 (2008) (“[EEOC’s] policy statements, embodied in its compliance manual and internal directives . . . reflect a body of experience and informed judgment. . . . As such, they are entitled to a measure of respect under the less deferential Skidmore standard.” (internal quotation marks omitted)). If the breadth of §2000e–2(m) can be deemed ambiguous (although I believe its meaning is plain), the provision should be construed to accord with the EEOC’s well-reasoned and longstanding guidance.

IV

The Court draws the opposite conclusion, ruling that retaliation falls outside the scope of §2000e–2(m). In so holding, the Court ascribes to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature’s effort to fortify the protections of Title VII. None of the reasons the Court offers in support of its restrictive interpretation of §2000e–2(m) survives inspection.
The Court first asserts that reading §2000e–2(m) to encompass claims for retaliation “is inconsistent with the provision’s plain language.” Ante, at 12. The Court acknowledges, however, that “the text of the motivating-factor provision . . . begins by referring to unlawful employment practices,” a term that undeniably includes retaliation. Ibid. (internal quotation marks omitted). Nevermind that, the Court continues, for §2000e–2(m) goes on to reference as “motivating factor[s]” only “race, color, religion, sex, or national origin.” The Court thus sees retaliation as a protected activity entirely discrete from status-based discrimination. Ibid.

This vision of retaliation as a separate concept runs up against precedent. See supra, at 6–7. Until today, the Court has been clear eyed on just what retaliation is: a manifestation of status-based discrimination. As Jackson explained in the context of sex discrimination, “retaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.” 544 U. S., at 174.

The Court does not take issue with Jackson’s insight. Instead, it distinguishes Jackson and like cases on the ground that they concerned laws in which “Congress’ treatment of the subject of prohibited discrimination was both broad and brief.” Ante, at 15. Title VII, by contrast, “is a detailed statutory scheme,” that “enumerates specific unlawful employment practices,” “defines key terms,” and “exempts certain types of employers.” Ante, at 16. Accordingly, the Court says, “it would be improper to indulge [the] suggestion that Congress meant to incorporate [in Title VII] the default rules that apply only when Congress writes a broad and undifferentiated statute.” Ibid.

It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection
against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation. It is hardly surprising, then, that our jurisprudence does not support the Court's conclusion. In *Gómez-Pérez*, the Court construed the federal-sector provision of the ADEA, which proscribes "discrimination based on age," 29 U. S. C. §633a(a), to bar retaliation. The Court did so mindful that another part of the Act, the provision applicable to private-sector employees, explicitly proscribes retaliation and, moreover, "set[s] out a specific list of forbidden employer practices." *Gómez-Pérez*, 553 U. S., at 486–487 (citing 29 U. S. C. §§623(a) and (d)).

The Court suggests that "the la[w] at issue in ... *Gómez-Pérez* [was a] broad, general ba[r] on discrimination." *Ante*, at 15. But, as our opinion in that case observes, some of the ADEA's provisions are brief, broad, and general, while others are extensive, specific, and detailed. 553 U. S., at 487. So too of Title VII. See *ibid.* ("The ADEA federal-sector provision was patterned directly after Title VII's federal-sector discrimination ban ... [which] contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices." (some internal quotation marks omitted)). It makes little sense to apply a different mode of analysis to Title VII's §2000e–2(m) and the ADEA's §633a(a), both brief statements on discrimination in the context of larger statutory schemes.\(^5\)

\(^5\)The Court obscures the inconsistency between today's opinion and *Gómez-Pérez* by comparing §633a to *all* of Title VII. See *ante*, at 16 ("Unlike Title IX, §1981, §1982, and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme."). That comparison is inapt. Like Title VII, the ADEA is a "detailed statutory scheme." *Ibid.* Compare *ibid.* (citing Title VII provisions that proscribe status-based discrimination by employers, employment agencies, labor organizations, and training programs; bar retaliation; prohibit advertising a preference for certain protected characteristics; define terms; exempt certain employers; and create an agency with rulemaking and enforcement authority), with 29 U. S. C. §§623(a)–(e) (proscribing age discrim-
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The Court's reliance on §109(b) of the Civil Rights Act of 1991, 105 Stat. 1077, and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, is similarly unavailing. According to the Court, Congress' explicit reference to §2000e–3(a) in §109(b) "reinforce[s] the conclusion that Congress acted deliberately when it omitted retaliation claims from §2000e–2(m)." *Ante*, at 13. The same is true of the ADA, the Court says, as "Congress provided not just a general prohibition on discrimination 'because of [an individual's] disability,' but also seven paragraphs of detailed description of the practices that would constitute the prohibited discrimination ... and ... an express antiretaliation provision." *Ante*, at 17.

This argument is underwhelming. Yes, Congress has sometimes addressed retaliation explicitly in antidiscrimination statutes. When it does so, there is no occasion for interpretation. But when Congress simply targets discrimination "because of" protected characteristics, or, as in §2000e–2(m), refers to employment practices motivated by race, color, religion, sex, or national origin, how should courts comprehend those phrases? They should read them informed by this Court's consistent holdings that such phrases draw in retaliation, for, in truth, retaliation is a

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6Now codified at 42 U. S. C. §2000e–1(b), §109(b) provides:

"It shall not be unlawful under §2000e–2 or 2000e–3 ... for an employer ... to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer ... to violate the law of the foreign country in which such workplace is located." The provision was framed to accord with this Court's decision in *EEOC v. Arabian American Oil Co.*, 499 U. S. 244 (1991).
“form of intentional [status-based] discrimination.” See Jackson, 544 U. S., at 173, described supra, at 6–7. That is why the Court can point to no prior instance in which an antidiscrimination law was found not to cover retaliation. The Court’s volle-face is particularly imprudent in the context of §2000e–2(m), a provision added as part of Congress’ effort to toughen protections against workplace discrimination.

B

The Court also disassociates retaliation from status-based discrimination by stressing that the bar on the latter appears in §2000e–2, while the proscription of retaliation appears in a separate provision, §2000e–3. Section 2000e–2, the Court asserts, “contains Title VII’s ban on status-based discrimination . . . and says nothing about retaliation.” Ante, at 13. Retaliation, the Court therefore concludes, should not be read into §2000e–2(m). Ante, at 13–14.

The Court’s reasoning rests on a false premise. Section 2000e–2 does not deal exclusively with discrimination based on protected characteristics. The provisions stated after §§2000e–2(a)–(d) deal with a variety of matters, some of them unquestionably covering retaliation. For example, §2000e–2(n), enacted in tandem with and located immediately after §2000e–2(m), limits opportunities to collaterally attack employment practices installed to implement a consent judgment. Section 2000e–2(n) applies beyond the substantive antidiscrimination provisions in §2000e–2; indeed, it applies beyond Title VII to encompass claims “under the Constitution or [other] Federal civil rights laws.” §2000e–2(n)(1)(A). Thus, if an employee sues for retaliatory discharge in violation of §2000e–3(a), and a consent judgment orders reinstatement, any person adversely affected by that judgment (e.g., an employee who loses seniority as a result) would generally be barred
from attacking the judgment if she was given actual notice of the proposed order and a reasonable opportunity to present objections. That Congress placed the consent-judgment provision in §2000e–2 and not in §2000e–3 is of no moment. As the text of the provision plainly conveys, §2000e–2(n) would reach consent judgments settling complaints about retaliation, just as it would cover consent judgments settling complaints about status-based discrimination.

Section 2000e–2(g) is similarly illustrative. Under that provision, “it shall not be an unlawful employment practice for an employer . . . to discharge [an] individual” if she fails to fulfill any requirement imposed in the interest of national security. Because §2000e–3(a) renders retaliation an “unlawful employment practice,” §2000e–2(g)’s exemption would no doubt apply to a Title VII retaliatory discharge claim. Given these provisions, Congress’ placement of the motivating-factor provision within §2000e–2 cannot bear the weight the Court places on it.7

C

The Court gives no deference to the EEOC’s longstanding position that §2000e–2(m) applies to retaliation because, the Court charges, the agency did not “address the particular interplay among the status-based antidiscrimi-

7The Court’s assertion that we “confronted a similar structural dispute in Lehman v. Nakshian, 453 U.S. 156 (1981),” ante, at 17, assumes its own conclusion. As the Court explains, in Nakshian, the plaintiff argued that §633a of the ADEA afforded the right to trial by jury. 453 U.S., at 157. An amendment to the private-sector provision, codified at 29 U.S. C. §626(c), granted that right to plaintiffs suing private employers, as well as state and local governmental entities. But no one argued in Nakshian that the private-sector amendment applied to the federal-sector provision. Hence, Nakshian’s holding that the ADEA does not permit a federal-sector plaintiff to try her case before a jury is relevant only if the Court is correct that §2000e–2(m) does not cover retaliation claims.

In its compliance manual, the EEOC noted that some courts had concluded that §2000e–2(m) does not cover retaliation, citing as an example *Woodson v. Scott Paper Co.*, 109 F. 3d 913 (CA3 1997). In that decision, the Third Circuit acknowledged it was “given pause by the fact that . . . courts have generally borrowed from discrimination law in determining the burdens and order of proof in retaliation cases.” *Id.*, at 934. One could therefore say, the Third Circuit continued, that “Congress knew of the practice of borrowing in retaliation cases, and presumed that courts would continue this practice after the 1991 Act.” *Ibid*.

While *Woodson* rejected that argument, the EEOC found it sound. See EEOC Compliance Manual, at 614:0008, n. 45 (“Courts have long held that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation.”). See also EEOC Guidance, at 20, n. 14 (while §2000e–2(m) does not explicitly refer to retaliation, nothing in the provision calls for deviation from the longstanding practice of finding liability when a plaintiff demonstrates that retaliatory intent motivated an adverse employment decision). By adverting to *Woodson*, the EEOC made clear that it considered the very argument the Court relies on today. Putting down the agency’s appraisal as “generic,” *ante*, at 22, is thus conspicuously unfair comment.

The Court’s second reason for refusing to accord deference to the EEOC fares no better. The EEOC’s conclusion that “the lessened causation standard is necessary in order to prevent ‘proven retaliation’ from ‘go[ing] unpunished,’” the Court reasons, “is circular” because it “assumes the answer to the central question at issue here,
which is what causal relationship must be shown in order to prove retaliation.” *Ibid.* That reasoning will not wash. Under the motivating-factor test set out in §2000e–2(m), a plaintiff prevails if she shows that proscribed conduct “was a motivating factor” for the adverse employment action she encountered, “even though other factors also motivated the [action].” She will succeed, although the relief to which she is entitled may be restricted. See *supra*, at 9. Under the Court’s view, proof that retaliation was a factor motivating an adverse employment action is insufficient to establish liability under §2000e–3(a). The Court’s but-for causation standard does not mean that the plaintiff has failed to prove she was subjected to unlawful retaliation. It does mean, however, that proof of a retaliatory motive alone yields no victory for the plaintiff. Put otherwise, the Court’s view “permits proven retaliation to go unpunished,” just as the EEOC recognized. See EEOC Compliance Manual, at 614:0008, n. 45.

V

A

Having narrowed §2000e–2(m) to exclude retaliation claims, the Court turns to *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167 (2009), to answer the question presented: Whether a plaintiff must demonstrate but-for causation to establish liability under §2000e–3(a).

The Court held in *Gross* that, in contrast to Title VII, §623(a) of the ADEA does not authorize any age discrimination claim asserting mixed motives. Explaining that uniform interpretation of the two statutes is sometimes unwarranted, the Court noted in *Gross* that the phrase “because of . . . age” in §623(a) has not been read “to bar discrimination against people of all ages, even though the Court had previously interpreted ‘because of . . . race [or] sex’ in Title VII to bar discrimination against people of all races and both sexes.” 557 U. S., at 175, n. 2. Yet *Gross*,
which took pains to distinguish ADEA claims from Title VII claims, is invoked by the Court today as pathmarking. See ante, at 2 ("The holding and analysis of [Gross] are instructive here.").

