The Impact of Gross v. FBL Financial Services, Inc. and the Meaning of the But-For Requirement

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With the interpretation of fair employment laws often mired in confusion, it comes as no surprise that the United States Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*[1] raises more questions than it answers. In declining to apply the mixed-motive standard, commonly used in Title VII discrimination actions to claims under the Age Discrimination in Employment Act (ADEA), the Court held that an employee must prove that an adverse action would not have occurred "but-for" the employee's age.[2] The Court maintained that the statutory text, which prohibited discrimination "because of" an employee's age, could not be literally interpreted any other way.[3] This holding marks a significant departure from the Court's prior pronouncement in the seminal *Price Waterhouse v. Hopkins*[4] case decided twenty years earlier and is likely a harbinger for impending disparity among the circuits.[5]

The "but-for" causal requirement, not often used in everyday employment litigation, raises questions as to what this requirement means and how it operates in an ADEA claim and, potentially, other employment law claims, since *Gross* did not provide explicit explanations. To prove discrimination, litigants, along with courts, are more accustomed to considering employment claims under the language of *McDonnell Douglas Corp. v. Green*,[6] which established the pretext standard, and *Price Waterhouse*, which established the mixed-motive standard. How then is the but-for requirement addressed in a discrimination claim under the ADEA? For summary judgment purposes, how is the requirement integrated into the *McDonnell Douglas* three-part test? Is the *McDonnell Douglas* test even the appropriate standard to handle but-for causality? Should another framework be devised for the requirement? What type of proof will actually establish but-for causation of discrimination at either summary judgment or trial? Equally critical is how the Court's method of statutory interpretation in *Gross* will affect other non-Title VII fair employment

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1. 129 S. Ct. 2343 (2008).
2. *See id.* at 2351 (holding plaintiff "retains burden" of showing but-for causation).
3. *See id.* at 2350-51 (explaining basis for holding on but-for causation).
4. *See* 490 U.S. 228 (1989).
5. *Id.*
6. 411 U.S. 792 (1973).

laws, as well as state employment laws, that are similar to and different from the ADEA.

All things considered, employment laws ideally should not be clouded with such uncertainty. In fact, they require a heightened level of clarity and accessibility, particularly where civil rights and livelihoods, as well as business reputations and finances, are at stake. Otherwise too many claims are left to chance. This article takes a first step at clearing the air. In the final analysis, the but-for requirement has the potential to alter the employment law landscape considerably. Whereas the mixed-motive standard only requires evidence that an illegitimate reason was a "motivating factor" in the adverse employment action, proving but-for causation will require more exacting proof at summary judgment and trial. With respect to summary judgment, while parties may likely address the but-for requirement under the *McDonnell Douglas* framework, they may find the standard inadequate. In fact, the *Gross* Court explicitly questioned the sufficiency of *McDonnell Douglas* in ADEA claims.[7] If Congress does not amend or overturn *Gross*, federal and state courts may be required to map out additional evidentiary frameworks to supplant or complement the *McDonnell Douglas* standard, a result that might further complicate employment litigation. Finally, it is not yet entirely clear when federal and state employment laws with causal statutory text identical to or different from the ADEA will have the mixed-motive standard grafted onto them.

I. AN OVERVIEW OF GROSS

In *Gross*, a fifty-four year old employee commenced a discrimination action against his employer, alleging that he was demoted from his position as Claims Administration Director to Project Coordinator on account of his age in violation of the ADEA.[8] At trial, the district court instructed the jury to enter a verdict for the plaintiff if he established age was a "motivating factor" in his demotion—the plaintiff's burden under the mixed-motive standard.[9] On appeal, the Eighth Circuit held that the jury had been incorrectly instructed to apply the mixed-motive standard because the plaintiff was only entitled to the instruction after presenting direct evidence that age was a factor in the decision, which Gross had failed to do.[10] While the Supreme Court originally certified the issue as to whether direct evidence was mandatory for a mixed-motive instruction under the ADEA, the Court unexpectedly addressed the unasked doctrinal question of whether a mixed-motive analysis was ever appropriate in an ADEA claim.[11]

7. *See Gross*, 129 S. Ct. at 2352 n.5 (discussing "motivating factor" test under ADEA claims).
8. *Id.* at 2346-47.
9. *Id.* at 2347 (quoting jury instructions).
10. *Id.* at 2348 (explaining requirement for burden shifting).
11. *See id.*

In requiring a plaintiff to prove, by either direct or circumstantial evidence, that age was the but-for cause of the challenged employment action, the Supreme Court looked to the strict meaning of the text in the ADEA—typically considered a textualist method of interpretation.[12] Whereas Title VII—which prohibits employment discrimination based on protected categories, such as race, gender, and religion—explicitly contains the "motivating factor" language (since 1991), the language of the ADEA makes it unlawful for an employer to take adverse action against an employee "*because of* such individual's age."[13] Lifting the definition of "because of" from the dictionary, the Court determined that the statutory language means "that age was the '*reason*' that the employer decided [not] to act"—indicative of but-for causality as opposed to a mixed-motive inquiry which only identifies a "motivating factor" in the decision, not the ultimate reason.[14] Absent mixed-motive language, courts could not, therefore, read the standard into the ADEA or, presumably, any similarly constructed employment statute.

