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A Gross Injustice: Proving Age Discrimination by Federal Employers Under the ADEA in the Wake of Gross v. FBL Financial Services, Inc.

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A *GROSS* INJUSTICE: PROVING AGE DISCRIMINATION BY FEDERAL EMPLOYERS UNDER THE ADEA IN THE WAKE OF *GROSS V. FBL FINANCIAL SERVICES, INC.*

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> "Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation[] the contribution they could make if they were working."[1]

INTRODUCTION

"I'd be better off with someone younger," says the supervisor to the fifty-three year old post office employee during her sixty day evaluation. Shocked and offended, the employee gets up and leaves, slamming the door on her way out. The next day, when the employee reports to work for her shift, she is informed that she has been let go, and that she must pack her things and leave immediately. The cause given for her termination is insubordination—treating a supervisor in an unprofessional manner—in violation of company policy.[2] Was age *a* cause of this employee's termination? Probably. Was age *the* cause of this employee's termination? Probably not.

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[1] H.R. REP. NO. 93-913, at 40 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849.

[2] *See* Harley v. Potter, 416 F. App'x 748 (10th Cir. 2011), *cert. denied sub nom.* Harley v. Donahoe, 132 S. Ct. 844 (2011). The facts of *Harley* are reproduced here in a modified version for illustrative purposes.

The "baby boomers," those seventy-five million individuals born between 1946 and 1964, are impacting today's workplace statistics in a tremendous way.[3] There are approximately sixty-nine million American workers over the age of forty in today's workforce.[4] In the private sector, approximately 45.3% of the workforce is between fourty and sixty-one years old.[5] This percentage is far greater among federal employees, with 64.1% of workers falling within this age group.[6] Both of these percentages are significantly higher than they were merely a decade ago.[7] As the average age of the American worker rises, so too does the prevalence of age discrimination in the workplace. Between 2007 and 2008, there was a 30% increase in the number of age discrimination claims brought against employers in the United States.[8]

The measures in place to protect against age discrimination in the workplace have become increasingly important as their applicability has come to cover a greater percentage of employees. One such measure is the Age Discrimination in Employment Act (the "ADEA").[9] In enacting the ADEA, Congress' purpose was "to promote 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."[10] The Act's implications are far-reaching.

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[3] Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Differential Treatment*, 46 AM. BUS. L.J. 607, 607 (2009); *see also* Marilyn Geewax, *For Baby Boomers, the Job Market's Even Worse*, NPR (May 1, 2010), http://www.npr.org/templates/story/story.php?storyId=126426518.

[4] *The Aging Workforce in America*, IMEC, http://imecred.imec.org/imec.nsf/All/Aging_Workforce (last visited Mar. 19, 2013).

[5] STUART GREENFIELD, CTR. FOR STATE & LOCAL GOV'T EXCELLENCE, PUBLIC SECTOR EMPLOYMENT: THE CURRENT SITUATION 1 (2007), *available at* http://slge.org/wp-content/uploads/2011/12/Public-Sector-Employment_Greenfield.pdf.

[6] *Id.*

[7] FREDRICA D. KRAMER & DEMETRA S. NIGHTINGALE, U.S. DEP'T OF LABOR EMP'T & TRAINING ADMIN., AGING BABY BOOMERS IN A NEW WORKFORCE DEVELOPMENT SYSTEM iii (2001), *available at* http://www.doleta.gov/Seniors/other_docs/AgingBoomers.pdf.

[8] Steve Vogel, *EEOC Examines Age Discrimination as Numbers of Claims Rise*, WASH. POST (July 16, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071503760.html.

[9] 29 U.S.C. §§ 621–634 (2006 & Supp. III 2009).

[10] *Id.* § 621(b).

The ADEA applies to all employers with twenty or more employees, "including federal, state, and local governments, and prohibits discrimination against a person over the age of forty because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promoting, laying off, compensation, benefits, job assignments, and training."[11] Different sections of the ADEA apply to different types of employers. Section 623 ("the non-federal provision") applies to all non-federal employers,[12] while § 633a ("the federal provision") applies solely to federal employers.[13]

Although the ADEA is fairly clear as to whom it applies and the types of adverse actions it protects against, how it should be enforced at the judicial level has proven to be more ambiguous. Specifically lacking from the ADEA is a description of the type of causation that a plaintiff must demonstrate when bringing a claim. In *Gross v. FBL Financial Services, Inc.*,[14] the Supreme Court interpreted the ADEA in an attempt to clarify this uncertainty. Relying closely on the statutory language of the non-federal provision—under which the claim in *Gross* was brought—the Court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[15] A mixed-motive analysis, comparable to that used in Title VII discrimination cases and used by many courts when faced with ADEA claims, was deemed inadequate.[16] Under the § 623 non-federal provision, age must be *the* reason an employee is treated adversely, not just one reason amongst many.[17]

However, in clarifying the causation standard to be used in § 623 non-federal claims, the Court cast further uncertainty upon the causation standard to be used in § 633a claims against federal employers. In *Gross*, the Court made no reference to

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[11] Jeffrey S. Klein et al., *Employee Selection*, *in* 38TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 2009, at 1005 (PLI Litig. & Admin. Practice, Course Handbook 2009).

[12] 29 U.S.C. § 623 (2006 & Supp. II 2008).

[13] *Id.* § 633a (2006 & Supp. III 2009).

[14] 557 U.S. 167 (2009).

[15] *Id.* at 180.