The word "because" in Title VII's retaliation provision, §2000e–3(a), the Court tells us, should be interpreted not to accord with the interpretation of that same word in the companion status-based discrimination provision of Title VII, §2000e–2(a). Instead, statutory lines should be crossed: The meaning of "because" in Title VII's retaliation provision should be read to mean just what the Court held "because" means for ADEA-liability purposes. But see Gross, 557 U.S., at 174 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" (quoting Holowechi, 552 U.S., at 393)). In other words, the employer prevailed in Gross because, according to the Court, the ADEA's anti-discrimination prescription is not like Title VII's. But the employer prevails again in Nassar's case, for there is no "meaningful textual difference," ante, at 11, between the ADEA's use of "because" and the use of the same word in Title VII's retaliation provision. What sense can one make of this other than "heads the employer wins, tails the employee loses"?

It is a standard principle of statutory interpretation that identical phrases appearing in the same statute—here, Title VII—ordinarily bear a consistent meaning. See Powerex Corp. v. Reliant Energy Services, Inc., 551 U.S. 224, 232 (2007). Following that principle, Title VII's retaliation provision, like its status-based discrimination provision, would permit mixed-motive claims, and the same causation standard would apply to both provisions.

B

The Court's decision to construe §2000e–3(a) to require
but-for causation in line with Gross is even more confounding in light of Price Waterhouse. Recall that Price Waterhouse interpreted “because of” in §2000e–2(a) to permit mixed-motive claims. See supra, at 8. The Court today rejects the proposition that, if §2000e–2(m) does not cover retaliation, such claims are governed by Price Waterhouse's burden-shifting framework, i.e., if the plaintiff shows that discrimination was a motivating factor in an adverse employment action, the defendant may escape liability only by showing it would have taken the same action had there been no illegitimate motive. It is wrong to revert to Price Waterhouse, the Court says, because the 1991 Civil Rights Act's amendments to Title VII abrogated that decision.

This conclusion defies logic. Before the 1991 amendments, several courts had applied Price Waterhouse's burden-shifting framework to retaliation claims. In the Court's view, Congress designed §2000e–2(m)'s motivating-factor standard not only to exclude retaliation claims, but also to override, sub silentio, Circuit precedent applying the Price Waterhouse framework to such claims. And with what did the 1991 Congress replace the Price Waterhouse burden-shifting framework? With a but-for causation requirement Gross applied to the ADEA 17 years after the 1991 amendments to Title VII. Shut from the Court's sight is a legislative record replete with statements evincing Congress' intent to strengthen antidiscrimination laws and thereby hold employers accountable for prohibited discrimination. See Civil Rights Act of 1991, §2, 105 Stat. 1071; House Report Part II, at 18. It is an odd mode of statutory interpretation that divines Congress' aim in 1991 by looking to a decision of this Court,

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8See Vislisel v. Turnage, 930 F. 2d 9, 10 (CA8 1991); Carter v. South Central Bell, 912 F. 2d 832, 843 (CA5 1990); Williams v. Mallinckrodt, 892 F. 2d 75 (CA4 1989) (table).
Gross, made under a different statute in 2008, while ignoring the overarching purpose of the Congress that enacted the 1991 Civil Rights Act, see supra, at 8–10.

C

The Court shows little regard for trial judges who must instruct juries in Title VII cases in which plaintiffs allege both status-based discrimination and retaliation. Nor is the Court concerned about the capacity of jurors to follow instructions conforming to today’s decision. Causation is a complicated concept to convey to juries in the best of circumstances. Asking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion. That would be tolerable if the governing statute required double standards, but here, for the reasons already stated, it does not.

VI

A

The Court’s assertion that the but-for cause requirement it adopts necessarily follows from §2000e–3(a)’s use of the word “because” fails to convince. Contrary to the Court’s suggestion, see ante, at 5–6, the word “because” does not inevitably demand but-for causation to the exclusion of all other causation formulations. When more than one factor contributes to a plaintiff’s injury, but-for causation is problematic. See, e.g., 1 Restatement (Third) of Torts §27, Comment a, p. 385 (2005) (noting near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist) (hereinafter Restatement Third); Restatement of Torts §9, Comment b, p. 18 (1934) (legal cause is a cause that is a “substantial factor in bringing about the harm”).

When an event is “overdetermined,” i.e., when two forces create an injury each alone would be sufficient to cause, modern tort law permits the plaintiff to prevail upon
showing that either sufficient condition created the harm. Restatement Third §27, at 376–377. In contrast, under the Court’s approach (which it erroneously calls “textbook tort law,” ante, at 6), a Title VII plaintiff alleging retaliation cannot establish liability if her firing was prompted by both legitimate and illegitimate factors. Ante, at 18–19.

Today’s opinion rehashes arguments rightly rejected in Price Waterhouse. Concurring in the judgment in that case, Justice O’Connor recognized the disconnect between the standard the dissent advocated, which would have imposed on the plaintiff the burden of showing but-for causation, see 490 U.S., at 282, 286–287 (Kennedy, J., dissenting), and the common-law doctrines on which the dissent relied. As Justice O’Connor explained:

“[I]n the area of tort liability, from whence the dissent’s ‘but-for’ standard of causation is derived, . . . the law has long recognized that in certain ‘civil cases’ leaving the burden of persuasion on the plaintiff to prove ‘but-for’ causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to . . . defendants to prove that their negligent actions were not the ‘but-for’ cause of the plaintiff’s injury.” Id., at 263–264 (concurring in judgment) (citing Summers v. Tice, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–4 (1948)).

Justice Brennan’s plurality opinion was even less solicitous of the dissent’s approach. Noting that, under the standard embraced by the dissent in Price Waterhouse, neither of two sufficient forces would constitute cause even if either one alone would have led to the injury, the plurality remarked: “We need not leave our common sense at the doorstep when we interpret a statute.” 490 U. S., at 241.
As the plurality and concurring opinions in *Price Waterhouse* indicate, a strict but-for test is particularly ill suited to employment discrimination cases. Even if the test is appropriate in some tort contexts, “it is an entirely different matter to determine a ‘but-for’ relation when...consider[ing], not physical forces, but the mind-related characteristics that constitute motive.” *Gross*, 557 U.S., at 190 (BREYER, J., dissenting). When assessing an employer’s multiple motives, “to apply ‘but-for’ causation is to engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different.” *Id.*, at 191. See also *Price Waterhouse*, 490 U.S., at 264 (opinion of O’Connor, J.) (“[A]t...times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs.”) (quoting Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956)).

This point, lost on the Court, was not lost on Congress. When Title VII was enacted, Congress considered and rejected an amendment that would have placed the word “solely” before “because of [the complainant’s] race, color, religion, sex, or national origin.” See 110 Cong. Rec. 2728, 13837–13838 (1964). Senator Case, a prime sponsor of Title VII, commented that a “sole cause” standard would render the Act “totally nugatory.” *Id.*, at 13837. Life does not shape up that way, the Senator suggested, commenting “[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.” *Ibid.*

* * *

The Court holds, at odds with a solid line of decisions recognizing that retaliation is inextricably bound up with status-based discrimination, that §2000e–2(m) excludes
retaliation claims. It then reaches outside of Title VII to arrive at an interpretation of “because” that lacks sensitivity to the realities of life at work. In this endeavor, the Court is guided neither by precedent, nor by the aims of legislators who formulated and amended Title VII. Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers. See ante, at 18–19. Congress had no such goal in mind when it added §2000e–2(m) to Title VII. See House Report Part II, at 2. Today’s misguided judgment, along with the judgment in Vance v. Ball State Univ., post, p. 1, should prompt yet another Civil Rights Restoration Act.

For the reasons stated, I would affirm the judgment of the Fifth Circuit.
SYNOPSIS

VANCE v. BALL STATE UNIVERSITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT


Under Title VII, an employer's liability for workplace harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action (i.e., "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," Burlington Industries, Inc. v. Ellerth, 524 U. S. 742, 761), the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. Paragher v. Boca Raton, 524 U. S. 775, 807; Ellerth, supra, at 765.

Petitioner Vance, an African-American woman, sued her employer, Ball State University (BSU) alleging that a fellow employee, Saundra Davis, created a racially hostile work environment in violation of Title VII. The District Court granted summary judgment to BSU. It held that BSU was not vicariously liable for Davis' alleged actions because Davis, who could not take tangible employment actions against Vance, was not a supervisor. The Seventh Circuit affirmed.

Held: An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. Pp. 9–30.

(a) Petitioner errs in relying on the meaning of "supervisor" in gen-
oral usage and in other legal contexts because the term has varying meanings both in colloquial usage and in the law. In any event, Congress did not use the term "supervisor" in Title VII, and the way to understand the term's meaning for present purposes is to consider the interpretation that best fits within the highly structured framework adopted in Faragher and Ellerth. Pp. 10–14.

(b) Petitioner misreads Faragher and Ellerth in claiming that those cases support an expansive definition of "supervisor" because, in her view, at least some of the alleged harassers in those cases, whom the Court treated as supervisors, lacked the authority that the Seventh Circuit's definition demands. In Ellerth, there was no question that the alleged harasser, who hired and promoted his victim, was a supervisor. And in Faragher, the parties never disputed the characterization of the alleged harassers as supervisors, so the question simply was not before the Court. Pp. 14–18.

(c) The answer to the question presented in this case is implicit in the characteristics of the framework that the Court adopted in Ellerth and Faragher, which draws a sharp line between co-workers and supervisors and implies that the authority to take tangible employment actions is the defining characteristic of a supervisor. Ellerth, supra, at 762.

The interpretation of the concept of a supervisor adopted today is one that can be readily applied. An alleged harasser's supervisor status will often be capable of being discerned before (or soon after) litigation commences and is likely to be resolved as a matter of law before trial. By contrast, the vagueness of the EEOC's standard would impede the resolution of the issue before trial, possibly requiring the jury to be instructed on two very different paths of analysis, depending on whether it finds the alleged harasser to be a supervisor or merely a co-worker.

This approach will not leave employees unprotected against harassment by co-workers who possess some authority to assign daily tasks. In such cases, a victim can prevail simply by showing that the employer was negligent in permitting the harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor in determining negligence. Pp. 18–25.

(d) The definition adopted today accounts for the fact that many modern organizations have abandoned a hierarchical management structure in favor of giving employees overlapping authority with respect to work assignments. Petitioner fears that employers will attempt to insulate themselves from liability for workplace harassment by empowering only a handful of individuals to take tangible employment actions, but a broad definition of "supervisor" is not neces-
Syllabus

...sary to guard against that concern. Pp. 25–26.
646 F. 3d 461, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.
Cite as: 570 U. S. ___ (2013)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 11–556

MAETTA VANCE, PETITIONER v. BALL STATE UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 24, 2013]

JUSTICE ALITO delivered the opinion of the Court.

In this case, we decide a question left open in Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998), and Faragher v. Boca Raton, 524 U. S. 775 (1998), namely, who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment? Under Title VII, an employer’s liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor’s harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. Id., at 807; Ellerth, supra, at 765. Under this framework,
therefore, it matters whether a harasser is a "supervisor" or simply a co-worker.

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim, and we therefore affirm the judgment of the Seventh Circuit.

I

Maetta Vance, an African-American woman, began working for Ball State University (BSU) in 1989 as a substitute server in the University Banquet and Catering division of Dining Services. In 1991, BSU promoted Vance to a part-time catering assistant position, and in 2007 she applied and was selected for a position as a full-time catering assistant.

