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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **RENT-A-CENTER EAST, INC.,** **Defendant.**	**Case No. 16-cv-2222** **Magistrate Judge Long**

PLAINTIFF EEOC'S TRIAL BRIEF ON THE STANDARD OF CAUSATION

In order to establish a violation of Title VII's sex discrimination provision, a plaintiff need only show that sex was a motivating factor in the challenged employment practice. The statute provides that a *defendant* may avail itself of a limited affirmative defense by demonstrating that even if it had not considered the employee's sex, it would have made the same employment decision anyway ("same-decision defense"). However, nothing in the statute requires the plaintiff to meet a higher, "but-for" causation standard of proof when the defendant forgoes the same-decision defense (or lacks evidence to prove it). While there may be cases whose facts render "motivating factor" and "but-for causation" functionally equivalent, this case is not one of them.

Accordingly, the jury should be given the "motivating factor" instruction that the parties agreed upon and jointly proposed. [ECF No. 63, at p. 16].

ARGUMENT

Title VII makes it unlawful for an employer to "discriminate" against an employee "because" of her race, color, sex, religion, and national origin (sometimes called "status-based

discrimination"). 42 U.S.C. § 2000e-2(a). Title VII also makes it unlawful to "discriminate" against an employee "because" she has opposed an unlawful employment practice or participated in a Title VII proceeding (commonly known as retaliation). 42 U.S.C. § 2000e-3(a). Although both of these prohibitions include the word "because," this does not, as Defendant implies, mean they utilize the same standard of causation.[1] Indeed, Congress has given "because" a different definition for status-based discrimination than it has for retaliation: Title VII expressly provides 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." 42 U.S.C. § 2000e-2(m) (emphasis added).

The Supreme Court has made clear that this statutory language means what it says. In a case holding that but-for causation is the correct standard for Title VII retaliation cases, the Supreme Court unambiguously stated that the applicable standard for status-based discrimination is motivating factor:

> 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*.

University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 2522-23 (June 24,

[1] Accordingly, the fact that the Complaint or the EEOC's briefs in this case use the words "because of" in the context of a sex discrimination claim does not somehow imply reliance on a but-for causation standard. An allegation of discrimination because of sex under Title VII necessarily invokes the standard of causation that Title VII (specifically § 2000e-2(m)) specifies for such a claim.

2013) (emphasis added).[2]

"In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003). A plaintiff need not make a heightened showing or present direct evidence in order to make use of the standard. See id. at 98-99, 101-02. In such cases, "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff." Id. at 94. "In order to avail itself of the affirmative defense, the employer must 'demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor.'" Id. at 94-95 (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

In this case, the instruction now proposed by Defendant — the first of two alternative instructions in Section 3.01 of the pattern instructions — plainly describes a but-for causation standard. That instruction would indeed be correct for some discrimination cases covered by Section 3.01 of the pattern instructions — in particular, Title VII retaliation claims, see Nassar, 133 S.Ct. at 2534, and age discrimination claims, see Gross v. FBL Financial Services, Inc., 557 U.S. 167, 177 (2009) ("the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action"). However, for a sex discrimination claim, a but-for instruction would not generally be an accurate statement of the law.

Indeed, one of the cases cited by the pattern instruction committee comment itself holds

[2] While the statement quoted from *Nassar* is technically dicta, its uncontroversial view of this point of law was shared by every member of the Court, majority and minority. See id. at 2535 (Ginsburg, J., dissenting) (noting that "all agree" that "the complaining party need show only that race, color, religion, sex, or national origin was 'a motivating factor" in an employer's adverse action").

that a plaintiff who brought Title VII sex discrimination claim (in that case, pregnancy) was *not* required to prove but-for causation "as a prerequisite to obtaining backpay." See Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1351 (7th Cir. 1995). Characterizing the employer's suggestion to the contrary as "mistaken," the court explained that "the employer, not the employee, must demonstrate that the employment decision would have occurred absent the impermissible motivating factor." Id. If a plaintiff is not required to prove but-for causation to obtain backpay, then logically she cannot be required to prove but-for causation in order to establish liability. Liability is prerequisite for obtaining any kind of relief, and so requiring but-for causation for liability would necessarily be to require but-for causation for backpay, as well, in violation of the holding of Hennessy. Accordingly, Hennessy compels the conclusion that the underlying standard of causation for a sex discrimination claim is motivating factor.