The Court arrived at this conclusion despite its previous interpretation in *Price Waterhouse* of the same "because of" language in the pre-1991 amended Title VII that had yet to include the mixed-motive language.[15] Back then, the Court concluded that such causal text authorized a mixed-motive inquiry. The *Gross* Court, however, justified the change of direction on the basis that Congress amended Title VII in 1991 after *Price Waterhouse* to include the "motivating factor" language, while declining to contemporaneously add it to the ADEA.[16]

Nevertheless, despite the Court's turnaround, *Gross* failed to define the meaning and mechanics of the but-for requirement in proving an ADEA claim. As a result, in order to understand "but-for" causality, the first place to begin is, interestingly enough, with *Gross*'s predecessor, *Price Waterhouse*, which *Gross* went just short of overruling.[17]

II. PRICE WATERHOUSE AND THE BURDEN OF CAUSATION

Decided in 1989, *Price Waterhouse v. Hopkins* involved a fractured opinion that resulted in a plurality. The core of the disagreement centered on the

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12. *See* Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60-61, 65 (1988) (articulating reasons to interpret by looking only at statutory text). *See generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (analyzing rationale for textualism).

13. *Compare* 42 U.S.C. 2000e-2(m) (2000) *with* 29 U.S.C. 623(a)(1) (2000) (emphasis added).

14. *See Gross*, 129 S. Ct. at 2350 (emphasis added).

15. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989) (interpreting "because of" language to forbid consideration of gender in termination decision).

16. *See Gross*, 129 S. Ct. at 2350 n.3 (acknowledging Congress' choice to omit "motivating factor" language in ADEA).

17. *See supra* note 5 and accompanying text (discussing traditional "but for" causation analysis prior to *Gross*).

correct standard of causation and the allocation of the ultimate burden of persuasion in a Title VII action. The evidence revealed that the employer's decision to reject the plaintiff, Ann Hopkins, for partnership at an accounting firm was motivated by both legitimate concerns about her interpersonal skills and "an impermissibly cabined view of the proper behavior of women."[18] What, then, precisely caused the employer to bypass Ms. Hopkins for the appointment? The plurality did not construe the statute as requiring the plaintiff to show such a definite determination.

In arriving at the mixed-motive standard, the plurality aimed to establish a standard of causation based on "the kind of conduct that violates the statute."[19] As with the ADEA, Title VII (prior to being amended in 1991) prohibited discrimination "because of" the employee's protected category. The plurality rejected the notion that the phrase "because of" mandated a plaintiff to establish "but-for" causation. Rather, the statute was designed "to forbid employers to take [a protected category] into account in making employment decisions."[20] Such was an interpretation that would only require a plaintiff to establish that an employer "relied upon" an illegitimate reason rather than having "to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision."[21] In other words, a plaintiff did not have to isolate and quantify the forms of legitimate and illegitimate conduct. For instance, if an employee who received numerous warnings for tardiness and performance was ultimately terminated by his employer who acknowledged an animus towards the employee's race, the employee would likely not have to prove which factor was determinative. It would be enough that race played a role in the employer's thought process.

Accordingly, the plurality devised a standard that required an employee first to establish that a protected category was a "motivating factor" in the employment decision. Once an employee met this burden, the plurality then allowed an employer to escape liability by proving it would have made the same decision regardless of the illegitimate reason, a burden which the plurality labeled as an "affirmative defense."[22] This shifting evidentiary burden became known as the mixed-motive standard, which was contrary to the traditional *McDonnell Douglas* standard created over a decade earlier. The *McDonnell Douglas* tripartite standard first required an employee to establish his or her prima facie case of discrimination—not an onerous burden—which created a presumption of discrimination. The burden then shifted to the employer to articulate a legitimate, non-discriminatory reason for the adverse action, thus

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18. *Price Waterhouse*, 490 U.S. at 236-37.

19. *See id.* at 237-38 (noting divergent views of required conduct).

20. *Id.* at 239-40.

21. *Id.* at 241-42 (distinguishing interpretations of "because of" in statute).