Over the course of her employment with BSU, Vance lodged numerous complaints of racial discrimination and retaliation, but most of those incidents are not at issue here. For present purposes, the only relevant incidents concern Vance's interactions with a fellow BSU employee, Saundra Davis.

During the time in question, Davis, a white woman, was employed as a catering specialist in the Banquet and Catering division. The parties vigorously dispute the precise nature and scope of Davis' duties, but they agree that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. See No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836, *12 (SD Ind., Sept. 10, 2008) ("Vance makes no allegations that Ms. Davis possessed any such power"); Brief for Petitioner 9–11 (describing Davis' authority over Vance); Brief for Respondent 39 ("[A]ll agree that Davis lacked the authority to take tangible employments [sic] actions against petitioner").

In late 2005 and early 2006, Vance filed internal com-
plaints with BSU and charges with the Equal Employment Opportunity Commission (EEOC), alleging racial harassment and discrimination, and many of these complaints and charges pertained to Davis. 646 F. 3d 461, 467 (CA7 2011). Vance complained that Davis “gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her.” Ibid. She alleged that she was “left alone in the kitchen with Davis, who smiled at her”; that Davis “blocked” her on an elevator and “stood there with her cart smiling”; and that Davis often gave her “weird” looks. Ibid. (internal quotation marks omitted).

Vance’s workplace strife persisted despite BSU’s attempts to address the problem. As a result, Vance filed this lawsuit in 2006 in the United States District Court for the Southern District of Indiana, claiming, among other things, that she had been subjected to a racially hostile work environment in violation of Title VII. In her complaint, she alleged that Davis was her supervisor and that BSU was liable for Davis’ creation of a racially hostile work environment. Complaint in No. 1:06–cv–01452–SEB–TAB (SD Ind., Oct. 3, 2006), Dkt. No. 1, pp. 5–6.

Both parties moved for summary judgment, and the District Court entered summary judgment in favor of BSU. 2008 WL 4247836, at *1. The court explained that BSU could not be held vicariously liable for Davis’ alleged racial harassment because Davis could not “hire, fire, demote, promote, transfer, or discipline” Vance and, as a result, was not Vance’s supervisor under the Seventh Circuit’s interpretation of that concept. See id., at *12 (quoting Hall v. Bodine Elect. Co., 276 F. 3d 345, 355 (CA7 2002)). The court further held that BSU could not be liable in negligence because it responded reasonably to the incidents of which it was aware. 2008 WL 4247836, *15.

The Seventh Circuit affirmed. 646 F. 3d 461. It explained that, under its settled precedent, supervisor status
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requires "the power to hire, fire, demote, promote, transfer, or discipline an employee." Id., at 470 (quoting Hall, supra, at 355). The court concluded that Davis was not Vance's supervisor and thus that Vance could not recover from BSU unless she could prove negligence. Finding that BSU was not negligent with respect to Davis' conduct, the court affirmed. 646 F. 3d, at 470–473.

II

A

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... 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." 42 U. S. C. §2000e–2(a)(1). This provision obviously prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts. But not long after Title VII was enacted, the lower courts held that Title VII also reaches the creation or perpetuation of a discriminatory work environment.

In the leading case of Rogers v. EEOC, 454 F. 2d 234 (1971), the Fifth Circuit recognized a cause of action based on this theory. See Meritor Savings Bank, FSB v. Vinson, 477 U. S. 57, 65–66 (1986) (describing development of hostile environment claims based on race). The Rogers court reasoned that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F. 2d, at 238. The court observed that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." Ibid.
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Following this decision, the lower courts generally held that an employer was liable for a racially hostile work environment if the employer was negligent, i.e., if the employer knew or reasonably should have known about the harassment but failed to take remedial action. See Ellerth, 524 U. S., at 768–769 (THOMAS, J., dissenting) (citing cases).

When the issue eventually reached this Court, we agreed that Title VII prohibits the creation of a hostile work environment. See Meritor, supra, at 64–67. In such cases, we have held, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. See, e.g., Harris v. Forklift Systems, Inc., 510 U. S. 17, 21 (1993).

B

Consistent with Rogers, we have held that an employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior. Faragher, 524 U. S., at 789. Courts have generally applied this rule to evaluate employer liability when a co-worker harasses the plaintiff.1

In Ellerth and Faragher, however, we held that different rules apply where the harassing employee is the plaintiff's "supervisor." In those instances, an employer may be vicariously liable for its employees' creation of a hostile work environment. And in identifying the situations in which such vicarious liability is appropriate, we looked to the Restatement of Agency for guidance. See, e.g., Meri-

1See, e.g., Williams v. Waste Management of Ill., 361 F. 3d 1021, 1029 (CA7 2004); McGinest v. GTE Serv. Corp., 360 F. 3d 1103, 1119 (CA9 2004); Joens v. John Morrell & Co., 354 F. 3d 938, 940 (CA8 2004); Noviello v. Boston, 398 F. 3d 76, 95 (CA1 2005); Duch v. Jakubeck, 588 F. 3d 757, 762 (CA2 2009); Huston v. Procter & Gamble Paper Prods. Corp., 568 F. 3d 100, 104–105 (CA3 2009).
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tor, supra, at 72; Ellerth, supra, at 755.

Under the Restatement, "masters" are generally not liable for the torts of their "servants" when the torts are committed outside the scope of the servants' employment. See 1 Restatement (Second) of Agency §219(2), p. 481 (1957) (Restatement). And because racial and sexual harassment are unlikely to fall within the scope of a servant's duties, application of this rule would generally preclude employer liability for employee harassment. See Faragher, supra, at 793–796; Ellerth, supra, at 757. But in Ellerth and Faragher, we held that a provision of the Restatement provided the basis for an exception. Section 219(2)(d) of that Restatement recognizes an exception to the general rule just noted for situations in which the servant was "aided in accomplishing the tort by the existence of the agency relation."2 Restatement 481; see Faragher, supra, at 802–803; Ellerth, supra, at 760–763.

Adapting this concept to the Title VII context, Ellerth and Faragher identified two situations in which the aided-in-the-accomplishment rule warrants employer liability even in the absence of negligence, and both of these situations involve harassment by a "supervisor" as opposed to a co-worker. First, the Court held that an employer is vicariously liable "when a supervisor takes a tangible employment action," Ellerth, supra, at 762; Faragher, supra, at 790—i.e., "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with

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2The Restatement (Third) of Agency disposed of this exception to liability, explaining that "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." 2 Restatement (Third) §7.08, p. 228 (2005). The parties do not argue that this change undermines our holdings in Faragher and Ellerth.
significantly different responsibilities, or a decision causing a significant change in benefits." Ellerth, 524 U. S., at 761. We explained the reason for this rule as follows: “When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. ... A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.” Id., at 761–762. In those circumstances, we said, it is appropriate to hold the employer strictly liable. See Faragher, supra, at 807; Ellerth, supra, at 765.

Second, Ellerth and Faragher held that, even when a supervisor’s harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor’s creation of a hostile work environment if the employer is unable to establish an affirmative defense.³ We began by noting that “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a

³Faragher and Ellerth involved hostile environment claims premised on sexual harassment. Several federal courts of appeals have held that Faragher and Ellerth apply to other types of hostile environment claims, including race-based claims. See Spriggs v. Diamond Auto Glass, 242 F. 3d 179, 186, n. 9 (CA4 2001) (citing cases reflecting “the developing consensus ... that the holdings [in Faragher and Ellerth] apply with equal force to other types of harassment claims under Title VII”). But see Ellerth, 524 U. S., at 767 (THOMAS, J., dissenting) (stating that, as a result of the Court’s decision in Ellerth, “employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged”). Neither party in this case challenges the application of Faragher and Ellerth to race-based hostile environment claims, and we assume that the framework announced in Faragher and Ellerth applies to cases such as this one.
supervisor always is aided by the agency relation.” Ellerth, supra, at 763; see Faragher, 524 U.S., at 803–805. But it would go too far, we found, to make employers strictly liable whenever a “supervisor” engages in harassment that does not result in a tangible employment action, and we therefore held that in such cases the employer may raise an affirmative defense. Specifically, an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided. Faragher, supra, at 807; Ellerth, 524 U.S., at 765. This compromise, we explained, “accommodate[s] the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees.” Id., at 764.

The dissenting Members of the Court in Ellerth and Faragher would not have created a special rule for cases involving harassment by “supervisors.” Instead, they would have held that an employer is liable for any employee’s creation of a hostile work environment “if, and only if, the plaintiff proves that the employer was negligent in permitting the [offending] conduct to occur.” Ellerth, supra, at 767 (Thomas, J., dissenting); Faragher, supra, at 810 (same).

C

Under Ellerth and Faragher, it is obviously important whether an alleged harasser is a “supervisor” or merely a co-worker, and the lower courts have disagreed about the meaning of the concept of a supervisor in this context. Some courts, including the Seventh Circuit below, have held that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or
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discipline the victim. *E.g.*, 646 F. 3d, at 470; _Noviello v. Boston_, 398 F. 3d 76, 96 (CA1 2005); _Weyers v. Lear Operations Corp._, 359 F. 3d 1049, 1057 (CA8 2004). Other courts have substantially followed the more open-ended approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another's daily work. *See, e.g.*, _Mack v. Otis Elevator Co._, 326 F. 3d 116, 126–127 (CA2 2003); _Whitten v. Fred's, Inc._, 601 F. 3d 231, 245–247 (CA4 2010); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, *3 (hereinafter EEOC Guidance).

We granted certiorari to resolve this conflict. 567 U.S. ___ (2012).

III

We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." _Ellerth, supra_, at 761. We reject the nebulous definition of a "supervisor" advocated in the EEOC Guidance and substantially adopted by several courts of appeals. Petitioner's reliance on colloquial uses

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4The United States urges us to defer to the EEOC Guidance. Brief for United States as Amicus Curiae 26–29 (citing _Skidmore v. Swift & Co._, 323 U. S. 134, 140 (1944)). But to do so would be proper only if the EEOC Guidance has the power to persuade, which "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." _Id._, at 140. For the reasons explained below, we do not find the EEOC Guidance persuasive.
of the term "supervisor" is misplaced, and her contention that our cases require the EEOC's abstract definition is simply wrong.

As we will explain, the framework set out in Ellerth and Faragher presupposes a clear distinction between supervisors and co-workers. Those decisions contemplate a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions. There is no hint in either decision that the Court had in mind two categories of supervisors: first, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker's labor to some ill-defined degree. On the contrary, the Ellerth/Faragher framework is one under which supervisory status can usually be readily determined, generally by written documentation. The approach recommended by the EEOC Guidance, by contrast, would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors.

The Ellerth/Faragher framework represents what the Court saw as a workable compromise between the aided-in-the-accomplishment theory of vicarious liability and the legitimate interests of employers. The Seventh Circuit's understanding of the concept of a "supervisor," with which we agree, is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial. The alternative, in many cases, would frustrate judges and confound jurors.

A

Petitioner contends that her expansive understanding of the concept of a "supervisor" is supported by the meaning of the word in general usage and in other legal contexts, see Brief for Petitioner 25–28, but this argument is both incorrect on its own terms and, in any event, misguided.

In general usage, the term "supervisor" lacks a suffi-
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sufficiently specific meaning to be helpful for present purposes. Petitioner is certainly right that the term is often used to refer to a person who has the authority to direct another's work. See, e.g., 17 Oxford English Dictionary 245 (2d ed. 1989) (defining the term as applying to "one who inspects and directs the work of others"). But the term is also often closely tied to the authority to take what Ellerth and Faragher referred to as a "tangible employment action." See, e.g., Webster's Third New International Dictionary 2296, def. 1(a) (1976) ("a person having authority delegated by an employer to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action").

