14-560

To Be Argued By:
DAVID C. NELSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-560

ROBERT CASSOTTO,

Appellant,

-vs-

PATRICK R. DONAHOE,
POSTMASTER GENERAL,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLEE

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Holly B. Fitzsimmons, M.J.) had subject matter jurisdiction over this civil case under 42 U.S.C. § 2000e pursuant to 28 U.S.C. § 1331. Final judgment entered on all claims on January 31, 2014. Joint Appendix ("JA__") 22. On February 19, 2014, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). JA 22. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

The plaintiff brought a lawsuit against the Postal Service claiming retaliation under Title VII. The jury returned a verdict against the defendant and the defendant moved for judgment as a matter of law and for a new trial. While the defendant's motion was pending, the Supreme Court decided *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), which increased the plaintiff's burden of proof. The district court granted the defendant's motion for a new trial and the defendant prevailed at the new trial. On this record, did the district court abuse its discretion when it granted the defendant's motion for a new trial?

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Preliminary Statement

In this case brought under Title VII, the plaintiff-appellant, Robert Cassotto, challenges the district court's decision to grant the defendant-appellant, Postmaster General Patrick R. Donahoe (hereinafter "Postal Service"), a new trial. After a jury trial in 2013 in which Cassotto prevailed, the Postal Service moved for judgment as a matter of law, or in the alternative, a new

trial. While the motion was pending, the Supreme Court decided *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), which increased the burden of proof for plaintiffs to prevail on a Title VII retaliation case. The Postal Service alerted the district court to this change in a letter brief.

The district court held that *Nassar* applied retroactively because, as a general matter, judicial decisions in civil cases are presumed to be retroactive. Because *Nassar* increased the burden of proof and because the evidence of liability was weak, the district court determined that the change in the law warranted a new trial. At the new trial in 2014, the Postal Service prevailed. As set forth below, the district court properly exercised its discretion to grant a new trial because *Nassar* increased Cassotto's burden of proof and Cassotto's evidence was not strong.

Statement of the Case

This is an employment discrimination case brought by Cassotto against the Postal Service. Cassotto filed this case in 2009 and it went to trial in 2013 before Magistrate Judge Holly B. Fitzsimmons, before whom the parties consented to proceed pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73. The jury returned a verdict for Cassotto and the Postal Service moved for a new trial or judgment as a matter of law. Magistrate Judge Fitzsimmons grant-

ed the Postal Service's motion for a new trial and the parties retried the case in 2014, where the jury returned a verdict for the Postal Service. Cassotto now challeges the district court's decision to grant the new trial.

A. Cassotto's termination from the Postal Service

The facts presented here are drawn from the evidence presented at the first trial.

Prior to the events the spawned this litigation, Cassotto had violated Postal Service rules on at least two occasions before his termination. In December of 2007 he failed to properly handle mail, JA 371-74; and in August of 2008 he was disciplined for antagonizing a co-worker, JA 376-77.

Cassotto was terminated following an altercation with Timothy Thibault, a fellow letter carrier and the chief union steward. JA 378, JA 602. On September 4, 2008, the Postal Service issued Cassotto a notice of removal that informed him to not report to work unless instructed to by the Postal Service. JA 169. The Postmaster, Fred Dotson, had the authority to return Cassotto to work. JA 550. Cassotto, assisted by Thibault, filed a grievance challenging the September 4th termination. JA 169. The Postal Service's "Dispute Resolution Team" upheld Cassotto's discipline but reduced the punishment to a 30-day suspension. JA 169.

On October 20, 2008, Postmaster Dotson, David Gelzinis, Cassotto's direct supervisor, and Thibault, called Cassotto. JA 273-74, JA 327-29, JA 380-81, JA 448-49. Dotson informed Cassotto of the grievance decision and instructed him to report to work on October 21, 2008. JA 380, JA 402. Dotson also attempted to fax the grievance decision to Cassotto, but the fax did not work. JA 275. After the attempted fax, Dotson called Cassotto and left a message, informing him that the fax did not work, that Cassotto should return to work on October 21, 2008, and that Dotson would give Cassotto a copy of the grievance decision when he arrived at work. JA 275.

The Postal Service has a rule which requires employees to comply with the instructions of their supervisors unless there is a safety concern. JA 170. The Postal Service also has a rule requiring its employees to be "regular in attendance." JA 171.