22. Price Waterhouse v. Hopkins, 490 U.S. 228, 246 (1989) (explaining burden on plaintiff so employer's burden better termed affirmative defense).

eliminating the presumption. The employee then carried the final burden of establishing that the employer's stated reason for the action was pretextual.[23]

In his *Price Waterhouse* dissent, Justice Anthony Kennedy sharply criticized the plurality for shifting the final burden of proof onto the defendant, instead of leaving it with the plaintiff.[24] The mixed- motive standard consequently excused a plaintiff from having to prove but-for causation and saddled the defendant with having to disprove it. Under such a scheme, the employer's purported affirmative defense was actually "nothing more than a label" disguising its true character as but-for causality.[25] The fundamental problem, however, with substituting plaintiff's but-for casual burden with a motivating factor standard, the dissent argued, was that it "represent[ed] a decision to impose liability without causation."[26] In other words, if an employer declined to offer any proof, a plaintiff could succeed by establishing only the mere presence of an illegitimate motive rather than the causal impact of the motive.[27]

In her concurrence, Justice Sandra Day O'Connor agreed with the dissent that a violation of Title VII "only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."[28] But she parted ways with Justice Kennedy in finding that the burden of causation could be shifted to the defendant in certain situations.[29] For Justice O'Connor, a mixed-motive analysis could be triggered if an employee presented direct evidence of a motivating factor. Absent direct evidence, an employee would have to utilize the *McDonnell Douglas* burden-shifting framework.[30] Since Justice O'Connor decided the action on the narrowest grounds, circuit courts regularly followed her concurrence, requiring direct evidence in order to apply the mixed-motive standard.[31]

III. THE POST-PRICE WATERHOUSE ENVIRONMENT

Following *Price Waterhouse*, a distinction soon arose among circuits between what became known as single versus dual motive cases in both Title VII and non-Title VII actions.[32] In a single motive case, also referred to as a

23. *See generally* McDonnell Douglas v. Green, 411 U.S. 792 (1973) (applying tripartite standard).

24. *See Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting).

25. *Id.* at 286.

26. *Id.* at 282.

27. *See id.* (stating Title VII concerned with result of motive over mere presence thereof).

28. *See Price Waterhouse*, 490 U.S. at 261-63 (O'Connor, J., concurring) (considering legislative history and plain language of Title VII).

29. *See id.* at 262.

30. *See id.* at 278 (explaining circumstance where burden would shift to defendant).

31. *See, e.g.,* Fakete v. Aetna, Inc., 308 F.3d 335, 337 n.2 (3rd Cir. 2002) (noting O'Connor's concurrence represents holding of case); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (stating O'Connor's concurrence best test); Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) (quoting O'Connor's concurrence).

32. *See* Roberson v. Alltell Info. Servs., 373 F.3d 647, 651 (5th Cir. 2004) (setting forth mixed-motive and single motive frameworks); Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1067-68 (9th Cir. 2003)

pretext case, the question is whether a legitimate or illegitimate motive was the reason for the adverse employment action, but not both.[33] At the summary judgment stage, this type of case is frequently analyzed under the *McDonnell Douglas* three step burden-shifting inquiry.[34] Conversely, in a dual (or multiple) motive case, an illegitimate reason is only one factor among several legitimate reasons that led to the adverse action.[35] Initially, the type of evidence a plaintiff introduced would determine the category of claim advanced.[36] A dual motive claim was only permitted when a plaintiff presented direct evidence that an illegitimate reason played a role in the adverse action. Otherwise, a plaintiff had to resort to a single motive inquiry, even if circumstantial evidence revealed multiple motives at play.

In 1991, Congress responded to *Price Waterhouse* and amended Title VII, in part, to expressly eliminate an employer's ability to escape liability by proving the so-called affirmative defense.[37] Instead, the amended statute allows employers to limit the available remedies by proving the absence of "but-for" causation.[38] If proven, a plaintiff would only be entitled to declaratory relief, limited injunctive relief (excluding orders to reinstate, hire, or promote) and attorney's fees and costs.[39]

Significantly, the amended statute codified the two categories of motive claims. Section 2000e-2(a)(1) of the statute provides for a single motive claim by prohibiting discrimination "because of" the protected category, while Section 2000e-(2)(m) permits an employee to establish an unlawful employment practice with proof that the protected category was a "motivating factor" even though other factors existed.[40] Circuit courts consistently verified that the amended statute provided alternative methods, rather than only an exclusive method, for establishing liability.[41] The statute, however, left open the question as to whether or not employees needed to present direct evidence to qualify for the mixed-motive standard, something which many circuits continued to require.[42]

Twelve years after the 1991 amendment, the Supreme Court in *Desert*

(discussing distinction between single motive and mixed-motive cases).

33. *See supra* note 32.

