Mixed-Motive Causation Under the Americans with Disabilities Act
By Daniel B. Moar and Stacey L. Budzinski

The Supreme Court’s recent decision in Gross v. FBL Financial Servs., Inc. casts significant doubt on the applicability of the existing mixed-motives causation test to discrimination claims brought under the Americans with Disabilities Act (“ADA”). This article examines the law on mixed-motive discrimination claims brought under the ADA and whether the burden-shifting “motivating factor” test remains applicable after Gross.

I. Background

Mixed-motives cases are those cases where employment decisions, such as hiring and firing, are based on both legitimate and discriminatory reasons. For example, if an employer considered both an employee’s sex and poor work performance record in making a termination decision, a case brought challenging that decision would be a mixed-motives case.

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A. Price Waterhouse v. Hopkins

The Supreme Court recognized mixed-motives cases and developed a specific causation standard for them in Title VII cases in Price Waterhouse v. Hopkins. The Supreme Court developed the mixed-motives framework because Title VII prohibits an employer from making employment decisions “because of” an employee’s race, color, religion, sex, or national origin, but the statute does not define how a plaintiff proves a decision was made “because of” discrimination. In Price Waterhouse, the employer argued that the “because of” standard requires that an employee prove that the discriminatory factor was given “decisive consideration” in the employment decision. The employee, however, argued that the “because of” standard merely required that the discriminatory factor play “any part” in the employment decision.

The Price Waterhouse Court’s response was to develop a burden-shifting standard that initially requires a Title VII plaintiff to prove that discrimination played a “motivating factor” in an employment decision, but then once such a showing is made, allows an employer to defeat all liability by proving by a preponderance of the evidence that it would have made the same decision even had it not considered the discriminatory factor. Thus, the “motivating factor” test requires a two-step causation inquiry. First, the employee must show that discrimination was a motivating factor in an employment decision. Second, if the employee makes such a showing, the burden then shifts to the employer to show that it would have made the decision anyway based on legitimate factors.

B. The Civil Rights Act of 1991

Following Price Waterhouse, Congress passed the Civil Rights Act of 1991 to reverse part of that decision and other Supreme Court decisions. The summary and purpose of the committee reports on the Civil Rights Act of 1991 (the “Act”) tell us that the Act was intended to respond to recent Supreme Court decisions by “restoring civil rights protections that had been dramatically limited by [its] decisions and to strengthen existing protections and remedies available under the federal civil rights law to provide more effective deterrence and adequate compensation for victims of discrimination.”

The Act was Congress’s second attempt to address the Court’s alleged curtailment of civil rights. The first attempt, the Civil Rights Act of 1990, was passed by Congress, but met the President’s veto. The veto by President George H. W. Bush represented his view that the Act would fail to eliminate discrimination in the workplace and create inducements for quotas. Congress failed to garner the votes necessary to override the veto, and in 1991 Congress and the President reached a compromise to pass the 1991 Civil Rights Act.

Section 107(a) of the Act partially reverses Price Waterhouse by allowing a plaintiff to prevail even if non-discriminatory motivations exist and the employer can show that it would have taken the same action in spite of the discriminatory purpose. However, the Act also limits a plaintiff’s remedies in mixed-motive cases where the employer can show that the same action would have been taken even in the absence of the improper motivating factor. In those instances, the court may only grant declaratory relief, an injunction, and attorney’s fees and costs directly attributable to these claims; it cannot grant damages, enter an order requiring admission, reinstatement, hiring, promotion, or require back wages to be paid.
The legislative history found in the introduction to a House Committee report states that “…other laws modeled after Title VII [including the ADA and ADEA] should be interpreted in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII.” Similarly, the House Committee report states “…mixed motive cases involving disability under the ADA should be interpreted in a manner consistent with the prohibition against all intentional discrimination in Section 5 of this Act.” However, introductions to committee reports are not binding law and were not incorporated into the final statute.

*Price Waterhouse* was handed down just one week prior to Congress beginning negotiations over the proper statutory provisions of the ADA. The *Price Waterhouse* decision was a fractured plurality opinion with no clear holding. Thus, when Congress amended Title VII to explicitly state a motivating factor standard, it did so to ensure that there could be no doubt that it was codifying that aspect of the *Price Waterhouse* plurality decision supporting a motivating factor standard. Congress did not, however, make the same explicit endorsement of the motivating factor standard in the ADA. Despite the language in the committee reports relating to the Act, the ADA makes no reference to the motivating factor standard that the Act’s legislative history asserts should be read into the statute.

