DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 16-CV-1135

DISTRICT OF COLUMBIA,

Appellant,

v.

JANET BRYANT,
as personal representative of the estate of Tyrone Bryant,

Appellee.

ON PETITION FOR REHEARING EN BANC

BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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Dated: July 23, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) *Parties and Amici*. All parties appearing before the Superior Court and in this Court are listed in the Appellant's Brief.

(B) *Rulings Under Review*. References to the rulings at issue appear in the Appellant's Brief.

(C) *Related Cases.* There are no related cases.

RULE 29 (c) STATEMENT OF *AMICUS*

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *amicus*.

RULE 29 (c)(3) STATEMENT OF INTEREST OF *AMICUS*

The Metropolitan Washington Employment Lawyers Association ("MWELA"), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 300 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice. MWELA's

members and their clients have an important interest in the proper interpretation of the anti-retaliation provision of the D.C. Human Rights Act, D.C. Code § 2-1401 *et seq*., including its "motivating reason" causation standard.

As *amicus* at the *en banc* petition stage,[1] MWELA seeks to illuminate two important and continuing errors in the District's view of causation in the retaliation provision of the D.C. Human Rights Act ("DCHRA"), D.C. Code § 2-1401 *et seq*. One is that the phrase "but for, wholly or partly" in the DCHRA applies only to status-based discrimination and not to retaliation. The other is that *Nassar* requires this Court to disavow the "motivating factor" standard for assessing causation in retaliation cases under the DCHRA. Neither of these suppositions is correct, as the division majority understood.[2] *Amicus* urges this Court to uphold the majority's understanding, whether by denying review or after *en banc* proceedings, and affirm the panel's decision.

[1] MWELA participated as *amicus* before the panel and was granted a share of the appellee's oral argument time.

[2] The terms "panel" and "division" are used interchangeably herein. D.C. Code § 11-705 (b) (describing divisions and rehearings in this Court).

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SUMMARY OF ARGUMENT

As the panel decision recognized, retaliation claims under the D.C. Human Rights Act ("DCHRA"), D.C. Code § 2-1402.61, are to be adjudicated under the "motivating factor" test for liability that applies to DCHRA discrimination claims across the board. The Act expressly requires that every "unlawful discriminatory practice" receive that treatment, D.C. Code § 2-1401.02 (31), and also states that retaliation is among those "unlawful discriminatory practice[s]." *Id.* This basic principle was upheld and explained in *Furline v. Morrison,* 953 A.2d 344, 357 (D.C. 2008) (DCHRA retaliation and status discrimination claims are to be tried under the same "motivating factor" standard).

Nothing in the federal courts' interpretation of federal anti-discrimination law, *see University of Southwest Texas Medical Center v. Nassar*, 570 U.S. 338 (2013), negates the DCHRA's explicit statutory text to this effect, or permits or requires this Court to read into the Act a liability standard that employers have been unable to write into it through the political process. Because the majority's decision followed this Court's consistent prior decisions to that effect, the panel decision should be upheld.

ARGUMENT

I. "Motivating reason" or "motivating factor" causation under the DCHRA is unaffected by any reading of Title VII.

The plain text of the DCHRA shows indisputably that all liability under that statute, including liability for retaliation, is to be determined on a "motivating reason" causation standard. The central DCHRA anti-discrimination provision, D.C. Code § 2-1401.11 (a), states that "it shall be an unlawful discriminatory practice" to take adverse employment action "*wholly or partially* for a discriminatory reason." *Id.* (emphasis added). The statute-wide definition of "unlawful discriminatory practices," D.C. Code § 2-1401.02 (31), expressly includes all nine parts, A through I, of the DCHRA's list of prohibited discriminatory acts. D.C. Code, Title 2 (Government Administration), Chapter 14 (Human Rights), Unit A (Human Rights Law), Subchapter II (Prohibited Acts of Discrimination) (containing parts A through I).[3] And Part G of the Subchapter II discriminatory practices list, captioned "Other Prohibited Practices," D.C. Code §§ 2-1402.61 through 2-1402.68, begins with "coercion or retaliation." D.C. Code § 2-1402.61.

In other words, retaliation, along with every other discriminatory practice made unlawful by the DCHRA, is expressly covered by the "wholly or partially" standard for liability in § 2-1401.11 (a).

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[3] *Available at* https://code.dccouncil.us/dc/council/code/titles/2/ chapters/14/units/A/ subchapters/II/ (last visited July 19, 2024).