34. *See Robertson*, 373 F.3d at 651 (describing burden-shifting analysis); *Stegall*, 350 F.3d at 1068-69 (applying burden-shifting analysis).

35. *See supra* note 32.

36. *See supra* notes 29-31 and accompanying text (discussing circuit courts adoption of O'Connor's concurrence suggesting evidence necessary to shift burden).

37. *See* 42 U.S.C. § 2000e-2(m) (2006).

38. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

39. *See* § 2000e-5(g)(2)(B)(i)-(ii) (2006).

40. *See* § 2000e-2(a)(1) (2006); § 2000e-2(m) (2006).

41. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 391 n.4 (6th Cir. 2008); Fogg v. Gonzales, 492 F.3d 447, 453 (D.C. Cir. 2007).

42. *See* Mohr v. Dustrol, Inc., 306 F.3d 636, 640 (8th Cir. 2002); Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999).

Palace, Inc. v. Costa[43] finally addressed the evidentiary requirements, holding that an employee may establish a mixed-motive claim with either direct or circumstantial evidence.[44] With the type of evidence no longer acting as the dividing line between the two motive claims, it was still necessary to sort a plaintiff's claim, since the extent of damages differed under each claim in a Title VII discrimination action. Neither the statute nor the Supreme Court, however, provided a criterion for making such a determination. As a result, circuits began employing an assortment of approaches for deciphering which claim was operative. For instance, courts sometimes took it upon themselves to review both claims; courts sometimes reviewed whichever claim an employee alleged, and other times courts waited to see which claims the evidence shined a light on after discovery or at trial.[45]

Along with Title VII claims, many circuits also utilized the single and mixed-motive designations in a number of non-Title VII employment actions. Prior to *Gross*, some circuits applied the mixed-motive approach in ADEA claims only with the introduction of direct evidence, while others did not impose a heightened evidentiary requirement.[46] The Fifth Circuit recognized both types of claims in a Family Medical Leave Act retaliation action, while the Fourth Circuit recognized both claims in actions arising under the Uniformed Services Employment and Reemployment Act (which protects returning veterans from employment discrimination) and under the Employment Polygraph Protection Act (which protects employees who decline a polygraph from employment discrimination).[47] The Ninth Circuit also permitted both types of approaches in an Americans with Disabilities Act claim.[48] Interestingly, the circuits did not always recognize the difference in remedies between single and dual motive claims since they deemed the limitation

43. 639 U.S. 90 (2003).

44. *See id.* at 101.

45. *See, e.g.,* Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, n.22 (1st Cir. 2007) (noting employee may choose to pursue a single motive theory); Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007) (jury inferred and the employer argued a single motive claim); Wright v. Murray Guard, Inc., 455 F.3d 702, n.7 (6th Cir. 2006) (Moore, J., concurring) (stating employees need not label their claims at outset of case, but may determine claim at trial); Roberson v. Alltel Information Servs., 323 F.3d 647, 652 (5th Cir. 2004) (reviewing both claims simultaneously); Dybdal v. Variable Annuity Life Insurance Co., No. 06-CV-5686 (JBW), 2007 WL 4118944, at *6 (E.D.N.Y. Nov. 19, 2007) (citing Bickerstaff v. Vassar College, 196 F.3d 435, 445 (2d Cir. 1999) (acknowledging Title VII claims may fall into either category)).

46. *Compare* Rachid v. Jack in the Box, Inc. 376 F.3d 305, 311 (5th Cir. 2004) (holding plaintiff may present direct or circumstantial evidence to warrant mixed-motive analysis), *with* Monaco v. Am. Gen. Assurance Co., 359 F.3d 296, 300 (3rd Cir. 2004) (holding plaintiff must present direct evidence to warrant mixed-motive analysis).

47. *See* Grubb v. Southwest Airlines, 296 F. App'x 383, 389 (5th Cir. 2008) (rejecting discrimination claim under both standards due to failure to rebut legitimate reason for termination); Worden v. SunTrust Banks, Inc., 549 F.3d 334, 341 (4th Cir. 2008) (holding result of polygraph examination not subject to heightened evidentiary standard); Hill v. Michelin N. Am. Inc., 252 F.3d 307, 314 (4th Cir. 2001) (rejecting USERRA claim even under lowered evidentiary standard because permissible reason for termination existed).

48. *See* Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065 (9th Cir. 2005).

exclusive to Title VII discrimination claims, but not claims under other employment statutes which could utilize the original *Price Waterhouse* construction. Nevertheless, in beginning to unpack the meaning of the but-for requirement, an initial question becomes whether or not, with *Gross*, but-for causation fits into this categorical arrangement, and whether the distinction will now disappear from both ADEA claims and from other similar employment claims.