If the Congress had wanted to endorse a motivating factor standard for the ADA, it could have easily added a conforming amendment to follow the amendment to Title VII. For example, Congress added Section 17 of the Act to address the statute of limitations and right to sue under both the ADEA and Title VII. To address “lingering confusion” between the two statutes, Congress specifically added a conforming amendment to the ADEA that eliminates the dual limitation scheme for filing charges and initiating litigation and replaces it with a single two-year charge-filing requirement. Congress understood its ability to expressly make changes to other laws in the Act; however, it made no similar amendment to the ADA. The exclusion of a conforming amendment should be construed as a cautionary sign against simply reading Title VII language into other non-discrimination laws.

Given that the ADA was passed in the midst of debates over the proper amendment to the Civil Rights Act, Congress was aware of the strengths and weaknesses of Title VII and likely knew of the challenges that needed to be addressed in light of recent Court decisions, including *Price Waterhouse*. With this in mind, Congress expressly addressed disparate impact by incorporating a specific provision into the ADA. However, Congress did not address the burden under mixed-motive cases by incorporating a provision into the ADA or adding a conforming amendment as it did with the ADEA. It is strange that Congress would have remained silent on its choice of causation standard for the ADA, merely assuming that a motivating factor standard would apply while explicitly pursuing disparate-impact provisions in both the Act and the ADA.

C. ADA Mixed-Motives Cases After Price Waterhouse

Most of the circuit courts subsequently issued decisions applying the *Price Waterhouse* motivating factor test to mixed-motives cases brought under the ADA. The ADA makes it illegal to discriminate “on the basis of disability,” a similar standard to Title VII’s prohibition on discrimination “because of” race, color, religion, sex, or national origin. Therefore, the circuit courts frequently examine the statutes together.

Several circuit courts concluded that the mixed motives standards of Title VII apply to the ADA because the ADA expressly provides that the remedies available under Title VII are available in ADA actions. Title VII 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.” Under the ADA, “[t]he remedies, procedures, and rights set forth in [Title VII] shall be the remedies, procedures, and rights... provided to any persons alleging discrimination on the basis of disability in violation of [the ADA].” Therefore, the courts reasoned, the ADA incorporates the motivating factor standard of Title VII for mixed-motives cases.

An additional reason the circuit courts provided for applying a motivating factor standard to ADA claims was to comply with the purpose of the ADA. The ADA states that its purpose includes providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The courts reasoned that applying a motivating factor standard complies with this purpose. For example, in rejecting the employer’s argument that it could face liability only if its employment decision were made “solely” because of disability discrimination, the Eleventh Circuit stated:

[A] standard that imposes liability only when an employee’s disability is the sole basis for the decision necessarily tolerates discrimination against individuals with disabilities so long as the employer’s decision was based—if ever so slightly—on at least one other factor. A liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to “eliminate” discrimination; instead it indulges it.
Several circuit courts have concluded that the legislative history of the Civil Rights Act of 1991 mandates that the motivating factor test apply to ADA mixed-motives claims. In Parker v. Columbia Pictures Indus.,28 for example, the Second Circuit noted that in the Civil Rights Act of 1991, Congress had defined the meaning of “because of” as a motivating factor standard. The Second Circuit recognized that the Civil Rights Act amendment did not explicitly apply to the ADA, but it concluded that there was no evidence that Congress intended the “because of” standard to have a different meaning in Title VII and ADA cases. Instead, the Second Circuit concluded that the use of substantially identical language in Title VII and ADA “indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well.”29 Other courts similarly noted that Congress did not specifically amend the ADA in the Civil Rights Act to provide for a motivating factor standard, but dismissed this as immaterial in light of the legislative history of the Civil Rights Act. For example, in Foster v. Arthur Andersen, LLP,30 the court wrote:

[The Civil Rights Act of 1991] § 107(a) states only that it is amending Title VII; it makes no reference to the ADA, an omission that seems significant in light of the fact that other provisions of the Act expressly do so when provisions of more than one civil rights statute are to be amended.