Meanwhile, "but for" causation is mentioned in a single DCHRA provision—the one regarding "subterfuge"—using the admittedly awkward but readily comprehensible phrase "but for, wholly or partially." D.C. Code § 2-1401.11 (b). That term is directly analogous, indeed functionally identical, to the "wholly or partially" language of Section 1401.02 (31). And, as pointed out in the appellee's brief to the division, in no other DCHRA provision is "but for" causation mentioned at all. The language of each DCHRA prohibition, retaliation included, is uniformly subservient to the cardinal "wholly or partially" principle that governs the entire statute.

This Court recognized in *Furline v. Morrison,* 953 A.2d 344, 357 (D.C. 2008), that given this statutory structure and express language, DCHRA discrimination and retaliation claims should be treated under exactly the same "motivating factor" standard. *Furline* properly held that under the DCHRA as written, non-discriminatory and non-retaliatory reasons had to be the employer's *sole* basis for the adverse action in order to immunize that action from liability as a matter of law. *Id*. at 351; *see also Daka, Inc. v. McCrae*, 839 A.2d 682, 690 (D.C. 2003) (allowing a jury to determine whether professed reason for adverse action "masked, at least partly," a retaliatory purpose). Indeed, *Furline* went so far as to hold that an impermissible motive, either to discriminate or to retaliate, need not even have "played a *substantial* part in the [adverse employment] decision . . . the DCHRA does not impose a 'substantiality' requirement"). *Furline*, 953 A.3d at 351 n.9.

The District seeks to dismantle these authoritative constructions of the DCHRA by contending that a U.S. Supreme Court decision under Title VII, rendered a decade after *Daka* and five years after *Furline,* supplies a more restrictive causation rule that this Court should now adopt. *University of Southwest Texas Medical Center v. Nassar*, 570 U.S. 338 (2013). In *Nassar,* the Supreme Court read a "but for" causation requirement for retaliation into Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3 (a).

The District contends that *Nassar* "but for" causation should be imported into the DCHRA for retaliation claims because this Court, when it construed the DCHRA's retaliation provision prior to *Nassar*, used Title VII as an analogue. Petition for rehearing at 3-5. But that is precisely why the District's contention collapses: once the U.S. Supreme Court restricted Title VII retaliation liability in *Nassar*, that narrow construction no longer governed the DCHRA given D.C. Council's acknowledged intent to exceed Title VII's level of employee protections. *See Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 886-87 (D.C. 2008) ("in enacting the DCHRA, the [D.C. Council] intended to go above and beyond the protections afforded to employees by Title VII").

Moreover, to bring about the District's desired result would require this Court to overrule a number of post-*Nassar* decisions—and to ignore the obvious fact that D.C. Council has amended the DCHRA several times since

Nassar and left the "motivating factor" causation standard undisturbed. Panel Op. at 21, 307 A.3d at 456.

In short, Title VII and the DCHRA are fundamentally different in language and structure. The division majority so pronounced, in definitive terms which should have put the District's twisted construction to rest once and for all. *See*, *e.g.*, *Railco Multi-Construction Co. v. Gardner*, 564 A.2d 1167, 1169 (D.C. 1989) (construction of statutory language proceeds "in light of the purposes of [the] statutory scheme"), citing *Thomas v. Dep't of Employment Servs.*, 547 A.2d 1034, 1037-38 (D.C. 1988).

II. The dissent attempted to rewrite the DCHRA.

The panel majority took care to reflect on the dissenting views of Judge Glickman. Because the full Court may properly do likewise, this brief now examines those views in particular.

A. *Importing "but-for" causation into a "motivating reason" statute is contrary to the DCHRA's text, structure and purpose.*

It is true that Title VII and the DCHRA both have retaliation bans. However, it is not true that the two enactments are so similar, as the dissent argued, that the differences in their causation standards are "small or nonexistent." Panel Op. at 21, 307 A.3d at 464 (Glickman, J., dissenting). As the panel correctly recognized, "the terms of the two statutes' pertinent provisions are different and can lead to different interpretations." Panel Op. at 21, 307 A.3d at 456.

It is impossible to pretend that the DCHRA's statute-wide "wholly or partially" causation language is indistinguishable from Title VII, where that language is absent.[4] But there is another layer of impossibility to the dissent's construction of Section 1402.61 (a), even without relating it to the overarching "wholly or partially" causation standard for the entire DCHRA. The majority opinion dealt with this issue in footnote 15, which is manifestly correct in its reading of the three "prongs" of the DCHRA retaliation provision. Those prongs are (1) "retaliate . . . or interfere . . . in the exercise," (2) "on account of having exercised," and (3) "on account of having aided or encouraged [another] in the exercise." D.C. Code § 2-1402.61 (a), quoted in Panel Op. at 22 n.15, 307 A.3d at 456 n.15.