A comparison of the definitions provided by two colloquial business authorities illustrates the term's imprecision in general usage. One says that "[s]upervisors are usually authorized to recommend and/or effect hiring, disciplining, promoting, punishing, rewarding, and other associated activities regarding the employees in their departments."6 Another says exactly the opposite: "A supervisor generally does not have the power to hire or fire employees or to promote them."6 Compare Ellerth, 524 U. S., at 762 ("Tangible employment actions fall within the special province of the supervisor").

If we look beyond general usage to the meaning of the term in other legal contexts, we find much the same situation. Sometimes the term is reserved for those in the upper echelons of the management hierarchy. See, e.g., 25 U. S. C. §2021(18) (defining the "supervisor" of a school within the jurisdiction of the Bureau of Indian Affairs as

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5http://www.businessdictionary.com/definition/supervisor.html (all Internet materials as visited June 21, 2013, and available in Clerk of Court's case file).
6http://management.about.com/od/policiesandprocedures/g/supervisor1.html
“the individual in the position of ultimate authority at a Bureau school”). But sometimes the term is used to refer to lower ranking individuals. See, e.g., 29 U.S.C. §152(11) (defining a supervisor to include "any individual having authority ... to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"); 42 U.S.C. §1396n(j)(4)(A) (providing that an eligible Medicaid beneficiary who receives care through an approved self-directed services plan may "hire, fire, supervise, and manage the individuals providing such services").

Although the meaning of the concept of a supervisor varies from one legal context to another, the law often contemplates that the ability to supervise includes the ability to take tangible employment actions.\(^7\) See, e.g., 5

\(^7\)One outlier that petitioner points to is the National Labor Relations Act (NLRA), 29 U. S. C. §152(11). Petitioner argues that the NLRA’s definition supports her position in this case to the extent that it encompasses employees who have the ability to direct or assign work to subordinates. Brief for Petitioner 27–28.

The NLRA certainly appears to define “supervisor” in broad terms. The National Labor Relations Board (NLRB) and the lower courts, however, have consistently explained that supervisory authority is not trivial or insignificant: If the term "supervisor" is construed too broadly, then employees who are deemed to be supervisors will be denied rights that the NLRA was intended to protect. E.g., In re Connecticut Humane Society, 358 NLRB No. 31, *33 (Apr. 12, 2012); Frenchtown Acquisition Co., Inc. v. NLRB, 683 F. 3d 298, 305 (CA6 2012); Beverly Enterprises-Massachusetts, Inc. v. NLRB, 165 F. 3d 960, 963 (CADC 1999). Indeed, in defining a supervisor for purposes of the NLRA, Congress sought to distinguish “between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the
Cite as: 570 U. S. ____ (2013)

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CFR §§ 9701.511(a)(2), (3) (2012) (referring to a supervisor’s authority to “hire, assign, and direct employees . . . and [t]o lay off and retain employees, or to suspend, re-

right to hire or fire, discipline, or make effective recommendations with respect to such action.” S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). Cf. NLRB v. Health Care & Retirement Corp. of America, 511 U. S. 571, 586 (1994) (HCRA) (GINSBURG, J., dissenting) (“Through case-by-case adjudication, the Board has sought to distinguish individuals exercising the level of control that truly places them in the ranks of management, from highly skilled employees, whether professional or technical, who perform, incidentally to their skilled work, a limited supervisory role”). Accordingly, the NLRB has interpreted the NLRA’s statutory definition of supervisor more narrowly than its plain language might permit. See, e.g., Connecticut Humane Society, supra, at *39 (an employee who evaluates others is not a supervisor unless the evaluation “affect[s] the wages and the job status of the employee evaluated”); In re CGLM, Inc., 350 NLRB 974, 977 (2007) (“If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of the company where to park his car” (quoting NLRB v. Security Guard Serv., Inc., 384 F. 2d 143, 151 (CA5 1967))). The NLRA therefore does not define the term “supervisor” as broadly as petitioner suggests.

To be sure, the NLRA may in some instances define “supervisor” more broadly than we define the term in this case. But those differences reflect the NLRA’s unique purpose, which is to preserve the balance of power between labor and management, see HCRA, supra, at 573 (explaining that Congress amended the NLRA to exclude supervisors in order to address the “imbalance between labor and management” that resulted when “supervisory employees could organize as part of bargaining units and negotiate with the employer”). That purpose is inapposite in the context of Title VII, which focuses on eradicating discrimination. An employee may have a sufficient degree of authority over subordinates such that Congress has decided that the employee should not participate with lower level employees in the same collective-bargaining unit (because, for example, a higher level employee will pursue his own interests at the expense of lower level employees’ interests), but that authority is not necessarily sufficient to merit heightened liability for the purposes of Title VII. The NLRA’s definition of supervisor therefore is not controlling in this context.
move, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source); §9701.212(b)(4) (defining "supervisory work" as that which "may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties").

In sum, the term "supervisor" has varying meanings both in colloquial usage and in the law. And for this reason, petitioner's argument, taken on its own terms, is unsuccessful.

More important, petitioner is misguided in suggesting that we should approach the question presented here as if "supervisor" were a statutory term. "Supervisor" is not a term used by Congress in Title VII. Rather, the term was adopted by this Court in Ellerth and Faragher as a label for the class of employees whose misconduct may give rise to vicarious employer liability. Accordingly, the way to understand the meaning of the term "supervisor" for present purposes is to consider the interpretation that best fits within the highly structured framework that those cases adopted.

B

In considering Ellerth and Faragher, we are met at the outset with petitioner's contention that at least some of the alleged harassers in those cases, whom we treated as supervisors, lacked the authority that the Seventh Circuit's definition demands. This argument misreads our decisions.

In Ellerth, it was clear that the alleged harasser was a supervisor under any definition of the term: He hired his victim, and he promoted her (subject only to the ministerial approval of his supervisor, who merely signed the
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paperwork). 524 U. S., at 747. Ellerth was a case from the Seventh Circuit, and at the time of its decision in that case, that court had already adopted its current definition of a supervisor. See Volk v. Coler, 845 F. 2d 1422, 1436 (1988). See also Parkins v. Civil Constructors of Ill., Inc., 163 F. 3d 1027, 1033, n. 1 (CA7 1998) (discussing Circuit case law). Although the en banc Seventh Circuit in Ellerth issued eight separate opinions, there was no disagreement about the harasser’s status as a supervisor. Jansen v. Packaging Corp. of America, 123 F. 3d 490 (1997) (per curiam). Likewise, when the case reached this Court, no question about the harasser’s status was raised.

The same is true with respect to Faragher. In that case, Faragher, a female lifeguard, sued her employer, the city of Boca Raton, for sexual harassment based on the conduct of two other lifeguards, Bill Terry and David Silverman, and we held that the city was vicariously liable for Terry’s and Silverman’s harassment. Although it is clear that Terry had authority to take tangible employment actions affecting the victim, see 524 U. S., at 781 (explaining that Terry could hire new lifeguards, supervise their work assignments, counsel, and discipline them), Silverman

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8The dissent suggests that it is unclear whether Terry would qualify as a supervisor under the test we adopt because his hiring decisions were subject to approval by higher management. Post, at 7, n. 1 (opinion of Ginsburg, J.). See also Faragher, 524 U. S., at 781. But we have assumed that tangible employment actions can be subject to such approval. See Ellerth, 524 U. S., at 762. In any event, the record indicates that Terry possessed the power to make employment decisions having direct economic consequences for his victims. See Brief for Petitioner in Faragher v. Boca Raton, O. T. 1997, No. 97–282, p. 9 (“No one, during the twenty years that Terry was Marine Safety Chief, was hired without his recommendation. [He] initiated firing and suspending personnel. [His] evaluations of the lifeguards translated into salary increases. [He] made recommendations regarding promotions . . . .” (citing record)).
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may have wielded less authority, *ibid.* (noting that Silverman was “responsible for making the lifeguards’ daily assignments, and for supervising their work and fitness training”). Nevertheless, the city never disputed Faragher’s characterization of both men as her “supervisors.” See App., O. T. 1997, No. 97–282, p. 40 (First Amended Complaint ¶¶6–7); *id.*, at 79 (Answer to First Amended Complaint ¶¶6–7) (admitting that both harassers had “supervisory responsibilities” over the plaintiff).9

In light of the parties’ undisputed characterization of the alleged harassers, this Court simply was not presented with the question of the degree of authority that an employee must have in order to be classified as a supervisor.10 The parties did not focus on the issue in their briefs, although the victim in Faragher appears to have agreed that supervisors are employees empowered to take tangible employment actions. See Brief for Petitioner, O. T.

9Moreover, it is by no means certain that Silverman lacked the authority to take tangible employment actions against Faragher. In her merits brief, Faragher stated that, as a lieutenant, Silverman “made supervisory and disciplinary decisions and had input on the evaluations as well.” *Id.*, at 9–10. If that discipline had economic consequences (such as suspension without pay), then Silverman might qualify as a supervisor under the definition we adopt today.

Silverman’s ability to assign Faragher significantly different work responsibilities also may have constituted a tangible employment action. Silverman told Faragher, “‘Date me or clean the toilets for a year.’” *Faragher, supra*, at 789. That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher’s eligibility for promotion, then it might constitute a tangible employment action.

10The lower court did not even address this issue. See *Faragher v. Boca Raton*, 111 F. 3d 1530, 1547 (CA11 1997) (Anderson, J., concurring in part and dissenting in part) (noting that it was unnecessary to “decide the threshold level of authority which a supervisor must possess in order to impose liability on the employer”).
1997, No. 97–282, p. 24 ("Supervisors typically exercise broad discretionary powers over their subordinates, determining many of the terms and conditions of their employment, including their raises and prospects for promotion and controlling or greatly influencing whether they are to be dismissed").

For these reasons, we have no difficulty rejecting petitioner's argument that the question before us in the present case was effectively settled in her favor by our treatment of the alleged harassers in Ellerth and Faragher.11

The dissent acknowledges that our prior cases do "not squarely resolve whether an employee without power to take tangible employment actions may nonetheless qualify as a supervisor," but accuses us of ignoring the "all-too-plain reality" that employees with authority to control their subordinates' daily work are aided by that authority in perpetuating a discriminatory work environment. Post, at 8 (opinion of GINSBURG, J.). As Ellerth recognized, however, "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation," and consequently "something more" is required in order to warrant vicarious liability. 524 U. S., at 760. The ability to direct another employee's tasks is

11According to the dissent, the rule that we adopt is also inconsistent with our decision in Pennsylvania State Police v. Suders, 542 U. S. 129 (2004). See post, at 7–8. The question in that case was "whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in Ellerth and Faragher." Suders, supra, at 140. As the dissent implicitly acknowledges, the supervisor status of the harassing employees was not before us in that case. See post, at 8. Indeed, the employer conceded early in the litigation that the relevant employees were supervisors, App. in Pennsylvania State Police v. Suders, O. T. 2003, No. 03–95, p. 20 (Answer ¶29), and we therefore had no occasion to question that unchallenged characterization.
simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments, see post, at 9–11 (discussing examples), but so are many other co-workers. Negligence provides the better framework for evaluating an employer’s liability when a harassing employee lacks the power to take tangible employment actions.

C

Although our holdings in Faragher and Ellerth do not resolve the question now before us, we believe that the answer to that question is implicit in the characteristics of the framework that we adopted.

To begin, there is no hint in either Ellerth or Faragher that the Court contemplated anything other than a unitary category of supervisors, namely, those possessing the authority to effect a tangible change in a victim’s terms or conditions of employment. The Ellerth/Faragher framework draws a sharp line between co-workers and supervisors. Co-workers, the Court noted, “can inflict psychological injuries” by creating a hostile work environment, but they “cannot dock another’s pay, nor can one co-worker demote another.” Ellerth, 524 U.S., at 762. Only a supervisor has the power to cause “direct economic harm” by taking a tangible employment action. Ibid. “Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.... Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” Ibid. (emphasis added). The strong implication of this passage is that the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify
as supervisors.