Cassotto called a union official in Boston, who agreed with Cassotto that he should not return to work without written permission. JA 381. Cassotto did not trust Dotson and felt that Dotson might be lying as part of a scheme to get Cassotto on Postal Service property and have him punished. JA 402-03.

Cassotto did not return to work until November 6, 2008. JA 173. Cassotto provided a letter to the Postal Service explaining that he was in-

jured from October 31, 2008 through November 5, 2008. JA 172.

Gelzinis marked Cassotto absent without leave (AWOL) from October 21, 2008 through October 30, 2008. JA 174. Gelzinis approved Cassotto's request for sick leave for the other days. JA 173. During the period that Cassotto was AWOL, Dotson called Cassotto and left messages for him, but Cassotto did not call Dotson back. JA 274.

On November 10, 2008, Gelzinis held a "pre-disciplinary interview" with Cassotto and Thibault, as Cassotto's union representative. JA 173, JA 472. Cassotto maintained that he refused to return to work until he received the grievance decision in writing, and because he did not get the grievance decision in the mail until October 28, 2008, he was not AWOL. JA 173.

The Postal Service, specifically Dotson and Gelzinis, rejected Cassotto's reason for being AWOL and on November 26, 2008 issued Cassotto another Notice of Removal. JA 392, JA 174. The reason for the termination was Cassotto's failure to follow the Postal Service's orders and being AWOL. JA 174. Cassotto again filed a grievance to challenge the November 26th termination. JA 174.

The dispute resolution team denied Cassotto's grievance. JA 174. The grievance decision stated "[t]he grievant also claims that he did not have

to return to work until he received a copy of the DRT decision. This argument also lacks merit. He was required to return when he received the call. . . . The Grievant does not make the rules. There is no language in the National Agreement or any Handbook or Manual that provides an employee out of work under the circumstances present in this case must first receive the Step B decision[1] prior to returning." JA 174.

Cassotto admitted that he did not know whether there were any Postal Service rules, regulations, or policies that allowed him to delay his return to work until he received the grievance decision in writing. JA 428-29. Further, a Postal Service human resource professional testified that there were no Postal Service rules, regulations, or policies that permitted an employee to remain home while awaiting the written version of the grievance decision. JA 626-27. Cassotto had no evidence that the individuals that authored the grievance decision upholding his November 26, 2008 termination were biased against him; he did not know either individual. JA 427.

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[1] The dispute resolution team is sometimes referred to as the "B Team" because it is step B, or the second step, in the grievance resolution process. Thus, its decisions are sometimes called "B Team decisions" or "Step B decisions."

Cassotto and his wife, Cynthia Cassotto, testified that the Postal Service's termination of his employment induced significant emotional distress. Cassotto testified: "I just, I love my job. I had a coat that said U.S. Postal employee and proud of it. I was proud—I used the play the commercials all the time. Ask my wife. I was—I was—I was devastated. Devastated. . . . I can't even tell you the nightmare—I gained 45 pounds. . . . I had to go to priests, counselors. I wanted to die." JA 393-94.

B. Cassotto's suit against the Postal Service

Cassotto filed his complaint in this case on August 17, 2009. JA 7. He amended his complaint on November 11, 2009. JA 23. In his amended complaint, he alleged violations of Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act (ADEA). JA 23. The Postal Service claimed that Cassotto failed to exhaust his administrative remedies in its answer. JA 29.

After discovery, the Postal Service moved for summary judgment as to all of Cassotto's claims. JA 12. In the Postal Service's motion for summary judgment, the Postal Service argued, inter alia, that Cassotto failed to exhaust his administrative remedies for his Rehabilitation Act and ADEA claims. Government Appendix ("GA__") 16-17. Cassotto did not oppose the Postal Service's arguments regarding his ADEA and Reha-

bilitation Act claims. GA 31. The Postal Service, in its reply brief, argued that Cassotto had abandoned these claims by failing to brief them. GA 53.

The district court held oral argument on the motion for summary judgment. At oral argument, Cassotto's attorney narrowed the case to the claim for retaliation. GA 59. In its ruling on the summary judgment motion, the district court held, "Plaintiff alleges that the Postal Service retaliated against him in violation of Title VII, the Rehabilitation Act, and the Age Discrimination Act, on the basis of his religion, disability and age. At oral argument and in his papers, plaintiff concedes that the only claim pursued in this case is for retaliation in violation of Title VII." GA 84 (footnote omitted). Cassotto did not file a motion for reconsideration or clarification of the district court's summary judgment decision. JA 14.