IV. THE MEANING OF BUT-FOR CAUSATION

The but-for requirement does not appear to limit employees to single motive actions. The basic principle of but-for causation certainly allows for the existence of multiple motives. The dissent in *Price Waterhouse*, whose methodological camp is behind *Gross*, did not view the but-for requirement narrowly.[49] Indeed, but-for causality requires an employee to identify the determinative reason, the driving force behind the adverse action, but the requirement theoretically allows employers to have illegitimate reasons, as long as those reasons were not the determinative cause of the adverse decision.

In that regard, the but-for requirement does not mean that an employee must establish that an illegitimate reason was the *sole* reason for the adverse action, despite the dissent in *Gross* protesting otherwise.[50] In his *Price Waterhouse* dissent, Justice Kennedy acknowledged that a protected category did not need to be the "sole cause" but rather "merely a necessary element of the set of factors that cause the decision, *i.e.*, a but-for cause."[51] This language likely means that an employee would need to establish that a discriminatory motive was such a strong motivating reason for the adverse action that, without consideration of it, any other legitimate reasons the employer had would not have resulted in that adverse action.

But-for causation, therefore, presumably eliminates the categorization of employment law claims. While the distinction may have admittedly helped for the purposes of determining the extent of remedies, it is a formulaic legal fiction which imagines that employment conduct can be shoehorned into fixed categories. As a regularly cited federal district court has remarked, the reality is that "few employment decisions are made solely on [the] basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational."[52]

The single motive claim in which an employee will argue that he was terminated *only* because of his race or some other protected class, while the

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49. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 283-87 (1989).
50. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 n.4 (Stevens, J., dissenting).
51. *Price Waterhouse*, 490 U.S. at 284 (Kennedy, J., dissenting).
52. Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 991 (D. Minn. 2003).

employer will argue that it was *only* because of his tardiness is an artificial construction that parties set forth because courts have sought to reduce a discrimination claim to its lowest common denominator. In truth, during litigation, employers will more often than not maintain that they had a legitimate reason and will not reveal any illegitimate reasons. Rather, it will be the plaintiff who exposes an illegitimate reason, which employers will strategize how to defend against; they may continue arguing that an illegitimate motive never existed or, alternatively, that it was not the ultimate cause of the decision. The point is that simply because the evidence is cast as a single motive action does not automatically mean additional legitimate and illegitimate reasons were not present.

V. THE CHALLENGES OF PROVING BUT-FOR CAUSALITY

At the end of the day, regardless of how a claim is labeled, the problem comes down to a matter of proof. The crux of the but-for requirement is how employees pinpoint the driving force behind an adverse action. By requiring conclusive proof of actual causation, but-for causation is undoubtedly more difficult to prove than mixed-motive causation which requires proof that an illicit motive was part of the consideration. Consider, for example, an elderly employee with chronic absentee problems who is given a final warning yet continues to be absent from work. If the employer eventually terminates the employee, which the employer wanted all along because of a prejudice against the elderly, would that satisfy but-for causation? Or at the very least, could the employee establish that an issue of fact existed that but-for his age, the employer would not have terminated him?

In *Gross*, the Court cited to its 2000 ADEA decision in *Reeves v. Sanderson Plumbing Products*,[53] which provides initial, but ultimately incomplete, guidance for employees.[54] *Reeves* addressed the type of proof an employee could present to sustain a jury verdict, as well as overcome summary judgment to permit a fact finder to decide whether a decision was based on a discriminatory motive.[55] The Court held that an employee could submit, at a minimum, evidence establishing a prima facie case of discrimination under *McDonnell Douglas*, combined with sufficient evidence of pretext.[56]

Evidence establishing a prima facie case under the ADEA consists of proof that a plaintiff was a qualified employee who was terminated and immediately replaced with a younger individual to fill the employee's position.[57] With that, a plaintiff could then offer proof that a defendant's non-discriminatory explanation is unworthy of credence, which allows a trier of fact to infer the

53. 530 U.S. 133 (2000).
54. *Id.*
55. *See id.* at 137 (outlining issues before Court).
56. *Id.* at 142.
57. *Id.* at 142.

false reason was a cover-up for discrimination.[58] The Court made clear, however, that pretext is not automatically dispositive of intentional discrimination; it is merely a form of persuasive circumstantial evidence that is suggestive of discrimination.[59] Even if an employer's reason is disproven, employers might still be entitled to judgment as a matter of law if the record reveals another legitimate reason for the decision, or if the plaintiff created a flimsy issue of fact regarding the credibility of the employer's reason, and an abundance of evidence exists that no discrimination occurred.[60] It is conceivable that an employer would provide a false reason to conceal something other than discrimination, such as an unethical or unfavorable reason.