The way in which we framed the question presented in *Ellerth* supports this understanding. As noted, the *Ellerth/Faragher* framework sets out two circumstances in which an employer may be vicariously liable for a supervisor's harassment. The first situation (which results in strict liability) exists when a supervisor actually takes a tangible employment action based on, for example, a subordinate's refusal to accede to sexual demands. The second situation (which results in vicarious liability if the employer cannot make out the requisite affirmative defense) is present when no such tangible action is taken. Both *Ellerth* and *Faragher* fell into the second category, and in *Ellerth*, the Court couched the question at issue in the following terms: "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat." 524 U.S., at 754. This statement plainly ties the second situation to a supervisor's authority to inflict direct economic injury. It is because a supervisor has that authority—and its potential use hangs as a threat over the victim—that vicarious liability (subject to the affirmative defense) is justified.

Finally, the *Ellerth/Faragher* Court sought a framework that would be workable and would appropriately take into account the legitimate interests of employers and employees. The Court looked to principles of agency law for guidance, but the Court concluded that the "malleable terminology" of the aided-in-the-commission principle counseled against the wholesale incorporation of that principle into Title VII case law. *Ellerth*, 524 U.S., at 763. Instead, the Court also considered the objectives of Title VII, including "the limitation of employer liability in certain circumstances." *Id.*, at 764.

The interpretation of the concept of a supervisor that we
adopt today is one that can be readily applied. In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment. By contrast, under the approach advocated by petitioner and the EEOC, supervisor status would very often be murky—as this case well illustrates.\(^\text{12}\)

According to petitioner, the record shows that Davis, her alleged harasser, wielded enough authority to qualify as a supervisor. Petitioner points in particular to Davis' job description, which gave her leadership responsibilities, and to evidence that Davis at times led or directed Vance and other employees in the kitchen. See Brief for Petitioner 42–43 (citing record); Reply Brief 22–23 (same). The United States, on the other hand, while applying the same open-ended test for supervisory status, reaches the opposite conclusion. At least on the present record, the United States tells us, Davis fails to qualify as a supervisor. Her job description, in the Government's view, is not dispositive, and the Government adds that it would not be enough for petitioner to show that Davis "occasionally took the lead in the kitchen." Brief for United States as Amicus Curiae 31 (U. S. Brief).

This disagreement is hardly surprising since the

\(^{12}\)The dissent attempts to find ambiguities in our holding, see \textit{post}, at 15–16, and n. 5, but it is indisputable that our holding is orders of magnitude clearer than the nebulous standard it would adopt. Employment discrimination cases present an almost unlimited number of factual variations, and marginal cases are inevitable under any standard.
EEOC’s definition of a supervisor, which both petitioner and the United States defend, is a study in ambiguity. In its Enforcement Guidance, the EEOC takes the position that an employee, in order to be classified as a supervisor, must wield authority “of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.” Id., at 27 (quoting App. to Pet. for Cert. 89a (EEOC Guidance)). But any authority over the work of another employee provides at least some assistance, see Ellerth, supra, at 763, and that is not what the United States interprets the Guidance to mean. Rather, it informs us, the authority must exceed both an ill-defined temporal requirement (it must be more than “occasional”) and an ill-defined substantive requirement (“an employee who directs ‘only a limited number of tasks or assignments’ for another employee ... would not have sufficient authority to qualify as a supervisor.” U. S. Brief 28 (quoting App. to Pet. for Cert. 92a (EEOC Guidance)); U. S. Brief 31.

We read the EEOC Guidance as saying that the number (and perhaps the importance) of the tasks in question is a factor to be considered in determining whether an employee qualifies as a supervisor. And if this is a correct interpretation of the EEOC’s position, what we are left with is a proposed standard of remarkable ambiguity.

The vagueness of this standard was highlighted at oral argument when the attorney representing the United States was asked to apply that standard to the situation in Faragher, where the alleged harasser supposedly threatened to assign the plaintiff to clean the toilets in the lifeguard station for a year if she did not date him. 524 U. S., at 780. Since cleaning the toilets is just one task, albeit an unpleasant one, the authority to assign that job would not seem to meet the more-than-a-limited-number-of-tasks requirement in the EEOC Guidance. Nevertheless, the Government attorney’s first response was that the author-
ity to make this assignment would be enough. Tr. of Oral Arg. 23. He later qualified that answer by saying that it would be necessary to “know how much of the day’s work [was] encompassed by cleaning the toilets.” Id., at 23–24. He did not explain what percentage of the day’s work (50%, 25%, 10%?) would suffice.

The Government attorney’s inability to provide a definitive answer to this question was the inevitable consequence of the vague standard that the Government asks us to adopt. Key components of that standard—“sufficient” authority, authority to assign more than a “limited number of tasks,” and authority that is exercised more than “occasionally”—have no clear meaning. Applying these standards would present daunting problems for the lower federal courts and for juries.

Under the definition of “supervisor” that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial. The elimination of this issue from the trial will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply. The plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the Ellerth/Faragher affirmative defense. Perhaps even more important, the work of the jury, which is inevitably complicated in employment discrimination cases, will be simplified. The jurors can be given preliminary instructions that allow them to understand, as the evidence comes in, how each item of proof fits into the framework that they will ultimately be required to apply. And even where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser’s authority to take tangible employment actions), this preliminary question is relatively straightforward.
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The alternative approach advocated by petitioner and the United States would make matters far more complicated and difficult. The complexity of the standard they favor would impede the resolution of the issue before trial. With the issue still open when trial commences, the parties would be compelled to present evidence and argument on supervisor status, the affirmative defense, and the question of negligence, and the jury would have to grapple with all those issues as well. In addition, it would often be necessary for the jury to be instructed about two very different paths of analysis, i.e., what to do if the alleged harasser was found to be a supervisor and what to do if the alleged harasser was found to be merely a co-worker.

Courts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases. And the danger of juror confusion

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13See, e.g., Gross v. FBL Financial Services, Inc., 557 U. S. 167, 179 (2009); Armstrong v. Bardette Tomlin Memorial Hospital, 438 F. 3d 240, 249 (CA3 2006) (noting in the context of McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1977), that that “the prima facie case and the shifting burdens confuse lawyers and judges, much less juries, who do not have the benefit of extensive study of the law on the subject” (quoting Mogull v. Commercial Real Estate, 162 N. J. 449, 471, 744 A. 2d 1186, 1199 (2000))); Whittington v. Nordam Group Inc., 429 F. 3d 986, 998 (CA10 2005) (noting that unnecessarily complicated instructions complicate a jury's job in employment discrimination cases, and “unnecessary complexity increases the opportunity for error”); Sanders v. New York City Human Resources Admin., 361 F. 3d 749, 758 (CA2 2004) (“Making the burden-shifting scheme of McDonnell Douglas part of a jury charge undoubtedly constitutes error because of the manifest risk of confusion it creates”); Mogull, supra, at 473, 744 A. 2d, at 1200 (“Given the confusion that often results when the first and second stages of the McDonnell Douglas test goes to the jury, we recommend that the court should decide both those issues”); Tymkovich, The Problem with Pretext, 85 Denver Univ. L. Rev. 503, 527–529 (2008) (discussing the potential for jury confusion that arises when instructions are unduly complex and proposing a simpler framework); Grebeldinger, Instructing the Jury in a Case of Circumstantial Individ-
is particularly high where the jury is faced with instructions on alternative theories of liability under which different parties bear the burden of proof.\textsuperscript{14} By simplifying the process of determining who is a supervisor (and by extension, which liability rules apply to a given set of facts), the approach that we take will help to ensure that juries return verdicts that reflect the application of the correct legal rules to the facts.

Contrary to the dissent's suggestions, see \textit{post}, at 14, 17, this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or by altering the work environment in objectionable ways. In such cases, the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be con-

sidered in determining whether the employer was negligent. The nature and degree of authority possessed by harassing employees varies greatly, see post, 9–11 (offering examples), and as we explained above, the test proposed by petitioner and the United States is ill equipped to deal with the variety of situations that will inevitably arise. This variety presents no problem for the negligence standard, which is thought to provide adequate protection for tort plaintiffs in many other situations. There is no reason why this standard, if accompanied by proper instructions, cannot provide the same service in the context at issue here.

D

The dissent argues that the definition of a supervisor that we now adopt is out of touch with the realities of the workplace, where individuals with the power to assign daily tasks are often regarded by other employees as supervisors. See post, at 5, 8–12. But in reality it is the alternative that is out of touch. Particularly in modern organizations that have abandoned a highly hierarchical management structure, it is common for employees to have overlapping authority with respect to the assignment of work tasks. Members of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus may have the responsibility to direct each other in that area of responsibility.

Finally, petitioner argues that tying supervisor status to the authority to take tangible employment actions will encourage employers to attempt to insulate themselves from liability for workplace harassment by empowering only a handful of individuals to take tangible employment actions. But a broad definition of “supervisor” is not necessary to guard against this concern.

As an initial matter, an employer will always be liable when its negligence leads to the creation or continuation of
a hostile work environment. And even if an employer concentrates all decisionmaking authority in a few individuals, it likely will not isolate itself from heightened liability under Faragher and Ellerth. If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. Cf. Rhodes v. Illinois Dept. of Transp., 359 F. 3d 498, 509 (CA7 2004) (Rovner, J., concurring in part and concurring in judgment) (“Although they did not have the power to take formal employment actions vis-à-vis [the victim], [the harassers] necessarily must have had substantial input into those decisions, as they would have been the people most familiar with her work—certainly more familiar with it than the off-site Department Administrative Services Manager”). Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies. See Ellerth, 524 U. S., at 762.

IV

Importuning Congress, post, at 21–22, the dissent suggests that the standard we adopt today would cause the plaintiffs to lose in a handful of cases involving shocking allegations of harassment, see post, at 9–12. However, the dissent does not mention why the plaintiffs would lose in those cases. It is not clear in any of those examples that the legal outcome hinges on the definition of “supervisor.” For example, Clara Whitten ultimately did not prevail on her discrimination claims—notwithstanding the fact that the Fourth Circuit adopted the approach advocated by the dissent, see Whitten v. Fred’s, Inc., 601 F. 3d 231, 243–247 (2010)—because the District Court subsequently dismissed her claims for lack of jurisdiction. See
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Whitten v. Fred's, Inc., No. 8:08-0218-HMH-BHH, 2010 WL 2757005, *3 (D SC, July 12, 2010). And although the dissent suggests that Donna Rhodes’ employer would have been liable under the dissent’s definition of “supervisor,” that is pure speculation: It is not clear that Rhodes suffered any tangible employment action, see Rhodes v. Illinois Dept. of Transp., 243 F. Supp. 2d 810, 817 (ND Ill. 2003), and no court had occasion to determine whether the employer could have established the affirmative defense (a prospect that is certainly feasible given that there was evidence that the employer had an “adequate anti-harassment policy in place,” that the employer promptly addressed the incidents about which Rhodes complained, and that “Rhodes failed to take advantage of the preventative or corrective opportunities provided,” Rhodes v. Illinois Dept. of Transp., 359 F. 3d, at 507).15 Finally, the dissent’s reliance on Monika Starke’s case is perplexing given that the EEOC ultimately did obtain relief (in the amount of $50,000) for the harassment of Starke,16 see Order of Dismissal in No. 1:07-cv-0095-LRR (ND Iowa, 15 Similarly, it is unclear whether Yasharay Mack ultimately would have prevailed even under the dissent’s definition of “supervisor.” The Second Circuit (adoption a definition similar to that advocated by the dissent) remanded the case for the District Court to determine whether Mack “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” Mack v. Otis Elevator Co., 326 F. 3d 116, 127-128 (2003) (quoting Ellerth, 524 U. S., at 766). But before it had an opportunity to make any such determination, Mack withdrew her complaint and the District Court dismissed her claims with prejudice. See Stipulation and Order of Dismissal in No. 1:00-cv-7778-LAP (SDNY, Oct. 21, 2004), Dkt. No. 63.