Prior to trial the district court ordered the parties to complete a joint trial memorandum, setting forth various aspects of the trial. JA 14. As part of this order, the parties were instructed to set forth "the claims that will be pursued at trial." Doc. 3:09-cv-1303 (HBF) #68, pg. 2. In response, the parties submitted the following statement: "The only claim to be pursued at trial is the Title VII retaliation claim against the Postal Service." JA 32.

C. The first trial

The district court held the first trial[2] on January 14-15, 2013. JA17. The subject of the January 2013 trial was Cassotto's termination in November of 2008 from the Postal Service. The parties stipulated that, in terms of protected activity under Title VII, Cassotto was litigating a case in district court against the Postal Service from February 21, 2007 to July 24, 2009. JA 66.

The facts presented at this trial are set forth above in subsection (A). At trial, Cassotto offered no evidence that anyone in the Postal Service made any retaliatory statements. JA 175. Cassotto also offered no evidence of similarly situated individuals who had not engaged in protected activity, were AWOL, and were not terminated. JA 175.

At no point in the trial did Cassotto discuss an ADEA claim. At no point did Cassotto request jury instructions regarding the ADEA.

The jury found for Cassotto on liability and awarded $5,000 in compensatory damages. JA 161-62.

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[2] The first trial under *this* docket number. The parties had previously litigated a case in the summer of 2009 ending in a verdict for the Postal Service after a trial.

D. Post-trial briefing

The Postal Service moved for judgment as a matter of law under Rule 50 at the close of the plaintiff's evidence, JA 435,[3] and renewed the motion at the close of evidence, JA 634. The Postal Service renewed its Rule 50 motion after the verdict and also argued that the district court should grant the parties a new trial pursuant to Rule 59. JA 164.

The Postal Service argued that the district court should enter judgment in its favor because Cassotto failed to prove that the Postal Service's explanation for terminating him was a pretext for discrimination. *See* JA 184-88. The Postal Service also argued that the lack of discriminatory intent warranted a new trial. JA 189-90. The Postal Service further argued that the district court should grant the parties a new trial because the jury's verdict represented a compromise verdict among the jurors. JA 197-201.

Approximately four months later, on June 25, 2013, the Postal Service provided the district court with a letter brief outlining additional authority, specifically the Supreme Court's decision in *Nassar* that had been released on June 24, 2013. JA 218. The Postal Service argued that *Nassar* applied retroactively and that, because the decision increased Cassotto's burden of proof,

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[3] The district court heard argument on the motion but ultimately reserved its ruling. JA 500-05.

it strengthened the Postal Service's arguments for relief under Rules 50 & 59. JA 218-20.

Cassotto responded, arguing only that the Postal Service had waived the *Nassar* issue by not requesting a charge based on *Nassar* during trial in January of 2013. JA 221-22. Cassotto did not argue that even if *Nassar* applied, the district court should still uphold the verdict given the evidence he submitted. JA 221-22. At no point in the post-trial briefing did Cassotto raise the claim that the district court should not grant a new trial because the charge as given correctly applied to his ADEA claim. *See* JA 203-11, JA 221-22. There was no mention of an ADEA claim in any of the parties' post-trial briefing. Cassotto did not raise any ADEA issues in his response to the Postal Service's letter brief updating the district court on the *Nassar* decision. JA 221-22.

E. District court's decision

On August 8, 2013, the district court granted the Postal Service's motion for a new trial. JA 223. The district court noted that while the post-trial motions were pending, the Postal Service filed a letter brief bringing the Supreme Court's decision in *Nassar*. JA 223.

The district court first addressed whether *Nassar* applied retroactively. JA 224. The district court determined that *Nassar* applied retroactively, relying on *Chevron Oil Co. v. Huson*,

404 U.S. 97, 106-07 (1971) and 20 Am. Jur. 2d Courts § 150 (2013). JA 224. Given that *Nassar* applied retroactively, the district court concluded that it should be applied to "all cases still open on direct review and as to all events, regardless of when they occurred." JA 225 (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) and 20 Am. Jur. 2d Courts § 150 (2013)).

