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A Close Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc.

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Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law; B.A., 2006, Boston College. I would like to thank my advisor, Professor Robert Kaczorowski, for his invaluable guidance and patience, and my family and friends for their constant encouragement and support throughout this process.

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A CLOSE LOOK AT ADEA MIXED-MOTIVES CLAIMS AND *GROSS v. FBL FINANCIAL SERVICES, INC.*

*Leigh A. Van Ostrand**

In Gross v. FBL Financial Services, Inc., *the U.S. Supreme Court held that a plaintiff bringing a claim for disparate treatment under the Age Discrimination in Employment Act (ADEA) could not shift the burden of persuasion to the defendant, even after the plaintiff had established that age was a motivating factor in the defendant's adverse employment decision. Prior to* Gross, *ADEA plaintiffs had two available frameworks to prove claims for intentional age discrimination: the three-prong* McDonnell Douglas Corp. v. Green *framework that creates an inference of discrimination using a prima facie case, and the burden-shifting, "mixed-motives" analysis laid out in* Price Waterhouse v. Hopkins, *which the* Gross *Court rejected for ADEA plaintiffs. This Note urges Congress to intervene and amend the ADEA to be consistent with the burden-shifting framework codified in § 107 of the Civil Rights Act of 1991. This Note explores the purposes behind the ADEA, including its relationship with Title VII, and looks at Supreme Court cases that shaped the analysis of disparate treatment discrimination claims prior to* Gross. *This Note explores the majority and dissenting opinions in* Gross *and how subsequent courts have treated ADEA cases in the wake of the Supreme Court's decision. Ultimately, this Note concludes that* Gross *does not necessarily alter the* McDonnell Douglas *framework for ADEA plaintiffs, but that Congress should step in and amend the ADEA so that plaintiffs may bring mixed-motives claims. If Congress were to amend the ADEA in this way, the causation standards under Title VII and the ADEA would be identical and the ADEA's goals of deterring discrimination and compensating victims would be fulfilled.*

* J.D. Candidate, 2010, Fordham University School of Law; B.A., 2006, Boston College. I would like to thank my advisor, Professor Robert Kaczorowski, for his invaluable guidance and patience, and my family and friends for their constant encouragement and support throughout this process.

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INTRODUCTION

"Age to me means nothing. I can't get old; I'm working. I was old when I was twenty-one and out of work. As long as you're working, you stay young."[1] The importance of staying active throughout one's life cannot be overstated.[2] However, age discrimination can prevent older workers from continuing to work in the later years of their lives.[3] If employers falsely associate age with a lack of productivity, then the employee can be deprived of a chance to be a contributing member of society.[4]

Age discrimination clearly has a negative impact on the victims.[5] Elder workers, on average, will be unemployed for seventy-five percent longer than younger workers.[6] Victimized older employees who are actually capable workers can be frustrated and experience anxieties because of age discrimination.[7] As workers age and are terminated from their employment, it can become more difficult for them to gain new employment.[8] This is particularly alarming because of the current

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1. RON GRAVES & RON PALERMO, ADVERSITY TO SUCCESS! 25 OPTIMISTIC PEOPLE WHO OVERCAME 80 (2007) (quoting George Burns (1896–1996)).

2. *See* W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT: REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 1 (1965).

> There is . . . no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, . . . finding "nothing to look backward to with pride, nothing to look forward to with hope."

Id.; *see also* BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 5 (2003) ("The cumulative effect of an arbitrary and illegal termination of a useful and productive older employee is a cruel blow to the dignity and self-respect of one who has devoted his life to productive work, and can take a dramatic toll." (citing Rogers v. Exxon Research & Eng'g Co., 404 F. Supp. 324, 329 (D.N.J. 1975))).

3. *See* WIRTZ, *supra* note 2, at 18.

4. *See* Katherine Krupa Green, Comment, *A Reason To Discriminate: Curtailing the Use of Title VII Analysis in Claims Arising Under the ADEA*, 65 LA. L. REV. 411, 414–15 (2004) ("The Department of Labor report noted that employers held beliefs and misconceptions about older workers being slower and less productive. . . . In a capitalist society such as ours, being perceived as unproductive is the death knell in employment." (citing WIRTZ, *supra* note 2, at 8)).

5. *See* WIRTZ, *supra* note 2, at 18–19; DAVID NEUMARK, REASSESSING THE AGE DISCRIMINATION IN EMPLOYMENT ACT 2 (2008).

6. WIRTZ, *supra* note 2, at 18. *But see* NEUMARK, *supra* note 5, at 12 ("Bureau of Labor Statistics data indicate that older workers are still considerably more likely than younger workers to have long unemployment durations (U.S. Department of Labor, 2007) Of course, longer durations do not necessarily reflect simply discrimination against older workers." (citing U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings (2007), www.bls.gov./cps/home.htm#annual (last visited Aug. 8, 2007))).

7. WIRTZ, *supra* note 2, at 18–19.

8. Green, *supra* note 4, at 434 ("The Congressional record contained ample documents which reflected the common societal consensus, that over time, as one ages, getting hired becomes more difficult, and when there is a choice to be made between a younger and an older individual for a job position, the younger individual will have the upper hand because she will not be 'tagged with demeaning stereotype[s].'" (alteration in original) (quoting Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004))) (discussing the U.S. Supreme

economic crisis in the United States.[9] Because of the stock market decline and the decrease in the values of 401(k) plans, American workers need to work later in life.[10] This can be a problem for individuals if companies lay off older, higher-paid workers in order to survive the economic downturn.[11]

Age discrimination also has widespread effects on parties beyond those who are the victims.[12] If older workers are unemployed, they depend on public spending for income and health insurance, placing a burden on others.[13] However, reducing age discrimination could mean greater levels of senior employment, leading to lower "dependency ratios," greater income, and more taxes, ultimately benefitting the public.[14]

In 1967, to address these concerns, Congress enacted the Age Discrimination in Employment Act (ADEA) to combat discrimination based on an employee's age.[15] The ADEA makes it unlawful for an employer to make a decision "because of" an employee's age.[16] The language of the ADEA was modeled after Title VII of the Civil Rights Act of 1964[17] (Title VII), which makes it unlawful for an employer to make a

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Court's opinion in *General Dynamics* and its conclusion that Congress intended the ADEA to only protect older workers from discrimination, rather than both older and younger workers).

9. Steven Greenhouse, *Working Longer as Jobs Contract*, N.Y. TIMES, Oct. 23, 2008, at F1. In addition, the number of age discrimination claims filed with the Equal Employment Opportunity Commission (EEOC) increased 25.8% in 2008, from 19,103 in 2007 to 24,582 in 2008. Charge Statistics From the U.S. Equal Employment Opportunity Commission FY 1997 Through FY 2008, http://www.eeoc.gov/stats/charges.html (last visited Sept. 13, 2009).

10. *See* Greenhouse, *supra* note 9.

11. *Id.* Companies are permitted to terminate older, high-paid employees, but the reason for termination cannot be based on a stereotype about age. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (holding that an employer firing an employee because the employee's pension benefits were about to vest does not violate the ADEA because the decision to terminate was not made "because of" the employee's age); *see infra* Part I.C.5 (discussing *Hazen Paper Co.*). This is consistent with the purpose of the ADEA, which aims to prevent arbitrary discrimination based on age. *Id.* ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."). An employer that terminates an older employee to save money is free to do so as long as the decision is not based on the employee's age. *Id.*; *see also* Green, *supra* note 4, at 423–24 (explaining the Court's decision in *Hazen Paper Co.*).

12. *See* NEUMARK, *supra* note 5, at 2.

13. *Id.*

14. *Id.* The dependency ratio is "the ratio of nonworking (i.e., 'dependent') persons to the economically active." *Id.* at 2 n.3.

15. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(b), 81 Stat. 602, 602 (codified as amended at 29 U.S.C. §§ 621–34 (2006)).

16. 29 U.S.C. § 623(a)(1) (2006). The full text of the relevant provision reads, "It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." *Id.*

17. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e to 2000e-17 (2006)). The U.S. Supreme Court has noted, "the prohibitions of the ADEA were derived *in haec verba* from Title VII." Nancy Lane, *After* Price Waterhouse *and the Civil Rights Act of 1991: Providing Attorney's Fees to Plaintiffs in Mixed Motive Age Discrimination Cases*, 3 ELDER L.J. 341, 346–47 (1995) (citing Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979)).

decision "because of" an "individual's race, color, religion, sex, or national origin."[18] Because of the similarity in language, courts often applied Title VII analyses to claims brought under the ADEA, specifically for claims of disparate treatment based on age.[19] In 1991, Congress amended Title VII through § 107 of the Civil Rights Act of 1991 (1991 Act) by adding 42 U.S.C. § 2000e-2(m), which states that an unlawful employment practice is established when a claimant "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."[20] Section 107 also limited the remedies a plaintiff may recover if a defendant proved that he would have "taken the same action in the absence of the impermissible motivating factor."[21]

The recent U.S. Supreme Court decision in *Gross v. FBL Financial Services, Inc.*[22] responded to a circuit split that had arisen whereby courts divided over whether direct evidence of discrimination was required for plaintiffs to receive a "mixed-motives" analysis under the ADEA.[23] The Supreme Court granted certiorari to resolve the question in *Gross*.[24] This Note focuses on the Supreme Court's decision in *Gross* and its implications for ADEA disparate treatment law.

Part I provides an overview of the ADEA, Title VII, the 1991 Act, and Supreme Court cases that shaped how federal courts analyzed disparate treatment claims brought under the ADEA and Title VII. In addition, Part I briefly describes the split in authority leading up to *Gross*. Part II discusses *Gross*, as well as reactions to the Court's decision. Part III provides an overview of questions left open by the Court's holding in *Gross* and urges Congress to amend the ADEA to include the language of § 107 so that mixed-motives claims are a viable option for ADEA plaintiffs.

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18. 42 U.S.C. § 2000e(2)(a)(1) (2006). The full text of the relevant provision reads,

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id.

19. "Disparate treatment" has been defined as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, . . . national origin," or age. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). *See infra* notes 55–58 and accompanying text.

20. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)).

21. 42 U.S.C. § 2000e-5(g).

22. 129 S. Ct. 2343 (2009).

23. *Id.*; *see* Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 541–52 (2008) (discussing fragmentation of ADEA disparate treatment law).

24. *See infra* Part II.

I. THE ADEA AND TITLE VII

Part I discusses the background of the ADEA and Title VII. Part I.A explains the reasons Congress enacted the ADEA and the ADEA's substantive structure and provisions. Part I.B discusses Title VII and the similarities and differences between Title VII and the ADEA. Part I.C discusses the seminal Supreme Court cases that have shaped disparate treatment discrimination claims, including a brief look at language used by the Court in analyzing ADEA cases. In addition, Part I.C describes § 107 of the Civil Rights Act of 1991, which amended Title VII. Part I.D provides a brief overview of the conflict that divided circuit courts, prompting the Supreme Court to grant certiorari in *Gross v. FBL Financial Services, Inc.*

A. *Purpose and Reasoning Behind Enacting the ADEA*

When Congress passed the Civil Rights Act of 1964, it instructed the Secretary of Labor, Willard Wirtz, to conduct a study on the effect age discrimination in employment may have on those discriminated against, as well as any effect it may have on the economy.[25] Wirtz's study found that age discrimination differed from discrimination based on race.[26] According to the study, there was little evidence of discrimination based on dislike of older workers; rather, employers often discriminated against older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*."[27] This type of discrimination is arbitrary and is one of the reasons that Congress passed the ADEA in 1967.[28]

The ADEA states, in relevant part, "It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."[29] Congress recognized that age can affect an employee's ability to do some jobs and therefore included a provision

25. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265; *see also* WIRTZ, *supra* note 2, at 1.

26. *See* WIRTZ, *supra* note 2, at 2; *see also* Lane, *supra* note 17, at 344 n.14 (explaining that race discrimination is often caused by hatred, fear, or ill-will, while age discrimination stems from misconceptions about age (citing Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. REV. 155, 220 (1986))).

27. WIRTZ, *supra* note 2, at 2, 6.

28. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(b), 81 Stat. 602, 602 (codified at 29 U.S.C. § 621 (2006)); *see* Green, *supra* note 4, at 415–16 (explaining that Congress enacted the ADEA in response to the U.S. Department of Labor study's finding that discrimination typically stemmed from misconceptions about the ability and productivity of older employees).

29. 29 U.S.C. § 623(a)(1); *see also* Lane, *supra* note 17, at 345 ("The ADEA prohibits discrimination across a broad range of employment activities, including hiring, discharges, decisions regarding compensation, terms, conditions, and privileges of employment, job classifications, job referrals, and exclusion from union membership.").

in the ADEA that states, "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ."[30] The Act initially protected employees who were between the ages of forty and sixty-five,[31] but the upper age limit was extended to seventy in 1978,[32] and finally removed completely in 1986.[33] The ADEA applies to employers who have twenty or more employees working for them.[34]

The purposes of enacting the ADEA were to "promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[35] Specifically, the ADEA is aimed at deterring age discrimination and compensating victims of age discrimination.[36] It achieves these goals through its structure, as discussed below.

The "substantive structure" of the ADEA was modeled after Title VII,[37] and the remedial and procedural provisions were modeled after the Fair Labor Standards Act (FLSA).[38] Following the FLSA, Congress incorporated two primary mechanisms to enforce the ADEA: the Secretary of Labor may file a suit on behalf of the alleged victim of age discrimination for injunctive and monetary relief, or a private civil action can be brought by the individual.[39] An ADEA claimant may recover

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30. 29 U.S.C. § 623(f)(1).

31. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607.

32. Discrimination in Employment Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat 189, 189; *see also* H. Lane Dennard, Jr. & Kendall L. Kelly, Price Waterhouse*: Alive and Well Under the Age Discrimination in Employment Act*, 51 MERCER L. REV. 721, 725 n.17 (2000).

33. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342; *see also* Dennard & Kelly, *supra* note 32.

34. *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 372 (2001).

35. 29 U.S.C. § 621(b).

36. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (discussing the deterrent and compensatory goals of the ADEA); *see also* Lane, *supra* note 17, at 344–45 ("[The ADEA] has both a remedial goal to compensate age discrimination victims and a broad social policy goal to eliminate arbitrary age discrimination in society.").

37. *See infra* notes 51–55 and accompanying text.

38. *See* 29 U.S.C. §§ 201–19 (2006); *see also* 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."); Lane, *supra* note 17, at 345, 347–48 (explaining that the ADEA was modeled after Title VII and the FLSA).

39. *See* Lorillard v. Pons, 434 U.S. 575, 579–81 (1978) (explaining that these two mechanisms were incorporated into the ADEA from the FLSA and that Congress had intended ADEA claimants to have a right to a jury trial in private actions because this was well established under the FLSA).

unpaid wages, liquidated damages, and attorney's fees; these remedies were available under the FLSA.[40] In addition to these remedies, the ADEA states that a court can authorize "legal or equitable relief" to accomplish the ADEA's purpose.[41]

The substantive provisions of the ADEA were modeled after Title VII.[42] Even though the statutes were very similar, there are differences to note.[43] One of the main differences is that the ADEA is aimed at "the *arbitrary* use of age as a proxy for ability," while "Title VII makes unlawful all discrimination based on [race, gender, and national origin]."[44] The ADEA also permits employers to differentiate between employees "based on reasonable factors other than age," demonstrating that Congress wanted to ensure that employers would evaluate older workers based on their abilities, rather than their age.[45] Despite these differences, the ADEA was largely modeled after Title VII, including its "substantive provisions and proof considerations."[46]

B. *Title VII and the ADEA*

Title VII was the first piece of legislation that prohibited employers from making decisions regarding their employees based on an employee's race, color, religion, sex, or national origin.[47] Title VII was primarily aimed at combating race discrimination against African Americans,[48] but it also prohibited consideration of color, religion, sex, and national origin.[49] Age

40. *See* Lane, *supra* note 17, at 347–48 ("Section 7(b) of the ADEA explicitly incorporates section 11(b) and part of section 16 of the FLSA. Section 7(b) authorizes a private suit for unpaid wages and an equal amount in liquidated damages and authorizes the Secretary of Labor to sue for injunctive relief, as well as the unpaid wages and liquidated damages." (citing 29 U.S.C. §§ 211(b), 216(b)–(e), 626(b) (1988 & Supp. 1991))).

41. *Id.* at 348.

42. *See* Dennard & Kelly, *supra* note 32, at 727 ("[S]ubstantive provisions [of the ADEA] are rooted in Title VII.").

43. *See* Lane, *supra* note 17, at 346.

44. *See id.* (distinguishing between Title VII and the ADEA by explaining that the ADEA does not "condemn[] *all* discrimination based on age," while Title VII makes any consideration of the protected characteristics unlawful).

45. 29 U.S.C. § 623(f)(1); *see also* Lane, *supra* note 17, at 346 (explaining that expressly including "reasonable factors other than age" in the ADEA "'highlight[s] [Congress's] concern that older workers be evaluated objectively on the basis of their performance'" (alterations in original) (quoting Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1399 (3d Cir. 1984))). The role that the "reasonable factors other than age" defense plays in ADEA cases is unclear. Prenkert, *supra* note 23, at 548–50. The Supreme Court recently held that the "reasonable factors other than age" provision is an affirmative defense for disparate impact cases. Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2400 (2008); Prenkert, *supra* note 23, at 548 n.193; *see infra* note 59 and accompanying text (defining disparate impact claims). Professor Jamie Prenkert notes that most courts have avoided the "reasonable factors other than age" provision and simply followed the *Price Waterhouse* same-decision defense in disparate treatment cases brought under the ADEA. Prenkert, *supra* note 23, at 549–50.

46. Lane, *supra* note 17, at 346.

47. *See* Green, *supra* note 4, at 414.