16 Starke herself lacked standing to pursue her claims, see EEOC v. CRST Van Expedited, Inc., 679 F. 3d 657, 678, and n. 14 (CA8 2012), but the Eighth Circuit held that the EEOC could sue in its own name to remedy the sexual harassment against Starke and other CRST employees, see id., at 682.
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Feb. 2, 2013, Dkt. No. 380, Exh. 1, ¶1, notwithstanding the fact that the court in that case applied the definition of "supervisor" that we adopt today, see EEOC v. CRST Van Expedited, Inc., 679 F. 3d 657, 684 (CA8 2012).

In any event, the dissent is wrong in claiming that our holding would preclude employer liability in other cases with facts similar to these. Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant. Thus, it is not true, as the dissent asserts, that our holding "relieves scores of employers of responsibility" for the behavior of workers they employ. Post, at 14.

The standard we adopt is not untested. It has been the law for quite some time in the First, Seventh, and Eighth Circuits, see, e.g., Noviello v. Boston, 398 F. 3d 76, 96 (CA1 2005); Weyers v. Lear Operations Corp., 359 F. 3d 1049, 1057 (CA8 2004); Parkins v. Civil Constructors of Ill., Inc., 163 F. 3d 1027, 1033–1034, and n. 1 (CA7 1998)—i.e., in Arkansas, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, and Wisconsin. We are aware of no evidence that this rule has produced dire consequences in these 14 jurisdictions.

Despite its rhetoric, the dissent acknowledges that Davis, the alleged harasser in this case, would probably not qualify as a supervisor even under the dissent's preferred approach. See post, at 20 ("[T]here is cause to anticipate that Davis would not qualify as Vance's supervisor"). On that point, we agree. Petitioner did refer to Davis as a "supervisor" in some of the complaints that she filed, App. 28; id., at 45, and Davis' job description does
state that she supervises Kitchen Assistants and Substitutes and "[i]ead[s] and direct[s]" certain other employees, id., at 12–13. But under the dissent’s preferred approach, supervisor status hinges not on formal job titles or "paper descriptions" but on "specific facts about the working relationship." Post, at 20–21 (internal quotation marks omitted).

Turning to the "specific facts" of petitioner's and Davis' working relationship, there is simply no evidence that Davis directed petitioner's day-to-day activities. The record indicates that Bill Kimes (the general manager of the Catering Division) and the chef assigned petitioner's daily tasks, which were given to her on "prep lists." No. 1:06–cv–1452–SEB–JMS, 2008 WL 4247836, *7 (SD Ind., Sept. 10, 2008); App. 430, 431. The fact that Davis sometimes may have handed prep lists to petitioner, see id., at 74, is insufficient to confer supervisor status, see App. to Pet. for Cert. 92a (EEOC Guidance). And Kimes—not Davis—set petitioner's work schedule. See App. 431. See also id., at 212.

Because the dissent concedes that our approach in this case deprives petitioner of none of the protections that Title VII offers, the dissent's critique is based on nothing more than a hypothesis as to how our approach might affect the outcomes of other cases—cases where an employee who cannot take tangible employment actions, but who does direct the victim's daily work activities in a meaningful way, creates an unlawful hostile environment, and yet does not wield authority of such a degree and nature that the employer can be deemed negligent with respect to the harassment. We are skeptical that there are a great number of such cases. However, we are confident that, in every case, the approach we take today will be more easily administrable than the approach advocated by the dissent.
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*   *   *

We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. Because there is no evidence that BSU empowered Davis to take any tangible employment actions against Vance, the judgment of the Seventh Circuit is affirmed.

It is so ordered.
THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 11–556

MAETTA VANCE, PETITIONER v. BALL STATE UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 24, 2013]

JUSTICE THOMAS, concurring.

I continue to believe that Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998), and Faragher v. Boca Raton, 524 U. S. 775 (1998), were wrongly decided. See ante, at 8. However, I join the opinion because it provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee’s harassment.
GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 11–556

MAETTA VANCE, PETITIONER v. BALL STATE UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 24, 2013]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In Faragher v. Boca Raton, 524 U. S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998), this Court held that an employer can be vicariously liable under Title VII of the Civil Rights Act of 1964 for harassment by an employee given supervisory authority over subordinates. In line with those decisions, in 1999, the Equal Employment Opportunity Commission (EEOC) provided enforcement guidance “regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.” EEOC, Guidance on Vicarious Employer Liability For Unlawful Harassment by Supervisors, 8 BNA FEP Manual 405:7651 (Feb. 2003) (hereinafter EEOC Guidance). Addressing who qualifies as a supervisor, the EEOC answered: (1) an individual authorized “to undertake or recommend tangible employment decisions affecting the employee,” including “hiring, firing, promoting, demoting, and reassigning the employee”; or (2) an individual authorized “to direct the employee’s daily work activities.” Id., at 405:7654.

The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those for-
mally empowered to take tangible employment actions. The limitation the Court decrees diminishes the force of Faragher and Ellerth, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation’s workplaces. I would follow the EEOC’s Guidance and hold that the authority to direct an employee’s daily activities establishes supervisory status under Title VII.

I

A

Title VII makes it “an unlawful employment practice for an employer” to “discriminate against any individual with respect to” the “terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. §2000e–2(a). The creation of a hostile work environment through harassment, this Court has long recognized, is a form of proscribed discrimination. Oncale v. Sundowner Offshore Services, Inc., 523 U. S. 75, 78 (1998); Meritor Savings Bank, FSB v. Vinson, 477 U. S. 57, 64–65 (1986).

In Faragher and Ellerth, this Court established a framework for determining when an employer may be held liable for its employees' creation of a hostile work environment. Recognizing that Title VII's definition of "employer" includes an employer's "agent[s]," 42 U.S.C. §2000e(b), the Court looked to agency law for guidance in formulating liability standards. Faragher, 524 U.S., at 791, 801; Ellerth, 524 U.S., at 755–760. In particular, the Court drew upon §219(2)(d) of the Restatement (Second) of Agency (1957), which makes an employer liable for the conduct of an employee, even when that employee acts beyond the scope of her employment, if the employee is "aided in accomplishing" a tort "by the existence of the agency relation." See Faragher, 524 U.S., at 801; Ellerth, 524 U.S., at 758.

Stemming from that guide, Faragher and Ellerth distinguished between harassment perpetrated by supervisors, which is often enabled by the supervisor's agency relationship with the employer, and harassment perpetrated by co-workers, which is not similarly facilitated. Faragher, 524 U.S., at 801–803; Ellerth, 524 U.S., at 763–765. If the harassing employee is a supervisor, the Court held, the employer is vicariously liable whenever the harassment culminates in a tangible employment action. Faragher, 524 U.S., at 807–808; Ellerth, 524 U.S., at 764–765. The term "tangible employment action," Ellerth observed, "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Id., at 761. Such an action, the Court explained, provides "assurance the injury could not have been inflicted absent the agency relation." Id., at 761–762.

An employer may also be held vicariously liable for a supervisor's harassment that does not culminate in a tangible employment action, the Court next determined.
In such a case, however, the employer may avoid liability by showing that (1) it exercised reasonable care to prevent and promptly correct harassing behavior, and (2) the complainant unreasonably failed to take advantage of preventative or corrective measures made available to her. Faragher, 524 U.S., at 807; Ellerth, 524 U.S., at 765. The employer bears the burden of establishing this affirmative defense by a preponderance of the evidence. Faragher, 524 U.S., at 807; Ellerth, 524 U.S., at 765.

In contrast, if the harassing employee is a co-worker, a negligence standard applies. To satisfy that standard, the complainant must show that the employer knew or should have known of the offensive conduct but failed to take appropriate corrective action. See Faragher, 524 U.S., at 799; Ellerth, 524 U.S., at 758–759. See also 29 CFR §1604.11(d) (2012); EEOC Guidance 405:7652.

The distinction Faragher and Ellerth drew between supervisors and co-workers corresponds to the realities of the workplace. Exposed to a fellow employee’s harassment, one can walk away or tell the offender to “buzz off.” A supervisor’s slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life. And she may be demoted or fired. Facing such dangers, she may be reluctant to blow the whistle on her superior, whose “power and authority invests his or her harassing conduct with a particular threatening character.” Ellerth, 524 U.S., at 763. See also Faragher, 524 U.S., at 803; Brief for Respondent 23 (“The potential threat to one’s livelihood or working conditions will make the victim think twice before resisting harassment or
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fighting back.”). In short, as Faragher and Ellerth recognized, harassment by supervisors is more likely to cause palpable harm and to persist unabated than similar conduct by fellow employees.

II

While Faragher and Ellerth differentiated harassment by supervisors from harassment by co-workers, neither decision gave a definitive answer to the question: Who qualifies as a supervisor? Two views have emerged. One view, in line with the EEOC’s Guidance, counts as a supervisor anyone with authority to take tangible employment actions or to direct an employee’s daily work activities. E.g., Mack v. Otis Elevator Co., 326 F. 3d 116, 127 (CA2 2003); Whitten v. Fred’s, Inc., 601 F. 3d 231, 246 (CA4 2010); EEOC Guidance 405:7654. The other view ranks as supervisors only those authorized to take tangible employment actions. E.g., Noviello v. Boston, 398 F. 3d 76, 96 (CA1 2005); Parkins v. Civil Constructors of Ill., Inc., 163 F. 3d 1027, 1034 (CA7 1998); Joens v. John Morrell & Co., 354 F. 3d 938, 940–941 (CA8 2004).

Notably, respondent Ball State University agreed with petitioner Vance and the United States, as amicus curiae, that the tangible-employment-action-only test “does not necessarily capture all employees who may qualify as supervisors.” Brief for Respondent 1. “[V]icarious liability,” Ball State acknowledged, “also may be triggered when the harassing employee has the authority to control the victim’s daily work activities in a way that materially enables the harassment.” Id., at 1–2.

The different view taken by the Court today is out of accord with the agency principles that, Faragher and Ellerth affirmed, govern Title VII. See supra, at 3–4. It is blind to the realities of the workplace, and it discounts the guidance of the EEOC, the agency Congress established to interpret, and superintend the enforcement of, Title VII.
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Under that guidance, the appropriate question is: Has the employer given the alleged harasser authority to take tangible employment actions or to control the conditions under which subordinates do their daily work? If the answer to either inquiry is yes, vicarious liability is in order, for the superior-subordinate working arrangement facilitating the harassment is of the employer's making.

A

Until today, our decisions have assumed that employees who direct subordinates' daily work are supervisors. In Faragher, the city of Boca Raton, Florida, employed Bill Terry and David Silverman to oversee the city's corps of ocean lifeguards. 524 U. S., at 780. Terry and Silverman "repeatedly subject[ed] Faragher and other female lifeguards to uninvited and offensive touching," and they regularly "ma[de] lewd remarks, and [spoke] of women in offensive terms." Ibid. (internal quotation marks omitted). Terry told a job applicant that "female lifeguards had sex with their male counterparts," and then "asked whether she would do the same." Id., at 782. Silverman threatened to assign Faragher to toilet-cleaning duties for a year if she refused to date him. Id., at 780. In words and conduct, Silverman and Terry made the beach a hostile place for women to work.

As Chief of Boca Raton's Marine Safety Division, Terry had authority to "hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." Id., at 781. Silverman's duties as a Marine Safety lieutenant included "making the lifeguards' daily assignments, and . . . supervising their work and fitness training." Ibid. Both men "were granted virtually unchecked authority over their subordinates, directly controlling and supervising all aspects of Faragher's day-
to-day activities." Id., at 808 (internal quotation marks and brackets omitted).