[16] *Id.*

[17] *Id.*

§ 633a, focusing solely on § 623 and its precise language.[18] It remains unclear what type of causation the federal provision requires; thus, various courts have interpreted *Gross*' impact on § 633a differently. Some courts have found that *Gross* should be extended to cover § 633a and federal employers, while others have found that it should not, and many have applied it to federal employers with no discussion of *Gross*' relevance whatsoever.[19]

This Note argues that the "but-for" causation required under *Gross* should not be extended to apply to ADEA claims brought against federal employers because the reasoning of *Gross* does not support a broad expansion of its holding, and because a less stringent burden of proof is more appropriate in the federal employment context. Part I explains the current requirements placed on a plaintiff bringing a § 623 ADEA claim against a non-federal employer, as laid out by the Supreme Court in *Gross*. Part II explores the applicability of *Gross* to § 633a of the ADEA, which applies to federal employers, and compares the reasoning of those courts that have chosen to apply *Gross* in the federal employment context with that of those courts that have refrained from doing so. Finally, Part III proposes that *Gross* should not be expanded to require "but-for" causation in claims brought against federal employers under § 633a of the ADEA for a number of statutory interpretation and policy reasons, and instead recommends a "substantial factor" causation test in which age must be material to an adverse employment action, but need not be the "but-for" cause.

I. BACKGROUND

Employment discrimination in the American workforce is a long recognized and heavily litigated issue, and protections against it come from a variety of different sources, including common law and both state and federal statutes.[20] Congress has acknowledged that " '[d]iscrimination based on age . . . can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a

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[18] *Id.* at 170.
[19] *See infra* Part II.
[20] Klein et al., *supra* note 11, at 1001.

member of some arbitrarily-defined group.' "[21] This section first describes the ADEA, the statutory basis of most age discrimination claims, and then discusses the implications of the Supreme Court's interpretation of the ADEA in *Gross v. FBL Financial Services, Inc*.

A. Statutory Protection Against Age Discrimination: The ADEA

The statute that takes center stage in the battle against age discrimination is the ADEA. First enacted in 1967, the ADEA has been protecting workers from discrimination for over forty years.[22] It applies to all workers over the age of forty in the private sector, as well as in local, state, and federal government.[23] The breadth of this protected class helps to identify and resolve many age-related issues.

Section 623 of the ADEA prohibits age discrimination by non-federal employers. In relevant part, it states that "[i]t shall be unlawful for an employer . . . 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*."[24]

Section 633a of the ADEA prohibits age discrimination by federal employers. In relevant part, it states that:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments . . . , in executive agencies . . . , in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress *shall be made free from any discrimination based on age.*[25]

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[21] H.R. REP. NO. 93-913, at 40 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849 (quoting a Presidential message supporting an extension of ADEA in March 1972).

[22] 29 U.S.C. § 623 (2006 & Supp. II 2008).

[23] Klein et al., *supra* note 11.

[24] 29 U.S.C. § 623(a)(1) (emphasis added).

[25] *Id.* § 633a(a) (2006 & Supp. III 2009) (emphasis added).

Despite Congress' attempt to protect employees through this legislation, enforcing the ADEA at the judicial level has been problematic.[26] Questions involving the burden of persuasion to be used and type of causation required have been particularly troubling. When interpreting the ADEA, courts have often looked to another Civil Rights era statute, Title VII of the Civil Rights Act of 1964 ("Title VII"), for guidance. "Title VII covers employers with 15 or more employees, and prohibits employers from making adverse employment decisions based upon an individual's race, color, religion, sex, or national origin."[27] Because both the ADEA and Title VII are intended to prevent discrimination in the workplace, albeit different types of discrimination, courts have often drawn analogies between the two and borrowed from the jurisprudence of one when interpreting the other.[28]

The ADEA and Title VII "inform each other in important ways."[29] Up until 2010, one such way was the type of causation analysis that courts required in both cases.[30] Many courts used the burden shifting analysis established in *Price Waterhouse v. Hopkins*[31] in both ADEA and Title VII cases. Under the *Price Waterhouse* analysis, used where there is direct evidence of discrimination, a plaintiff has to prove that discrimination played a motivating role in an adverse employment action.[32] Where this is established, the defendant then has the opportunity to prove that the adverse employment action still would have occurred for a different reason, even if the discriminatory motive had not been present.[33] Such proof can serve as an affirmative defense for the

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[26] *See* Tracey, *supra* note 3, at 608. ("[A]s now interpreted, the ADEA is confusing, convoluted, and problematic.").

[27] Klein et al., *supra* note 11, at 1001.

[28] *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 359 (8th Cir. 2008) (applying a Title VII analysis in an ADEA case), *rev'd*, 557 U.S. 167 (2009).

[29] Tracey, *supra* note 3, at 609.

[30] *See Gross*, 557 U.S. at 173–75 (banning the *Price Waterhouse* analysis in ADEA cases).

[31] 490 U.S. 228 (1989). In *Price Waterhouse*, the Court specified that the analysis it set forth was not technically burden shifting, but instead an initial burden placed on the plaintiff which may be rebutted through what is "most appropriately deemed an affirmative defense." *Id.* at 246. However, in later cases, including *Gross* (to be discussed shortly), the Court references the *Price Waterhouse* "burden-shifting framework," so this Note utilizes the same language in discussing this concept. *See Gross*, 557 U.S. at 173–74.

[32] *Price Waterhouse*, 490 U.S. at 244–45.