48. *Id.*

49. 42 U.S.C. § 2000e-2(a)(1) (2006).

was not included as a protected characteristic in Title VII, in part because the nature of the discrimination is different than discrimination based on the characteristics included in the Act.[50]

Title VII prohibits an employer from making an employment decision "because of" an individual's "race, color, religion, sex, or national origin."[51] As noted above, the ADEA similarly prohibits an employer from making a decision "because of" an individual's age.[52] Since the language of the acts was nearly identical, courts typically held that an interpretation of one act applied to the other act.[53] However, the Supreme Court's decision in *Gross* has disrupted any uniformity in analysis.[54] In the past, courts frequently applied Title VII analysis for disparate treatment and disparate impact claims to similar claims brought under the ADEA.[55]

In a claim for disparate treatment under the ADEA, a plaintiff alleges that the employer treated the plaintiff less favorably than other employees because of the plaintiff's age.[56] A disparate treatment plaintiff must prove that the employer had a discriminatory motive for an adverse employment action.[57] The way a plaintiff may prove an employer's discriminatory motive in disparate treatment claims of age discrimination will be discussed in greater detail in Part I.C of this Note.[58]

Disparate impact claims of age discrimination "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[59] A plaintiff does not have to show intentional discrimination in order to prove disparate impact; the fact that the practice has a disparate impact on the protected class is sufficient.[60]

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50. *See* Green, *supra* note 4, at 414; *see also supra* notes 26, 44 and accompanying text.

51. 42 U.S.C. § 2000e-2(a)(1); *see supra* note 18 and accompanying text.

52. 29 U.S.C. § 623(a)(1) (2006); *see supra* note 16 and accompanying text.

53. *See* Green, *supra* note 4, at 418 & n.67 ("Due to their similar statutory construction and purpose, courts have traditionally relied upon Title VII to serve as the guide or standard by which claims arising under the ADEA are analyzed."); *see also* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2354–55 & n.5 (2009) (Stevens, J., dissenting) ("Courts of Appeals to have considered the issue unanimously have applied *Price Waterhouse* to ADEA claims."); Lane *supra* note 17, at 347 n.33 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Fields v. Clark Univ., 817 F.2d 931, 934 n.1 (1st Cir. 1987); Hinton v. Bd. of Trs. of Univ. of Ill., 53 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (N.D. Ill. 1990)).

54. *See infra* Part II.

55. *See* Green, *supra* note 4, at 418 n.67 (citing Hase v. Missouri, 972 F.2d 893 (8th Cir. 1992); Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339 (D.C. Cir. 1983); Ragland v. Rock-Tenn Co., 955 F. Supp. 1009 (N.D. Ill. 1997)) (explaining that each of these cases discussed the applicability of *McDonnell Douglas* to ADEA cases).

56. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

57. *See* Green *supra* note 4, at 419 & n.68.

58. See *infra* Part I.C for an explanation of the different frameworks available for proving intentional discrimination.

59. *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15. The Supreme Court held that disparate impact claims are available under the ADEA in *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

60. *See* Green, *supra* note 4, at 421. This Note focuses on disparate treatment claims. For a thorough analysis of disparate impact claims, see Jamie Darin Prenkert, *Bizarro*

C. *The Civil Rights Act of 1991 and Seminal Supreme Court Cases That Shaped the Analysis of ADEA and Title VII Disparate Treatment Claims*

1. *McDonnell Douglas Corp. v. Green*

McDonnell Douglas Corp. v. Green,[61] decided in 1973, was a seminal case that shaped the burden-of-proof analysis for claims brought under Title VII and, subsequently, claims brought under the ADEA.[62] In *McDonnell Douglas*, the plaintiff brought a claim for race discrimination under Title VII against his former employer.[63] The Supreme Court granted certiorari to determine the "order and allocation of proof in a private, non-class action challenging employment discrimination."[64]

The Supreme Court held that in a Title VII claim, the plaintiff carried the burden of establishing a prima facie case of discrimination.[65] This prima facie case of discrimination "create[d] a legally mandatory, rebuttable presumption of unlawful motive."[66] A plaintiff establishes a prima facie case of discrimination if he shows

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[67]

The burden of establishing this prima facie case is "not onerous."[68] Once the plaintiff establishes a prima facie case, a presumption that the defendant's action was discriminatory is created.[69]

Statutory Stare Decisis, 28 BERKELEY J. EMP. & LAB. L. 217 (2007) (analyzing how disparate impact cases are treated under the ADEA).

61. 411 U.S. 792 (1973).

62. *See* Lovell v. Covenant Homeland Sec. Solutions, Ltd., No. G-07-0412, 2008 U.S. Dist. LEXIS 103686, at *23 (D. Tex. Dec. 23, 2008) (citing Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 (5th Cir. 2000)) (applying *McDonnell Douglas* to an ADEA case, stating "proof via circumstantial evidence is assembled using the framework set forth in the seminal case of *McDonnell Douglas Corp. v. Green*"); *see also* Green, *supra* note 4, at 418 n.67.

63. *McDonnell Douglas*, 411 U.S. at 796.

64. *Id.* at 800.

65. *Id.* at 802. The Supreme Court subsequently stated that "the shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)).

66. *See* Green, *supra* note 4, at 420 (citing REBECCA HANNER WHITE, EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION 79 (1998)).

67. *McDonnell Douglas*, 411 U.S. at 802.

68. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (elaborating on the burden-shifting framework established in *McDonnell Douglas*).

69. *Id.* at 254. The Supreme Court has explained the purpose of the prima facie case in *McDonnell Douglas*, stating it "eliminate[d] the most common nondiscriminatory reasons for the plaintiff's rejection." *Id.*; *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) ("[P]laintiff carries the initial burden of showing actions taken by the employer from

According to the Supreme Court, once the plaintiff established a prima facie case of discrimination, the burden shifted to the defendant to articulate a "legitimate, nondiscriminatory reason" for its employment decision.[70] The defendant's burden is a burden of production,[71] and the plaintiff retains the burden of persuasion throughout.[72] If the defendant articulates a nondiscriminatory reason, the presumption of discrimination created by plaintiff's prima facie case is rebutted.[73] However, "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."[74]

The Court in *McDonnell Douglas* held that if the defendant articulates a nondiscriminatory reason, the plaintiff must have an opportunity to present evidence that the given reason was a pretext for discrimination.[75] In *Texas Department of Community Affairs v. Burdine*,[76] the Court explained that in this third step of the *McDonnell Douglas* framework, the plaintiff has the chance to show that the defendant's proffered reason was not the "true

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which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the [1964] Act.'" (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977))). According to scholars, the "prima facie case framework was developed to 'compensate' for the fact that direct evidence may be difficult to supply in intentional discrimination cases." Dennard & Kelly, *supra* note 32, at 735 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. Usi Film Prods., 511 U.S. 244, 251 (1994)). The Court acknowledged that the proof required for the prima facie case set out in *McDonnell Douglas* "necessarily will vary" depending on the facts of each case brought under Title VII. *McDonnell Douglas*, 411 U.S. at 802 n.13; *see also* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 310–13 (1996) (stating that in an ADEA case where a fifty-six-year-old plaintiff was discharged from his job and replaced by a forty-year-old employee, the third prong of the prima facie case is that the plaintiff was meeting his employer's legitimate expectations and the fourth prong is that plaintiff was replaced by someone substantially younger than him).

70. *McDonnell Douglas*, 411 U.S. at 802.

71. *Burdine*, 450 U.S. at 254–55 (stating that defendant does not need to persuade the court that the proffered reason actually motivated the defendant, holding that "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff").

72. *Id.* at 256.

73. *Id.* at 255; *see also* Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 398 (2005) ("[T]he Court instructed us that, once the defendant successfully meets its burden of production, 'the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant.'. . . Thus, the trier of fact must proceed 'to decide the ultimate question: whether plaintiff has proven, that the defendant intentionally discriminated against him because of' the impermissible factor." (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993))).

74. *Burdine*, 450 U.S. at 254.

75. *McDonnell Douglas*, 411 U.S. at 804. As the Court explained in *Burdine*, the defendant's articulated nondiscriminatory reason will "present[] a legitimate reason for the action and . . . frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255–56.

76. 450 U.S. 248.

reason" for the adverse employment action.[77] This is where the plaintiff carries the "ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[78] This burden-shifting pretext analysis set out in *McDonnell Douglas* and clarified in *Burdine* has consistently been applied to claims brought under the ADEA.[79]

2. *Price Waterhouse v. Hopkins*

In *Price Waterhouse v. Hopkins*,[80] the Supreme Court granted certiorari to determine the burdens of proof that a defendant and a plaintiff each carry in a Title VII "mixed-motives" claim for disparate treatment.[81] In a mixed-motives case, a defendant is motivated by both legitimate and illegitimate reasons when it makes an adverse employment decision regarding the plaintiff.[82] In *Price Waterhouse*, the plaintiff brought a lawsuit against the

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77. *Id.* at 255–56.

78. *Id.* at 256; *see also* Prenkert, *supra* note 23, at 524–25. According to one scholar, Professor Michael Zimmer, "in *McDonnell Douglas* cases, the courts have typically required the plaintiff to prove that discriminatory motivation was the but-for or the determinative influence in the employer's decision." Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?* 53 EMORY L.J. 1887, 1930 (2004). Professor Zimmer also explains that the *McDonnell Douglas* framework provided a process of elimination for plaintiffs to prove intentional discrimination. *Id.* at 1894. Professor Zimmer states that under *McDonnell Douglas*, "[a] plaintiff could prove discrimination using circumstantial evidence without having to show that the employer had admitted that it was discriminating." *Id.*; *see also* Kristina N. Klein, Note, *Oasis or Mirage?* Desert Palace *and Its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1182 (2006) ("The *McDonnell Douglas* scheme was born out of the notion that Title VII cases required proof of *but-for*, or sole-factor, causation. This meant that plaintiffs essentially had to prove that *but for* the plaintiff's protected status, the employer would not have taken the adverse employment action." (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. Usi Film Prods., 511 U.S. 244, 251 (1994); William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1567–68 (2005))).

79. *See supra* note 53; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, also applies to ADEA actions. . . . [W]e shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here." (citing O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996))); *O'Connor*, 517 U.S. at 311 ("We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it."). In *Gross v. FBL Financial Services, Inc.*, the Supreme Court stated it had never "definitively decided" whether *McDonnell Douglas* applied to ADEA cases. 129 S. Ct. 2343, 2349–50 n.2 (2009). See *infra* Parts II.D and III.A.2 for further discussion regarding *Gross*'s impact on *McDonnell Douglas* in ADEA cases.

80. 490 U.S. 228.

81. *Id.* at 232.

82. *Id.*; *see also* Scott & Chapman, *supra* note 73, at 405 (explaining that a plaintiff's case is not transformed into a mixed-motives case just because plaintiff alleges a

accounting firm Price Waterhouse for gender discrimination under Title VII.[83] The plaintiff presented evidence of sexist comments made by her co-workers involved in deciding whether she would become a partner.[84] To challenge the plaintiff's allegations, Price Waterhouse presented evidence that the plaintiff was "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."[85] The U.S. District Court for the District of Columbia determined that even though these were legitimate reasons for not making the plaintiff partner, illegitimate, discriminatory reasons also motivated defendant's decision.[86]

The Supreme Court established that in a mixed-motives case, if the plaintiff showed the defendant had a discriminatory motive, the defendant would be liable unless it "prov[ed] that it would have made the same decision even if it had not allowed gender to play such a role."[87]

Justice William Brennan wrote the plurality opinion for the Court, basing the opinion on the language of Title VII.[88] According to the plurality, Title VII's "because of" language "mean[s] that gender must be irrelevant to employment decisions."[89] If a Title VII claimant proved that an

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discriminatory motive and defendant asserts a nondiscriminatory motive). Matthew Scott & Russell Chapman state, "[A] true mixed motive case under § 2000e-2(m) involves either a defendant who (a) *admits* to a partially discriminatory reason for its actions, while also claiming it would have taken the same action were it not for the illegitimate rationale or (b) otherwise credible evidence to support such a finding." *Id.* The article distinguishes a mixed-motives case from a pretext case because in a pretext case brought under § 2000e-2(a), the plaintiff alleges a discriminatory motive, and the defendant denies that motive and offers only a nondiscriminatory motive. *Id.*

83. *Price Waterhouse*, 490 U.S. at 231–32 (plurality opinion).

84. *Id.* at 234–35.

85. *Id.* at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp 1109, 1113 (D.C. Cir. 1985)).

86. *See id.* at 236–37.

87. *Id.* at 244–45. The Supreme Court held that the defendant should prove this by a preponderance of the evidence. *Id.* at 253. According to the plurality, "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Id.* at 246.

88. *Id.* at 239–40.

89. *Id.* at 240 ("To construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."). One scholar explains the plurality's interpretation of the standard of causation:

> "But-for" generally means that reliance on race or another protected characteristic of the plaintiff was necessary for the employer to have acted as it did, even though factors other than race may have influenced the employer's decision. The standard is met if, but for the plaintiff's race, the employer would not have taken the action it did.

Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1250 (2008). Chief Justice William Rehnquist, Justice Anthony Kennedy, and Justice Antonin Scalia dissented in *Price Waterhouse*. *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting). The dissenters would follow the framework established in *McDonnell Douglas* and *Burdine*, and require a Title VII claimant to bear the burden of proving "but-for" causation in order to establish a claim. *Id.* at 281, 286–87 & n.3. The dissent also stated, "[t]he plurality's causation analysis is misdirected, for it is clear that, whoever bears the

illegitimate criterion was a motivating factor in the employer's decision, this violates Title VII unless the defendant proved the affirmative defense.[90] Therefore, a defendant will escape liability if he proves that he would have made the same decision regardless of the plaintiff's protected characteristic.[91]

Justice Sandra Day O'Connor concurred in the judgment, but did not agree with the plurality's interpretation of Title VII's language or its stance on when the burden should shift to the employer.[92] Justice O'Connor disagreed with the plurality because

> the plurality appears to conclude that if a decisional process is "tainted" by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus *commands* that the burden shift to the employer .... The plurality thus effectively reads the causation requirement out of the statute, and then replaces it with an "affirmative defense."[93]

Justice O'Connor recognized the potential difficulty that proving but-for causation could create for plaintiffs in discrimination cases.[94] Justice

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burden of proof on the issue, Title VII liability requires a finding of but-for causation." *Id.* at 281.

90. *Price Waterhouse*, 490 U.S. at 241 (plurality opinion) ("Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations . . . .").

91. *Id.* at 244–45; *see supra* note 87 and accompanying text.

92. *Price Waterhouse*, 490 U.S. at 261–62 (O'Connor, J., concurring) ("My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof . . . . I write separately to . . . express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered.").

93. *Id.* at 276.

94. Justice O'Connor cited areas of tort liability in which "leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care." *Id.* at 263. She noted that the burden shifts to defendants in multiple causation cases, and also noted the difficulties that requiring a Title VII claimant to prove but-for causation might create. *Id.* at 264 ("While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's 'breach of duty' was the 'but-for' cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action, 'at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy.'" (alteration in original) (quoting Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956))). Commentators have noted the difficulty of proving discriminatory intent in disparate treatment cases as well. *See, e.g.*, Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 864 (2004) ("Subtle discrimination cases such as *McDonnell Douglas* had dogged the judiciary because of the elusiveness of proving or disproving discriminatory intent. Unlike most other types of cases, discrimination suits often rest on a thin evidentiary base. . . . [M]any discrimination cases depend on revealing shadowy motives that no one would

O'Connor stated, "[I]n order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[95] Therefore, Justice O'Connor's opinion differed in two ways from the plurality's: (1) she required direct evidence of discrimination, and (2) the discrimination must have been a substantial factor in the employer's decision.[96] The plurality did not mention a direct evidence requirement,

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publicly articulate or be foolish enough to memorialize."); Klein, *supra* note 78, at 1181 ("[P]roving intentional discrimination is quite difficult." (citing Davis, *supra*)).

95. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring). Justice O'Connor did not define direct evidence, but she provided examples of what did not constitute direct evidence. *See id.* at 277. She stated that "stray remarks in the workplace," "statements by nondecisionmakers, or statements made by decisionmakers unrelated to the decisional process itself," are not direct evidence and therefore do not justify shifting the burden of persuasion to the defendant. *Id.* Scholars and courts have discussed this direct evidence requirement at great length, ranging from what constitutes direct evidence to whether or not it is required to receive a mixed-motives analysis. Donald Spero, in his column, *Labor Law:* Desert Palace, Inc. v. Costa*-Does* McDonnell Douglas *Survive?*, discusses different ways courts have defined direct evidence of discrimination. FLA. B.J., Nov. 2004, at 53, 54 (2004). Spero notes the U.S. Court of Appeals for the Eleventh Circuit has rejected the *Black's Law Dictionary* definition of direct evidence. *Id.* According to the court in *Rollins v. TechSouth, Inc.*, *Black's Law Dictionary* defines direct evidence as "'evidence which if believed, proves existence of fact in issue *without inference or presumption*.'" *Rollins*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting BLACK'S LAW DICTIONARY 413 (5th ed. 1979)). In his column, Spero notes that the Eleventh Circuit has defined direct evidence as "'evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic.'" Spero, *supra*, at 54 (quoting Wright v. Southland, 187 F.3d 1287, 1293 (11th Cir. 1999)). The U.S. Court of Appeals for the First Circuit considered a statement that was "'made by a decision maker, pertained to the decisional process, bore squarely on the employment decisions at issue . . . and straightforwardly conveyed age animus'" to be direct evidence. *Id.* (quoting Febres v. Challenger Caribbean Corp., 214 F.3d 57, 61 (1st Cir. 2000)).