Prong 1 retaliation simply does not include the phrase "on account of." The panel majority is correct that a court cannot insert that phrase into prong 1—even if that could be done without mangling the statutory syntax—or apply *Nassar* to the prong of Section 1402.61 (a) in which "on account of" does not appear. And because, as the appellee argues, Mr. Bryant's claim of

[4] Title VII's federal sector protections themselves illuminate the difference, embodying as they do a different legislative compromise from that of the original 1964 Civil Rights Act. *See* 42 U.S.C. § 2000e-16 (a) (providing that personnel actions affecting federal employees "shall be made *free from any discrimination*" based on race, color, religion, sex, or national origin) (emphasis added), cited in U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Retaliation and Related Issues" (2016), n. 151 and accompanying text, *available at* www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#_ftn151 (last visited July 20, 2024).

retaliation rests on the first prong of Section 1402.61 (a) as much as either of the others, the facts and the jury's verdict give no path to reversal or remand other than the dissent's proposed judicial rewrite of the retaliation statute.

The only reasonable construction of the whole of Section 1402.61 (a) is to recognize that it incorporates and rests upon the "wholly or partially" causation standard of Section 1402.02 (31) for all discriminatory practices the DCHRA covers, and that in this respect Title VII and the DCRA are completely different in structure and intention. This is the true meaning of the panel majority's comment that "Title VII case law is not binding on us in the DCHRA context." Panel Op. at 20, 307 A.3d at 456. In contending otherwise, the dissent's proposal, regrettably, makes no sense.

B. *"Motivating reason" vs. "substantial contributing factor" is a distinction without a difference.*

The dissent opines that the omission of "substantial," as seen in the DCHRA "motivating reason" jury instruction at issue, impermissibly favored the plaintiff even under this Court's post-*Nassar* decisions, to the point of requiring a remand for an agonizing third trial in this case for failure to hold the jury to a "substantiality" requirement. In support of this contention, the dissent refers to a tort standard, far outside the DCHRA, and purports to borrow the logic of the *Restatement* reporters that the "substantial factor" test for tort liability used in some courts is "vague" and "confusing." Panel Op. at 38-39 & n.7, 307 A.3d at 464 n.7 (Glickman, J., dissenting) (using concern over "substantial" to object to any causation standard more lenient than "but

for"), *citing Restatement (Third) of Torts*: Phys. & Emot. Harm § 26 cmt. j (Am. Law Inst. 2010).

Here again the panel majority deals effectively with the dissent's objection. Panel Op. at 13-15 & nn. 9, 10, 307 A.3d at 453-54 & nn. 9, 10. This Court and the U.S. Supreme Court, in decisions extending from half a century ago to today, have used the "substantial factor" formulation interchangeably with "motivating reason" so often as to collapse the two. *Id.* at 13-14 n.9, 307 A.3d at 454 n.9, citing, *e.g., Rose v. United Gen. Contractors,* 285 A.3d 186, 196-98 (D.C. 2022); *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). The District itself, both in briefing and at oral argument before the panel, conflated the two and did not raise the conflation as a problem. Panel Op. at 14, 307 A.3d at 453 (noting that "the District . . . use[d] the terms interchangeably in its briefing" and "at oral argument . . . equated a substantial-factor standard with a motivating-factor standard").

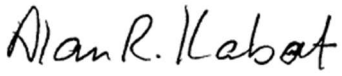
Amicus submits that the term "substantial," in the panel's view, simply requires more than *de minimis* significance, which Mr. Bryant's retaliatory motive evidence at trial fully satisfied, and which in the run of cases a plaintiff's *prima facie* showing will meet in any event. Either of those is a more than sufficient basis to accept that the panel's "substantiality" requirement for future cases, in line with this Court's language in *Daka,* 839 A.2d at 690; *Propp v. Counterpart Int'l*, 39 A.3d 856, 870 (D.C. 2012); and *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 369-70 (D.C. 1993), poses

no bar to acceptance of the challenged "motivating reason" jury instruction as given.

CONCLUSION

For the foregoing reasons, *amicus* MWELA respectfully urges this Court (a) to uphold its consistent prior pronouncements that with regard to proof of retaliation, the DCHRA's language, structure and legislative purpose are qualitatively different from Title VII and must not fall to *Nassar*'s narrow reading of Title VII's quite different retaliation terms, and (b) to affirm the division majority opinion, either by a denial of rehearing or by a new decision definitively establishing DCHRA retaliation plaintiffs' right to prevail on proof that retaliatory animus was a significant motivating factor in the challenged adverse employment action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 23rd day of July, 2024, the foregoing brief *amicus curiae* was submitted for filing with the Court's electronic filing system, through which it was delivered to all counsel of record, as follows:

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