[33] *Id.*

accused employer.[34] Although *Price Waterhouse* involved sex discrimination under Title VII,[35] courts nonetheless used the burden shifting analysis in both the ADEA and Title VII contexts.[36] This allowed a plaintiff to succeed on a claim where age was not the "but-for" cause of an adverse employment action, but merely "a factor in the employment decision *at the moment it was made*," so long as the employer could not prove that the employee would have been negatively impacted in the same manner for some other reason.[37] Even "a mixture of legitimate and illegitimate considerations" could serve as adequate proof of discrimination.[38] However, all of this changed with the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*

B. Judicial Interpretation of the ADEA: Gross v. FBL Financial Services, Inc.

In *Gross v. FBL Financial Services, Inc.*, the Court put a swift end to the use of the mixed-motive analysis in ADEA § 623 claims by instead requiring a showing of "but-for" causation in all § 623 claims.[39] In *Gross*, the plaintiff, Jack Gross, began working for FBL Financial Group ("FBL" or "the company") in 1971.[40] Gross worked for the company for over thirty years, and rose to the position of "claims administration director."[41] However, in 2003, when Gross was fifty-four years old, he was reassigned to the position of "claims project coordinator."[42] Many of his former responsibilities were given to the newly appointed "claims administration manager," a woman in her early forties who had previously been supervised by Gross.[43] FBL stated that "Gross' reassignment was part of a corporate restructuring" and

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[34] *Id.* at 246.

[35] *Id.* at 231–32.

[36] *See, e.g.*, Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 571–72 (6th Cir. 2003); Febres v. Challenger Caribbean Corp., 214 F.3d 57, 64 (1st Cir. 2000); Beshears v. Asbill, 930 F.2d 1348, 1353 n.6 (8th Cir. 1991) (noting that the Eighth Circuit has applied the *Price Waterhouse* analysis to age discrimination claims).

[37] *Price Waterhouse*, 490 U.S. at 240–41.

[38] *Id.* at 241.

[39] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[40] *Id.* at 170.

[41] *Id.*

[42] *Id.*

[43] *Id.*

explained that Gross' new position was "better suited to his skills."[44] Gross "considered [his] reassignment a demotion because of FBL's reallocation of his former job responsibilities."[45]

In 2004, Gross filed suit in federal district court alleging a violation of his rights under the ADEA.[46] Applying the mixed-motive burden shifting framework, the jury in the district court found that age was a motivating factor in Gross' reassignment and awarded him $46,945.[47] FBL then appealed the verdict to the United States Court of Appeals for the Eighth Circuit, citing an improper jury instruction.[48] On appeal, the Eighth Circuit found that the jury had improperly applied the *Price Waterhouse* framework, which is used in Title VII cases and which the Eighth Circuit, at the time, also applied to ADEA cases.[49] The court found that Gross had failed to provide " '[d]irect evidence' . . . 'sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action."[50] Because Gross had not met his initial burden of providing "direct evidence," FBL never should have been given the opportunity to prove that the illegitimate factor was of no consequence in the decision.[51] The Eighth Circuit, therefore, found that the jury instruction below had been flawed and remanded the case for a new trial.[52]

Gross then appealed the reversal, and the Supreme Court granted certiorari. In a 5-4 opinion, the majority opted not to use the standard of proof set out by either the district court or the Eighth Circuit and instead laid down a different causation requirement.[53] The Court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[54]

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See id.* at 171.

[48] *Id.* at 171.

[49] Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 360 (8th Cir. 2008), *rev'd*, 557 U.S. 167 (2009).

[50] *Id.* at 359 (quoting Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)).

[51] *Id.* at 360.

[52] *Id.* at 358.

[53] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009)

[54] *Id.*

The first step in the Court's analysis was to definitively rule out the *Price Waterhouse* burden shifting framework.[55] The Court clarified that the *Price Waterhouse* analysis should be limited to the Title VII context and should never play a role in § 623 ADEA claims.[56] The majority cautioned that "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.' "[57] Furthermore, the Court reasoned that, because Congress specifically amended Title VII to provide that race, color, religion, sex, or national origin used as a "motivating factor" would suffice to prove causation but failed to make the same amendment to the ADEA's language, Congress did not intend for the same standard to apply in the ADEA context.[58]

After outlining why a "motivating factor" test should not be used, the Court's second step was to establish the type of causation test that should be used in § 623 ADEA claims.[59] The Court set forth a strict "but-for" causation requirement. In order to meet the burden of proving "but-for" causation, a party must show that in the absence of a precipitating event, a later event simply would not have occurred.[60] Unlike the "mixed-motive" test, which considers an event a motivating factor—and therefore a cause—so long as it "played a part or a role" in a decision,[61] the "but-for" test demands a much closer relationship between one event and another. Simply playing a role is not enough.

Additionally, under the "but-for" test, the materiality of the precipitating event is of no relevance. No matter how important or wrongful a given event is, it is not the "but-for" cause unless the result would not have occurred in its absence. This lack of a materiality inquiry differentiates the "but-for" test from a "substantial factor" test. A substantial factor test, discussed in depth in Part III.B, weighs how material an event is in

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[55] *Id.* at 173.

[56] *Id.* at 174 ("This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now.").

[57] *Id.* (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

[58] *Id.*

[59] *See id.* at 175–76.

[60] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265 (5th ed. 1984).