96. *See Price Waterhouse*, 490 U.S. at 276–77 (O'Connor, J., concurring) ("It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality . . . ."). According to Professor Martin Katz, "[t]he source of plaintiffs' burden to prove 'but for' causation is the 'direct evidence' requirement in Justice O'Connor's concurrence in *Price Waterhouse*." Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 660 (2008) [hereinafter Katz, *Unifying Disparate Treatment*] (explaining that under *Price Waterhouse*, a plaintiff can prove "motivating factor" causation and shift the burden of persuasion to the defendant "to prove a lack of 'but for' causation," but noting that Justice O'Connor's "direct evidence" requirement limits when a plaintiff can utilize the burden-shifting mechanism). Professor Katz also points out that "substantial factor" causation does not necessarily differ from "motivating factor" causation. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 507 (2006) [hereinafter Katz, *Fundamental Incoherence of Title VII*]. Katz states, "it is not clear that Justice O'Connor really rejected the plurality's 'motivating factor' test—much less that she intended the 'substantial factor' test to be more restrictive. Nowhere in her concurrence does she criticize the 'motivating factor' test." *Id.* at 508. In addition, Professor Katz points out that the Supreme Court had previously "expressly equated the two standards, holding that the plaintiff must show that his protected speech 'was a substantial factor [in the employer's termination decision] or to put it in other words, that it was a motivating factor.'" *Id.* at 507 (alteration in original) (quoting Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274, 287 (1977)) (internal quotation marks omitted); *see also* Brief for the United States as Amicus Curiae Supporting Petitioner at 18, 22, Gross v. FBL Fin. Servs., Inc., 129 S. Ct.

and it stated a plaintiff must prove that discrimination was a "motivating factor" in the employer's decision.[97]

Subsequent courts followed Justice O'Connor's concurring opinion by requiring a plaintiff to present direct evidence in order to receive a mixed-motives analysis.[98] Therefore, if a plaintiff presents direct evidence of discrimination and proves that the defendant relied on an illegitimate factor when making a decision regarding the plaintiff's employment, the burden of persuasion shifts to the defendant to prove by a preponderance of evidence that he would have made the same decision regardless of the illegitimate reason.[99] If the defendant proves this, he is not liable under Title VII.[100]

The Supreme Court plurality's ruling in *Price Waterhouse* limited an employee's protection against intentional discrimination in the

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2343 (2009) (No. 08-441) (quoting the same language in *Mt. Healthy* and pointing out that the *Price Waterhouse* plurality opinion and Justice Byron White's concurring opinion both relied on *Mt. Healthy* in the analyses). See *infra* note 97 for Justice White's concurring opinion. Therefore, for Professor Katz, "we should understand the 'substantial factor' test, like the 'motivating factor' test, as referring to the concept of minimal causation." Katz, *Fundamental Incoherence of Title VII, supra*, at 507.

97. *See Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *see also* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 580–82 (1996). Justice White also wrote a separate concurring opinion. *Price Waterhouse*, 490 U.S. at 258 (White, J., concurring). Justice White would hold that the plaintiff's "burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action," and if plaintiff established this, the burden of persuasion should shift to the defendant to prove that he would have made the same decision. *Id.* at 259–60. Justice White departed from the plurality opinion because he disagreed with the type of evidence that an employer may present when proving the same-decision defense. *Id.* at 260–61. Justice White interpreted the plurality opinion to require objective evidence, but he believed that if "the employer credibly testifies that the action would have been taken for legitimate reasons alone, this should be ample proof." *Id.* at 261.

98. *See* Klein, *supra* note 78, at 1184 n.58 (2006) (citing courts that have followed Justice O'Connor's opinion); *see also* Prenkert, *supra* note 23, at 532 (explaining that courts have treated Justice O'Connor's concurring opinion as controlling because "her approach was the most restrictive"); Spero, *supra* note 95, at 54 ("Although Justice O'Connor was not joined in her opinion by any other member of the Court, the lower courts have almost universally required plaintiffs to present direct evidence before they will present the jury with a mixed motive instruction."); Ezra S. Greenberg, Note, *Stray Remarks and Mixed-Motive Cases After* Desert Palace v. Costa*: A Proximity Test for Determining Minimal Causation*, 29 CARDOZO L. REV. 1795, 1804 n.48 (2008) ("'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,' and [lower courts] considered Justice O'Connor's concurrence as the narrowest grounds for the *Price Waterhouse* decision." (quoting Marks v. United States, 430 U.S. 188, 193 (1977))).

99. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

100. *Id.* This burden placed on the defendant is greater than the burden placed on the defendant under the burden-shifting framework outlined in *McDonnell Douglas*. *See* Spero, *supra* note 95, at 54. The defendant's burden in *Price Waterhouse* is one of persuasion, while in *McDonnell Douglas* it is a burden of production. *Id.* (explaining that shifting the burden of persuasion to the defendant to prove that he would have made the same decision regardless of the plaintiff's protected characteristic is "far more difficult" than simply articulating a nondiscriminatory reason for his decision as required under *McDonnell Douglas*).

workplace.[101] According to the plurality, Justice Byron White, and Justice O'Connor, an employer may escape all liability even if the employee proved a protected characteristic was considered in the employment decision.[102] Congress confronted the *Price Waterhouse* ruling head on with the Civil Rights Act of 1991.[103] Congress amended Title VII to ensure that if an employee proved the employer had been motivated by discrimination in an adverse employment action, the employer would not escape liability.[104]

3. The Civil Rights Act of 1991

Because *Price Waterhouse* limited the protection that Title VII offered persons in the protected classes, Congress enacted § 107 of the Civil Rights Act of 1991.[105] Congress had enacted Title VII in order to prohibit any "invidious consideration" of race, color, religion, sex, or national origin.[106] The outcome of *Price Waterhouse* "undercut this prohibition" by allowing a defendant to escape liability even if the plaintiff proved discrimination was

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101. H.R. REP. NO. 102-40, pt. 2, at 14–15 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

102. *Price Waterhouse*, 490 U.S. at 242; *id.* at 261 n.* (White, J., concurring); *id.* at 276–77 (O'Connor, J., concurring). One scholar explains that *Price Waterhouse* requires "but for" causation in order to establish a Title VII violation, but the plaintiff does not bear the burden of proving "but for" causation. *See* Katz, *Unifying Disparate Treatment*, *supra* note 96, at 653 ("By proving 'motivating factor' causation, the plaintiff can shift the burden to the defendant on the issue of 'but for' causation (to prove a lack of 'but for' causation). But if the defendant prevails on this issue—that is, if there is only 'motivating factor' causation—then there is no liability. Put simply, *Price Waterhouse* requires 'but for' causation for liability, as well as damages." (citing *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring))). Professor Katz argues disparate treatment claimants should not be required to prove "but-for" causation in order to hold a defendant liable. *Id.* at 657. According to Professor Katz, if a plaintiff had to prove "but-for" causation for liability, then a defendant who had relied in part on discrimination could escape liability. *Id.* at 658. Professor Katz argues that "[t]he point of disparate treatment law is to prevent employers from considering protected factors (such as race or sex) in their decisions; that is, from engaging in 'motivating factor' discrimination." *Id.* Professor Katz argues that "[v]irtually all disparate treatment statutes share the same two goals . . . deterrence and compensation. . . . [A] simple 'but for' requirement undermines these goals, particularly the goal of deterrence." *Id.* at 672. Defendants would not be deterred from making employment decisions that are based in part on age because if they could prove that they would have made the same decision regardless of the employee's age, then they would not be held liable. *Id.* ("[A 'but for'] requirement exonerates defendants who have used protected characteristics (such as race or sex—or age, disability, or family leave status) in their decision-making."). Professor Katz argues that the standard of causation outlined in § 107 of the 1991 Act is a better approach to disparate treatment discrimination cases than *McDonnell Douglas* and *Price Waterhouse*. *Id.* See *supra* Part I.C.3 for a full explanation of § 107.

103. H.R. REP. NO. 102-40, pt. 2, at 17, *reprinted in* 1991 U.S.C.C.A.N. at 710.

104. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m), e-5(g)(2)(B) (2006)).

105. H.R. REP. NO. 102-40, pt. 2, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711 ("The Court's holding in *Price Waterhouse* severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII.").

106. *Id.* at 17, *reprinted in* 1991 U.S.C.C.A.N. at 710.

a motivating factor in the adverse employment action.[107] Congress enacted § 107 of the 1991 Act in response to *Price Waterhouse* in order to expand the protections afforded employees.[108]

Section 107 only explicitly amended Title VII,[109] codifying the "motivating factor" mixed-motives analysis outlined by the plurality in *Price Waterhouse*, while explicitly rejecting the affirmative defense.[110] Section 107 reads, "Except as otherwise provided in this subchapter, 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."[111] Thus, § 107 overruled part of the Supreme Court's decision in *Price Waterhouse*, because even if an employer proves

107. *Id.* The House Report from the 1991 Act stated that *Price Waterhouse* limited protections for Title VII plaintiffs, explaining, "even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason." *Id.* at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711.

108. *Id.* at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711.

109. *See* Civil Rights Act of 1991, § 107(a). Although § 107 of the 1991 Act did not amend the ADEA, § 115 of the 1991 Act did. Civil Rights Act of 1991, § 115, 105 Stat. at 1079 (codified at 29 U.S.C. § 626(e) (2006)). Section 115 amended § 7(e) of the ADEA, changing the two and three year statutes of limitations for filing claims under the ADEA, and also requiring the EEOC to notify the aggrieved employee if it dismissed his charge. *Id.* See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1106–25 (1993), for more information on § 115 and other provisions of the 1991 Act that impliedly modified the ADEA.

Section 107 similarly did not amend the Americans with Disabilities Act (ADA), but the House Report for the 1991 Act stated, "[M]ixed motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act." H.R. REP. NO. 102-40, pt. 2, at 4, *reprinted in* 1991 U.S.C.C.A.N. at 697. *But see* John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2039–51 (1995) ("The motivating factor amendment itself does not include 'disability' in its enumerated factors [and] the ADA does not reference the section now containing the motivating factor amendment.... Finally, the legislative history, while pointing strongly to a motivating factor interpretation, looks like a suspicious end-run around winning the amendment's application to the ADA in the statute itself.") *Id.* at 2051. See *infra* note 116 for further discussion on the ADA.

110. *See* Prenkert, *supra* note 23, at 534–35.

111. 42 U.S.C. § 2000e-2(m) (2006). The language of § 107 shows that Congress adopted the plurality's "'motivating factor' analysis" instead of Justice O'Connor's "substantial factor" analysis. *See* Klein, *supra* note 78, at 1184 & n.61; *see also* Katz, *Fundamental Incoherence of Title VII*, *supra* note 96, at 492 n.8. In addition, Congress did not specify a heightened standard of evidence when it enacted § 107; it simply stated that an employee must "demonstrate" that a prohibited characteristic was considered. 42 U.S.C. § 2000e(m). In § 104 of the 1991 Act, Congress amended Title VII to include a definition for "demonstrates," defining it as "meets the burdens of production and persuasion." *Id.*; *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

he would have made the same decision regardless of the employee's protected characteristic, the employer's decision was still unlawful.[112]

In addition, through § 107, "Congress converted the 'same decision' defense . . . from an affirmative defense against liability to a remedy limitation."[113] Congress amended § 706 of Title VII, which outlined remedies available for plaintiffs.[114] According to § 107, a plaintiff is not entitled to damages if the defendant proved he would have made the same decision regardless of the illegitimate consideration.[115] Section 107(b) states that a court "(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs . . . ; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ."[116]

112. H.R. REP. NO. 102-40, pt. 2, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711 ("In providing liability for discrimination that is a 'contributing factor,' the Committee intends to restore the rule . . . that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability."). According to Professor Katz, "Congress expressly overruled the *Price Waterhouse* definition of 'because of' . . . [because] requiring 'but for' causation for liability lets defendants who engaged in 'motivating factor' discrimination off the hook. . . . In other words, Congress thought that *Price Waterhouse* got the definition of 'because of' wrong—very wrong." Katz, *Unifying Disparate Treatment*, *supra* note 96, at 671–72 (footnotes omitted); *see also* Klein, *supra* note 78, at 1184–85; Prenkert, *supra* note 23, at 534–35.

113. Prenkert, *supra* note 23, at 534 (footnote omitted).

114. 42 U.S.C. § 2000e-5(g)(1)(B); *see* Prenkert, *supra* note 23, at 534–35.

115. 42 U.S.C. § 2000e-5(g)(1)(B).

116. *Id.* One scholar explains that the § 107 provisions use both "but for" causation and "minimal causation." *See* Katz, *Unifying Disparate Treatment*, *supra* note 96, at 652–53. According to Professor Katz, § 107 outlines a "two-tier causal standard—'motivating factor' for liability and 'but for' for full damages." *Id.* at 666. Katz explains that under § 107, the burden of proof shifts to the defendant to "prove a lack of 'but for' causation." *Id.* at 653. If the defendant cannot prove that he would have made the same decision regardless of the protected characteristic, then the plaintiff's protected characteristic is a "but for" cause. *Id.* Only then will a plaintiff be entitled to full damages. *Id.* Professor Katz points out, "[A]bsent 'but for' causation, requiring the defendant to compensate the plaintiff for [his] injuries may provide a windfall to the plaintiff. That is, the plaintiff might be compensated for injuries [he] would have suffered as a result of another factor—that is, irrespective of the defendant's act." *Id.* at 658. Professor Katz argues that § 107's "motivating factor" standard for liability and "but for" standard for damages is a better causation standard for disparate treatment statutes than *McDonnell Douglas* or *Price Waterhouse*. *Id.* at 658 & n.61 (noting shortcomings of § 107 because the costs imposed upon defendants who engage in "motivating factor" discrimination could be too low to deter discrimination, and plaintiffs' "moral satisfaction of being vindicated" might not provide an incentive for plaintiffs to pursue "motivating factor" discrimination cases, but that § 107's framework was better than *McDonnell Douglas* or *Price Waterhouse*). Holding a defendant liable for "motivating factor" liability is consistent with the purpose of disparate treatment law: "to prevent employers from considering protected factors . . . in their decisions." *Id.* at 658. Katz goes on to argue that "[s]ociety, as well as the individual plaintiff, has a strong interest in deterring 'motivating factor,' as well as 'but for' discrimination." *Id.* Professor Katz's article advocates using § 107's framework for other disparate treatment statutes that prohibit employers from making decisions "because" of a prohibited reason, including the ADA and § 704, Title VII's antiretaliation provision. *Id.* at 644, 647–48 & n.26, 650 n.31. The ADA's relevant provision states, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a) (2006); *see also* Prenkert, *supra* note 23, at 554 ("[C]ourts have applied the mixed-motives

Despite the fact that Congress adopted the plurality's "motivating factor" analysis from *Price Waterhouse* in § 107, federal courts continued to apply Justice O'Connor's direct evidence requirement in employment discrimination cases.[117] In 2003, the Supreme Court abrogated the direct evidence requirement for Title VII disparate treatment claims when it handed down its decision in *Desert Palace, Inc. v. Costa.*[118]

4. *Desert Palace, Inc. v. Costa*

In *Desert Palace*, the Supreme Court addressed whether direct evidence of discrimination was required for a plaintiff to receive a mixed-motives jury instruction in a sex discrimination claim brought under Title VII.[119] *Desert Palace* was the first time the Supreme Court interpreted the effect that § 107 had on Title VII mixed-motives cases.[120] The Court held that direct evidence was not required for Title VII mixed-motives claims.[121]

In *Desert Palace*, the plaintiff brought claims for sex discrimination and sexual harassment under Title VII against her employer.[122] The Supreme Court began its analysis with the statutory text of § 107.[123] The Court determined that Congress's choice of the word "demonstrate" to describe how the plaintiff must prove discrimination under Title VII was unambiguous.[124] Congress had defined "demonstrates" in the 1991 Act as

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framework to ADA claims. Most apply the *Price Waterhouse* framework and suffer the attendant difficulties of distinguishing between direct and circumstantial evidence. . . . As we saw with the ADEA, there is substantial variation in the application of the mixed-motives framework to the ADA and no real opportunity for unification of ADA disparate treatment law under it."). Title VII's antiretaliation provision states,

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

117. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003) (collecting cases in which courts followed Justice O'Connor's concurring opinion, requiring direct evidence in order to obtain a mixed-motive analysis after the Civil Rights Act of 1991 was enacted); *see also* Klein, *supra* note 78, at 1185; *supra* note 98 and accompanying text.

118. 539 U.S. 90.

119. *Id.* at 92, 96. The "mixed-motive" instruction refers to instructing the jury that a defendant will be held liable if the plaintiff can prove that a protected characteristic was a "motivating factor" in the adverse employment decision, and the burden of persuasion shifts to the defendant to prove that he would have made the same adverse employment decision regardless of the plaintiff's protected characteristic, which determines the remedy. *Id.* at 96–97.

120. *Id.* at 98.

121. *Id.* at 92.

122. *Id.* at 96.

123. *Id.* at 98 ("[T]he starting point for our analysis is the statutory text."). See also *supra* notes 109–11 and accompanying text for the statutory text of 42 U.S.C. § 2000e-2(m) (2006).

124. *Desert Palace*, 539 U.S. at 98.

to "mee[t] the burdens of production and persuasion."[125] The Court determined that since there was no heightened evidence requirement in the statute, a plaintiff should not be required to present direct evidence of discrimination in order to obtain a mixed-motives jury instruction.[126] The Court further explained that "Congress has been unequivocal when imposing heightened proof requirements," concluding that Congress would have expressly stated that direct evidence was necessary for mixed-motive cases under Title VII.[127]

The unanimous Court concluded its opinion by stating "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[128] Justice O'Connor wrote a brief concurring opinion in which she repeated her reasoning in *Price Waterhouse*, but noted that the 1991 Act "codified a new evidentiary rule for mixed-motive cases arising under Title VII."[129]

The impact of the Supreme Court's holding in *Desert Palace* on ADEA cases was not uniform among circuit courts.[130] After *Desert Palace*, courts in the First, Fifth, and Seventh Circuits did not require direct evidence to shift the burden to the defendant, while courts in the Second, Third, Sixth, and Eighth Circuits maintained Justice O'Connor's direct evidence requirement.[131] Before examining this division among the circuit courts, a brief look at the language the Supreme Court has used in evaluating ADEA claims is necessary.

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125. *Id.* at 99 (alteration in original) (quoting 42 U.S.C. § 2000e-2(m)); *see also supra* note 111.

126. *Desert Palace*, 539 U.S. at 99.