The district court noted that Cassotto argued "that the defendant waived its right to challenge the jury charge by not objecting to the charge at trial even though 'defendant was well aware when this case was tried that the Supreme Court was about to issue a ruling in the *Nassar* case.'" JA 224. The district court rejected this argument. JA 225.

The district court held that the Supreme Court's decision in *Nassar*, which changed the causation standard for a Title VII retaliation case, dictated that a new trial was warranted. JA 225. In so holding, the district court denied the Postal Service's motion for judgment as a matter of law, holding that it was moot. JA 225.

F. The second trial

After the district court's decision, the parties prepared for a second trial. In the second joint trial memorandum, just as in the first, the parties were asked to state the nature of the case and, just as in the first, the parties stated: "The only claim to be pursued at trial is the Title VII

retaliation claim against the Postal Service." GA 91. Cassotto did not raise an ADEA claim.

The parties presented largely the same evidence at the second trial as they did at the first trial. The only differences between the presentations were that the Postal Service did not call the union steward and Cassotto called some of his doctors and offered his medical records into evidence. *Compare* JA 31-38 to GA 91-99. Aside from these minor changes, Cassotto again presented his and his wife's testimony, and the Postal Service again presented Dotson's and Gelizinis' testimony along with the testimony of a Postal Service human resources professional. Almost all of the exhibits, save for the addition of Cassotto's doctors' records, were the same. *See* GA 97-98.

The jury in the second trial, hearing roughly the same evidence as presented at the first trial but instructed as to the legal standard under *Nassar*, returned a verdict in favor of the Postal Service. JA 226. This appeal followed.

Summary of Argument

The district court properly exercised its discretion when it granted the Postal Service's motion for a new trial because of the change in the law and the weakness of Cassotto's evidence. Despite Cassotto's arguments on appeal, there was no ADEA claim presented at trial; thus, the

jury was only presented with the claim of retaliation under Title VII.

Because there was no ADEA claim, the Supreme Court's decision in *Nassar* was critical to Cassotto's only claim. The Supreme Court's decision in *Nassar* increased Cassotto's burden of proof for his Title VII retaliation claim. The *Nassar* decision was retroactive, so the district court properly applied it to this case because it was presently pending before the district court. Because *Nassar* increased Cassotto's burden of proof and because Cassotto's evidence of a retaliatory motive was weak, the district court's decision to grant a new trial was within its discretion. Finally, defense counsel did not waive the *Nassar* issue or invite error when they requested that the district court give the jury charge in the 2013 trial. The requested charge accurately reflected the law at the time of trial. There is no requirement that trial attorneys ask district courts to issue jury charges on hypothetical changes in the law that have not yet happened.

Argument

I. The district court properly exercised its discretion to grant a new trial based on the Supreme Court's decision in *Nassar*.

A. Governing law and standard of review

Rule 59 of the Federal Rules of Civil Procedure governs a district court's decision to set aside a jury verdict and grant a new trial. Rule 59(a) states, in relevant part: "The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." "[F]or a district court to order a new trial under Rule 59(a), it must conclude that the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice, i.e., it must view the jury's verdict as against the weight of the evidence." *Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003) (internal citations and quotation marks omitted). "[A] new trial under Rule 59(a) may be granted even if there is substantial evidence supporting the jury's verdict . . . and . . . a trial judge is free to weigh the evidence [herself], and need not view it in the light most favorable to the verdict winner." *Id.* at 244-45 (internal citations and quotation marks omitted).

This Court reviews a district court's decision to grant a motion for a new trial for abuse of discretion. *Id.* at 245; *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 128 (2d Cir. 2012). "A district court abuses its discretion when (1) its decision rests on an error of law (such as the application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Manley*, 337 F.3d at 245 (internal citations and quotation marks omitted).

B. Discussion

1. There is no ADEA claim in this case, despite Cassotto's representations on appeal.

It is important to identify exactly which claim was tried below. In his appellate brief, Cassotto argues that he has a Title VII claim *and* an ADEA claim. This is the first time Cassotto has made this argument and it is unsupported by the record. Cassotto never advanced an ADEA claim to trial.