[61] *Gross*, 557 U.S. at 171. (citation omitted) (internal quotation marks omitted).

contributing to a given result.[62] If one event is a "material element" in bringing about another event, it will be considered its cause.[63] Materiality is of the utmost importance.

In the context of age discrimination, a "but-for" causation requirement means that age must be the " 'reason' that the employer decided to act."[64] A claim " 'cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*.' "[65] In short, "but-for" causation means that the adverse action would not have occurred unless discrimination was present.[66]

In *Gross,* the Court's primary reason for distinguishing the ADEA from Title VII was the difference in statutory language between the two. Writing for the majority, Justice Thomas relied extensively on the different language used by the drafters of the ADEA. Turning to the dictionary to define "because of," Thomas concluded that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[67]

Four justices dissented, and Justice Stevens and Justice Breyer authored the two dissenting opinions. All four dissenting justices joined in Justice Stevens' opinion,[68] while all but Justice Stevens joined in Justice's Breyer's opinion.[69] Justice Stevens vehemently argued that it is not clear by its plain meaning that "because of" means "but for."[70] He focused largely on the similarities between the ADEA and Title VII and the courts' earlier treatment of similar language in Title VII as allowing proof of a mixed motive to be sufficient.[71] He felt that the mixed-

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[62] *See* discussion *infra* Part III.B.

[63] *See* Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45, 49 (Minn. 1920).

[64] *Gross*, 557 U.S. at 176.

[65] *Id.* (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)) (explaining *Hazen*).

[66] *Id.*

[67] *Id.*

[68] *Id.* at 180 (Stevens, J., dissenting).

[69] *Id.* at 190 (Breyer, J., dissenting).

[70] *Id.* at 180–81 (Stevens, J., dissenting).

[71] *Id.* at 180–83.

motive approach should continue to be used in ADEA claims and that the "Court's resurrection of the but-for causation standard [was] unwarranted."[72]

Like Justice Stevens, Justice Breyer also felt that the mixed-motive analysis should be used in age discrimination cases. Justice Breyer focused on the inadequacies of a "but-for" test, arguing that because of the intangible nature of age discrimination, proof of a mixed motive should suffice to prove causation.[73] He saw no problem with the jury instruction in *Gross* that made age a motivating factor, and therefore a cause, if it "played a part or a role in the defendant's decision."[74] A "but-for" determination was not necessary in his opinion.

II. CIRCUIT SPLIT: APPLYING *GROSS* TO § 633A

In the wake of *Gross*, courts have split over the applicability of *Gross*' holding to ADEA § 633a claims. A majority of courts, including the Court of Appeals for the Tenth Circuit, have extended *Gross*' "but-for" requirement to claims against federal employers. Within this group, most courts have extended the holding without acknowledging that it might not be applicable. A smaller contingency within the majority has acknowledged the potential difference, but reasoned that *Gross* should still be extended to the federal claims in question. Other courts, including the Court of Appeals for the District of Columbia, have declined to extend *Gross* to claims against federal employers. This minority has cited the differences between the governing sections of the ADEA as the reason for not requiring a showing of "but-for" causation against federal employers.

A. Extending Gross

The Court of Appeals for the Tenth Circuit is among those courts that have applied *Gross* to a claim against a federal employer without acknowledging that it might be inapplicable. In *Harley v. Potter*,[75] the court upheld the application of *Gross* in a case against the Unites States Postal Service, an entity

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[72] *Id.* at 187.

[73] *Id.* at 190–92 (Breyer, J., dissenting).

[74] *Id.* at 192.

[75] 416 F. App'x 748, 752 (10th Cir. 2011) ("The district court properly identified *Gross* as the controlling legal standard.").

expressly governed by § 633a rather than § 623.[76] Wanda Harley was fired from her position as a post office employee after refusing to sign an evaluation with which she disagreed.[77] Another employee testified that Wanda's supervisor had stated that he "needed somebody younger."[78] At trial, Harley was required to prove that her age was the "but-for" cause of her termination.[79] The fact that her age was a motivating factor in the firing was not enough.[80] Because Harley did not prove that she would not have been fired but for her age, she lost.[81] By affirming the lower court's use of the "but-for" analysis, the Tenth Circuit silently extended *Gross*, requiring a "but-for" causation showing against federal and non-federal employers alike.

Similarly, several district courts have applied *Gross* in claims against federal employers, which should be governed by § 633a rather than § 623. These federal employers include a V.A. Hospital,[82] the United States Army,[83] the United States Small Business Administration,[84] the United States Army Corp of Engineers,[85] and the FDIC.[86] None of these courts acknowledged that the employers in question were governed by a section of the ADEA that was never addressed in *Gross*. They all made their decisions with the understanding that *Gross* was the applicable standard to be used in all ADEA cases, regardless of whether the employer was a federal or non-federal entity.

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[76] 29 U.S.C. § 633a (2006 & Supp. III 2009) ("All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in the United States Postal Service and the Postal Regulatory Commission . . . shall be made free from any discrimination based on age.").

[77] *Harley*, 416 F. App'x at 750.

[78] *Id.* at 749–50.

[79] *Id.* at 750–51.

[80] *Id.* at 751 ("While Harley's age was one of many reasons . . . for her termination, Harley has not proved by a preponderance of the evidence that her age was the 'but-for' cause of her termination. Harley simply has not shown that her age was *the* reason for her termination.").

[81] *Id.* at 753–4.

[82] Frankel v. Peake, Civ. No. 07-3539 (WJM), 2009 WL 3417448, at *3–4 (D.N.J. Oct. 20, 2009).