127. *Id.*

128. *Id.* at 101. Although the Court held that a plaintiff does not need direct evidence for a mixed-motive instruction, "*Desert Palace* did not clarify what level of causation a mixed-motive employee must show before the burden properly shifts to the employer on the ultimate issue of 'but for' causation." *See* Greenberg, *supra* note 98, at 1806–07.

129. *Desert Palace*, 539 U.S. at 102 (O'Connor, J., concurring).

130. *See infra* Part I.D. The Supreme Court decisions discussed in this Note have all dealt with jury instructions. Many discrimination cases, including those discussed in Part II.D, are decided at the summary judgment stage. This is not a significant difference because the standards should be the same for summary judgment and at trial because "[a]t both stages the question is the same: is a plaintiff required to meet some sort of 'heightened standard' to shift the burden of proof to the defendant. The standards to be utilized at trial are equally applicable at summary judgment." Reply Brief for Petitioner On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 2, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441) (citing *Desert Palace*, 539 U.S. at 101; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). Furthermore, the Supreme Court does not recognize a distinction between the evidentiary standards for summary judgment and trial. *Id.* at 2–3. In *Desert Palace*, the Supreme Court described the split among circuit courts and whether or not direct evidence was required in Title VII cases, and in citing cases, the Court did not distinguish between those at the summary judgment stage and those at trial. *Id.* at 3 (citing *Desert Palace*, 539 U.S. at 95).

131. *See infra* Part I.D.

5. The U.S. Supreme Court's Treatment of ADEA Claims

Each of the Supreme Court decisions discussed in Part I.C involved Title VII cases, but lower courts subsequently applied each analysis to ADEA cases.[132] Prior to *Gross*, when the Supreme Court addressed ADEA claims, it had stated that the employer's adverse decision must actually be motivated by age in disparate treatment claims.[133]

In *Hazen Paper Co. v. Biggins*,[134] the Supreme Court analyzed a claim for age discrimination brought under the ADEA.[135] The Supreme Court determined that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[136] Although there was evidence that the employer had fired the employee because his pension benefits were close to vesting, the Court determined that this did not establish a violation of the ADEA.[137] The Court noted that "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role . . . and had a determinative influence on the outcome."[138] This language is cited in subsequent ADEA cases as the causation standard.[139]

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132. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–42 (2000); *see also supra* note 79. The Supreme Court never held that the *Price Waterhouse* burden-shifting analysis applied to ADEA cases, but prior to *Gross*, lower courts consistently applied the analysis. *See Gross*, 129 S. Ct. at 2349 ("This Court has never held that this burden-shifting framework applies to ADEA claims."); Petition for a Writ of Certiorari at 7–10, *Gross*, 129 S. Ct. 2343 (No. 08-441) (explaining that the Supreme Court in *Desert Palace* did not address whether the direct evidence requirement from *Price Waterhouse* survived outside of Title VII claims and that lower courts apply the *Price Waterhouse* analysis to ADEA claims). See also *infra* Part I.D for lower courts that apply the *Price Waterhouse* analysis to ADEA claims. The Supreme Court held in *Gross* that mixed-motives claims were not available under the ADEA. *Gross*, 129 S. Ct. at 2349.

133. *Reeves*, 530 U.S. at 141.

134. 507 U.S. 604 (1993).

135. *Id.* at 606. The Court noted that the courts of appeals had frequently addressed the question of whether "an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age." *Id.* at 608.

136. *Id.* at 609.

137. *Id.* at 613. The Court noted that the employer could be liable under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (2006), for interfering with his pension benefits, but that this did not constitute age discrimination under the ADEA. *Id.* at 612.

138. *Id.* at 610. Different scholars have different interpretations of the causation standard that this "played a role"/"determinative influence" language created. *See* Prenkert, *supra* note 23, at 549 n.198 (citing different articles in which scholars state that this causation standard requires "but for" causation, requires less than "but-for" causation, and "tracks the motivating factor/same decision framework of the 1991 Act").

139. *See Reeves*, 530 U.S. at 141; *see also* Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361, 2366 (2008) ("[A] plaintiff alleging disparate treatment cannot succeed unless the employee's age '*actually played a role in that process and had a determinative influence on the outcome*'" (quoting *Hazen Paper Co.*, 507 U.S. at 610)); Brief in Opposition to Petition for a Writ of Certiorari at 6, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441) (quoting same language from *Kentucky Retirement Systems*).

In *Reeves v. Sanderson Plumbing Products, Inc.*,[140] the Supreme Court addressed a claim for intentional discrimination brought under the ADEA.[141] The issue before the Court was "whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, [was] adequate to sustain a finding of liability for intentional [age] discrimination."[142] According to the Supreme Court, "'liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.' That is, the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'"[143] The Supreme Court determined that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[144] The Court reasoned that because the defendant is in the best position to present evidence explaining the reasons for its actions, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[145]

Therefore, ADEA plaintiffs must prove that age "'actually played a role'" and "'had a determinative influence on the outcome'" of an adverse employment decision.[146] Lower courts have generally applied the Supreme Court's holding in *Price Waterhouse*, while quoting the "determinative influence" language from *Reeves*, so there was not a notable difference between the different language used.[147]

D. *Direct or Circumstantial Evidence: Setting the Stage for* Gross v. FBL Financial Services, Inc.

Prior to the Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc.*, the availability of mixed-motives claims to ADEA plaintiffs

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140. 530 U.S. 133.
141. *Id.* at 138–41.
142. *Id.* at 140 (citations omitted).
143. *Id.* at 141 (alteration in original) (quoting *Hazen Paper Co.*, 507 U.S. at 610).
144. *Id.* at 148.
145. *Id.* at 147.
146. *Id.* at 141 (quoting *Hazen Paper Co.*, 507 U.S. at 610).
147. *See* Fasold v. Justice, 409 F.3d 178, 183–84 (3d Cir. 2005) (stating an ADEA plaintiff had to prove that age "'actually motivated'" or 'had a determinative influence on'" the adverse decision, and then explaining that a plaintiff meets this burden by either presenting direct evidence of discrimination under *Price Waterhouse* or indirect evidence using *McDonnell Douglas* (quoting *Reeves*, 530 U.S. at 141)). Professor Prenkert has argued that the "'played a role/determinative influence' language potentially creates a more stringent causal standard for disparate treatment claims under the ADEA than does the motivating-factor language of *Price Waterhouse* or the 1991 Act." Prenkert, *supra* note 23, at 549; *see also id.* at 549 n.198. However, Professor Zimmer notes there is probably not a significant difference between the "played a role/determinative influence" standard and the "motivating factor" standard. Zimmer, *supra* note 97, at 587.

went unquestioned, but courts divided over the type of evidence required to shift the burden of proof.[148]

Before *Gross*, the First, Fifth, and Seventh Circuits did not require direct evidence of discrimination for an ADEA claimant to receive a mixed-motives analysis. The U.S. Court of Appeals for the Fifth Circuit held that because there was no heightened direct evidence requirement specified in the ADEA, direct evidence of discrimination was not required for an ADEA disparate treatment plaintiff to receive a mixed-motives analysis.[149] The U.S. Court of Appeals for the First Circuit applied *Desert Palace* to ADEA claims, thereby abrogating the direct evidence requirement.[150] In addition, some district courts in the Seventh Circuit applied *Desert Palace* to ADEA claims.[151]

On the other hand, the Second, Third, and Sixth Circuits all required direct evidence of discrimination for an ADEA claimant to receive a mixed-motives analysis, even after the Supreme Court abrogated the requirement in *Desert Palace*. The U.S. Court of Appeals for the Third Circuit required direct evidence because the Court in *Desert Palace* had relied on the language of 42 U.S.C. § 2000e-2(m), which differed from the provisions in

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148. *See* Brief for the United States, *supra* note 96, at 11 & n.2; *see also* Reply Brief for Petitioner at 19, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441); Brief for Respondent at 50 n.34, *Gross*, 129 S. Ct. 2343 (No. 08-441); Petition for a Writ of Certiorari, *supra* note 132, at 11–23.

149. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 311 (5th Cir. 2004); *see also* Tratree v. BP N. Am. Pipelines, Inc., 277 Fed. App'x 390, 393–95 (5th Cir. 2008) (following *Rachid* in ADEA case, noting that the standards of proof for claims of discrimination under the ADEA and Title VII were treated identically in the Fifth Circuit).

150. Burton v. Town of Littleton, 426 F.3d 9, 19–20 (1st Cir. 2005) ("This court, . . . following the Supreme Court's command in *Desert Palace v. Costa*[,] has rejected the requirement that there be direct evidence in [ADEA] mixed-motive cases; any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive." (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003); Hillstrom v. Best W. TLC Hotel, 354 F.3d 27, 30–31 (1st Cir. 2003); Beacon Mut. Ins. Co. v. OneBeacon Ins. Group, 376 F.3d 8, 17 (1st Cir. 2004))); *Hillstrom*, 354 F.3d at 30–31 (noting that the Supreme Court's holding in *Desert Palace* overruled the direct evidence requirement for mixed-motives analyses where plaintiff brought a claim of gender and age discrimination under Title VII and the ADEA).

151. Ballatore v. Fairmont Hotels & Resorts, Inc., No. 02 C 4807, 2004 U.S. Dist. LEXIS 2672, at *22 (N.D. Ill. Feb. 23, 2004) (denying defendant's motion for judgment because both plaintiff's age and poor job performance could have been factors in the disparate treatment). *But see* Lawhead v. Ceridian Corp., 463 F. Supp. 2d 856, 867 (N.D. Ill. 2006) (noting that the U.S. Court of Appeals for the Seventh Circuit had not applied *Desert Palace* to ADEA cases). The Seventh Circuit permitted plaintiffs to proceed under what it termed the "direct method" of proof, permitting circumstantial evidence to shift the burden of persuasion to the defendant even before *Desert Palace*. *See* Abioye v. Sundstrand Corp., 164 F.3d 364, 369 (7th Cir. 1998) ("Under the mixed motives approach to discrimination cases, a plaintiff may rely on either direct or circumstantial evidence to establish discriminatory intent."); *see also* Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 695 (7th Cir. 2006) ("[The plaintiff] must put forth evidence that her employer's decision to terminate her had a discriminatory motivation. She may do so under the direct method by providing direct evidence . . . or by presenting sufficient circumstantial evidence." (citations omitted)); Petition for Writ of Certiorari, *supra* note 132, at 17–19 & n.16 (citing cases from the Seventh Circuit that did not require direct evidence of discrimination).

the ADEA.[152] Similarly, the U.S. Court of Appeals for the Sixth Circuit also required direct evidence after *Desert Palace*.[153] Finally, the U.S. Court of Appeals for the Second Circuit also required direct evidence to shift the burden in ADEA mixed-motives cases.[154]

The Supreme Court granted certiorari in *Gross v. FBL Financial Services, Inc.* to address this split among the circuit courts.[155] Part II of this Note outlines *Gross*'s factual background, the decisions of the trial court and the U.S. Court of Appeals for the Eighth Circuit, and the Supreme Court majority and dissenting opinions. In addition, Part II provides an overview of lower court cases that have faced ADEA claims post-*Gross* and describes the reactions to the Supreme Court's decision.

II. *GROSS V. FBL FINANCIAL SERVICES, INC.*

Part II.A of this Note describes the factual background of *Gross* and the Eighth Circuit's opinion. Part II.B outlines the arguments made on appeal by the petitioner, Gross, and the respondent, FBL. Part II.C discusses the majority and dissenting opinions in the Supreme Court's decision. Part II.D provides an overview of ADEA cases after *Gross*, and Part II.E describes the reactions to the Supreme Court's holding in *Gross*.

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152. Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 512 n.3 (3d Cir. 2004) (noting that the 1991 Act's "motivating factor" language did not apply to the ADEA, and therefore where direct evidence of discrimination was presented in ADEA cases, the *Price Waterhouse* framework applied); Cobetto v. Wyeth Pharm., 619 F. Supp. 2d 142, 155–58 & n.11 (W.D. Pa. 2007) (recognizing that *Desert Palace* overruled the direct evidence requirement in Title VII claims, but concluding that the Court's reasoning in *Desert Palace* did not apply to ADEA claims, which were still controlled by Justice O'Connor's concurring opinion in *Price Waterhouse* in the Third Circuit).

153. *See* Blair v. Henry Filters, Inc., 505 F.3d 517, 523–24 (6th Cir. 2007) (explaining that where an ADEA plaintiff presented direct evidence, the burden of persuasion shifted to the defendant to prove that he would have made the same adverse employment decision regardless of plaintiff's age, but where plaintiff presented circumstantial evidence of discrimination, courts used the *McDonnell Douglas* framework to analyze the claim); Felder v. Nortel Networks Corp., 187 Fed. App'x 586, 591 (6th Cir. 2006) ("Unlawful discrimination need not be the only reason for an adverse employment action, but rather need only be an essential component of an employer's mixed motive. A plaintiff may carry the burden by introducing direct evidence which shows that in treating a plaintiff adversely the defendant was motivated by discriminatory intent, or by introducing circumstantial evidence that supports an inference of discrimination." (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. Usi Film Prods., 511 U.S. 244, 251 (1994))).

154. Graves v. Finch Pruyn & Co., 457 F.3d 181, 187 (2d Cir. 2006) ("Because [the plaintiff] presents no direct evidence of age discrimination, the court evaluates his ADEA claim under the *McDonnell Douglas* burden-shifting framework.").

155. *See* 129 S. Ct. 2343, 2346 (2009).

A. *The Road to the Supreme Court*

1. Factual Background

Jack Gross began working for a subsidiary of FBL Financial Group in 1971 as a multi-line claims adjuster.[156] After working there for seven years, he voluntarily left.[157] Gross returned to work for FBL in 1987 as a claims adjuster and was promoted several times before he reached the position of Claims Administration Director in 2001.[158] In 2003, the Iowa operations, where Gross worked, merged with the Kansas and Nebraska operations.[159] Gross, at fifty-four-years-old, was reassigned to the position of Claims Project Coordinator.[160] FBL created a new position of Claims Administration Manager, and most of Gross's responsibilities as Claims Administration Director were transferred to this position.[161] FBL gave this new position to Lisa Kneeskern, a woman in her early forties who had been working beneath Gross as a subrogation supervisor.[162] Gross, as Claims Project Coordinator, had the same pay grade and salary points as Kneeskern, but he believed his reassignment was a demotion "because Kneeskern assumed the functional equivalent of [his] former position, and his new position was ill-defined and lacked a job description or specifically assigned duties."[163]

Gross brought a claim of age discrimination under the ADEA against FBL, alleging FBL demoted him because of his age.[164]

2. Procedural Posture

At trial, the judge gave the jury a mixed-motives instruction.[165] The trial judge instructed the jury that if the plaintiff "proved by any evidence—direct or otherwise—that age was 'a motivating factor' in the employment

156. Gross v. FBL Fin. Group, Inc., No. 4:04-CV-60209-TJS, 2006 U.S. Dist. LEXIS 98081, at *5–6 (S.D. Iowa June 23, 2006), *rev'd sub. nom.*, Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 358 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009). *See also* Brief for Petitioner at 2, *Gross*, 129 S. Ct. 2343 (No. 08-441). FBL Financial Group is the owner and manager of insurance and financial services companies. *Id.*

157. *Gross*, 2006 U.S. Dist. LEXIS 98081, at *5–6.

158. *Id.* at *6–8. Gross had been the Claims Administration Vice President from 1999 until 2001, when his job changed to Claims Administration Director. Brief for Petitioner, *supra* note 156, at 2 n.1. Gross viewed this reassignment as a demotion because his points for the company's system for salary grades were reduced. *Id.*; *see Gross*, 2006 U.S. Dist. LEXIS 98081, at *8. This demotion was not at issue in the case. Brief for Petitioner, *supra* note 156, at 2 n.1. For further information regarding Gross's previous positions at FBL, see *Gross*, 2006 U.S. Dist. LEXIS 98081, at *6.

159. *Gross*, 2006 U.S. Dist. LEXIS 98081, at *8–9.

160. *Id.* at *9–10.

161. *Id.* at *10.

162. *Id.*

163. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 358 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009).

164. *Id.*

165. *Id.* at 360.

decision, then the burden shifted to [the employer] to prove that its decision would have been the same" regardless of the plaintiff's age.[166] The jury found in favor of Gross and awarded him lost compensation.[167] FBL appealed the decision, arguing that the jury should not have been given a mixed-motives instruction because Gross did not present direct evidence of discrimination.[168] The Eighth Circuit reversed and remanded the case because it determined Gross was not entitled to a mixed-motives instruction because he had not presented direct evidence of discrimination.[169] The court of appeals noted that *Desert Palace* abrogated this direct evidence requirement in Title VII cases but determined that *Desert Palace* was not applicable to the ADEA case before it.[170]

Gross petitioned the Supreme Court, and the Court granted certiorari on the question of whether direct evidence was required in order to shift the burden of persuasion in ADEA mixed-motives cases.[171]

B. *Arguments on Appeal*

Gross's merit brief argued various reasons why direct evidence should not be required for a mixed-motives instruction.[172] For example, Gross argued that the ADEA did not impose a heightened evidentiary requirement on plaintiffs, and therefore the Court should not impose one either.[173]

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166. *Id.*

167. *Id.* at 358. The amount of the award was $46,945. *Id.*

168. *Id.* FBL also challenged the lower court's decision to exclude testimony, and its denial of the employer's judgment as a matter of law. *Id.* These challenges are not relevant for the analysis of this Note.