On the other hand, the legislative history of the Civil Rights Act suggests that Congress wanted the causation standard under the ADA to be the same as under Title VII.31

While the majority of the circuit courts addressing the issue concluded that the motivating factor test applies to ADA mixed-motives cases, many of the circuit courts departed from Price Waterhouse by holding that even under the motivating factor standard a plaintiff must prove but-for causation. A “but-for” causation standard is a “hypothetical construct” in which the court asks whether the employment decision would have occurred anyway if the discriminatory factor had not been considered.32 For example, if the employer would have fired the individual based on poor performance alone, then the employer’s consideration of the employee’s disability was not the “but-for” cause of the termination. In Price Waterhouse, the plurality expressly rejected the argument that “because of” required a “but-for” causation standard.33

Many of the circuit courts, however, have held that a mixed-motives ADA plaintiff must show “but-for” causation.34 The circuit court decisions following Price Waterhouse’s rationale in providing for a motivating factor standard, but then equating the motivating factor standard with but-for causation may simply reflect confusion over the meaning of the Price Waterhouse decision. If so, such confusion was anticipated by Justice Kennedy. Dissenting in Price Waterhouse, Justice Kennedy suggested that “the plurality decision may sow confusion.”35 Justice Kennedy argued that “[m]uch of the plurality’s rhetoric is spent denouncing a ‘but-for’ standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard.”36

In contrast to the majority of the circuit courts, which applied the motivating factor standard to ADA mixed-motives claims, the Sixth Circuit issued decisions pre-dating Gross that reject applying the motivating factor standard in ADA cases. In Layman v. Alloway Stamping & Mach. Co.,37 the Sixth Circuit rejected the application of the motivating factor standard to ADA mixed-motives cases. The Sixth Circuit’s rationale in rejecting the motivating factor standard for ADA mixed-motives claims has some similarity to the Supreme Court’s rationale in Gross in rejecting the motivating factor standard in ADEA claims.

First, the Sixth Circuit rejected the argument that the Civil Rights Act of 1991 amended the meaning of “because of” in ADA cases to provide for a motivating factor standard. The Sixth Circuit concluded that the motivating factor standard applied in Title VII cases because “Congress modified the statute expressly to adopt that standard,” but that Congress did not make the same amendment to the ADA.38 Similarly, the Gross decision indicates that “[u]nlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII.”39

Second, the Sixth Circuit rejected the argument that the “because of” language alone, which appears in both Title VII and the ADEA, requires a motivating factor standard. The Sixth Circuit concluded that “[t]he modification of Title VII to adopt the ‘motivating factor’ standard suggests that the ‘because of’ language is not alone sufficient to trigger ‘mixed motives’ review.”40 The Supreme Court similarly concluded in Gross that the “because of” standard of Title VII alone does not mandate a motivating factor standard, but that rather such a standard is mandated by “Congress’ careful tailoring of the ‘motivating factor’ claim in Title VII.”41

II. Gross v. FBL

On June 18, 2009, a sharply divided Supreme Court issued its decision in Gross v. FBL Financial Servs., Inc. The 5-4 decision established that plaintiffs bringing disparate-treatment claims under the ADEA must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action.42 Following that showing, the burden of persuasion
does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

This case arose after FBL Financial Group (“FBL”) transferred its employee Jack Gross, who was 54 years old, from his position as claims administration director to claims project coordinator. FBL also transferred many of Gross’ duties to another employee, who was then in her forties, once reported to Gross, and had been assigned to the newly created position of claims administrative manager. Although Gross and the other employee received the same compensation, Gross considered his new position to be a demotion because his co-worker assumed the functional equivalent of his former position, and his new position was ill-defined and lacked a job description or specifically assigned duties.43

The Court, in a majority opinion authored by Justice Thomas, stated, “[B]ecause Title VII is materially different with respect to the relevant burden of persuasion, this Court’s interpretation of the ADEA is not governed by Title VII decisions such as Price Waterhouse and Desert Palace, Inc. v. Costa 44…. This Court has never applied Title VII’s burden-shifting framework to ADEA claims and declines to do so now.”45 Moreover, the Court explained that the ADEA’s text does not authorize an alleged mixed-motive age discrimination claim. The Court stated, “[U]nlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor…Congress neglected to add such a provision when it amended Title VII [through the Civil Rights Act of 1991].”46 The ordinary meaning of the ADEA’s requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act.47 To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the “but-for” cause of the employer’s adverse decision.