Despite *Reeves*'s prescription for proof, the problem is that many times the stated legitimate motive is true even though illegitimate motives exist. In actions where employers offer several motives, how does the employee weed out the ultimate cause, and, at the very least, create an issue of fact? The more truthful legitimate reasons an employer presents, the more difficult it may become for an employee to isolate the exact cause of the adverse action.

In addition, much of the time, discriminatory conduct is not explicit and outwardly manifested, but takes place indirectly. While proof based on circumstantial evidence is not an impossible obstacle, it frequently requires employees to piece together evidence, much of which consists of fragments of a larger narrative. Furthermore, employees are often terminated after a build-up of issues. Eventually, the proverbial "final straw" triggers the adverse action, although it may not necessarily be the cause. This makes it rather difficult for employees and courts to sift through an employee's history with the employer, sometimes lasting for years, to unearth the determinative cause, assuming a single overriding cause even exists. The true cause may actually be an equal share of legitimate and illegitimate reasons. Would that satisfy but-for causation? In other words, circumstances may arise when an adverse employment action either would not have occurred but-for both motives, or would have occurred for either motive. It seems the illegitimate reason would have to account for at least fifty-one percent of the employer's decision, assuming that thought processes were actually quantifiable.

Another reason but-for causation is so difficult to prove is that, in the employment context, employees do not have the luxury of utilizing objective, scientific analysis to ascertain the precise relationship between a cause and effect, as would be more available in a general tort claim. Where expert engineers, architects, or physicians, for example, might offer calculations of cause, such expert information is rarely, if ever, available in an employment action. At the very most, an expert in human resources, or possibly

58. *See Reeves*, 530 U.S. at 143.
59. *See* Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143 (2000).
60. *See id.* at 146-47.

psychology, might be able to identify the overriding cause of the adverse action among the multiple reasons proffered. However, it is questionable whether such expert opinions are admissible in federal actions considering the strict federal expert witness requirements.[61]

Further complicating matters is the question of which framework a court should employ at the summary judgment stage. While courts have applied the *McDonnell Douglas* tripartite standard to ADEA actions, *Gross* questioned whether the standard would remain appropriate in such claims, yet declined to make any determination.[62] Thus, circuit courts have since continued to use the standard.[63] A few federal district courts have, in fact, inserted the but-for language from *Gross* into the place that the pretext language traditionally lies in the third part of the *McDonnell Douglas* test, treating the requirements as interchangeable.[64] When applying the language in that manner, proof that an employer's legitimate reason is pretext for the actual non-legitimate reason is presumably evidence of but-for causation, something which is not necessarily an accurate application.

Nevertheless, the *McDonnell Douglas* framework may generally be inadequate to handle but-for causation. The standard operates on the idea that the employer is offering a false legitimate reason which, when disproved, helps bring to light the underlying illegitimate reason. Of course, while *Reeves* points out that establishing pretext is not dispositive of discrimination by itself, a fact finder is still permitted to rely on the reductive process of *McDonnell Douglas*. This framework presumes, however, that a single motive action where the parties attempt to prove one motive over another. The issue again is what happens when the evidence reveals that both illegitimate and legitimate factors were involved in the adverse decision. It is not so much about eliminating the false motives, but identifying which among the true illegitimate and legitimate motives was the actual cause. This may be a calculus beyond the capacity of *McDonnell Douglas.*

In questioning whether the *McDonnell Douglas* standard was appropriate for a mixed-motive action, as recently as 2008, the Sixth Circuit commented that it was better suited for single motive claims because it effectively rules out which motives were true.[65] The circuit court, therefore, fashioned a wholly new standard tailored to the needs of multiple motive actions. In another variation,

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61. *See generally* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) (noting trial judges must ensure scientific testimony relevant and reliable).

62. *See* Gross v. FBL Fin. Servs. Inc., 129 S. Ct. 2343, 2349 (2009).

63. *See, e.g.*, Geiger v. Tower Automotive, 579 F.3d 614 (6th Cir. 2009); Milby v Greater Phil. Health Action, 339 Fed. Appx. 190 (3rd Cir. 2009); Cervantez v. KMGP Services Company Inc., 2009 WL 2957297 (5th Cir. 2009).

64. *See* Miller v. Hartford Fire Insurance,652 F. Supp. 2d 220, 230 (D. Conn. 2009); Cozzi v. Great Neck Union Free School Dist., 2009 WL 2602462, at *16 (E.D.N.Y. 2009).

65. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 401 (6th Cir. 2008) (declining to apply *McDonnell Douglas* framework to mixed-motive claims).

the Ninth Circuit has allowed plaintiffs to employ the *McDonnell Douglas* framework in both single and dual motive cases or, alternatively, to simply "produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer's] decision."[66]

These circuits have recognized the limitations of the *McDonnell Douglas* standard where multiple motives are at play. While the standard helps to expose the falsity of the non-discriminatory reason in an effort to uncover the ultimate discriminatory reason, it fails to effectively measure the impact of legitimate motives in relation to illegitimate motives. Courts may, therefore, have to supplement or replace the *McDonnell Douglas* standard to improve the parties' ability to identify which of the multiple reasons so strongly motivated the adverse action.

VI. THE IMPACT OF GROSS ON FAIR EMPLOYMENT LAWS

In the wake of *Gross*, fair employment statutes containing identical or similar language to the ADEA will presumably not have the mixed-motive standard incorporated into them by courts. Such a result has already occurred with a minor employment law. In September 2009, a District of Columbia federal court declined to extend the mixed-motive analysis to an employee who brought an action under the Juror Systems Improvement Act, which prohibits employers from discriminating against an employee "by reason of" the employee's service on a jury.[67] The court relied on *Gross* which had expressly treated the phrase "by reason of" as a definition of the phrase "because of."[68]

A key employment statute *Gross* may impact is the Americans with Disabilities Act (ADA). Prior to 2009, the ADA prohibited employers from discriminating against employees "because of" their disabilities.[69] Some circuits, such as the Second Circuit, had adopted the mixed-motive standard in such actions.[70] In 2008, however, Congress amended the ADA (effective 2009), replacing the phrase "because of" with "on the basis of."[71] While circuits probably would have declined to apply the mixed-motive standard considering *Gross*, they will now have to resolve the meaning of the statute's substitute causal language to determine if the standard applies. While the two

66. *See* Dominguez-Curry v. Nev. Transp. Dep't., 424 F.3d 1027, 1037 (9th Cir. 2005) (detailing responses to summary judgment motion in a Title VII case); *see also* Diamond v. Colonial Life & Accident Inc. Co., 416 F.3d 310, 319, n.4 (4th Cir. 2005).

67. Williams v. District of Columbia, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) (finding insufficient evidence to deem jury service but-for cause of termination).

68. *See id.* at 109 (noting *Gross* court's inclusion of phrase "by reason of" in its definition of "because of").

69. Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (1990).

70. *See* Parker v. Columbia Pictures Industries, 204 F.3d 326, 336-37 (2d Cir. 2000) (agreeing with several other circuits' adoption of mixed-motive analysis in ADA cases).

71. Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (as amended by ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(1) (2008).

textual phrases are presumably interchangeable, they nevertheless raise the question as to why Congress took the time to substitute synonymous language. It is feasible that the legislature did not intend a different causal burden because the amendment predates *Gross*.

Another critical question is how federal courts will address employment statutes whose causal language is presumably dissimilar from the ADEA altogether. Since *Gross*, a few circuit courts have already devised ways to preserve the mixed-motive standard for employment laws that contain alternative causal language. In August 2009, the Sixth Circuit applied the original *Price Waterhouse* mixed-motive approach to a Family Medical Leave Act (FMLA) retaliation action, allowing the plaintiff to offer both circumstantial and direct evidence.[72] Unlike the casual language in Title VII and the ADEA, the FMLA forbids employers from using family medical leave as a "negative factor" in employment actions.[73] According to the circuit court, that language "envisions that the challenged employment decision might also rest on other, permissible factors."[74] Therefore, if a plaintiff established his family medical leave was a motivating factor, the burden shifted to the employer to prove otherwise.

A month later, the Third Circuit addressed whether, in light of *Gross*, the mixed-motive standard applied in a Section 1981 discrimination claim.[75] Section 1981 also does not contain the "because of" language found in the ADEA, but instead states broadly that "'all persons . . . shall have *the same right* . . . to make and enforce contracts . . . as enjoyed by white citizens.'"[76] Despite the concurrences' suspicions,[77] the circuit court affirmed that although Section 1981 lacked mixed-motive language, the *Price Waterhouse* analysis could be grafted onto a Section 1981 claim because "the plain terms of the statutory text suggest" as much.[78] Interestingly, the circuit court would only apply the mixed-motive analysis if an employee presented direct evidence of discrimination.[79]

Finally, there is the issue of how *Gross* will trickle down and affect state fair employment laws. Much of the time, states apply the evidentiary frameworks established under Title VII to discrimination claims.[80] With *Gross* holding that the standard of causation should be determined by the text of the employment

72. *See* Hunter v. Valley View Local Schools, 579 F.3d 688, 692-93 (6th Cir. 2009).

73. *See id.*

74. *See id.* at 692.

75. *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n.5 (3rd Cir. 2009) (noting *Gross* inapplicable to Section 1981 analysis).

76. *See id.* at 5.