169. *Id.* at 360. The court of appeals noted that the plaintiff's case should have been analyzed under *McDonnell Douglas*, with the burden of persuasion remaining with plaintiff throughout, and that "the jury should have been charged to decide whether the plaintiff proved that age was the determining factor" in the defendant's adverse employment decision. *Id.*

170. *Id.* at 360–61. According to the court of appeals, *Desert Palace* did not apply because the Supreme Court had based its holding on interpreting § 107 of the 1991 Act, which did not amend the ADEA. *Id.* at 361–62. The court of appeals pointed out that another section of the 1991 Act did amend the ADEA. *Id.* at 361; *see also supra* note 109. The U.S. Court of Appeals for the Eighth Circuit found this significant because Congress did not elect to amend the ADEA when it enacted § 107. *Gross*, 526 F.3d at 361. The court of appeals determined that it was still bound by *Price Waterhouse*, noting,

> When the Court previously addressed statutory text comparable to the ADEA in *Price Waterhouse*—"*because* of such individual's . . . sex,"—the result was a fragmented decision from which our court adopted Justice O'Connor's concurring opinion as the controlling rule. . . . [T]he Court [in *Desert Palace*] did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable.

Id. at 362 (first omission in original) (citing 42 U.S.C. §§ 2000e-2(a)(1), (2); Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

171. *Gross*, 129 S. Ct. 2343, 2348 (2009).

172. *See generally* Brief for Petitioner, *supra* note 156.

173. *Id.* at 11–13, 16. ("The ADEA does not require a plaintiff (or defendant) to establish anything by direct evidence, does not bar reliance on circumstantial evidence, and does not insist on proof by clear and convincing evidence. The Court should not engraft onto the

Gross cited *Price Waterhouse*, *Desert Palace*, and *Hazen Paper Co.*, noting that in each of these cases, "where the text of the relevant statute does not specifically impose any elevated evidentiary requirement on a party in civil litigation, the courts themselves will not do so. The absence of any direct evidence requirement in the text of the ADEA is thus dispositive in the instant case."[174] Gross argued that Congress "enact[s] specific language substituting some other standard" when it wants to depart from established proof principles in civil cases.[175] Therefore, the Court should not require direct evidence of discrimination in order to receive a mixed-motives analysis because Congress did not do so in the ADEA.[176]

In addition, Gross argued that requiring direct evidence impeded the enforcement of the ADEA.[177] Gross noted that the definition of direct evidence in the court of appeals's opinion in *Gross* "exclude[d] virtually all of the types of circumstantial evidence which this Court has recognized can be probative of a discriminatory intent."[178] If direct evidence, rare in discrimination cases, was required to shift the burden to the defendant, Gross argued, "the employer would avoid liability in a substantial number of cases in which the adverse action would not indeed have otherwise occurred."[179]

Gross argued that the court of appeals erroneously relied on Justice O'Connor's concurring opinion in *Price Waterhouse* as the controlling opinion.[180] Gross pointed out that both the plurality opinion, in which four Justices joined, and Justice White's concurring opinion, did not require direct evidence in order to shift the burden to the defendant.[181] For this reason, Gross argued that five Justices in *Price Waterhouse* voted "for the rule under which, regardless of whether there is direct evidence, when a plaintiff proves that an impermissible purpose was 'a motivating factor,' the defendant bears the burden of showing that it would have made the same decision in the absence of discrimination."[182] Therefore, Gross argued, the

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ADEA a departure from the conventional standards of litigation which Congress knew how to—and indisputably did not—include in the language of the statute.").

174. *Id.* at 17.

175. *Id.* at 12.

176. *Id.* at 12–13. Gross argued that only Congress should decide whether to impose heightened evidentiary standards because "the fashioning of such alternatives, like the decision to depart at all from the conventional rules of litigation, turns on the types of policy choices that fall within the unique province of the legislative branch." *Id.* at 26.

177. *Id.* at 43.

178. *Id.* at 45–46 (citations omitted) (citing Supreme Court cases that relied upon discriminatory acts and statements of supervisors who were not involved in making employment decisions, discriminatory comments made outside the disputed adverse decision, disparate treatment of female and male job applicants during interviews, and statistics).

179. *Id.* at 51.

180. *Id.* at 13, 52–54.

181. *Id.* at 13–14, 53–54.

182. *Id.* at 14.

Supreme Court should hold that direct evidence is not required for ADEA claimants to receive a mixed-motives instruction.[183]

FBL's brief responded to Gross by arguing that the burden of persuasion should never shift to the employer and that the Court should overrule *Price Waterhouse* as applied to the ADEA.[184] FBL contended that the "because of" language of the ADEA meant "but-for causation."[185] In addition, FBL argued that the burden of persuasion should remain with the plaintiff because "one will search in vain for any language in the ADEA purporting to shift the burden of persuasion to the employer with respect to causation."[186] According to FBL, since Congress did not "articulat[e] a departure from the conventional rule allocating to the employee the burden of persuasion," the Court should not do so either.[187] FBL acknowledged that the Court chose to impose a burden-shift in *Price Waterhouse* when Congress did not articulate one in Title VII, but FBL argued that *Price Waterhouse* should be overruled.[188] FBL noted that the traditional reasons for overruling precedent weighed in favor of overruling *Price Waterhouse*.[189] FBL argued that neither the text of the ADEA nor the common law rules typically applied to civil litigation supported *Price Waterhouse*.[190] In addition, FBL argued that *Price Waterhouse* should be overruled because "the opinion was splintered and has been difficult to interpret. . . . [O]verruling *Price Waterhouse* would bring needed clarity back to this area of the law rather than upset any settled expectations."[191]

In the alternative, if *Price Waterhouse* remained good law, FBL argued, Justice O'Connor's concurring opinion should control, and thus the direct evidence requirement should be retained.[192] At the very least, FBL stated, "*Price Waterhouse* nonetheless requires that an employee present

183. *Id.* at 11–14.

184. Brief for Respondent, *supra* note 148, at 18, 30–32. In his Reply Brief, Gross argued that whether *Price Waterhouse* applied to the ADEA was not before the Court, and therefore the Court should not rule on it. Reply Brief for Petitioner, *supra* note 148, at 1–2 (citing cases in which the Court "repeatedly declined to address . . . issue[s] of such importance when [they are] raised for the first time in respondent's merits brief," and noting the United States did not have an opportunity to brief the issue). Gross stated that if the Court were to overrule *Price Waterhouse*, its impact would reach beyond the ADEA, including federal and state laws that similarly rely on *Price Waterhouse* and its burden-shifting framework. *Id.* at 2, app. at 1a–5a (citing state court cases in which *Price Waterhouse* was applied to state law claims).

185. Brief for Respondent, *supra* note 148, at 19 ("FBL believes the phrase ["because of"] is best interpreted as imposing a common sense but-for causation standard.").

186. *Id.* at 22.

187. *Id.* at 26.

188. *Id.*

189. *Id.* at 31–32.

190. *Id.* at 32. FBL further argued, "[t]his was no less true with respect to the text of Title VII in effect at the time *Price Waterhouse* was decided." *Id.*

191. *Id.* at 33 (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003); Robert A. Kearney, *The High Price of* Price Waterhouse*: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303 (2003); Prenkert, *supra* note 23, at 532).

192. *Id.* at 41 ("FBL believes that Justice O'Connor's concurring opinion states the holding of the Court.").

substantial evidence of discriminatory intent for the burden to shift to the employer."[193] Furthermore, FBL argued that if the burden ever shifted in ADEA cases, it should only happen under "extraordinary circumstances,"[194] namely, where there is "substantial and direct evidence" of discrimination.[195] According to FBL,

> [t]he critical point . . . is that the *Price Waterhouse* requirement of substantial and direct evidence in order to shift the burden of persuasion on an element of an employee's cause of action serves an indispensable function if the burden is to be shifted at all. The requirement must be interpreted to have teeth.[196]

Finally, FBL argued that *Desert Palace* does not have an effect on ADEA claims.[197] According to FBL, because the Court in *Desert Palace* interpreted § 107, a provision of Title VII, it did not control ADEA analysis.[198] Therefore, although *Desert Palace* abrogated the direct evidence requirement espoused by Justice O'Connor in *Price Waterhouse,* FBL argued that this was only for Title VII claims and had no impact on ADEA claims.[199]

C. *The Supreme Court Case*

1. The Majority Opinion

The Supreme Court granted certiorari in *Gross* to resolve the conflict that divided circuit courts: whether direct evidence of discrimination was required in order to receive a mixed-motives, burden-shifting jury instruction in cases brought under the ADEA.[200] The Supreme Court did not decide this issue, however, because it first evaluated whether a mixed-motives instruction was even available to an ADEA claimant.[201] The Court held that a "[mixed-motives] jury instruction is never proper in an ADEA

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193. *Id.* at 42.

194. *Id.* at 43.

195. *Id.* at 45. FBL stated that Justice O'Connor did not distinguish between direct and circumstantial evidence; "[i]nstead, Justice O'Connor required that the evidence relate directly to the challenged decision." *Id.* at 43–44.

196. *Id.* at 45–46. In his Reply Brief, Gross argued that FBL did not set out which heightened standard of proof the Court should adopt, noting that there were differences between "substantial evidence" and "direct evidence." Reply Brief for Petitioner, *supra* note 148, at 8–9 ("These standards are different in kind; 'direct evidence' refers to a particular kind of evidence, while 'substantial evidence' refers to the degree of probativeness of the evidence.").

197. Brief for Respondent, *supra* note 148, at 47–50.

198. *Id.* at 47–48.

199. *Id.* at 48. FBL also argued that "[t]he evidence at trial simply did not contain facts sufficient to support a finding that age was a substantial motivating factor in Gross's demotion." *Id.* at 56.

200. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2346 (2009).

201. *Id.* at 2348.

case."[202] Therefore, it did not decide whether a plaintiff needed to present direct evidence.[203]

The Court began its analysis by noting, "Title VII is materially different [from the ADEA] with respect to the relevant burden of persuasion."[204] Gross's briefs had relied on the Court's past Title VII decisions, including *Price Waterhouse* and *Desert Palace*, but the *Gross* majority concluded it was not controlled by these decisions because of the differences between the statutes.[205] The Court explained that Congress amended Title VII to "explicitly authoriz[e] discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision,"[206] but noted that Congress did not similarly amend the ADEA to provide for motivating factor liability.[207]

The Court declined to extend the Title VII burden-shifting approach to claims brought under the ADEA.[208] The Court noted two reasons why it did not extend the Title VII interpretation to the ADEA.[209] First of all, the Court reasoned that the language in the ADEA differs from the language in Title VII because it does not have the provision that permits a finding of liability where age was a "motivating factor."[210]

Second of all, Congress had explicitly amended Title VII to include this language in the 1991 Act, choosing not to similarly amend the ADEA.[211] Congress had amended the ADEA in other ways when it drafted the 1991 Act.[212] The Court found this significant because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[213] Furthermore, the Court explained that this was particularly significant in the case before it because "'negative implications raised by disparate provisions are strongest' when the provisions were

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202. *Id.* at 2346.

203. *Id.* at 2351 n.4. Justice Thomas wrote the opinion for the Court, an opinion that Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Alito joined. *Id.* at 2346.

204. *Id.* at 2348.

205. *Id.*

206. *Id.* at 2349 (citing 42 U.S.C. § 2000e-2(m), e-5(g)(2)(b) (2006); Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003)).

207. *Id.*

208. *Id.* ("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.'" (quoting Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1153 (2008))).

209. *Id.*

210. *Id.* ("Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.").

211. *Id.* Section 107 of the 1991 Act amended Title VII, codifying the "motivating factor" standard of causation espoused by the Court in *Price Waterhouse*. *See supra* note 109 and accompanying text.

212. *Id.* at 2349 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079; Civil Rights Act of 1991, § 302, 105 Stat. at 1088).

213. *Id.* (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA."). Justice Stevens acknowledged this in his dissent, noting that Congress may have intended the Title VII amendments to similarly amend the ADEA. *Id.* at 2356 n.6 (Stevens, J., dissenting); *see also infra* Part II.C.2.

'considered simultaneously when the language raising the implication was inserted.'"[214] Therefore, because the language of the statutes were different, the majority held that Title VII cases such as *Price Waterhouse* or *Desert Palace* did not control its interpretation of the ADEA.[215]

Since the Court determined it was not controlled by previous Title VII cases, it took a textualist approach, focusing its analysis on the statutory text of the ADEA, specifically 29 U.S.C. § 623(a)(1).[216] The Court relied on dictionaries to define the "because of" causation standard, concluding that "because of" means "'by reason of: on account of.'"[217]

In interpreting 29 U.S.C. § 623(a)(1), the Court stated that, according to the "plain language of the ADEA," a plaintiff bringing a disparate treatment claim "must prove that age was the 'but-for' cause of the employer's adverse decision."[218] The Court held that in an ADEA disparate treatment case, "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."[219] According to the majority, the burden of persuasion should never shift to the defendant, even where the plaintiff presented evidence that age partly motivated the employer's decision.[220] The Court reasoned that because the statutory text of the ADEA was "'silent on the allocation of the burden of persuasion,'" the statute should be interpreted using the "'ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'"[221]

The Court thus rejected Gross's argument that any statutory interpretation of the ADEA was controlled by the Court's opinion in *Price Waterhouse*.[222] The Court questioned whether it would even reach the same conclusion that the *Price Waterhouse* Court reached in 1989 if it were ruling on the case today.[223] The Court cited recent opinions in which it

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214. *Gross*, 129 S. Ct. at 2349 (quoting Lindh v. Murphy, 521 U.S. 320, 330 (1997)).

215. *Id.*

216. *Id.* at 2350. "Our inquiry . . . must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not." *Id.* The Court quoted another Supreme Court opinion, stating "'[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Id.* (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)). The relevant provision of the ADEA the Court interpreted was 29 U.S.C. § 623(a)(1). *Id*; *see also* Darrell VanDeusen, *Darrell VanDeusen on New Standards in Age Discrimination Litigation:* Gross v. FBL Fin. Services, Inc., 2009 EMERGING ISSUES 4021 (LEXIS), Jul. 15, 2009.

217. *Gross*, 129 S. Ct. at 2350 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)) (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1st ed. 1966); OXFORD ENGLISH DICTIONARY 746 (1st ed. 1933)).

218. *Id.* (citing Bridge v. Phoenix Bond & Indemnity Co., 128 S. Ct. 2131, 2141–42 (2008); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 (2007); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

219. *Id.* at 2351.

220. *Id.* at 2352.

221. *Id.* at 2351 (quoting Schaffer v. Weast, 546 U.S. 49, 56 (2005)).

222. *Id.* at 2351–52.

223. *Id.* (citing 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (2009); Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2400–01 (2008) (cases in which the Court took a textual approach to the ADEA)).

noted it would not "'introduc[e] a qualification into the ADEA that is not found in its text'"[224] and that the ADEA "must be 'read . . . the way Congress wrote it.'"[225] The Court also noted the difficulty lower courts had in instructing juries properly on the shifting burden, stating "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."[226]

The Court noted that Congress should decide whether an employer should be liable for "motivating factor" discrimination, rather than the Court.[227] Congress amended Title VII to hold employers liable for adverse decisions that were motivated in part by discrimination.[228] Since Congress did not explicitly amend the ADEA to provide for "motivating factor" liability, the Court stated, "[w]e must give effect to Congress' choice."[229] Therefore, after *Gross*, the burden of persuasion never shifts to the defendant in an ADEA case, even where a plaintiff demonstrates age partly motivated the defendant.[230]

2. The Dissenting Opinions

Justice John Paul Stevens filed a dissenting opinion, which Justice Ruth Bader Ginsburg, Justice David Souter, and Justice Stephen Breyer joined.[231] Justice Stevens believed the majority had "engage[d] in unnecessary lawmaking" because it answered a question that was not presented on appeal.[232] As Justice Stevens pointed out, the question the Court answered was only brought up in FBL's brief, rather than in FBL's opposition to a petition for certiorari.[233] Justice Stevens disapproved of the Court's decision to answer a question that was not briefed by the parties or amici curiae, stating it was "especially irresponsible" to not consider the U.S. government's view, particularly because this is the agency that administers the ADEA.[234]

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224. *Id.* at 2352 (alteration in original) (quoting *14 Penn Plaza LLC*, 129 S. Ct. at 1472).

225. *Id.* (omission in original) (quoting *Meacham*, 128 S. Ct. at 2406).

226. *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 839–44 (1991) (Souter, J., concurring); Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977)).

227. *Id.* at 2350 n.3.

228. *Id.*

229. *Id.* Justice Stevens, however, argued a different conclusion. *See infra* notes 247–50 and accompanying text.

230. *Gross*, 129 S. Ct. at 2352 ("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.").

231. *Id.* (Stevens, J., dissenting).

232. *Id.* at 2353.

233. *Id.* The respondent's brief asked the Court to "overrule *Price Waterhouse* with respect to its application to the ADEA." Brief for Respondent, *supra* note 148, at 26; *see also Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting).

234. *Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting). During the oral argument, the Government asked that the Court not rule on the issue of whether or not *Price Waterhouse* applied to the ADEA. *Id.* at 2353 n.2.

Justice Stevens also disagreed with the Court's interpretation of the "because of" language of the ADEA.[235] For Justices Stevens, Souter, Ginsburg, and Breyer, "the most natural reading of ['because of'] proscribes adverse employment actions motivated in whole or in part by the age of the employee."[236] According to the dissenters, the Supreme Court had already interpreted "because of" in *Price Waterhouse*, and the Court in *Gross* should not have disregarded this precedent.[237]

> That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"[238]

Therefore, in Justice Stevens's view, where age partly motivated an employer's decision, the decision was "because of" the employee's age.[239]

Justice Stevens further pointed out that Congress approved of the Court's interpretation of the "because of" language in *Price Waterhouse*.[240] Congress adopted the *Price Waterhouse* plurality's "motivating factor" causation standard, rejecting "but-for" causation, when it enacted § 107 of the 1991 Civil Rights Act.[241] Justice Stevens noted that the majority acted "reasonably" in not applying the 1991 Act amendments to the ADEA.[242] However, according to Justice Stevens, the Court "proceed[ed] to ignore the conclusion compelled by this interpretation of the Act: *Price Waterhouse*'s construction of 'because of' remains the governing law for ADEA

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235. *Id.* at 2353–56.

236. *Id.* at 2354.