We may assume that Terry would fall within the definition of supervisor the Court adopts today. See ante, at 9.1

But nothing in the Faragher record shows that Silverman would. Silverman had oversight and assignment responsibilities—he could punish lifeguards who would not date him with full-time toilet-cleaning duty—but there was no evidence that he had authority to take tangible employment actions. See Faragher, 524 U. S., at 780–781. Holding that Boca Raton was vicariously liable for Silverman’s harassment, id., at 808–809, the Court characterized him as Faragher’s supervisor, see id., at 780, and there was no dissent on that point, see id., at 810 (Thomas, J., dissenting).

Subsequent decisions reinforced Faragher’s use of the term “supervisor” to encompass employees with authority to direct the daily work of their victims. In Pennsylvania State Police v. Suders, 542 U. S. 129, 140 (2004), for example, the Court considered whether a constructive discharge occasioned by supervisor harassment ranks as a tangible employment action. The harassing employees lacked authority to discharge or demote the complainant,

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1It is not altogether evident that Terry would qualify under the Court’s test. His authority to hire was subject to approval by higher management, Faragher v. Boca Raton, 524 U. S. 775, 781 (1998), and there is scant indication that he possessed other powers on the Court’s list. The Court observes that Terry was able to “recommen[d]” and “initiat[e]” tangible employment actions. Ante, at 15, n. 8 (internal quotation marks omitted). Nothing in the Faragher record, however, shows that Terry had authority to take such actions himself. Faragher’s complaint alleged that Terry said he would never promote a female lifeguard to the rank of lieutenant, 524 U. S., at 780, but that statement hardly suffices to establish that he had ultimate promotional authority. Had Boca Raton anticipated the position the Court today announces, the city might have urged classification of Terry as Faragher’s superior, but not her “supervisor.”
but they were "responsible for the day-to-day supervision" of the workplace and for overseeing employee shifts. *Suders v. Easton*, 325 F. 3d 432, 450, n. 11 (CA3 2003). Describing the harassing employees as the complainant's "supervisors," the Court proceeded to evaluate the complainant's constructive discharge claim under the *Ellerth* and *Faragher* framework. *Suders*, 542 U. S., at 134, 140–141.

It is true, as the Court says, *ante*, at 15–17, and n. 11, that *Faragher* and later cases did not squarely resolve whether an employee without power to take tangible employment actions may nonetheless qualify as a supervisor. But in laboring to establish that Silverman's supervisor status, undisputed in *Faragher*, is not dispositive here, the Court misses the forest for the trees. *Faragher* illustrates an all-too-plain reality: A supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer. That Silverman could threaten Faragher with toilet-cleaning duties while Terry could orally reprimand her was inconsequential in *Faragher*, and properly so. What mattered was that both men took advantage of the power vested in them as agents of Boca Raton to facilitate their abuse. See *Faragher*, 524 U. S., at 801 (Silverman and Terry "implicitly threaten[ed] to misuse their supervisory powers to deter any resistance or complaint."). And when, assisted by an agency relationship, in-charge superiors like Silverman perpetuate a discriminatory work environment, our decisions have appropriately held the employer vicariously liable, subject to the above-described affirmative defense. See *supra*, at 3–4.

B

Workplace realities fortify my conclusion that harassment by an employee with power to direct subordinates'
day-to-day work activities should trigger vicarious employer liability. The following illustrations, none of them hypothetical, involve in-charge employees of the kind the Court today excludes from supervisory status.²

Yasharay Mack: Yasharay Mack, an African-American woman, worked for the Otis Elevator Company as an elevator mechanic’s helper at the Metropolitan Life Building in New York City. James Connolly, the “mechanic in charge” and the senior employee at the site, targeted Mack for abuse. He commented frequently on her “fantastic ass,” “luscious lips,” and “beautiful eyes,” and, using deplorable racial epithets, opined that minorities and women did not “belong in the business.” Once, he pulled her on his lap, touched her buttocks, and tried to kiss her while others looked on. Connolly lacked authority to take tangible employment actions against mechanic’s helpers, but he did assign their work, control their schedules, and direct the particulars of their workdays. When he became angry with Mack, for example, he denied her overtime hours. And when she complained about the mistreatment, he scoffed, “I get away with everything.” See Mack, 326 F. 3d, at 120–121, 125–126 (internal quotation marks omitted).

Donna Rhodes: Donna Rhodes, a seasonal highway maintainer for the Illinois Department of Transportation, was responsible for plowing snow during winter months. Michael Poladian was a “Lead Lead Worker” and Matt Mara, a “Technician” at the maintenance yard where Rhodes worked. Both men assembled plow crews and managed the work assignments of employees in Rhodes’s position, but neither had authority to hire, fire, promote,

²The illustrative cases reached the appellate level after grants of summary judgment in favor of the employer. Like the Courts of Appeals in each case, I recount the facts in the light most favorable to the employee, the nonmoving party.
demote, transfer, or discipline employees. In her third season working at the yard, Rhodes was verbally assaulted with sex-based invectives and a pornographic image was taped to her locker. Poladian forced her to wash her truck in sub-zero temperatures, assigned her undesirable yard work instead of road crew work, and prohibited another employee from fixing the malfunctioning heating system in her truck. Conceding that Rhodes had been subjected to a sex-based hostile work environment, the Department of Transportation argued successfully in the District Court and Court of Appeals that Poladian and Mara were not Rhodes's supervisors because they lacked authority to take tangible employment actions against her. See Rhodes v. Illinois Dept. of Transp., 359 F. 3d 498, 501–503, 506–507 (CA7 2004).

Clara Whitten: Clara Whitten worked at a discount retail store in Belton, South Carolina. On Whitten's first day of work, the manager, Matt Green, told her to “give [him] what [he] want[ed]” in order to obtain approval for long weekends off from work. Later, fearing what might transpire, Whitten ignored Green's order to join him in an isolated storeroom. Angered, Green instructed Whitten to stay late and clean the store. He demanded that she work over the weekend despite her scheduled day off. Dismissing her as "dumb and stupid," Green threatened to make her life a "living hell." Green lacked authority to fire, promote, demote, or otherwise make decisions affecting Whitten's pocketbook. But he directed her activities, gave her tasks to accomplish, burdened her with undesirable work assignments, and controlled her schedule. He was usually the highest ranking employee in the store, and both Whitten and Green considered him the supervisor. See Whitten, 601 F. 3d, at 236, 244–247 (internal quotation marks omitted).

Monika Storke: CRST Van Expedited, Inc., an interstate transit company, ran a training program for newly hired
truckdrivers requiring a 28-day on-the-road trip. Monika Starke participated in the program. Trainees like Starke were paired in a truck cabin with a single “lead driver” who lacked authority to hire, fire, promote, or demote, but who exercised control over the work environment for the duration of the trip. Lead drivers were responsible for providing instruction on CRST’s driving method, assigning specific tasks, and scheduling rest stops. At the end of the trip, lead drivers evaluated trainees’ performance with a nonbinding pass or fail recommendation that could lead to full driver status. Over the course of Starke’s training trip, her first lead driver, Bob Smith, filled the cabin with vulgar sexual remarks, commenting on her breast size and comparing the gear stick to genitalia. A second lead driver, David Goodman, later forced her into unwanted sex with him, an outrage to which she submitted, believing it necessary to gain a passing grade. See EEOC v. CRST Van Expedited, Inc., 679 F. 3d 657, 665–666, 684–685 (CA8 2012).

In each of these cases, a person vested with authority to control the conditions of a subordinate’s daily work life used his position to aid his harassment. But in none of them would the Court’s severely confined definition of supervisor yield vicarious liability for the employer. The senior elevator mechanic in charge, the Court today tells us, was Mack’s co-worker, not her supervisor. So was the store manager who punished Whitten with long hours for refusing to give him what he wanted. So were the lead drivers who controlled all aspects of Starke’s working environment, and the yard worker who kept other employees from helping Rhodes to control the heat in her truck.

As anyone with work experience would immediately grasp, James Connolly, Michael Poladian, Matt Mara, Matt Green, Bob Smith, and David Goodman wielded employer-conferr confferred supervisory authority over their victims. Each man’s discriminatory harassment derived
force from, and was facilitated by, the control reins he held. Cf. Burlington N. & S. F. R. Co. v. White, 548 U. S. 52, 70–71 (2006) ("Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."). Under any fair reading of Title VII, in each of the illustrative cases, the superior employee should have been classified a supervisor whose conduct would trigger vicarious liability.3

C

Within a year after the Court’s decisions in Faragher and Ellerth, the EEOC defined “supervisor” to include any employee with “authority to undertake or recommend tangible employment decisions,” or with “authority to direct [another] employee’s daily work activities.” EEOC Guidance 405:7654. That definition should garner “respect proportional to its ‘power to persuade.’” United States v. Mead Corp., 533 U. S. 218, 235 (2001) (quoting Skidmore v. Swift & Co., 323 U. S. 134, 140 (1944)). See also Crawford v. Metropolitan Government of Nashville

3The Court misses the point of the illustrations. See ante, at 26–28, and nn. 15–16. Even under a vicarious liability rule, the Court points out, employers might escape liability for reasons other than the harasser’s status as supervisor. For example, Rhodes might have avoided summary judgment in favor of her employer; even so, it would have been open to the employer to raise and prove to a jury the Faragher/Ellerth affirmative defense, see supra, at 3–4. No doubt other barriers also might impede an employee from prevailing, for example, Whitten’s and Starke’s intervening bankruptcies, see Whitten v. Fred’s Inc., No. 8:08–0218–HM–BHH, 2010 WL 2757005 (D. SC, July 12, 2010); EEOC v. CRST Van Expedited, Inc., 679 F. 3d 657, 678, and n. 14 (CA8 2012), or Mack’s withdrawal of her complaint for reasons not apparent from the record, see ante, at 27–28, n. 16. That, however, is no reason to restrict the definition of supervisor in a way that leaves out those genuinely in charge.

The EEOC's definition of supervisor reflects the agency's "informed judgment" and "body of experience" in enforcing Title VII. Id., at 65 (internal quotation marks omitted). For 14 years, in enforcement actions and litigation, the EEOC has firmly adhered to its definition. See Brief for United States as Amicus Curiae 28 (citing numerous briefs in the Courts of Appeals setting forth the EEOC's understanding).

In developing its definition of supervisor, the EEOC paid close attention to the Faragher and Ellerth framework. An employer is vicariously liable only when the authority it has delegated enables actionable harassment, the EEOC recognized. EEOC Guidance 405:7654. For that reason, a supervisor's authority must be "of a sufficient magnitude so as to assist the harasser ... in carrying out the harassment." Ibid. Determining whether an employee wields sufficient authority is not a mechanical inquiry, the EEOC explained; instead, specific facts about the employee's job function are critical. Id., at 405:7653 to 405:7654. Thus, an employee with authority to increase another's workload or assign undesirable tasks may rank as a supervisor, for those powers can enable harassment. Id., at 405:7654. On the other hand, an employee "who directs only a limited number of tasks or assignments"

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ordinarily would not qualify as a supervisor, for her harassing conduct is not likely to be aided materially by the agency relationship. Id., at 405:7655.

In my view, the EEOC's definition, which the Court puts down as "a study in ambiguity," ante, at 21, has the ring of truth and, therefore, powerfully persuasive force. As a precondition to vicarious employer liability, the EEOC explained, the harassing supervisor must wield authority of sufficient magnitude to enable the harassment. In other words, the aided-in-accomplishment standard requires "something more than the employment relation itself." Ellerth, 524 U.S., at 760. Furthermore, as the EEOC perceived, in assessing an employee's qualification as a supervisor, context is often key. See infra, at 16–17. I would accord the agency's judgment due respect.