The Court also rejected the application of Price Waterhouse, explaining that it is not clear whether the Court would have adopted such a reasoning if it were to visit the issue today in the first instance.48 In rejecting the application of Price Waterhouse, the Court explained that its decision was motivated in part by the difficulty faced by jurors when applying the burden-shifting framework. Justice Thomas opined that even if “Price Waterhouse was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.”49

Justice Stevens, dissenting, castigated the majority for its “utter disregard of our precedent and Congress’ intent” by resurrecting a “but-for” standard long since rejected by both the Court and Congress. Justice Stevens asserted that “the most natural reading” of “because of…age” is to prohibit actions motivated in whole or in part by age, and that the dictionary definitions cited by Justice Thomas simply do not support the majority’s conclusion. Justice Stevens further explained that it is not the job of the Court to reject as “unworkable” a mixed-motive framework drawn up by Congress, albeit under a slightly different statute.50 Justice Stevens concluded that mixed-motive claims are viable under the ADEA and, based on the Court’s decision in Desert Palace, do not depend on any distinction between direct and circumstantial evidence.

III. Lower Courts React to Gross v. FBL

The Supreme Court’s decision in Gross is a lesson in both statutory interpretation and drafting. In light of the Court’s decision, lower courts are taking a much closer look at the relationship between statutes, noting the need to “be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.”51 As a result of Gross, many district and circuit courts interpreting similarly phrased statutes, such as the Family Medical Leave Act (“FMLA”), the Jury System Improvement Act, and even the ADA, have begun to question whether the reasoning in Gross applies and alters the standard by which discriminatory conduct is evaluated. Additionally, some courts have questioned whether the reasoning in Gross should also be applied to statutes that do not utilize the precise “because of” standard found in the ADEA.52

According to the Fifth Circuit’s recent decision in Crouch v. JC Penney Corp., Inc., “[T]he Supreme Court’s recent opinion in Gross v. FBL Financial Services, Inc., raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework.”53 However, in its decision the court refrains from deciding the applicability of Gross and states, “[W]e need not reach this question, however, because Crouch cannot meet either standard [Price Waterhouse or McDonnell Douglas].” Id.

In Crouch, the plaintiff sued under both the FMLA and the ADA. In the analysis, the court cites Gross when deciding whether the plaintiff’s claim of mixed-motive retaliation is proper under the FMLA. After rejecting the plaintiff’s claim for lack of evidence, the court explains that “FMLA and ADA claims rise and fall together, because they employ the same burden-shifting framework” thus signaling the possibility that if the courts apply Gross in the FMLA mixed-motive retaliation cases, the same standard and analysis will also govern ADA claims.54

In Williams v. District of Columbia,55 the district court applied Gross to the Jury System Improvement Act and explained that, unlike Title VII, the Jury System Improvement Act does not allow a plaintiff to establish discrimination by showing that [jury service] was simply
a motivating factor. Despite recognizing that the plaintiff’s jury service was likely a factor in the employer’s decision, the court found for the defendant because the plaintiff could produce no evidence that the jury service was the “but-for cause” of the decision.

The Seventh Circuit, in *Serwatka v. Rockwell Automation, Inc.*, is the first court thus far to apply *Gross* in a mixed-motive case brought under the ADA. In *Serwatka* the jury found that the plaintiff was perceived by her employer to be disabled, but would have been terminated regardless of her perceived disability. On appeal, the Seventh Circuit vacated the district court’s decision and held that because there is no provision in the governing version of the ADA akin to Title VII’s mixed-motive provision, an ADA plaintiff must show that his or her employer would not have fired him or her but for his or her actual or perceived disability—mere proof of mixed motives will not suffice. The court explained that “like her actual or perceived disability—mere proof of mixed employer would not have fired him or her but for his or her actual or perceived disability—mere proof of mixed motives will not suffice. The court explained that “like the ADEA, the ADA renders employers liable for decisions made ‘because of’ a person’s disability, and *Gross* construes ‘because of’ to require a showing of but-for causation.”

The Seventh Circuit relied on the importance of implicit statutory language to place employers on notice of the proper basis for decision-making and applicable remedies. The court discussed the failure of Congress to add a provision to the ADA akin to Title VII’s mixed-motive provision and noted that section 12117(a) of the ADA makes available to plaintiffs the same “powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 for Title VII plaintiffs…[however] the motivating factor amendment to Title VII is not a power, remedy, or procedure, it is, instead, a substantive standard of liability.” Thus, the Seventh Circuit held that mixed-motive claims were not proper under the ADA because Congress’s failure to amend the ADA suggests that it had decided not to authorize mixed-motive claims under the ADA. The court refused to broadly construe a statute to provide causes of action and remedies not recognized by Congress.