237. *Id.*

238. *Id.* (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)). Justice Stevens further noted that *Hazen Paper Co.* and *Reeves* "support the conclusion that the ADEA should be interpreted consistently with Title VII," noting that the Court had "followed the standards set forth in non-mixed-motives Title VII cases including *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)." *Id.* at 2355 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–43 (2000); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). The majority countered Justice Stevens by stating that "the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), utilized in Title VII cases is appropriate in the ADEA context." *Id.* at 2349–50 n.2 (majority opinion) (citing *Reeves*, 530 U.S. at 142; O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996)). The Court went on to note that the differences in the text of the ADEA and Title VII precluded the Court from applying *Price Waterhouse* and *Desert Palace*. *Id.*

239. *Id.* at 2354–55 (Stevens, J., dissenting).

240. *See id.* at 2355 ("Congress ratified *Price Waterhouse*'s interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard.").

241. *See id.* ("The conclusion that 'because of' an individual's age means that age was a motivating factor in an employment decision is bolstered by Congress' reaction to *Price Waterhouse* in the 1991 Civil Rights Act."); *see also supra* notes 110–12 and accompanying text.

242. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting).

claims."[243] The fact that Congress only amended Title VII meant, for the dissent, that *Price Waterhouse* remained good law for the ADEA.[244]

Justice Stevens viewed the majority's decision to reject the *Price Waterhouse* interpretation as "utter disregard of [the Court's] precedent and Congress' intent."[245] Justice Stevens pointed out,

> As we made clear [in *Price Waterhouse*], when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." We readily rejected the dissent's contrary assertion. "To construe the words 'because of' as colloquial shorthand for 'but-for' causation," we said, "is to misunderstand them."[246]

While Justice Stevens acknowledged it was reasonable that the Court did not apply the 1991 Act to the ADEA, he noted "[t]here is . . . some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well."[247] He explained, quoting the House Report for the 1991 Act,

> a "number of other laws banning discrimination, including . . . the [ADEA] are modeled after and have been interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act," including the mixed-motives provisions.[248]

Therefore, for Justice Stevens, whether the 1991 Act amendments should have applied to the ADEA was not clear, but this did not affect his decision that *Price Waterhouse* should control the Court's interpretation of the ADEA language.[249]

To further support his contention that *Price Waterhouse* should control the Court's interpretation in *Gross*, Justice Stevens discussed *Smith v. City of Jackson*,[250] a 2005 ADEA disparate impact case in which the Court faced a similar situation.[251] In *Smith*, the Court applied the "pre-1991 [Act] interpretation of Title VII's identical language" from *Wards Cove Packing*

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243. *Id.*; *see also supra* notes 240–42.

244. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting).

245. *Id.* at 2353.

246. *Id.* at 2354 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. Usi Film Prods., 511 U.S. 244, 251 (1994) (citing *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring))).

247. *Id.* at 2356 n.6.

248. *Id.* (quoting H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 696–97); *see* Katz, *Unifying Disparate Treatment*, *supra* note 96, at 671. *But see* Eglit, *supra* note 109, at 1168–72 (pointing out that Congress's intent to apply the amendments to the ADEA "was never reiterated" and "[t]he drafters of the bill actually enacted made no reference to the impact on the ADEA of the CRA's amendments to Title VII").

249. *See Gross*, 129 S. Ct. at 2356–57 (Stevens, J., dissenting).

250. 544 U.S. 228 (2005).

251. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting). *See supra* note 59 and accompanying text (describing disparate impact claims of discrimination).

Co. v. Atonio[252] to an ADEA disparate impact claim.[253] *Wards Cove* had been overruled by Congress through § 105 of the 1991 Act,[254] and therefore Justice Stevens viewed the *Smith* decision as "precisely on point" in *Gross*.[255]

In *Smith*, the Court specifically referenced § 105 of the 1991 Act and acknowledged that it overruled *Wards Cove* with respect to Title VII claims.[256] The *Smith* Court also noted, however, that Congress did not similarly amend the ADEA, concluding that the Court was free to apply reasoning from *Wards Cove* to the ADEA case before it.[257] According to Justice Stevens in *Gross*, "[i]f the *Wards Cove* disparate-impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies."[258] Therefore, Justice Stevens and the dissenters believed that "motivating factor" causation was the appropriate standard for ADEA disparate treatment claims.[259]

In his dissent, Justice Stevens answered the question for which the Court granted certiorari.[260] Justice Stevens would follow *Desert Palace* and hold that direct evidence is not required for mixed-motives claims brought under the ADEA.[261] According to the dissent, Justice O'Connor's concurring opinion in *Price Waterhouse* was not the controlling opinion; therefore direct evidence should not be required.[262] The dissent explained that lower courts treated Justice O'Connor's opinion as controlling,

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252. 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

253. *Smith*, 544 U.S. at 240.

254. Civil Rights Act of 1991 § 105 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)); *see also* Prenkert, *supra* note 60, at 219, 231–32.

255. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting).

256. *Smith*, 544 U.S. at 240.

257. *Id.*; *see also* Prenkert, *supra* note 60, at 243. Prenkert described the Supreme Court's holding in *Smith* as "Bizarro statutory stare decisis" because the Court "relied on its congressionally overridden interpretation of Title VII in *Wards Cove* to structure important aspects of the ADEA [disparate] impact analysis." *Id.* For a full discussion of *Smith* and the Court's resurrection of *Wards Cove*, see Prenkert, *supra* note 23, at 544–47.

258. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting). The *Gross* majority addressed the *Smith* decision, but reached a different conclusion than Justice Stevens. *Id.* at 2351 n.5 (majority opinion). The majority concluded that because Congress added the "motivating factor" language to Title VII in 42 U.S.C. § 2000e-2(m), mixed-motives claims had not previously been available to Title VII claimants based on its original language. *Id.* According to the majority, "[i]f such 'motivating factor' claims were already part of Title VII, the addition of [42 U.S.C.] § 2000e-5(g)(2)(B) alone would have been sufficient." *Id.* To combat the majority's argument, Justice Stevens noted, "Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII." *Id.* at 2356 (Stevens, J., dissenting) (citations omitted) (listing various examples from the legislative history).

259. *Id.* at 2356 (Stevens, J., dissenting).

260. *Id.* at 2357.

261. *Id.*

262. *Id.*

> in light of [the Court's] statement in *Marks v. United States*, that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[263]

According to Justice Stevens, Justice O'Connor's opinion should not have been treated as controlling.[264] Rather, Justice Stevens stated that Justice White's concurring opinion controlled *Price Waterhouse* because Justice White's opinion supported the plurality's motivating factor test.[265] Justice Stevens noted that Justice White's concurring opinion differed from the plurality's with respect to the type of evidence an employer must present to prove the affirmative defense.[266] Therefore, Justice Stevens concluded that because "Justice White provided a fifth vote for the 'rationale explaining the result' of the *Price Waterhouse* decision, his concurrence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence."[267]

Finally, Justice Stevens stated that the Court's *Desert Palace* analysis "applie[d] with equal force to the ADEA."[268] The Court in *Desert Palace* evaluated whether Title VII imposed a heightened evidentiary standard and found that it did not.[269] Justice Stevens noted, "As with the 1991 amendments to Title VII, no language in the ADEA impose[d] a heightened direct evidence requirement."[270] Justice Stevens pointed to Supreme Court cases in which the Court refused to impose special evidentiary requirements in ADEA cases.[271] Therefore, Justice Stevens concluded, an ADEA plaintiff did not need to present direct evidence of discrimination in order to receive a mixed-motives instruction.[272]

Justice Breyer, joined by Justice Souter and Justice Ginsburg, filed a brief dissenting opinion as well.[273] Justice Breyer wrote to express his disagreement with the "but-for" causation standard espoused by the majority.[274] For Justice Breyer, "to apply 'but-for' causation [where the employer had multiple motives for the adverse action] is to engage in a

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263. *Id.* (quoting Marks v. United States, 430 U.S. 188, 193 (1977); Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

264. *Id.*

265. *Id.*

266. *Id.* See *supra* note 97 for more information on Justice White's concurring opinion.

267. *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) (quoting *Marks*, 430 U.S. at 193).

268. *Id.* at 2358.

269. See *supra* notes 119–29 and accompanying text for the Court's analysis in *Desert Palace*.

270. *Gross*, 129 S. Ct. at 2358 (Stevens, J., dissenting).

271. *Id.* Justice Stevens pointed to *Hazen Paper Co.*, stating that the Court "held that an award of liquidated damages for a 'willful' violation of the ADEA did not require proof of the employer's motivation through direct evidence." *Id.* (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 615 (1993)).

272. *Id.* at 2358.

273. *Id.* at 2358 (Breyer, J., dissenting).

274. *Id.*

hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different."[275] Justice Breyer believed that if a plaintiff can prove that age was one of the reasons for the employer's action, he has established that the decision was "because of" age.[276] Justice Breyer, however, stated, "the law need not automatically assess liability in these circumstances," and pointed to the employer's affirmative defense outlined in *Price Waterhouse*.[277] Justice Breyer could "see nothing unfair or impractical about allocating the burdens of proof in this way"[278] because the employer would be in a better position to prove the "hypothetical situation" of how the employer would have acted.[279]

Gross is an important case for parties litigating under the ADEA. With its decision, the Supreme Court has taken away a framework upon which lower courts had frequently relied in analyzing ADEA cases.[280] Part II.D provides an overview of ADEA disparate treatment cases that were decided immediately after *Gross*.

D. *Post-*Gross *Cases*

After the Supreme Court's decision in *Gross*, ADEA claimants no longer have access to the burden-shifting, "motivating factor" analysis set out in *Price Waterhouse*. Whether *McDonnell Douglas* applies to ADEA cases was a question left open by the Court,[281] thus, there is confusion in lower courts over whether the *McDonnell Douglas* framework continues to apply to ADEA cases after *Gross*.

Some federal district courts have continued to analyze disparate treatment claims brought under the ADEA using the *McDonnell Douglas* framework. Federal courts note that the Supreme Court in *Gross* explicitly stated that it had applied *McDonnell Douglas* to ADEA cases, but that it never definitively held that *McDonnell Douglas* applied to ADEA cases.[282] Most federal courts continue to follow precedent in their circuits after *Gross*, applying *McDonnell Douglas* to ADEA cases.[283]

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275. *Id.* at 2359.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* ("[I]t makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation.").

280. *See supra* note 148 and accompanying text.

281. *Gross*, 129 S. Ct. at 2349 n.2 (majority opinion); *see also supra* note 238.

282. *E.g.*, Guinto v. Exelon Generation Co., No. 08-2191, 2009 U.S. App. LEXIS 18447, at *11 n.2 (7th Cir. Aug. 18, 2009); Fuller v. Seagate Tech., LLC, No. 08-cv-00656-CMA-CBS, 2009 U.S. Dist. LEXIS 73422, at *24 n.9 (D. Colo. Aug. 19, 2009); Woehl v. Hy-Vee, Inc., No. 4:08-CV-00019-JAJ, 2009 WL 2105480, at *5 (S.D. Iowa July 10, 2009); *see also supra* note 238.

283. *See, e.g.*, *Guinto*, 2009 U.S. App. LEXIS 18447, at *10–11 & n.2 (applying the *McDonnell Douglas* framework to an ADEA case because the Seventh Circuit frequently applied it, noting that the Supreme Court never definitively decided whether the *McDonnell Douglas* framework applied to ADEA cases) ("To prevail on an ADEA claim, a plaintiff

In *Woehl v. Hy-Vee, Inc.*,[284] the U.S. District Court for the Southern District of Iowa faced a claim for age discrimination under the ADEA.[285] The district court noted that, after *Gross*, the *Price Waterhouse* burden-shifting instruction was not available to ADEA claimants,[286] and the court questioned whether *McDonnell Douglas* still applied to ADEA cases.[287] In *Woehl*, the court evaluated the plaintiff's claim twice, first using the *McDonnell Douglas* framework,[288] and second without shifting the burden of production to the defendant.[289] The court held that the plaintiff's claim did not survive summary judgment under either analysis.[290]

In *Bell v. Raytheon Co.*,[291] the U.S. District Court for the Northern District of Texas faced three plaintiffs alleging age discrimination under the

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'must prove that age was the 'but-for' cause of the employer's adverse decision.' At the summary-judgment stage, however, the plaintiff only needs to create a genuine issue as to whether the employer discriminated against him on the basis of his age." (quoting *Gross*, 129 S. Ct. at 2350)); *Fuller*, 2009 U.S. Dist. LEXIS 73422, at *24 n.9 ("Justice Thomas pointed out that the Supreme Court has not 'definitively decided whether' the *McDonnell Douglas* framework applies in ADEA cases. Nonetheless, this Court finds nothing in Justice Thomas' opinion that would alter the widespread use of the *McDonnell Douglas* framework to decide whether summary judgment is appropriate in ADEA cases." (quoting *Gross*, 129 S. Ct. at 2349 n.2) (citing Martino v. MCI Commc'ns. Servs., Inc., 574 F.3d 447 (7th Cir. 2009); Misner v. Potter, No. 2:07-CV-330 CW, 2009 U.S. Dist. LEXIS 55147, at *2 n.2 (D. Utah June 26, 2009))); Jackson v. Lakewinds Natural Foods, No. 08-398 (JNE/JJG), 2009 WL 2255286, at *3 n.4 (D. Minn. July 28, 2009) (noting the uncertainty after *Gross* of whether *McDonnell Douglas* applied to ADEA cases, but applying it because the Eighth Circuit had done so previously and because the parties had analyzed the plaintiff's claim using the framework in their memoranda); Wagner v. Geren, No. 8:08 CV 208, 2009 WL 2105680, at *4–5 (D. Neb. July 9, 2009) (noting that after *Gross*, mixed-motives claims were not available under the ADEA and that it was unclear whether *McDonnell Douglas* applied to ADEA claims, but holding that it did not matter "because [plaintiff had] not presented sufficient evidence from which a reasonable finder of fact could conclude that his age was the 'but-for' cause of any adverse employment action," and therefore granting summary judgment for defendant); Miller v. Hartford Fire Ins. Co., No. 3:07-CV-943 (JCH), 2009 WL 1939808, at *6 n.4 (D. Conn. July 6, 2009) ("In its recent decision in *Gross*, the Supreme Court noted that the Court 'has not definitively decided' whether the *McDonnell Douglas* framework, first developed in the context of Title VII cases, 'is appropriate in the ADEA context.' In the absence of further direction from the Supreme Court, this court must follow Second Circuit precedent, which applies the *McDonnell Douglas* framework to ADEA claims." (quoting *Gross*, 129 S. Ct. at 2349 n.2) (citing D'Cunha v. Genovese/Eckerd Corp., 479 F.3d 193, 194–95 (2d Cir. 2007))).

284. 2009 WL 2105480.

285. *Id.* at *1.

286. *Id.* at *4.

287. *Id.* at *5.

288. *Id.*

289. *Id.* at *8–9 ("The Supreme Court [in *Gross*] stated that the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action in an ADEA action. Thus, if *McDonnell Douglas* were not applicable in this matter, the burden would not shift to [defendant] at any point in the analysis." (citing Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009))).

290. *Id.* at *9. The plaintiff only presented evidence that she was replaced by a younger worker. *Id.* The court held that this piece of evidence alone was "insufficient to create a genuine issue of material fact as to 'the reason the employer decided to act.'" *Id.* (quoting *Gross*, 129 S. Ct. at 2350).

291. No. 3:08-CV-0702-G, 2009 WL 2365454 (N.D. Tex. July 31, 2009).

ADEA.[292] The district court questioned whether the *McDonnell Douglas* framework still applied to the ADEA after the Court's holding in *Gross*.[293] The court ultimately decided to analyze the plaintiffs' claims using *McDonnell Douglas* because, first, the Supreme Court had previously applied *McDonnell Douglas* to ADEA cases and, second, courts in the Fifth Circuit had consistently applied it to ADEA claims.[294] However, the court altered the framework to account for the *Gross* holding, stating, "the court will not shift the burden to the defendant to articulate a legitimate nondiscriminatory reason unless the plaintiffs show that age was the but-for cause of any adverse employment actions."[295] Once the plaintiffs established the prima facie case under *McDonnell Douglas*, the court evaluated whether they had established that age was the "but-for" cause for the defendant's decision.[296] The evidence the plaintiffs presented was not "sufficient to create a genuine issue of material fact"; therefore the court granted summary judgment for the defendant.[297] The court noted, "Although the plaintiffs have stated a *prima facie* case of age discrimination, the court need not reach stage two [of the *McDonnell Douglas* framework] because the plaintiffs have not shown by a preponderance of the evidence that age was the but-for cause of [the adverse acts]."[298]

Thus, lower courts have taken different approaches to analyzing ADEA disparate treatment claims after *Gross*. Part III.A.2 discusses further the varying approaches and the effect *Gross* has had on *McDonnell Douglas*. Before analyzing the implications of *Gross*, Part II.E provides an overview of the reactions to the Court's holding in *Gross*.

E. *Reactions to the Court's Decision*

Employers predictably applauded the Supreme Court's holding in *Gross*,[299] while others have criticized the decision because an employee

292. *Id.* at *1. The plaintiffs also brought age discrimination claims under the state provision, but that is not relevant for the purpose of this discussion.

293. *Id.* at *4–5.

294. *Id.* at *5.

295. *Id.*

296. *Id.* at *6–7. ("Thus, the court will assume that Cox's facts set forth a *prima facie* case of age discrimination. Nonetheless, the court will not yet proceed to stage two. Although the plaintiffs have sufficient evidence to demonstrate the four elements laid out above, they still must demonstrate that age was the but-for cause of Raytheon choosing Rogers over Cox.").

297. *Id.* at *8. ("The plaintiffs have presented a series of remarks, none of which is in temporal proximity—or in any other way related—to the decision not to hire Cox. Moreover, the plaintiffs do not allege that the business practices they cite . . . were in any way related to the decision to hire Cox.").