[83] Shelley v. Geren, No. CV-08-5045-RHW, 2009 WL 3783159, at *3 (E.D. Wash. Nov. 6, 2009).

[84] Guerrero v. Preston, No. H-08-2412, 2009 WL 2581568, at *3 (S.D. Tex. Aug. 18, 2009).

[85] Wagner v. Geren, No. 8:08 CV 208, 2009 WL 2105680, at *4–5 (D. Neb. July 9, 2009).

[86] Glenn v. Bair, 643 F. Supp. 2d 23, 29 (D.D.C. 2009).

Other district courts have acknowledged that *Gross* did not interpret § 633a but have made it clear that they are nonetheless choosing to extend *Gross*' holding to federal employers. In *Reynolds v. Department of the Army*, a New Jersey district court discussed the applicability of *Gross*, despite the fact that "[t]he parties [did] not dispute the applicability of *Gross*' 'but-for' causation requirement."[87] The court noted that "the ADEA contains two distinct prohibition sections, one applicable to non-federal employers, 29 U.S.C. § 623(a), and one applicable to federal employers, § 633a(a). . . . The ADEA provision at issue in *Gross*, however, dealt strictly with the non-federal employer provision which has markedly different statutory language."[88] Nonetheless, because a majority of district courts had chosen to extend the *Gross* holding, the *Reynolds* court ultimately decided to do the same.[89]

B. Limiting Gross

Other courts have declined to extend *Gross* to § 633a claims, acknowledging the differences between §§ 623 and 633a, and the fact that the Supreme Court's analysis was limited to only the former. In *Ford v. Mabus*, the Court of Appeals for the District of Columbia declined to require a "but-for" showing in a claim brought against the United States Navy.[90] The plaintiff, Richard Ford, was denied a promotion, and the position was instead given to someone twenty-five years younger than Ford.[91] One of the supervisors involved in the hiring process allegedly made a comment about the negative impact the aging workforce was having on the Navy.[92] At trial, the district court found that Ford had not met his burden of showing that his age was the "but-for" cause of his firing, and therefore found in favor of the government.[93]

The court of appeals remanded the case to determine if "age was *a* factor in the Navy's decision to deny [Ford] the promotion."[94] Relying on statutory language, much as the Court

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[87] No. 08-2944 (FLW), 2010 WL 2674045, at *10 (D.N.J. June 30, 2010).
[88] *Id.* at *10 n.5.
[89] *Id.*
[90] 629 F.3d 198 (D.C. Cir. 2010).
[91] *Id.* at 200.
[92] *Id.* at 200–01.
[93] *Id.* at 200.
[94] *Id.* at 207.

in *Gross* did, the *Ford* court reasoned that the language in the two sections of the statute could not be read to have the same plain meaning. "[B]ecause of" in § 623 does not mean the same thing as "based on" in § 633a.[95] The court of appeals held that "while a § 623 plaintiff must, as *Gross* holds, show that the challenged personnel action was taken because of age, a § 633a plaintiff must show that the personnel action involved 'any discrimination based on age.' "[96] A "but-for" test was therefore deemed inappropriate.

Many district courts have also declined to expand *Gross* into the federal setting, relying primarily on the different language of the two relevant statutory provisions of the ADEA. In *Fuller v. Gates*, the District Court for the Eastern District of Texas determined that "but-for" causation should not be required in a suit brought against the Secretary of Defense.[97] In *Torres v. McHugh*, the District Court for the District of New Mexico held that "*Gross* is inapplicable to the federal employer provision which contains different statutory language."[98] Both the *Fuller* and *Torres* courts reasoned that *Gross*' application should be limited to those cases involving the statutory provision of the ADEA that the Supreme Court actually interpreted in *Gross*, § 623.[99]

For the reasons discussed in Part III below, the approach taken by the *Ford*, *Fuller*, and *Torres* courts is the more appropriate of the two. By declining to extend *Gross* to federal employers, these courts are truer to the language of the statute, and to the holding of *Gross* itself.

III. THE INAPPLICABILITY OF "BUT-FOR" CAUSATION AND THE BENEFITS OF A "SUBSTANTIAL FACTOR" TEST

The first part of this section describes the reasons why *Gross* should not be extended to § 633a federal employer cases, relying on norms of statutory interpretation and policy considerations.

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[95] *Id.* at 205.

[96] *Id.*

[97] No. 5:06-CV-091, 2010 WL 774965, at *1 (E.D. Tex. Mar. 1, 2010) ("The language of § 633a(a) compels the court to conclude that a mixed-motive analysis continues to apply in claims against the government.").

[98] 701 F. Supp. 2d 1215, 1222 (D.N.M. 2010). However, the *Torres* court reluctantly applied "but-for" causation because of other binding Tenth Circuit precedent obligating it to do so. *Id.* at 1222–23.

[99] *Id.* at 1222; *Fuller*, 2010 WL 774965, at *1.

The elements of statutory interpretation discussed include the plain meaning of the language used in § 633a as compared to § 623, the structure of § 633a as compared to § 623, and the structure of the ADEA generally. The policy considerations discussed include the additional remedies available to federal employers and the historical notion that federal workers are held to a higher standard than their private counterparts.

Having explained why *Gross*' "but-for" causation standard should not be used, the second part of this section proposes an alternative "substantial factor" causation test. Such a test would be truer to the language of § 633a and diminish many of the policy concerns raised by a "but-for" test.