The decision by the Seventh Circuit logically construes both the Supreme Court’s decision in *Gross* as well as Congress’s intent when drafting the ADA. However, regardless of how the issue is ultimately resolved, there will likely be significant confusion in instructing juries in mixed-motives cases where there is evidence of discrimination under multiple statutes. For example, as a result of *Gross*, in mixed-motives cases where there is discrimination under both Title VII and the ADEA, Title VII’s prohibition on making employment decisions “because of” race will warrant a motivating factor instruction. However, the ADEA’s prohibition on making employment decisions “because of” age will not warrant such an instruction in the same case. As noted by Justice Stevens’ dissent in *Gross*, this “will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.”

Any confusion may be short-lived, however, as Congress will be holding hearings on the *Gross* decision and may “clarify the law’s intent” through further legislation.

**Endnotes**

2. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (“In mixed-motives cases…there is no one ‘true’ motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.”) (O’Connor, J., concurring); Lex K. Larson, *Employment Discrimination* § 8.09 (2d ed. 2009) (“The term ‘mixed motive’ case describes the situation in which the plaintiff has provided sufficient evidence for a jury to find that there was a discriminatory motivation for the employer’s actions and the employer seeks to prove that the action was motivated by nondiscriminatory as well as discriminatory reasons.”).
3. 490 U.S. 228 (plurality opinion).
5. 490 U.S. at 237.
6. Id.
7. Id. at 258.
14. Id.
15. Id. at 734.
16. Gross, 129 S. Ct. at 2349 (“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.’ ”).
18. *See, e.g.*, Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996); Olson v. State of New York, 315 Fed. Appx. 361 (2d Cir. 2009); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); Buchsbaum v. University Physicians Plan, 55 Fed. Appx. 40 (3d Cir. 2002); Walton v. Mental Health Assoc. of S. Pa., 168 F.3d 661 (3d Cir. 1999); Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Pinkerton v. Spellings, 529 F.3d 513 (5th Cir. 2008); Newberry v. East Tex. State Univ., 161 F.3d 276 (5th Cir. 1998); Buchanan v. City of San Antonio, 85 F.3d 196 (5th Cir. 1996); Pedigo v. P.A.M. Transport, Inc., 60 F.3d 1300 (8th Cir. 1995); Head v. Glacier NW., Inc., 413 F.3d 1053 (9th Cir. 2005); Bell...
v. Kaiser Found. Hosp., 122 Fed. Appx. 880 (9th Cir. 2004); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996). Both the Sixth and Tenth Circuits, however, have issued decisions rejecting the possibility of a motivating factor standard in ADA mixed-motives cases and, instead, requiring plaintiffs to show that the adverse employment decision was made "solely by reason of" disability discrimination. See Macy v. Hopkins County Sch. Bd. of Educ., 484 F.3d 357, 363-64 (6th Cir. 2007); Fitzgerald v. Corrections Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005); see also Despres v. Milwaukee County, 63 F.3d 655, 656 (7th Cir. 1995) (stating a "sole cause" standard for an ADA claim), overruled on other grounds as stated in Barrett v. Pearson, 2009 U.S. App. LEXIS 23556, at *4, 2009 WL 3416658, at *1 (10th Cir. Oct. 26, 2009). The Macy decision expresses doubt as to the propriety of the "solely by reason of" standard, but indicates that it is bound to follow prior reported Sixth Circuit panel decisions. 484 F.3d at 364 n.2. The propriety of the standard is doubtful, given the Supreme Court’s determination that "because of" does not mean "solely because of." Price Waterhouse, 490 U.S. at 242; see also Head, 413 F.3d at 1065 ("[W]e conclude that 'solely' is not the appropriate causal standard under any of the ADA’s liability provisions."); McNely, 99 F.3d at 1074 ("[W]e believe that importing the restrictive term 'solely' from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA.").


24. Baird, 192 F.3d at 470; Buchanan, 85 F.3d at 200 ("The remedies provided under the ADA are the same as those provided by Title VII.").