298. *Id.*

299. David G. Savage, *Age Bias Much Harder To Prove: The Supreme Court Shifts the Burden of Proof to the Worker Making the Claim. Businesses Cheer*, L.A. TIMES, June 19, 2009, at A1 (noting that "[b]usinesses applauded" the Court's decision in *Gross*).

must now make a higher showing in order to establish an age discrimination claim.[300]

Under the Court's holding in *Gross*, the burden of persuasion never shifts to the employer, even if the plaintiff proves age partly motivated the employer.[301] Rather, the plaintiff must prove his age was the "but-for" cause of the adverse decision.[302] This is a "'significant and marked change'" from the previous approach[303] and "a significant victory for employers."[304] Now that the burden of persuasion never shifts to the defendant, "employers need only show that there were other factors—workplace reorganization, the employee's work record, financial considerations, etc.—affecting their decision."[305] This showing is easier for employers than proving they would have made the same decision regardless of the employee's age.[306] One article states, "Businesses applauded the decision in [*Gross*], saying employers sometimes settle weak claims to avoid battling before a jury over the real reasons behind a layoff."[307] Anjana Samant, a lawyer for the Center for Constitutional Rights, pointed out that "[w]hichever party [does not] have the burden of proof is more likely to win," noting that *Gross* may thus have an impact on whether plaintiffs file lawsuits at all.[308]

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300. The Chairman of the House Education and Labor Committee, Representative George Miller, stated that the Court's ruling in *Gross* "will make it even more difficult for workers to stand up for their basic rights in the workplace. A narrow majority of the Supreme Court has once again overturned decades of precedent and congressional intent and sided with powerful corporate interests on a workplace discrimination case." Press Release, Committee on Education and Labor, Congress To Hold Hearing on Supreme Court's 'Gross' Ruling Regarding Age Discrimination, Says Chairman Miller (June 30, 2009), *available at* http://edlabor.house.gov/newsroom/2009/06/congress-to-hold-hearing-on-su.shtml [hereinafter Press Release]. Senate Judiciary Committee Chairman, Patrick Leahy, stated with respect to the Court's decision in *Gross*, "five justices acted to disregard precedent and ignore the plain reading and common understanding of the statute that Congress passed to protect Americans from discrimination based on their age." Comment of Senator Patrick Leahy, Chairman, Senate Judiciary Committee, on the Supreme Court's 5-4 Ruling in *Gross v. FBL Financial Services, Inc.* (June 18, 2009), http://leahy.senate.gov/press/200906/061809c.html.

301. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2352 (2009).

302. *Id.*

303. *See* Savage, *supra* note 299 (quoting corporate defense attorney Diana Hoover).

304. James O. Castagnera, Patrick J. Cihon, Andrew P. Morriss, *Supreme Court EEO Decisions Present Mixed Results for Employers*, 25 TERMINATION OF EMP. BULL., July 2009, at 1, 2.

305. *Id.*

306. *See supra* notes 90–91, 100 and accompanying text.

307. Savage, *supra* note 299. Karen Harned, the executive director of the National Federation of Independent Business, stated that small businesses are in favor of the Court's decision. *Id.* Harned believes that "employers should not have to defend themselves in court 'based on speculative evidence that age was merely a motivating factor in an employer's decision.'" *Id.*

308. *Supreme Court Makes It Harder To Prove Age Discrimination*, THE HUFFINGTON POST, June 18, 2009, http://www.huffingtonpost.com/2009/06/19/supreme-court-makes-it-ha_n_217915.html.

Conversely, advocates of older workers are opposed to the Court's holding in *Gross* because ADEA plaintiffs must now prove age was the "but-for" cause to establish a violation, which is a higher standard than "motivating factor" causation.[309] AARP Executive Vice President of Social Impact, Nancy LeaMond, stated, "It will now be harder for age-discrimination victims to prove their claims under the [ADEA]. The timing of this decision could not be worse—in the midst of a severe recession, with layoffs falling hard on older workers."[310] An article from the *Los Angeles Times*, reporting on *Gross* and the reactions to the decision, cites analysts who claim that it will be difficult for ADEA plaintiffs to obtain evidence that age was the reason behind an employer's adverse decision.[311] These analysts note, "[W]orkers claiming such discrimination almost certainly will not be present while their employers discuss laying them off or demoting them."[312]

In addition, one commentator noted that *Gross* does not serve the deterrent purpose of the ADEA,[313] stating, "[m]ixed-motive analysis serves as an important deterrent to employers who might otherwise permit improper motives to infect their decision-making processes—and as a deterrent, it may affect, and protect, numerous employees."[314]

One commentator notes the potential impact *Gross* may have on jury instructions in cases where the plaintiff alleges discrimination under both Title VII and the ADEA.[315] Darrell VanDeusen, a labor and employment lawyer, observes that because the burdens of proof after *Gross* differ for Title VII and ADEA claims, juries will have to be instructed on the two standards and "[t]his arguably amplifies the difficulty [of instructing juries on the mixed-motives burden-shifting framework], instead of ameliorating it."[316] VanDeusen adds, "the jury will be tasked with parsing out the evidence to determine if the plaintiff has met his burden with respect to the ADEA claims, and for Title VII claims, determining if the defendant-employer has met its."[317]

309. *See supra* Part II.C. Corporate defense attorney Diana Hoover stated that *Gross* "imposes a difficult burden on the employee." Savage, *supra* note 299.

310. Nancy LeaMond, Letter to the Editor, *Setback for Older Workers*, N.Y. TIMES, July 14, 2009, at A24. The fact that the burden of proof remains with the plaintiff is significant because, as one commentator noted, "proof structures . . . often make or break an employee's case." Joanna L. Grossman, *The Supreme Court Curtails Federal Protection Against Age Discrimination*, June 25, 2009, http://writ.news.findlaw.com/grossman/20090625.html.

311. Savage, *supra* note 299.

312. *Id.*

313. *See supra* notes 35–36, 102 and accompanying text.

314. Grossman, *supra* note 310.

315. *See* VanDeusen, *supra* note 216, at 13.

316. *Id.*

317. *Id.*

Many critics of *Gross* compare the decision to a 2007 Supreme Court decision[318] that limited protections for victims of pay discrimination.[319] In *Ledbetter v. Goodyear Tire & Rubber Co.*,[320] the Supreme Court held that the statutory period for bringing a Title VII pay discrimination claim began when the act occurred, rather than each time a paycheck was issued.[321] As a result, the Court held that the plaintiff's claim for discrimination was time-barred.[322] Congress passed the Lilly Ledbetter Fair Pay Act of 2009 to overrule *Ledbetter* in order to increase employee protections.[323] One labor and employment attorney has noted the similarities between *Ledbetter* and *Gross*, stating that in both cases the Court interpreted the plain text of the statute "to deny a discrimination plaintiff the ability to more readily prove his or her case."[324] Critics of *Gross* note it is possible that Congress will similarly act to overrule the *Gross* decision.[325] According to one commentator, "[a] like-minded Congress and Administration have already demonstrated a willingness to amend legislation to create a more 'employee-friendly' atmosphere, such as the passing of the Lily [sic] Ledbetter Fair Pay Act earlier this year. There seems no reason to think

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318. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 42 U.S.C. and 29 U.S.C.).

319. *Id.* at 641–43. Senate Judiciary Committee Chairman, Patrick Leahy, commented, "[t]he decision [in *Gross*] reminds me of the Court's wrong-headed ruling in *Ledbetter*. In fact, it was these same five justices who misconstrued an employment discrimination statute in that case." *See* Comment of Senator Patrick Leahy, *supra* note 300; *see also* Tiffany G. Hildreth, *Two Steps Forward, One Step Back—Congress and the Supreme Court Take Turns Leading the Employment Law Dance*, LAB. & EMP. NEWSL. (Strasburger & Price, LLP, Austin, Tex.), June 23, 2009, at 3, *available at* http://www.strasburger.com/calendar/news/labor/Gross-v-FBL-Financial-Services.pdf (drawing parallels between *Gross* and *Ledbetter*).

320. 550 U.S. 618.

321. *Id.* at 628 ("The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.").

322. *Id.* at 628–29. The Court stated, "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure." *Id.*

323. Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 42 U.S.C. and 29 U.S.C.). Under the Fair Pay Act, "an unlawful employment practice occurs . . . when a discriminatory compensation decision or other practice is adopted . . . or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid." § 3, 123 Stat. at 5–6 (to be codified at 42 U.S.C. § 2000e-5(e)(3)(A)). See Jason R. Bent, *What the Lilly Ledbetter Fair Pay Act Doesn't Do: "Discrete Acts" and the Future of Pattern or Practice Litigation*, 33 RUTGERS L. REC. 31 (2009), *available at* http://www.lawrecord.com/files/bent.pdf, for more information on the Ledbetter Fair Pay Act.

324. Hildreth, *supra* note 319, at 3.

325. *See* Press Release, *supra* note 300 ("Like with the Lilly Ledbetter case, Congress may be forced to clarify the law's intent so we can prevent the damage this decision will have on workers' civil rights.").

similar action will not happen here."[326] Congress announced two weeks after *Gross* was decided that it would hold a hearing to examine how the decision will impact employees' protections against age discrimination and other workplace discrimination.[327]

At the very least, Congress will examine the impact of *Gross*.[328] Part III of this Note urges Congress to act and amend the ADEA to permit mixed-motives cases. Specifically, Part III suggests that Congress amend the ADEA to include language identical to § 107 of the 1991 Act so that ADEA disparate treatment claims will be interpreted consistently with Title VII claims.

III. CONGRESS SHOULD AMEND THE ADEA TO INCLUDE § 107

Whether *Price Waterhouse* should have controlled the Court's interpretation of the ADEA in *Gross* is not an easy question.[329] Part III of this Note will not repeat the Justices' efforts in analyzing whether precedent and congressional intent make mixed-motives claims available under the ADEA.[330] Rather, Part III looks to the future of ADEA disparate treatment law and urges Congress to take action to amend the ADEA to include the "motivating factor" standard of causation and the limited remedies available to plaintiffs that are available to Title VII plaintiffs through § 107. Before explaining the reasons why Congress should amend the ADEA, this Note explores the questions left in the wake of *Gross*.

326. VanDeusen, *supra* note 216, at 13–14; *see also* Prenkert, *supra* note 23, at 563–64 (urging congressional action to make mixed-motives claims uniform across antidiscrimination statutes and noting that Congress had introduced the Fair Pay Act in response to *Ledbetter*, thus showing Congress might amend civil rights laws).

327. Press Release, *supra* note 300.

328. *Id.* ("The court's ruling was unacceptable, and this Congress will work to protect all Americans' ability to be treated fairly on the job. Employment decisions should be based on merit, not prejudice.").

329. Numerous articles have been written about ADEA disparate treatment law and the different standards of causation used. *See, e.g.*, Prenkert, *supra* note 23, at 543–44 ("*Price Waterhouse* has been applied outside the Title VII context where it was initially crafted; however, . . . its application is much less uniform. In fact, the application of the mixed-motive framework has been so inconsistent that I call it the mixed-motives mess."); Prenkert *supra* note 60, at 223, 255–63 (noting the confusion surrounding ADEA mixed-motives claims).

330. For the majority, because Congress codified the *Price Waterhouse* plurality's "motivating factor" causation standard and rejected its affirmative defense by amending Title VII with § 107, this meant that Congress intended "motivating factor" causation to be available only for Title VII disparate treatment claimants. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009); *supra* notes 211–15 and accompanying text. For the dissent, however, this meant Congress intended "because of" to mean "motivating factor," and therefore this definition should apply to the ADEA. *Gross*, 129 S. Ct. at 2353–54 (Stevens, J., dissenting); *supra* notes 240–50 and accompanying text.

A. *Questions After* Gross

1. How Far Does *Gross* Reach?

The Court's holding in *Gross* leaves open a few questions. First of all, *Gross* may have an effect on other antidiscrimination statutes that use the same "because of" language as the ADEA and Title VII.[331] In particular, the Americans with Disabilities Act (ADA) prohibits discrimination "because of" an individual's disability, and the statute was not amended by § 107.[332] Based on the Court's reasoning in *Gross*, mixed-motives instructions should not be available under the ADA because the statute does not provide for "motivating factor" liability, nor did Congress explicitly amend the ADA when it amended Title VII through § 107.[333] However, there is language in the House Report on the 1991 Act that indicates Congress intended mixed-motives claims to be available under the ADA.[334]

Furthermore, the Court's holding in *Gross* has already extended beyond antidiscrimination statutes.[335] In a recent case brought under the Jury Systems Improvement Act (Juror Act),[336] the U.S. District Court for the District of Columbia relied on *Gross* to determine the burden of proof a Juror Act plaintiff carried.[337] The district court reasoned that because the Juror Act's "by reason of" language[338] is similar to the ADEA's "because of" language, the plaintiff had to establish that her jury service was the

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331. Barry A. Guryan, CLIENT ALERT, *Supreme Court Applies More Stringent 'But For' Standard of Proof in Age Cases in* Gross v. FBL Financial Services 2 (Epstein Becker Green), June 2009, *available at* http://www.ebglaw.com/files/29455_ClientAlertGross.pdf; *see supra* note 116; *see also supra* note 184; Reply Brief for Petitioner, *supra* note 148, at 2, app. at 1a–5a (citing cases in which *Price Waterhouse* was applied to state law claims).

332. Guryan, *supra* note 331, at 2; *see also supra* notes 109, 116.

333. *See supra* note 116. For further discussion of mixed-motives claims and the ADA, see Prenkert, *supra* note 23, at 552–54 and Flynn, *supra* note 109.

334. *See supra* note 109. *But see* Flynn, *supra* note 109, at 2046 (explaining that the legislative history is not convincing on the issue of whether the causation standard under the ADA should be "motivating factor" liability as set out in § 107 of the 1991 Act).

335. Williams v. District of Columbia, No. 07-505 (RMC), 2009 WL 2568011 (D.D.C. Aug. 21, 2009); *see also* Posting of Jordan Weissmann to The Blog of Legal Times, http://legaltimes.typepad.com/blt/2009/08/high-court-ruling-on-age-discrimination-decides-juror-rights-case-.html (Aug. 21, 2009, 15:22 EST) (noting the district court's opinion in *Williams* was "a sign of how far a recent Supreme Court decision on age discrimination could reach into labor law").

336. 28 U.S.C. § 1875 (2006). The relevant provision states, "No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States." *Id.* § 1875(a).

337. *Williams*, 2009 WL 2568011, at *7 ("The Supreme Court's decision in *Gross v. FBL Financial Services* clarifie[d plaintiff's] burden of proof."). The plaintiff alleged that she had been "excess[ed]" because she had served jury duty for four months. *Id.* at *1. The court explained that to "excess" a worker was to transfer her to another job location. *Id.* at *3. The court noted that the case was "a close case of mixed motives." *Id.* at *1.

338. According to the court, the Juror Act "prohibits an employer from taking an adverse action against an employee 'by reason of' that employee's federal jury service." *Id.* at *6 (quoting 28 U.S.C. § 1875(a)).

"but-for" cause of the adverse action.[339] The court noted that it "ha[d] no doubt that [plaintiff's] jury service was *a* motivating factor behind [the adverse action],"[340] but that "motivating factor" causation was not sufficient to establish a claim under the Juror Act after *Gross*.[341] The court stated, "Thus, under *Gross,* [plaintiff] must prove by a preponderance of the evidence that she was 'excessed' 'by reason of' her jury service—that is, that jury service was the 'but-for' cause of the decision to excess her."[342] The district court held that the plaintiff had not established a claim under the Juror Act because she did not prove that her jury service was the "but-for" cause of the adverse action.[343]

The full impact of *Gross* is still uncertain because the decision is still new.[344] However, in just a few short months the Supreme Court's decision has already reached beyond the ADEA. Whether *Gross* will eliminate ADA mixed-motives claims remains to be seen, but if courts follow the reasoning in *Williams*, it is likely that ADA plaintiffs will not establish violations by proving motivating factor causation.

2. Does *Gross* Affect *McDonnell Douglas*?

The Court also left open the question of whether the framework outlined in *McDonnell Douglas* applies to the ADEA.[345] The Court had previously applied the *McDonnell Douglas* approach to ADEA cases, but it never

339. *Id.*

340. *Id.* at *7.

341. *Id.* at *6 ("'Unlike Title VII, [the Juror Act's] text does not provide that a plaintiff may establish discrimination by showing that [jury service] was simply a motivating factor.'" (alterations in original) (quoting Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009))).

342. *Id.*

343. *Id.* at *6–7. *But see* Hunter v. Valley View Local Sch., No. 08-4109, 2009 U.S. App. LEXIS 19141 (6th Cir. Aug. 26, 2009). In *Hunter*, the U.S. Court of Appeals for the Sixth Circuit faced a retaliation claim brought under the Family and Medical Leave Act of 1993 (FMLA). *Id.* at *7. The court noted that analysis of FMLA retaliation claims had often previously mirrored Title VII claims, but that the Supreme Court in *Gross* "reminded us that its Title VII decisions do not automatically control the construction of other employment discrimination statutes." *Id.* The Court of Appeals interpreted the language of the FMLA because "*Gross* . . . requires us to revisit the propriety of applying Title VII precedent to the FMLA by deciding whether the FMLA, like Title VII, authorizes claims based on an adverse employment action motivated by both the employee's use of FMLA leave and also other, permissible factors." *Id.* at *8. The court concluded that the FMLA permitted these claims because one of the implementing regulations for the FMLA states, "'*employers cannot use the taking of FMLA leave as a negative factor in employment actions*.'" *Id.* at *9–10 (quoting 29 C.F.R. § 825.220(c) (2008)) ("We have already held that § 825.220(c) is a reasonable interpretation of the FMLA entitled to deferential judicial review."). According to the court, the use of "[t]he phrase 'a negative factor' envisions that the challenged employment decision might also rest on other, permissible factors." *Id.* at *10. Therefore the court concluded that it could continue to apply *Price Waterhouse*'s burden-shifting framework to FMLA retaliation claims. *Id.*

344. The decision was handed down on June 18, 2009. *Gross*, 129 S. Ct. 2343.

345. *See supra* note 238.

definitively held that the framework applied.[346] Lower courts have continued to apply the *McDonnell Douglas* approach to ADEA cases after *Gross*, but its application has not been uniform.[347]

One district court altered the first prong of the *McDonnell Douglas* framework to account for the Court's holding in *Gross*.[348] The district court held that even after the plaintiffs established a prima facie case of age discrimination, the burden did not shift to the defendant to articulate a legitimate nondiscriminatory reason because they did not prove that age was the but-for cause of the adverse decision.[349] This should not be the effect of the *Gross* holding. Under *McDonnell Douglas*, the second prong of the analysis shifts the burden of production, rather than the burden of persuasion, to the employer.[350] The *Gross* Court stated that the burden of persuasion never shifts;[351] therefore, the *Gross* holding should not affect the burden of production shift in *McDonnell Douglas*.[352]

McDonnell Douglas assists disparate treatment plaintiffs because direct evidence of discrimination is frequently not available.[353] It aids plaintiffs by forcing employers to articulate a nondiscriminatory reason for the adverse decision so that the plaintiff can disprove the proffered reason or prove that it is a pretext for discrimination.[354] *McDonnell Douglas* still requires but-for causation, but the plaintiff does not have to prove this until the third stage of the framework.[355]

As noted in Part II.D, some district courts have analyzed post-*Gross* ADEA cases using the *McDonnell Douglas* framework, simply stating that the plaintiff's burden in the third step, after the employer articulates a legitimate, nondiscriminatory reason, is to prove that age was the but-for cause of the adverse employment decision.[356] These courts have properly interpreted *Gross* and its impact on *McDonnell Douglas*: after the prima facie case is rebutted, the plaintiff must prove that age was the "but-for" cause of the defendant's decision. The *McDonnell Douglas* framework was meant to structure and allocate the burden of proof in disparate treatment

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346. *See supra* note 79.