A. Gross *Should Not Be Extended To Apply to § 633a*

The norms of statutory interpretation suggest that § 623 should be understood differently than § 633a. There is a long accepted method for interpreting federal statutes. Courts first look to the statute's textual plain meaning, then to statutory structure, and then to sources outside the four corners of the statute itself.[100] In this case, all of these factors suggest that § 633a should not be interpreted to mean the same thing as § 623.

The first step in this process is to look at the statutory language in light of "*its textual plain meaning, as gleaned from ordinary usage, dictionaries, grammar, and linguistic canons.*"[101] Ironically, *Gross* itself is an excellent example of the proposition that courts will look to the plain meaning of the words of a statute when construing its meaning.[102] In *Gross*, the Court said that " '[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.' "[103]

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[100] William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2042 (2006) (book review) (summarizing William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321 (1990)).

[101] *Id.* (emphasis added).

[102] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009).

[103] *Id.* (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004).

The plain meaning of § 623 was established by the Supreme Court in *Gross*. The § 623 ADEA language in question makes an adverse employment action illegal where the action takes place "because of [an] individual's age."[104] After consulting a dictionary, the Court determined that the plain meaning of "because of" is "by reason of,"[105] which in turn requires a showing that but for the employee's age, the adverse employment action would not have occurred.[106]

Section 633a uses different language than § 623, and therefore cannot automatically be read as having the same plain meaning. Instead, the actual language used must be interpreted. "[I]t is through the 'dint of . . . phrasing' that Congress speaks, and where it uses different language in different provisions of the same statute, we must give effect to those differences."[107] Where Congress uses different language within the same statute, as was done here, it can be assumed that it did so intentionally. While § 623 bans discrimination "because of [an] individual's age,"[108] § 633a bans "any discrimination based on age."[109] Merriam-Webster's, the Supreme Court's dictionary of choice in *Gross*,[110] defines "any" as "one or some indiscriminately of whatever kind."[111] As the Court has previously stated, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' "[112] Where Congress uses the word "any" without adding additional language to modify it, its breadth remains unlimited.[113] The type of discrimination covered under § 633a is therefore very extensive.

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[104] 29 U.S.C. § 623(a)(1) (2006 & Supp. II 2008).

[105] *Gross*, 557 U.S. at 176.

[106] Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 (2007).

[107] Ford v. Mabus, 629 F.3d 198, 206 (D.C. Cir. 2010).

[108] 29 U.S.C. § 623(a)(1).

[109] *Id.* § 633a(a) (2006 & Supp. III 2009).

[110] *Gross*, 557 U.S. at 176.

[111] *Any Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/any (last visited March 18, 2013).

[112] United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)).

[113] *See* Ford v. Mabus, 629 F.3d 198, 206 (D.C. Cir. 2010).

Furthermore, "based on" means "to . . . form a foundation for."[114] Something serves as a foundation for an action when it is an integral or substantial part of the action upon which other factors are added. The foundation is not necessarily the determinative element, but it is nonetheless important to the action. An action is based on a given element when that element is a fundamental reason behind it.

Coupled together, the plain meaning of § 633a's freedom from "any discrimination based on age" is that employees shall be free of "whatever kind" of age discrimination, so long as age is the foundation upon which the discrimination is based. Section 633a's plain language, therefore, suggests a causation analysis different from the "but-for" test put forth in *Gross* for use with § 623. While § 623 protects against age discrimination in a certain limited context, § 633a is much more expansive in the type and degree of age discrimination that it protects against. Because "any" and "based on" are more inclusive than "because of," it follows that a greater degree of discrimination should be included. A less stringent showing of discrimination would therefore suffice. A substantial factor test is one way this burden could be established, as will be discussed in the following section.

In addition to plain meaning, courts also look at sentence structure and syntax. Sections 623 and 633a contain a structural difference that sets them apart, as noted by the Court of Appeals in *Ford v. Mabus*. "Because of" in § 623 modifies "to fail or refuse to hire," whereas "based on" in § 633a modifies "discrimination."[115] In practice, this means that "while a section 623 plaintiff must, as *Gross* holds, show that the challenged personnel action was taken because of age, a section 633a plaintiff must show that the personnel action involved 'any discrimination based on age.' "[116] Once again, the plain meaning of the statute suggests that the federal employee provision offers a more expansive form of protection than does its non-federal counterpart. "Recognizing the 'sharp[]' difference between these

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[114] *Base, v.3*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/15856 (last visited March 18, 2013). The Oxford English Dictionary is used here rather than Merriam-Webster's, used by the Court in interpreting § 623, because Webster's definition of "based" was self-referential ("to serve as a base for") and less helpful.

[115] *Ford*, 629 F.3d at 205.

[116] *Id.*

two provisions, the Supreme Court in *Gomez-Perez v. Potter* described section 633a as a 'broad, general ban on discrimination based on age,' " as compared with the more lenient § 623.[117]

The next source that federal courts generally turn to in construing statutory meaning is the "statutory structure."[118] Much like the plain meaning of the language and structure of the provisions, this factor too suggests that §§ 623 and 633a should be treated differently. On the issue of statutory structure, the Supreme Court has previously stated that §§ 623 and 633a are completely independent provisions, which do not substantively affect one another.[119] Section 633a is "self-contained and unaffected by other sections" of the ADEA.[120] Therefore, the Court's interpretation of § 623 should not have an impact on § 633a, and the same test need not be used in both sections.