25. Parker, 204 F.3d at 337 ("Congress intended the statute...to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action. Such a reading is consistent with the broad purpose of the ADA."); McNely, 99 F.3d 1068; see also Walton, 168 F.3d at 666 ([I]n the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose—to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under on statute should inform the standards under the others as well.").


29. Id. at 337. The Second Circuit took an arguably inconsistent position with respect to Age Discrimination in Employment Act (ADEA) claims. In DeMarco v. Holy Cross High Sch., the Second Circuit rejected an argument that the motivating factor standard applied in ADEA cases because the Civil Rights Act of 1991 did not specifically amend the ADEA. 4 F.3d 166, 172 (2d Cir. 1993) ("We see no basis for concluding that the new Title VII standard applies to the ADEA, since Congress could have amended the ADEA along with Title VII, but did not."). Given that the Civil Rights Act also did not explicitly amend the ADA to provide for a motivating factor standard, the Second Circuit case law is difficult to square.


32. Price Waterhouse, 490 U.S. at 240 ("But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.").

33. Id. ("To construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’, ... is to misunderstand them.").

34. See, e.g., Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008) ("The proper causation standard under the ADA is a ‘motivating factor’ test...discrimination need not be the sole reason for the adverse employment decision, [but] must actually play a role in the employer’s decision making process and have a determinative influence on the outcome."); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033-34 (7th Cir. 1999) ("To be a motivating factor, then, the forbidden criterion must be a significant reason for the employer’s action. It must make such a difference in the outcome of events that it can fairly be characterized as the catalyst which prompted the employer to take the adverse employment action, and a factor without which the employer would not have acted."); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076-77 (11th Cir. 1996) ("we hold that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer’s decision, i.e., when it is a 'but-for' cause.... In everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome. The ADA imposes a 'but-for' liability standard.").

35. Price Waterhouse, 490 U.S. at 283.

36. Id. at 281.

37. 98 Fed. Appx. 369 (6th Cir. 2004).

38. Id. at 376 n.3.


40. 98 Fed. Appx. at 376 n.3.

41. 129 S. Ct. at 2352 n.5.

42. Id. at 2351.

43. Id. at 2347.

44. 539 U.S. 90, 94-95 (2003).

45. 129 S. Ct. at 2349.

46. Id.

47. Id. at 2350 (citing Hazen Paper Co. v. Higgins, 507 U.S. 604, 610 (1993)).

48. Id. at 2352.

49. Id. at 2352. But see Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977) (reevaluating precedent that was subject to criticism and continuing controversy and confusion).

50. Id. at 2353.


refused to apply the Supreme Court’s decision in Gross to the plaintiff’s FMLA claims because of the Seventh Circuit precedent that predates Gross. However, the court also noted that there is a serious question as to whether the mixed-motive theory of FMLA retaliation survives the Supreme Court’s recent decision in Gross v. FBL Fin. Servs., Inc., which it called on the Seventh Circuit to address.

56. Id. at 109.
57. Id.
59. In Doe v. Deer Mountain Day Camp, Inc., the district court for the Southern District of New York declined to apply Gross to a mixed-motives case under the ADA. 2010 U.S. Dist. LEXIS 3265, at *39-*40, 2010 WL 181373, at *8 (S.D.N.Y. Jan. 13, 2010). The court recognized that the Supreme Court’s Gross decision might mandate a higher standard of causation, but because Gross did not expressly apply to the ADA, the district court continued to apply Second Circuit precedent as set forth in Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000). The district court nonetheless concluded that even if the higher “but-for” standard set forth in Gross applied, the plaintiff met that standard. 2010 U.S. Dist. LEXIS 3265, at *40 n.40, 2010 WL 181373, at *8 n.40.
61. Id.
62. Id.
63. Id. (citing McNutt v. Bd. Of Trustees of U. of Ill., 141 F.3d 706 (7th Cir. 1998) (refusing to allow a mixed-motive claim under Title VII because the omission of retaliation claims from 42 U.S.C. § 2000e-2(m) limits the relief that courts can grant).
64. 129 S. Ct. at 2357. When he served on the Third Circuit, Justice Alito expressed a similar concern about judges facing “the challenge of trying to make lay jurors understand that ‘because of’ means one thing as applied to the first claim and another thing as applied to the other claims.” Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 220 (3d Cir. 2000) (Alito, J.).

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