Cassotto originally alleged that the Postal Service violated the ADEA, Title VII, and the Rehabilitation Act. JA 23. In the Postal Service's summary judgment motion, it argued that Cas-

sotto had failed to exhaust his ADEA claim.[4] GA 16-17. In his opposition to summary judgment, Cassotto failed to advance any argument to support his ADEA claim. *See* GA 31-41. The Postal Service raised Cassotto's failure to brief the issue in its reply brief and argued that the failure to oppose summary judgment constituted abandonment of these claims. GA 53.

At oral argument on the Postal Service's motion for summary judgment, the district court immediately addressed the issue of what causes of action Cassotto planned to advance:

> THE COURT: Yes. Well, first of all, I want to ask you whether the other causes of action, other than the one for retaliation, are being claimed here?
>
> MR. WILLIAMS: No, they were never intended to be. This is a retaliation case.
>
> THE COURT: Okay.
>
> MR. WILLIAMS: It is obviously based upon prior complaints of discrimination on the basis of age, disability and religion, and so forth, but this is a clear, clear retaliation case.
>
> THE COURT: Okay. So, having narrowed the issue to only the retaliation claim,

[4] The Postal Service also argued that Cassotto failed to exhaust his Rehabilitation Act claim. GA 16-17.

> why, Mr. Williams, do you think that the motion should be denied?

GA 59.

In light of the briefing and oral argument, the district court, in its ruling on summary judgment, held that Cassotto had abandoned all of his claims except a claim for retaliation under Title VII: "Plaintiff alleges that the Postal Service retaliated against him in violation of Title VII, the Rehabilitation Act, the Age Discrimination in Employment Act, on the basis of his religion, disability and age. At oral argument and in his papers, *plaintiff concedes that the only claim pursued in this case is for retaliation in violation of Title VII*." GA 84 (footnote omitted; emphasis added). Cassotto did not dispute the district court's holding, nor did he file a motion to clarify or reconsider the holding. He did nothing to address the district court's characterization of the action. He accepted the district court's characterization likely because he failed to oppose summary judgment as to any ADEA claim, and claimed at oral argument that he was only advancing a retaliation claim.

Now, on appeal, Cassotto attempts to assert an ADEA claim. He argues that he was confused and mis-focused during the litigation below. Appellant's Br. at 19-21. In the joint trial memorandum filed before the first trial, however, Cassotto agreed that "[t]he only claim to be pursued at trial is the Title VII retaliation claim against

the Postal Service." JA 32. Further, Cassotto never argued that he had an ADEA claim in the post-trial briefing following the 2013 trial. *See* JA 203-211, JA 221-222. Finally, after the district court granted a new trial, in the joint trial memorandum for the 2014 trial, Cassotto *again* stated, "[t]he only claim to be pursued at trial is the Title VII retaliation claim against the Postal Service." GA 91. It is only now, for the first time on appeal, that Cassotto asserts that he had a viable ADEA claim and that his ADEA claim is the reason why the district court's decision was wrong.

Cassotto's failure to raise this issue below, however, constitutes waiver of it. *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 104 (2d Cir. 2001) (courts generally decline to consider issues first raised on appeal); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003) (same).

Cassotto, through his attorney, has disclaimed an ADEA cause of action throughout this litigation. Cassotto is bound by his pleadings. *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) (parties are normally bound by assertions in their pleadings). Cassotto is also bound his attorney's concessions. *Bergerson v. New York State Office of Mental Health, Cent. New York Psychiatric Ctr.*, 652 F.3d 277, 289 (2d Cir. 2011).

Cassotto and his attorney were not confused or mis-focused; they recognized that Cassotto did not have a valid ADEA claim and they chose to waive the claim. Further, Cassotto raises this issue for the first time on appeal, and this Court generally does not review issues raised for the first time on appeal. Because there is no ADEA claim, Cassotto's argument that a new trial was not warranted because the district court accurately stated the law for ADEA retaliation is incorrect.[5] There is no ADEA claim in this case,

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[5] The idea that the ADEA and Title VII are interchangeable at trial ignores the law. Unlike Title VII, the ADEA does not allow for a jury trial in an action against the federal government. *Lehman v. Nakshian*, 453 U.S. 156, 165 (1981); *Cyr v. Perry*, 301 F. Supp. 2d 527, 536 (E.D. Va. 2004). "Like waiver of sovereign immunity, the government's consent to trial by jury must be 'unequivocally expressed' in the statute. . . . Analysis of the ADEA establishes that 'Congress did not intend to confer a right to trial by jury on ADEA plaintiffs proceeding against the Federal Government.'" *Cyr*, 301 F. Supp. 2d at 536 (quoting *Lehman*, 453 U.S. at 165). If there were truly an ADEA claim, there would have been no jury instructions regarding the ADEA because there is no right to a jury trial. Thus the underlying logic of Cassotto's appeal—that somehow the jury charge in the 2013 trial was correct for the (theoretical) ADEA claim and therefore a new trial was not warranted—is incorrect *because the ADEA claim could not have been tried to a jury*.

and this Court should disregard Cassotto's arguments to the contrary.