77. *See id.* at 186 (Jordan, J., concurring).

78. *See id.* at 182, n.5.

79. *See Brown*, 581 F.3d at 182.

80. *See, e.g.*, Forest v. Jewish Guild for the Blind, 819 N.E.2d 998, 1015 (N.Y. 2004) (Smith, J., concurring); Guz v. Bechtel National, Inc., 8 P.3d 1098 (Cal. 2000); Grimwood v. Univ. of Puget Sound, Inc., 753 P.2d 517, 520 (Wash. 1988).

statute invoked, states and their subdivisions with statutes containing causal language comparable to that of the ADEA may have to choose whether to take the path of *Gross* or *Price Waterhouse*.

Consider the New York City Human Rights Law, for example, which prohibits discrimination "because of" an employee's protected status, including age.[81] Declining to apply long-standing principles of federal sexual harassment law, which would make bringing such a claim difficult, a New York State appellate court in early 2009 held that the New York City Human Rights Law (the City law) should be interpreted broadly and liberally.[82] The court relied on the dictates of the 2005 amendment to the city law, known as the Local Civil Rights Restoration Act of 2005, which explicitly affirmed that while interpretations of similar New York state and federal statutes "may be used to aid in [the] interpretation" of the city law and should be viewed "as a floor below which the City's . . . law cannot fall, rather than a ceiling," the city law should nevertheless be "construed independently" of those laws.[83] The purpose of the law was ultimately "to eliminate and prevent discrimination from playing any role in actions relating to employment."[84] In another illustrative example, the state of Washington's law against discrimination also prohibits discrimination "because of" an employee's age, among other categories.[85] As with the New York City Council, the Washington state legislature wrote into the statute that the law "shall be construed liberally for the accomplishment of . . . [its] purposes."[86] When interpreting the statute, Washington's highest court has advised in an age discrimination case that federal law may serve as "a source of guidance," but it is "not binding" on state courts, which are "free to adopt those theories and rationale which best further the purposes and mandates of . . . [the] state statute."[87] The statutory policies of both Washington state and New York City suggest that they would entertain a *Price Waterhouse* approach in age claims in spite of *Gross.*

In September 2009, the Eighth Circuit, while not necessarily speaking for the state of Missouri itself, actually faced this very issue. In *Baker v. Silver Oak Senior Living Mgt. Co.*,[88] the circuit court applied the mixed-motive standard to the Missouri Human Rights Act (MHRA) although the state statute explicitly prohibits discrimination "because of" the employer's age.[89]

81. N.Y. CITY ADMIN CODE § 8-101 (2009).

82. *See* Williams v. New York City Hous. Auth., 872 N.Y.S. 2d 27, 31, 35-37 (N.Y. App. Div. 2009).

83. *See* N.Y. CITY LOC. 85, § 1 (2005) (setting forth method of statutory interpretation of City law).

84. N.Y. CITY ADMIN. CODE § 8-101 (2009) (noting policy aim of City law).

85. *See* WASH. REV. CODE § 49.60.180. (2010) (indicating specific type of barred employment discrimination).

86. *See* WASH. REV. CODE § 49.60.020 (2010) (denoting legislature's intent for application of statute).

87. *See* Grimwood v. Univ. of Puget Sound, Inc., 753 P.2d 517, 520 (Wash. 1988) (suggesting usefulness but non-mandatory application of federal law to state statute's interpretation).

88. 581 F.3d 684 (8th Cir 2009).

89. *Id.* at 689 (noting interplay of MHRA and mixed-motive standard in light of state law).

According to the circuit court, the Missouri Supreme Court had held that the MHRA is "less demanding than the ADEA" and only requires a plaintiff to establish at summary judgment that "age was a *contributing factor*" in the adverse action.[90]

Accordingly, in the event that Congress declines to overturn *Gross* or until it does so, it is possible that many states will decline to follow the *Gross* methodology, or at least attempt to narrow its application, because many states provide broader employment protections than federal law. But until the legislature intervenes, *Gross* generally threatens to reverberate through the federal and state systems in a manner that will likely generate uncertainty and inconsistency in employment litigation. Not only does the Court's method of interpreting the ADEA's causal text leave the use of the mixed-motive standard in other fair employment laws unsettled, but also the Court's failure to expressly define the meaning of the but-for requirement may ultimately lead to varying and conflicting explanations. While courts should begin to clarify the contours of the requirement, they should also attempt to look beyond formulaic constructions and integrate a more holistic view of the modern workplace when devising standards of causation and proof. Admittedly, while this is not always easily done, it can nonetheless serve as a type of overarching policy goal.

90. *See id.* at 690 (propounding plaintiff's burden at summary judgment to establish age discrimination case).