347. See *supra* Part II.D for cases in which lower courts discussed the Supreme Court's holding in *Gross* and its potential impact on whether *McDonnell Douglas* applies to ADEA cases.

348. *See supra* notes 292–99 and accompanying text.

349. *See supra* notes 292–99 and accompanying text.

350. *See supra* notes 72, 100 and accompanying text.

351. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2352 (2009); *supra* note 220 and accompanying text.

352. Similarly, the district court that analyzed an ADEA claim by, first, using the *McDonnell Douglas* framework and, second, without shifting even the burden of production to the defendant, could have simply analyzed the plaintiff's claim using *McDonnell Douglas*. *See supra* notes 285–91 and accompanying text. As noted above, *Gross* requires the burden of persuasion to remain with the plaintiff, and it does remain with the plaintiff when using *McDonnell Douglas*. *See supra* notes 75, 78 and accompanying text.

353. *See supra* notes 65, 78.

354. *See supra* notes 65, 69, 78.

355. *See supra* notes 77–78 and accompanying text.

356. *See supra* note 283 and accompanying text.

cases so that a plaintiff could prove discrimination "without having to show that the employer had admitted that it was discriminating."[357] It is meant to assist plaintiffs in presenting their case despite the unavailability of evidence of discrimination. Employers are certainly no more likely to openly admit discrimination today than they were in 1973 when *McDonnell Douglas* was decided and, therefore, any departure from this established precedent appears unwarranted.

Since the ultimate burden of proof remains with the plaintiff at all times when *McDonnell Douglas* is used, the framework is consistent with *Gross*. *McDonnell Douglas* simply offers a way to ensure an ADEA claimant "'[has] his day in court despite the unavailability of direct evidence.'"[358] The *Gross* Court did not decide whether *McDonnell Douglas* applies to the ADEA, and therefore lower courts could continue following their circuits' precedent.[359] Even after the Court held that an ADEA plaintiff must prove "but-for" causation, the *McDonnell Douglas* framework can still be used to prove age discrimination claims.[360]

B. *The Next Step: Congress Should Amend the ADEA*

The Supreme Court in *Gross* hinted that Congress could step in to amend the ADEA to permit mixed-motives instructions.[361] The Court viewed the decision to permit ADEA violations based on "motivating factor" causation as a choice for Congress, rather than the Court, to make.[362] Congress should amend the ADEA to be consistent with Title VII, permitting an ADEA plaintiff to establish a violation where an employer is motivated in part by age discrimination, limiting the plaintiff's remedies if the employer proves it would have made the same decision regardless of the plaintiff's age.

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357. *See* Zimmer, *supra* note 78, at 1894; *see supra* note 78.

358. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)); *supra* note 65. The continued application of *McDonnell Douglas* has been written about extensively. Professor Prenkert argues that courts cling to *McDonnell Douglas* because it is a sort of "security blanket" among the "utter disarray" of disparate treatment law. Prenkert, *supra* note 23, at 515–16. In his article, he argues that once disparate treatment law is brought into "second-order uniformity," *McDonnell Douglas* can be "put to rest." *Id.* at 559. Professor Prenkert argues that "courts and litigants will continue to cling to *McDonnell Douglas* so long as they lack a viable, coherent alternative to the *McDonnell Douglas* framework. For all its faults and shortcomings, *McDonnell Douglas* provides uniformity to disparate treatment law across the various relevant statutes and claims. I call this 'second-order uniformity.'" *Id.* at 515. If and until Congress acts, *McDonnell Douglas* can maintain its position in ADEA disparate treatment law. Without congressional action, ADEA claimants are no longer entitled to any mixed-motives claims; therefore Professor Prenkert's hope of second-uniformity across disparate treatment statutes cannot exist.

359. *See supra* note 283.

360. See supra notes 77–78 and accompanying text, explaining that *McDonnell Douglas* requires a plaintiff to prove "but-for" causation.

361. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 n.3 (2009); *see supra* notes 227–31 and accompanying text.

362. *See supra* notes 227–31 and accompanying text.

1. Interest in Eliminating Age Discrimination in Employment

Age discrimination in employment is becoming increasingly important in light of the current economic crisis in the United States.[363] The poor economy is causing more workers to be laid off.[364] When older workers are unemployed, it typically takes longer for them to find new jobs.[365] The effect of large numbers of unemployed older workers could have a substantial impact on government resources, and therefore age discrimination should be deterred and avoided where possible.[366] Of course, the ADEA permits an employer to make decisions based on "reasonable factors other than age" or to take an employee's age into account where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[367] However, deterring arbitrary age discrimination would not prevent employers from relying on age where the ADEA permits.

Proving discriminatory intent is not easy for plaintiffs.[368] This was the original reason for shifting the burden of proof to the defendant in *Price Waterhouse*[369] and for adopting the *McDonnell Douglas* framework to permit plaintiffs to prove discrimination based on circumstantial evidence.[370] Now that the Court has held that the burden of persuasion never shifts to the defendant in cases brought under the ADEA, reactions to the Court's holding suggest that it will be even more difficult for plaintiffs to show the defendant discriminated.[371]

Age discrimination may differ from discrimination prohibited in Title VII because it is not typically based on animus,[372] but this does not mean that the two causation standards must differ. Although age discrimination is not necessarily invidious, it is discrimination nonetheless and should be eradicated from the workplace. Employers should base decisions on an individual's abilities and qualifications, rather than his age.[373] Amending the ADEA to include the § 107 causation standard would help to eliminate age discrimination in the workplace, which is one of the goals of the ADEA.[374] The fact that age discrimination is not typically animus-based

363. *See supra* note 310 and accompanying text.
364. *See supra* note 9 and accompanying text.
365. *See supra* notes 5–11 and accompanying text.
366. *See supra* notes 12–14 and accompanying text.
367. 29 U.S.C. § 623(f)(1) (2006); *see supra* notes 29–30, 45 and accompanying text.
368. *See supra* notes 94, 279, 311–13 and accompanying text.
369. *See supra* note 94 and accompanying text.
370. *See supra* note 78 and accompanying text.
371. *See supra* notes 309–13. It is true employers benefit from *Gross* because they will not be liable for decisions motivated in part by discrimination. *See supra* notes 303–09. However, this should not outweigh individuals' and society's interest in eradicating discrimination from the workplace. Parts III.C.2 and III.C.3 outline the best standards of causation for ADEA plaintiffs to eradicate age discrimination in employment.
372. *See supra* notes 27, 50 and accompanying text.
373. *See supra* note 15 and accompanying text.
374. *See supra* note 15 and accompanying text.

does not change the benefits of using motivating factor causation for liability and but-for causation for damages that will be discussed below in Parts III.C.2 and III.C.3.[375]

2. "Because of" Should Mean "Motivating Factor" for Liability

The causation standard under the ADEA should be "motivating factor" for liability and "but-for" for full damages—identical to what Congress enacted in § 107 of the 1991 Act. The ADEA should not require the plaintiff to prove "but-for" causation in order to establish a claim under the ADEA. Professor Martin Katz argues that *McDonnell Douglas* and *Price Waterhouse* require "but-for" causation for claims under the Act and that there are normative problems with requiring "but-for" causation in discrimination cases.[376] Even before the Supreme Court granted certiorari in *Gross*, Professor Katz argued that § 107's "motivating factor" standard of causation for liability and "but for" causation for damages should be the causation standard in all antidiscrimination statutes that use the same "because of" language as Title VII.[377] Professor Katz argued that courts should not require a disparate treatment plaintiff to prove but-for causation for liability because "[a] defendant who engages in 'motivating factor'

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375. Professor Prenkert focused on the importance of "second-order uniformity" in disparate treatment law, advocating for Congress to amend all antidiscrimination statutes to be consistent with the "motivating factor" framework set out in § 107. Prenkert, *supra* note 23, at 560–61. Professor Prenkert noted that there may be reasons to have different remedy limitations between the various antidiscrimination statutes, but he did not identify specific reasons in his analysis. *See id.* at 561 n.268.

376. The shortcomings of *McDonnell Douglas* and *Price Waterhouse* are outlined in Professor Martin Katz's article. Katz, *Unifying Disparate Treatment*, *supra* note 96; *see also supra* notes 112, 116.

377. *See supra* note 116. Professor Katz's article advocates for applying § 107's two-tier causation standard to all disparate treatment statutes, including the ADEA and the Americans with Disabilities Act, 42 U.S.C. §§ 12101–17 (2006). Katz, *Unifying Disparate Treatment*, *supra* note 96, at 659–60, 667 n.92. Professor Katz's article proposed a way for lower courts to implement § 107's causation standards without the need for Supreme Court or congressional action. *Id.* at 644. Since the Supreme Court has now ruled that mixed-motives claims are unavailable under the ADEA, lower courts cannot apply the "motivating factor" standard of causation in ADEA cases. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2346 (2009).

Professor Prenkert wrote an article that focused on bringing "second-order uniformity" to disparate treatment law. *See* Prenkert, *supra* note 23; *see also supra* note 358. Professor Prenkert advocated for Congress to take action in order to "clean up the mixed-motives mess" by making § 107's "motivating factor" standard the standard for all disparate treatment law. Prenkert, *supra* note 23, at 559–61 (analyzing the varying approaches to mixed-motives claims before the Supreme Court granted certiorari in *Gross*). Professor Prenkert noted two particular ways Congress could amend the antidiscrimination statutes in order to accomplish the goal of uniformity: (i) amending the statutes to include the same language as § 107, or (ii) defining "because of" and "based on" in the statutes' definition sections. *Id.* at 560. This Note argues that Congress should amend the ADEA to include § 107's motivating factor provision for liability and but-for causation for damages. The reason this Note advocates to amend the ADEA is to offer protection to victims of age discrimination, rather than bringing uniformity to disparate treatment law, as Professor Prenkert emphasizes. *See* Prenkert, *supra* note 23.

discrimination has engaged in wrongdoing."[378] This remains true today under the ADEA.

The ADEA was enacted to combat age discrimination in the workplace by deterring employers from discriminating; attaching liability to an employer who engages in "motivating factor" discrimination would help achieve this purpose.[379] As Professor Katz argues, "but-for" causation for liability could permit defendants who are motivated in part by discrimination to escape liability.[380] If an employer were not liable for relying in part on discriminatory motive, the employer would not be deterred from discriminating in the future.[381] This undermines one of the purposes of the ADEA.[382] Congress rejected *Price Waterhouse* because it permitted defendants motivated by discrimination to escape liability.[383] In enacting § 107, Congress intended to "restore the rule . . . that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability."[384] Despite the differences in race and age discrimination, eliminating discriminatory motives from the workplace should be a common goal.[385]

When an employer discriminates based on age, it is typically arbitrary because age discrimination is often based on misconceptions about a person's productivity because of his age.[386] If "motivating factor" was the standard for liability, employers would be deterred from arbitrary use of age as a proxy for ability, and therefore this goal of the ADEA would be fulfilled.[387] There may be instances in which an older employee is not as effective or productive as a younger employee, but that lack of ability, and not age, should be the basis for disparate treatment.

Congress should amend the ADEA to permit burden-shifting, mixed-motives instructions because it provides a better way to combat age discrimination than "but-for" causation as mandated by the Supreme Court in *Gross*. Where an employer relies in part on an employee's age in making an adverse employment decision, this is discrimination and should be a violation of the ADEA.[388] Similar to Title VII cases, where an employee proves an employer was motivated by discrimination, the burden of persuasion should shift to the employer in ADEA cases to prove that the employer would have made the same decision regardless of the employee's

378. Katz, *Unifying Disparate Treatment*, *supra* note 96, at 658; *see also supra* note 102.

379. *See supra* notes 35–36 and accompanying text.

380. *See supra* note 102.

381. *See supra* notes 35–36, 102, 314 and accompanying text.

382. *See supra* notes 35–36 and accompanying text.

383. *See supra* note 112 and accompanying text.

384. H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711; *see supra* note 112 and accompanying text.

385. *See supra* Part III.C.1 (explaining reasons to eliminate age discrimination).

386. *See supra* notes 26–28, 35–36 and accompanying text.

387. *See supra* notes 35–36, 102, 116 and accompanying text; *cf. supra* note 116 and accompanying text (explaining the shortcomings of § 107's causation standards).

388. Katz, *Unifying Disparate Treatment*, *supra* note 96, at 658; *see also supra* note 102.

age.[389] As discussed in Part III.C.3, if the employer can prove he would have made the same decision regardless of the plaintiff's age, the remedies available to the plaintiff should be limited in the same way § 107 limits a Title VII plaintiff's remedies.

3. "Because of" Should Mean "But-For" for Damages

Congress should amend the ADEA to include the limitation on remedies for plaintiffs in cases where the defendant proves it would have made the same decision regardless of the plaintiff's age. This causation standard set out in the 1991 Act best serves the purposes of the ADEA.[390]

In addition to deterring future acts of age discrimination, the ADEA was designed to compensate victims of age discrimination.[391] "Motivating factor" causation for liability and "but-for" causation for damages is consistent with this goal of compensating victims. As Professor Katz points out, if a plaintiff only had to prove "motivating factor" liability for damages, then a plaintiff could receive a windfall.[392] If a plaintiff proved that age was a motivating factor in the employer's adverse decision, but other reasons also motivated the employer's decision, it is possible for the plaintiff to be compensated where he would have been terminated regardless of discrimination.[393] For example, assume a fifty-year-old plaintiff-employee can prove that an employer fired him for two reasons.[394] First, the employee constantly left work early and, second, the employer assumed that the employee was less productive because he was significantly older than his coworkers. In this mixed-motives example, if the employee received damages because he proved that discrimination was one of the motivating factors behind the adverse employment decision, this would be a windfall.[395] The employer had a legitimate reason for terminating the employee—because the employee constantly left work early—even though age discrimination also motivated the decision.

"But-for" causation for damages narrowly tailors the statute to fulfill the ADEA's purpose of eliminating discrimination.[396] By limiting the remedies a plaintiff can recover where the defendant proves he would have made the same decision, the focus is on eliminating age discrimination in the workplace, rather than forcing employers to keep older workers who should be terminated regardless of their age.[397] If an employer would have terminated an older employee because his work was unsatisfactory, §

389. *See supra* Part I.C.3 (outlining § 107 of the 1991 Act).
390. *See supra* note 116 and accompanying text.
391. *See supra* notes 36, 102, 116 and accompanying text.
392. *See supra* note 116.
393. *See supra* note 116.
394. See Professor Katz's article, *Unifying Disparate Treatment Law*, *supra* note 96, at 656, which provides a hypothetical of a mixed-motives case in which the defendant was motivated in part by the employee's race and in part by the employee's excessive tardiness.
395. *See id.*
396. *See supra* notes 113–16 and accompanying text.
397. *See supra* notes 115–16 and accompanying text.

107(b) dictates that a court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[398] Thus, an employer is not forced to employ older workers; rather, it is forced to make decisions without relying on age as a proxy for an employee's ability.[399] Eradicating any reliance on age as a proxy for ability is one of the purposes of the ADEA.[400] The remedy limitation means that the employer is not liable for damages or injunctive relief where he would have made the same decision regardless of the employee's age.[401] Thus, the employer is not compelled to reinstate or hire, for example, a worker who is not qualified for the position, but he is liable for attorney's fees if his decision was partly motivated by discrimination.[402]

As Professor Katz argues, § 107's "two-tier causal standard" provides a better causation standard for antidiscrimination statutes than the standards outlined by the Court in *Price Waterhouse* and *McDonnell Douglas*.[403]

CONCLUSION

Congress should amend the ADEA to prohibit employers from making decisions in which age is a motivating factor. If age is proven to be a motivating factor in an employer's decision, the burden should shift to the defendant to prove that he would have made the same decision regardless of the employee's age; otherwise, he will be liable for damages. While it is generally understood that age discrimination differs from other types of discrimination, the main goals of deterring future discriminatory acts and compensating victims of discrimination support adopting the two-tiered causal framework. The goals of the ADEA would be fulfilled if Title VII's causation standard were used for disparate treatment cases; therefore, Congress should amend the ADEA.

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398. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006); *see also supra* note 116 and accompanying text.

399. *See supra* note 11.

400. *See supra* note 44 and accompanying text.

401. *See supra* note 116 and accompanying text.

402. *See supra* note 116 and accompanying text.

403. *See supra* note 116 and accompanying text.

Notes & Observations