2. The district court properly granted the Postal Service's motion for a new trial because the Supreme Court's decision in *Nassar* increased Cassotto's burden of proof and Cassotto's scant evidence could not meet the higher burden.

The district court correctly held that a new trial was warranted in light of the Supreme Court's decision in *Nassar*. First, the district court correctly decided that *Nassar* applied retroactively and therefore applied to pending cases, such as this case. Second, because *Nassar* increased the burden of proof requiring a plaintiff to prove that retaliation was the "but-for" cause of the adverse action instead of merely a "substantial or motivating factor" for the adverse action, a new trial was warranted. Given the weaknesses in Cassotto's case, the change in the legal standard was important. Third, defense counsel did not invite this error; defense counsel requested a charge in the 2013 trial that accurately reflected the law and, upon the Supreme Court's decision in *Nassar*, argued that the change in the law should lead to a new trial.

a. The district court properly concluded that *Nassar* applied retroactively.

The Supreme Court's decision in *Nassar* applied retroactively to pending cases. The Supreme Court has explained when its decisions apply retroactively: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). Not surprisingly, this Court has followed this precedent. *Mitsui Sumitomo Ins. Co., Ltd. v. Evergreen Marine Corp.*, 621 F.3d 215, 220 (2d Cir. 2010) (per curiam) ("[W]hen the Supreme Court or this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review.") (internal quotation marks omitted).

In *Nassar*, the Supreme Court announced a new rule and applied it in that case, remanding the case for further proceedings consistent with its opinion. *Nassar*, 133 S. Ct. at 2534. The Supreme Court summarized its holding as follows:

> 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.

Id. (emphasis added). Thus, *Nassar* applied the federal rule to the case before it.

At least one other case (other than the district court in this case) has explicitly reached the same conclusion, *i.e.*, that *Nassar* announced a new rule:

> In *Nassar*, the Supreme Court articulated a new legal standard for analyzing causation in retaliation claims under Title VII, and applied that standard to the parties before it, vacating and remanding the Fifth Circuit's affirmation of the jury verdict for the plaintiff on his retaliation claim. *Nassar*, 570 U.S. at ——, ——, 133 S. Ct. at 2524, 2534. Thus, under *Harper*

> and *Mitsui*, the new standard for retaliation applies retroactively to all cases still open on direct review, including the case before this Court.

Sass v. MTA Bus Co., __ F. Supp. 2d __, 10-CV-4079 (MKB), 2014 WL 585418 at *6 (E.D.N.Y. Feb. 14, 2014). *See also Costa v. Pennsylvania Dep't of Revenue*, 12-854, 2014 WL 1235879 at *12 (W.D. Pa. Mar. 25, 2014). District courts in the Second Circuit are routinely applying *Nassar* to cases pending when the *Nassar* opinion was released. *See, e.g., Weber v. City of New York*, 973 F. Supp. 2d 227, 271 (E.D.N.Y. 2013); *Russo v. New York Presbyterian Hosp.*, 972 F. Supp. 2d 429, 454 (E.D.N.Y. 2013); *Smith v. Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2, Bd. of Comm'rs*, 982 F. Supp. 2d 225, 231-32 (E.D.N.Y. 2013); *Housel v. Rochester Inst. of Tech.*, __ F. Supp. 2d __, 10-CV-6222FPG, 2014 WL 1056576 at *16 (W.D.N.Y. Mar. 17, 2014); *Joseph v. Owens & Minor Distribution, Inc.*, __ F. Supp. 2d __, 11-CV-5269 (MKB), 2014 WL 1199578 at *13 (E.D.N.Y. Mar. 24, 2014); *St. Juste v. Metro Plus Health Plan*, __ F. Supp. 2d __, 10-CV-4729 (MKB), 2014 WL 1266306 at *25 (E.D.N.Y. Mar. 28, 2014); *Bowen-Hooks v. City of New York*, __ F. Supp. 2d __, 10-CV-5947 (MKB), 2014 WL 1330941 at *25 (E.D.N.Y. Mar. 31, 2014). In addition, at least one other circuit has applied *Nassar* to a case pending before it. *Ver-*

ma v. University of Pennsylvania, 533 Fed. Appx. 115, 119 (3d Cir. 2013).