Defendant's reliance on Rapold v. Baxter Int'l Inc., 718 F.3d 602 (7th Cir. Jan. 30, 2013), is misplaced. That case, decided several months before Nassar, involved a specific factual scenario in which the Seventh Circuit concluded that there was no practical difference between the but-for and motivating factor standards. Rapold does not hold that a but-for causation standard is generally appropriate (much less required) for status-based discrimination claims, and it does not require the conclusion that such an instruction is appropriate in this case. Preliminarily, under Rapold, the appropriateness of what it refers to as a "mixed-motive instruction" turns on the nature of the evidence, not what the plaintiff or defendant allege or concede about how many factors may have been considered in making the challenged employment decision. See id. at 609-12. Rather, the Seventh Circuit concluded that the evidence in that case presented a "binary proposition" in which only two conclusions were available, namely that the plaintiff was fired for misconduct or because of his national origin. Id. at 608. Even so, the Seventh Circuit characterized it as "a close question whether [plaintiff] was

entitled to a motivating factor instruction," id. at 612, but concluded that it was not an abuse of discretion (id. at 609) to deny that instruction because the court was "hardpressed to see how the motivating factor instruction would have made a difference here," id. at 612.

The case against Rent-A-Center, by contrast, is one in which a motivating factor instruction *would* make a difference. It goes without saying that a jury is not required to wholly adopt the view of the facts advocated by either party if the evidence would permit the jury to rationally settle on some other view of the facts, perhaps crediting one party on some facts and the other party on other facts.[3] For example, the jury in this case might conclude (contrary to the EEOC's position) that Ms. Kerr used a company vehicle without permission and that this was part of why RAC fired her, but also conclude that (contrary to RAC's position) Carnahan's disapproval of her transgender status also contributed to that decision to fire her.[4] Indeed, there is evidence that unauthorized use of the vehicle alone does not automatically result in termination at RAC; other individuals who used company vehicles for personal use were sometimes fired but sometimes not disciplined at all. Logically, this would permit the jury to conclude that other factors must also be part of the equation, and that in Ms. Kerr's case, her transgender status was such a factor.

If the jury reached that conclusion, then under a motivating factor standard, the jury would find RAC liable. It would be the Defendant's burden to prove, as a limited affirmative defense to certain forms of relief, "that [RAC] would have taken the same action in the absence

[3] A jury could even permissibly draw factual inferences that no party advocated, if they are supported by the evidence.

[4] Under Rapold, the EEOC is not required to concede that RAC considered factors other than gender identity when making the termination in order for a motivating factor instruction to be appropriate. See id. at 611. To be clear, the EEOC believes the evidence shows that Kerr did not engage in unauthorized use of a company vehicle. The point here is simply that since there is a genuine dispute of fact on that point, a jury could conclude otherwise.

of the impermissible motivating factor." See 42 U.S.C. § 2000e-5(g)(2)(B).[5] Under a but-for causation instruction, however, the EEOC would have the additional burden to prove the opposite proposition in order for RAC to be found liable — i.e., that RAC would *not* have taken the same action in the absence of the impermissible consideration. In short, this is not a case in which the two standards of causation are functionally equivalent and can be harmlessly substituted for one another as the court found in Rapold.[6]

CONCLUSION

Congress established motivating factor as the standard of causation for sex discrimination claims under Title VII. The jury should be instructed accordingly here.

February 2, 2018

Respectfully Submitted,

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[5] If, as Defendant seems to suggest, there is no evidence to support the same-decision defense, then that defense, like any other claim or defense without evidentiary support, could simply be summarily resolved at the close of evidence — or Defendant could simply withdraw it. The unavailability of a particular defense does not, however, alter the underlying legal standard prescribed by Title VII for liability in a sex discrimination case, which continues to be motivating factor.

[6] Even if the two were considered to be functionally equivalent, it is unclear what benefit there would be in using the but-for instruction rather than instructing the jury on the standard actually prescribed by statute.

CERTIFICATE OF SERVICE

I hereby certify that on today's date, I caused the PLAINTIFF EEOC'S TRIAL BRIEF ON THE STANDARD OF CAUSATION to be served upon counsel to Defendant via the court's Electronic Case Filing system, pursuant to Local Rule 5.3(A).

February 2, 2018

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