III

Exhibiting remarkable resistance to the thrust of our prior decisions, workplace realities, and the EEOC's Guidance, the Court embraces a position that relieves scores of employers of responsibility for the behavior of the supervisors they employ. Trumpeting the virtues of simplicity and administrability, the Court restricts supervisor status to those with power to take tangible employment actions. In so restricting the definition of supervisor, the Court once again shuts from sight the "robust protection against workplace discrimination Congress intended Title VII to secure." Ledbetter v. Goodyear Tire & Rubber Co., 550 U. S. 618, 660 (2007) (GINSBURG, J., dissenting).

A

The Court purports to rely on the Ellerth and Faragher framework to limit supervisor status to those capable of taking tangible employment actions. Ante, at 10, 18. That framework, we are told, presupposes "a sharp line between co-workers and supervisors." Ante, at 18. The definition
of supervisor decreed today, the Court insists, is “clear,” “readily applied,” and “easily workable,” ante, at 10, 20, when compared to the EEOC’s vague standard, ante, at 22.

There is reason to doubt just how “clear” and “workable” the Court’s definition is. A supervisor, the Court holds, is someone empowered to “take tangible employment actions against the victim, i.e., to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’" Ante, at 9 (quoting Ellerth, 524 U.S., at 761). Whether reassignment authority makes someone a supervisor might depend on whether the reassignment carries economic consequences. Ante, at 16, n. 9. The power to discipline other employees, when the discipline has economic consequences, might count, too. Ibid. So might the power to initiate or make recommendations about tangible employment actions. Ante, at 15, n. 8. And when an employer “concentrates all decisionmaking authority in a few individuals” who rely on information from “other workers who actually interact with the affected employee,” the other workers may rank as supervisors (or maybe not; the Court does not commit one way or the other). Ante, at 26.

Someone in search of a bright line might well ask, what counts as “significantly different responsibilities”? Can any economic consequence make a reassignment or disciplinary action “significant,” or is there a minimum threshold? How concentrated must the decisionmaking authority be to deem those not formally endowed with that authority nevertheless “supervisors”? The Court leaves these questions unanswered, and its liberal use of “might” and “may,” ante, at 15, n. 8, 16, n. 9, 26, dims
the light it casts.\(^5\)

That the Court has adopted a standard, rather than a clear rule, is not surprising, for no crisp definition of supervisor could supply the unswerving line the Court desires. Supervisors, like the workplaces they manage, come in all shapes and sizes. Whether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly different responsibilities?), or a law firm associate supervises the firm’s paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches. One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim. That is why Faragher and Ellerth crafted an employer liability standard embrace of all whose authority significantly aids in the creation and perpetuation of harassment.

The Court’s focus on finding a definition of supervisor capable of instant application is at odds with the Court’s ordinary emphasis on the importance of particular circumstances in Title VII cases. See, e.g., Burlington Northern, 548 U.S., at 69 ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances."); Harris, 510 U.S., at 23 ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by

\(^{5}\)Even the Seventh Circuit, whose definition of supervisor the Court adopts in large measure, has candidly acknowledged that, under its definition, supervisor status is not a clear and certain thing. See Doe v. Oberweis Dairy, 456 F. 3d 704, 717 (2006) ("The difficulty of classification in this case arises from the fact that Nayman, the shift supervisor, was in between the paradigmatic classes of supervisor and co-worker. He had supervisory responsibility in the sense of authority to direct the work of the [ice-cream] scoopers, and he was even authorized to issue disciplinary write-ups, but he had no authority to fire them. He was either an elevated coworker or a diminished supervisor.").
looking at all the circumstances.”). The question of supervisory status, no less than the question whether retaliation or harassment has occurred, “depends on a constellation of surrounding circumstances, expectations, and relationships.” *Oncale*, 523 U. S., at 81–82. The EEOC’s Guidance so perceives.

**B**

As a consequence of the Court’s truncated conception of supervisory authority, the *Faragher* and *Ellerth* framework has shifted in a decidedly employer-friendly direction. This realignment will leave many harassment victims without an effective remedy and undermine Title VII’s capacity to prevent workplace harassment.

The negligence standard allowed by the Court, see *ante*, at 24, scarcely affords the protection the *Faragher* and *Ellerth* framework gave victims, harassed by those in control of their lives at work. Recall that an employer is negligent with regard to harassment only if it knew or should have known of the conduct but failed to take appropriate corrective action. See 29 CFR §1604.11(d); EEOC Guidance 405:7652 to 405:7653. It is not uncommon for employers to lack actual or constructive notice of a harassing employee’s conduct. See Lindemann & Grossman 1378–1379. An employee may have a reputation as a harasser among those in his vicinity, but if no complaint makes its way up to management, the employer will escape liability under a negligence standard. *Id.*, at 1378.

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6The Court worries that the EEOC’s definition of supervisor will confound jurors who must first determine whether the harasser is a supervisor and second apply the correct employer liability standard. *Ante*, at 22–24, and nn. 13, 14. But the Court can point to no evidence that jury instructions on supervisor status in jurisdictions following the EEOC Guidance have in fact proved unworkable or confusing to jurors. Moreover, under the Court’s definition of supervisor, jurors in many cases will be obliged to determine, as a threshold question, whether the alleged harasser possessed supervisory authority. See *supra*, at 15–16.
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Faragher is illustrative. After enduring unrelenting harassment, Faragher reported Terry’s and Silverman’s conduct informally to Robert Gordon, another immediate supervisor. 524 U.S., at 782–783. But the lifeguards were “completely isolated from the City’s higher management,” and it did not occur to Faragher to pursue the matter with higher ranking city officials distant from the beach. Id., at 783, 808 (internal quotation marks omitted). Applying a negligence standard, the Eleventh Circuit held that, despite the pervasiveness of the harassment, and despite Gordon’s awareness of it, Boca Raton lacked constructive notice and therefore escaped liability. Id., at 784–785. Under the vicarious liability standard, however, Boca Raton could not make out the affirmative defense, for it had failed to disseminate a policy against sexual harassment. Id., at 808–809.

On top of the substantive differences in the negligence and vicarious liability standards, harassment victims, under today’s decision, are saddled with the burden of proving the employer’s negligence whenever the harasser lacks the power to take tangible employment actions. Faragher and Ellerth, by contrast, placed the burden squarely on the employer to make out the affirmative defense. See Suders, 542 U.S., at 146 (citing Ellerth, 524 U.S., at 765; Faragher, 524 U.S., at 807). This allocation of the burden was both sensible and deliberate: An employer has superior access to evidence bearing on whether it acted reasonably to prevent or correct harassing behavior, and superior resources to marshal that evidence. See 542 U.S., at 146, n. 7 (“The employer is in the best position to know what remedial procedures it offers to employees and how those procedures operate.”).

Faced with a steeper substantive and procedural hill to climb, victims like Yasharay Mack, Donna Rhodes, Clara Whitten, and Monika Starke likely will find it impossible to obtain redress. We can expect that, as a consequence of
restricting the supervisor category to those formally empowered to take tangible employment actions, victims of workplace harassment with meritorious Title VII claims will find suit a hazardous endeavor.\footnote{\textsuperscript{7}}

Inevitably, the Court's definition of supervisor will hinder efforts to stamp out discrimination in the workplace. Because supervisors are comparatively few, and employees are many, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers," and a greater incentive to "screen [supervisors], train them, and monitor their performance." \textit{Faragher}, 524 U.S., at 803. Vicarious liability for employers serves this end. When employers know they will be answerable for the injuries a harassing jobsite boss inflicts, their incentive to provide preventative instruction is heightened. If vicarious liability is confined to supervisors formally empowered to take tangible employment actions, however, employers will have a diminished incentive to train those who control their subordinates' work activities and schedules, \textit{i.e.,} the supervisors who "actually interact" with employees. \textit{Ante}, at 26.

\textit{IV}

I turn now to the case before us. Maetta Vance worked as substitute server and part-time catering assistant for Ball State University's Banquet and Catering Division. During the period in question, she alleged, Saundra Davis, a catering specialist, and other Ball State employees subjected her to a racially hostile work environment. Applying controlling Circuit precedent, the District Court and Seventh Circuit concluded that Davis was not Vance's

\footnote{\textsuperscript{7}Nor is the Court's confinement of supervisor status needed to deter insubstantial claims. Under the EEOC Guidance, a plaintiff must meet the threshold requirement of actionable harassment and then show that her supervisor's authority was of "sufficient magnitude" to assist in the harassment. See EEOC Guidance 405:7652, 405:7654.}
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supervisor, and reviewed Ball State’s liability for her conduct under a negligence standard. 646 F. 3d 461, 470–471 (2011); App. to Pet. for Cert. 53a–55a, 59a–60a. Because I would hold that the Seventh Circuit erred in restricting supervisor status to employees formally empowered to take tangible employment actions, I would remand for application of the proper standard to Vance’s claim. On this record, however, there is cause to anticipate that Davis would not qualify as Vance’s supervisor.8

Supervisor status is based on “job function rather than job title,” and depends on “specific facts” about the working relationship. EEOC Guidance 405:7654. See supra, at 13. Vance has adduced scant evidence that Davis controlled the conditions of her daily work. Vance stated in an affidavit that the general manager of the Catering Division, Bill Kimes, was charged with “overall supervision in the kitchen,” including “reassign[ing] people to perform different tasks,” and “control[ling] the schedule.” App. 431. The chef, Shannon Fultz, assigned tasks by preparing “prep lists” of daily duties. Id., at 277–279, 427. There is no allegation that Davis had a hand in creating these prep lists, nor is there any indication that, in fact, Davis otherwise controlled the particulars of Vance’s workday. Vance herself testified that she did not know whether Davis was her supervisor. Id., at 198.

true, Davis’ job description listed among her responsibilities “[l]ead[ing] and direct[ing] kitchen part-time, substitute, and student employee helpers via demonstra-

8In addition to concluding that Davis was not Vance’s supervisor, the District Court held that the conduct Vance alleged was “neither sufficiently severe nor pervasive to be considered objectively hostile for the purposes of Title VII.” App. to Pet. for Cert. 66a. The Seventh Circuit declined to address this issue. See 646 F. 3d 461, 471 (2011). If the case were remanded, the Court of Appeals could resolve the hostile environment issue first, and then, if necessary, Davis’ status as supervisor or co-worker.
tion, coaching, and overseeing their work." *Id.*, at 13. And another employee testified to believing that Davis was "a supervisor." *Id.*, at 386. But because the supervisor-status inquiry should focus on substance, not labels or paper descriptions, it is doubtful that this slim evidence would enable Vance to survive a motion for summary judgment. Nevertheless, I would leave it to the Seventh Circuit to decide, under the proper standard for supervisory status, what impact, if any, Davis’ job description and the co-worker’s statement should have on the determination of Davis’ status.9

V

Regrettably, the Court has seized upon Vance’s thin case to narrow the definition of supervisor, and thereby manifestly limit Title VII’s protections against workplace harassment. Not even Ball State, the defendant-employer in this case, has advanced the restrictive definition the Court adopts. See *supra*, at 5. Yet the Court, insistent on constructing artificial categories where context should be key, proceeds on an immoderate and unrestrained course to corral Title VII.


9The Court agrees that Davis “would probably not qualify” as Vance’s supervisor under the EEOC’s definition. *Ante*, at 28–29. Then why, one might ask, does the Court nevertheless reach out to announce its restrictive standard in this case, one in which all parties, including the defendant-employer, accept the fitness for Title VII of the EEOC’s Guidance? See *supra*, at 5.
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(1989); and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.

*   *   *

For the reasons stated, I would reverse the judgment of the Seventh Circuit and remand the case for application of the proper standard for determining who qualifies as a supervisor.