Nassar interpreted Title VII, changing the burden of proving retaliation from a "substantial or motivating factor" to "but-for" causation. The *Nassar* Court applied the new rule to the parties before it. Although the Court did not resolve the case based on the new rule, it clearly applied the new rule when it remanded the case with instruction to the Fifth Circuit to resolve whether the defendant was entitled to judgment as a matter of law. Applying *Nassar* retroactively is consistent with this circuit's precedent in *Mitsui*, 621 F.3d at 220. Finally, courts considering this issue, albeit district courts, have consistently held that *Nassar* applies retroactively. Because the *Nassar* Court announced a new rule and applied it to the parties before it, the new rule "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate . . . announcement of the rule." *Harper*, 509 U.S. at 97. Thus, the district court properly applied *Nassar* retroactively to this case because this case was pending at the time of the *Nassar* decision.

b. Because *Nassar* applied retroactively and increased Cassotto's burden of proof, the district court properly exercised its discretion to grant the motion for a new trial.

The district court properly exercised its discretion when it granted a new trial to the Postal Service in light of *Nassar*. *Nassar* meaningfully increased Cassotto's burden of proof. In the 2013 trial, Cassotto could argue that all he needed to show was that retaliation was a "substantial or motivating factor" in his termination. After *Nassar*, in the 2014 trial, he needed to prove that retaliation was the "but-for" cause of the termination. Given the evidence in this case, this was a significant change.

Here, there was little dispute about the underlying facts. Everyone agreed that Cassotto was instructed to return to work and that he did not return to work. Cassotto maintained that he did not have to return until he received a written decision and the Postal Service stated that he had to return after receiving Dotson's verbal instruction on October 20, 2008. Thus, the jury's responsibility focused on the Postal Service's motivation for termination; there were few factual disputes for it to resolve.

Under the "substantial or motivating factor" test, a jury could have reached a verdict for Cassotto by reasoning that the Postal Service was

motivated by both Cassotto's decision to go AWOL and the fact that Cassotto was litigating a case against the Postal Service. After *Nassar*, however, Cassotto needed to prove that, absent retaliation, he would have remained employed. *See Nassar*, 133 S. Ct. at 2525. Because he had not offered any evidence of similarly situated individuals being treated differently and lacked any direct evidence, JA 175, the increase in the burden of proof significantly weakened Cassotto's case.

Cassotto could not claim that the Postal Service's interpretation of its rule requiring him to return to work without getting the grievance decision in writing was wrong. First, he did not know if there was a rule supporting his interpretation. JA 428-29. Second, a human resources witness testified that the Postal Service's interpretation was correct and the grievance dispute resolution team agreed with her. JA 174, JA 626-27. Moreover, the dispute resolution team's grievance decision "is highly probative of the absence of discriminatory intent in that termination," *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002), because it came from a neutral, independent team that was provided with significant evidence. Third, Cassotto could not directly challenge the rule and ask the jury to disregard it because this circuit's business judgment rule prohibits such an argument. *See Alfano v. Costello*, 294 F.3d 365,

377 (2d Cir. 2002); *see also Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) ("Our role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments.") (quoting *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999)); *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) ("Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.").

Cassotto was left with very little to support a jury verdict. Essentially, he had to ask the jury to infer discrimination without evidence of similarly situated employees or direct evidence while admitting that he violated a very clear and logical workplace rule. In this situation, the difference between retaliation being a "substantial or motivating factor" and retaliation being "the but-for" factor is enormous. Because Cassotto had so little evidence, he could hope to meet the lower standard, but not the higher standard. The verdict in the 2014 trial demonstrates this perfectly.