The fact that Congress enacted separate sections for federal and non-federal employers in the ADEA should not be overlooked. The original ADEA did not apply to federal employers.[121] In 1972, an amendment was introduced that would have expanded the language of § 623 to include federal employers.[122] One of the reasons given for the amendment by the bill's author, Senator Bentsen, was the "subtle" discrimination against "Federal employees who [were] ignored or harassed by their superiors."[123] Before passage, the bill was restructured "to remove the federal government from the general definition of employer and to place appropriate substantive provisions in a separate section."[124]

Ultimately, Congress added an entirely new section to the ADEA in order to specifically address the distinctive problem of age discrimination in federal employment.[125] Section 633a was created to apply solely to federal employers, and Congress chose not to use the same language in that section as it had in § 623.

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[117] *Id.* (quoting Gomez-Perez v. Potter, 553 U.S. 474, 486, 488 (2008) (internal quotation marks omitted)).

[118] Eskridge, *supra* note 100.

[119] Lehman v. Nakshian, 453 U.S. 156, 166–67 (1981).

[120] *Id.* at 168.

[121] Bornholdt v. Brady, 869 F.2d 57, 65–66 (2d Cir. 1989).

[122] *Id.*

[123] 118 Cong. Rec. 7745 (1972) (statement of Sen. Bentsen).

[124] *Bornholdt*, 869 F.2d at 66; 118 Cong. Rec. 15,894–95.

[125] *See Lehman*, 453 U.S. at 166–67 (comparing the applicability of jury trials to each of the provisions).

The fact that Congress gave federal employers their own subsection suggests that they are held to a different standard, which prevents them from being grouped together with everyone else in § 623.

Section 633a also gives special consideration to federal employees when it comes to bringing their claims, which is not mirrored in § 623. Even before the ADEA was enacted, federal discrimination claims were dealt with through the Civil Service Commission (the "CSC"), providing federal employees with a great deal of protection that was not available outside of the federal context.[126] After the ADEA was passed and amended to cover federal employees, "Congress empowered the CSC 'to enforce the provisions of [§ 633a(a)] through appropriate remedies.' "[127] Today, § 633a(b) specifies that the Equal Employment Opportunity Commission (the "EEOC") is authorized to enforce the ADEA.[128] Only federal employees are entitled to have their claims heard by this committee.

The fact that federal employees are given a different channel through which to bring their claims suggests that Congress did not intend §§ 623 and 633a to function in the same way. As Chief Justice Roberts stated in his dissent in *Gomez-Perez v. Potter*, "civil service is a complex issue, requiring 'careful attention to conflicting policy considerations' and 'balancing governmental efficiency and the rights of employees.' The resulting system often requires remedies different from those found to be appropriate for the private sector (or even for the States)."[129] The difference in available remedies shows Congress' acknowledgment that federal employees should be judged by a different set of standards.

All of these statutory interpretation factors suggest that §§ 623 and 633a should be kept separate and distinct.

Policy considerations also suggest that the two sections should be treated differently. There is a history in the United States of holding federal employers to a higher standard than their non-federal counterparts simply because they are federal employers. The Civil Service Reform Act of 1978 (the "CSRA")

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[126] Gomez-Perez v. Potter, 553 U.S. 474, 500–01 (2008).

[127] *Id.* at 501.

[128] 29 U.S.C. § 633a(b) (2006 & Supp. III 2009).

[129] *Gomez-Perez*, 553 U.S. at 500 (Roberts, C.J., dissenting) (citation omitted) (quoting Bush v. Lucas, 462 U.S. 367, 388, 389 (1983)).

offers one such example.[130] The CSRA states that "in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices."[131] The Act then goes on to lay out a merit-based system for career advancement with federal employers.[132] This Act applies only to federal employees, suggesting that Congress was not concerned with furthering similar competence, honesty, and productivity in the private sector. It is only federal employers that are held to this legislatively created higher standard.

The federal government, by way of being the sovereign, is responsible for the well-being and protection of every American in a way that non-federal entities are not. The federal employers previously mentioned, such as the Army, Navy, and Corp of Engineers, all do critical work. Where age discrimination within one of these organizations denies an opportunity to the most qualified individual because of his or her age, the effect is detrimental to American society as a whole.

B. A "Substantial Factor" Test Should Be Implemented in § 633a Cases

Rather than "but-for" causation, or a mixed-motive burden shifting analysis, this Note proposes that a "substantial factor" test be used in § 633a claims. Under such a test, a plaintiff would have to prove that age was a "substantial factor" in the adverse employment action that occurred. Age need not be the definitive reason, but it must be "material" to the events that transpired.[133]

As previously discussed, in *Gross*, the Court outlined its "but-for" test as requiring proof that "age was the 'reason' that the employer decided to act."[134] Whether there are multiple

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[130] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of Title V).

[131] *Id.* § 3(1).

[132] *Id.* § 3(2).

[133] *See* Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45, 49 (Minn. 1920) *overruled on other grounds by* Borsheim v. Great N. Ry. Co., 183 N.W. 521 (1921); KEETON ET AL., *supra* note 60, § 41, at 265–68.

[134] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

motives or not, "[a] plaintiff must prove by a preponderance of the evidence . . . that age was the 'but-for' cause of the challenged employer decision."[135] Even if evidence of age discrimination is present, it is deemed meaningless unless it is accompanied by proof that the adverse action happened because of said discrimination. The burden never shifts to the defendant to show that the action would have happened regardless of age, so the plaintiff is never afforded the opportunity to show that other reasons given by the defendant for negative treatment are pretextual.