Liability was sharply contested in this case. Examining the parties' closings in the 2013 trial, the entirety of the defense counsel's closing was devoted to the issue of liability. JA 664-78. The

majority of the plaintiff's counsel's closing dealt with the issue of liability. Both counsel in the 2013 trial focused the jury on the "substantial or motivating factor" standard. JA 647, JA 666. The plaintiff's counsel went so far as to say, "It does not—it is not necessary that the only reason that they acted was because of his complaints and his filing the lawsuit, however, his complaints and/or his filing the lawsuit have to have been an—an important factor, a moving factor; one of the significant reasons that they relied on . . . ." JA 647. This, of course, is nearly the exact opposite of *Nassar*.

Moreover, Cassotto failed to offer the district court any argument as to wh*y Nassar*, if it applied, should not result in a new trial. In response to the Postal Service's statement of additional authority, Cassotto argued only that the Postal Service waived its argument. JA 221-22. Cassotto did not argue that even if *Nassar* applied, a new trial was not warranted in light of the evidence he produced. Cassotto's response left the district court with a binary choice: (1) *Nassar* applies and, as the defendant argues, should result in post-trial relief; or (2) the defendant has waived any argument under *Nassar*. Cassotto cannot complain to this Court that the district court should have evaluated the evidence differently because he did not make this argument to the district court. *See Suez Equity Investors, L.P.*, 250 F.3d at 104. Indeed, even on ap-

peal Cassotto focuses on the waiver argument. He has not argued that, should *Nassar* apply, a new trial was not warranted because of the strength of his evidence. *See* Appellant's Br. at 13-14.

The district court properly applied *Nassar* retroactively. Cassotto's evidence of motivation at trial was weak and the Supreme Court's decision increasing the burden of proof damaged the viability of Cassotto's case. Cassotto does not now, and has never, argued that the evidence he offered at the 2013 trial was sufficient to meet the new burden of proof. The district court, therefore, properly exercised its discretion when it held that the change in law warranted a new trial.

c. The defense attorneys did not "invite error" when they requested a jury charge that accurately reflected the law at the time of the trial.

Cassotto argues in his brief that defense counsel either waived the *Nassar* argument or invited error when it requested that the district court issue the "substantial or motivating factor" charge in the first trial. This is inaccurate.

At the first trial, the defense counsel, the plaintiff's counsel, and the district court all believed that the district court should issue a retaliation charge that used the "substantial or moti-

vating factor" test. JA 701, JA 717. No one objected to the charge. JA 717.

Cassotto argues that "[i]t thus was an intentional choice, and not mere oversight, that motivated defense counsel in this case to affirmatively request the court to give the very jury instruction which it later used as its basis for setting aside a verdict with which it was displeased." Appellant's Br. at 16. This argument is simply an attack on a straw man. Of course defense counsel requested a "substantial or motivating factor" charge because, at the time of the trial, it represented the law of the land. This Court had said, "[a] retaliatory motive must be, however, 'at least a 'substantial' or 'motivating' factor' behind the adverse action." *Raniola v. Bratton*, 243 F.3d 610, 625 (2d Cir. 2001) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). When the law changed after the first trial, in a manner favorable to the defendant, defense counsel, consistent with their obligation to zealously represent their clients, raised the issue with the district court. The Supreme Court changed the law; whatever defense counsel, plaintiff's counsel, the Department of Justice, or anyone else thought the law *should be* or *might turn out to be*, *Nassar* represented *what the law actually was*.

Cassotto goes on to argue that "the defense affirmatively sought and actively supported the charge which was given by the court and then,

solely for the tactical reason of overturning a displeasing verdict, attacked that verdict because the court did what the defense had requested." Appellant's Br. at 17. This argument rests on a misreading of the record. As the post-trial motions made clear, the defendant attacked the verdict because it was factually and legally incorrect as well as the result of a compromise. When the law changed, it merely strengthened the defendant's arguments because it increased Cassotto's burden of proof.

The essence of Cassotto's arguments is that the defendant should have anticipated the change in the law and at the first trial asked the district court to charge the jury not on what the law was, but on what it might be at some point in the future. But attorneys and courts do not charge juries based on potential future variations in the law; instead, when there is controlling case law setting forth the relevant standard, this Court expects the attorneys and courts to follow the binding precedent. The attorneys for the defendant did not invite error or waive the *Nassar* argument; they asked the district court to follow the law in the first instance, and when the law changed, they asked the district court to follow the new law, as the Supreme Court has instructed courts to do.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,140 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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