The previously used *Price Waterhouse* test allowed a claim to proceed on a showing of a partly discriminatory "mixed-motive." Under that test, so long as age was part of the reason for an adverse employment action, an ADEA claim could be brought, even if age was not a material factor.[136] Since using this very low burden of proof unencumbered would give rise to claims based on only the slightest inference of discrimination, it was couched within a burden shifting framework. After the plaintiff showed that age was a factor, the employer then had the opportunity to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken [age] into account."[137] Where the employer did not meet this burden, the plaintiff could prevail on his or her claim so long as age was *a* factor in the adverse action.

Neither of these tests are apt for a § 633a analysis. As previously discussed, statutory interpretation and policy considerations rule out the "but-for" test because § 623 and § 633a are different in many substantial ways.[138] Section 633a is broader and intended to protect against more than a "but-for" test allows. Additionally, as Justice Breyer pointed out in his dissent in *Gross,* proving "but-for" causation in tort law is different than proving it in the discrimination context because the subjective intentions of individuals are often in question in

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[135] *Id.* at 177–78.

[136] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). In applying the mixed-motive test in *Gross*, the district court instructed the jury that age was the cause of the firing so long as it "played a part or a role" in the decision. *Gross*, 557 U.S. at 170–71. No amount of materiality was required. *See id.*

[137] *Gross*, 557 U.S. at 173–74.

[138] *See supra* Part III.A; Gomez-Perez v. Potter, 553 U.S. 474, 487–89 (2008).

discrimination cases.[139] Tort claims are conducive to "reasonably objective scientific or commonsense theories of physical causation."[140] Discrimination claims, on the other hand, rely "not [on] physical forces, but the mind-related characterizations that constitute motive."[141] "But-for" causation places a heavy and often insurmountable burden on the plaintiff, who needs to show that but for what her discriminator was thinking, she would not have been treated adversely.[142]

The "mixed-motive" analysis is also unsuitable for many of the reasons pointed out by the Court in *Gross* in reference to § 623 claims. First, the "mixed-motive" burden shifting analysis was intended for Title VII cases instead of ADEA cases and, therefore, should not automatically be applied between statutes. Title VII has been amended to provide for a "mixed-motive" analysis, while the ADEA has not.[143] Second, practically speaking, *Price Waterhouse*'s mixed-motive burden shifting has proved to be unworkable. The burden shifting framework has been difficult to explain to juries and has been the subject of much debate.[144] Although § 633a is meant to be protective, an unencumbered "mixed-motive" standard would be too deferential. Some proof that discrimination is the foundation for the discriminatory action is needed. Neither the "but-for" test nor the "mixed-motive" analysis appears to be the ideal solution to the current state of ambiguity.

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[139] *Gross*, 557 U.S. at 190–91 (Breyer, J., dissenting) (discussing the differences between the facts that generally give rise to tort law causation and the facts in *Gross*).

[140] *Id.* at 190. It should be noted that subjective intentions often play a crucial role in tort law cases as well. Claims such as defamation, material misrepresentation, and fraud all rely on proof of intent. The issue is not necessarily that tort law is an inadequate means of analyzing subjective intent, as Justice Breyer implies, but more generally, that subjective intent is never an easy point to prove.

[141] *Id.*

[142] Acknowledging this onerous burden, tort law often looks to the materiality of an event in determining if it is a cause. Where two forces are sufficient to bring about a harm, a party may prove that one event was "material" to the outcome. The harm may have still occurred without the event, but the event was a "substantial factor" nonetheless. *See* KEETON ET AL., *supra* note 60, § 41, at 267–69.

[143] *Gross*, 557 U.S. at 174.

[144] Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J., dissenting).

A substantial factor test would be more practical than *Gross*' inflexible "but-for" requirement and *Price Waterhouse*'s lenient and unworkable "mixed-motive" burden shifting analysis. While the language of § 633a does not specifically provide that age must be a "substantial factor," such a test would nonetheless be compatible with the "any discrimination based on age" language. As previously discussed, the plain meaning of this language, as gleaned from dictionary definitions, is that age must be the foundation upon which the decision is based.[145] Requiring something to be a "substantial factor" would ensure that it is an integral part of the decision, as the language of the statute requires. Unlike the "but-for" test, age need not be *the* reason for the action. So long as age is a substantial factor, the claim may be brought. Unlike the "mixed-motive" analysis, age cannot just be *a* factor. Rather, it must be a substantial factor in order for the claim to be brought.

The causation principles of tort law could be drawn upon in formulating such a "substantial factor" analysis. Many different areas of law borrow from tort law's extensive causation jurisprudence.[146] Among these are anti-trust,[147] civil RICO,[148] and securities laws.[149] In anti-trust law, causality analysis is based on the tort understanding of proximate cause.[150] Antitrust law provides the framework, while tort law provides the substance of the causation analysis. "The antitrust violation need not be the only cause of [an] injury, but it must be a material or substantial cause."[151] In civil RICO claims, the Court has used tort concepts of causation to explain what a plaintiff must prove in order to recover treble damages. The need for a direct relationship between the conduct alleged and the injury asserted is dependent upon the tort theory of proximate cause.[152]

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[145] *See* discussion *supra* Part III.A.

[146] *See* Michael A. Carrier, *A Tort-Based Causation Framework for Antitrust Analysis*, 77 ANTITRUST L.J. 991, 991–92 (2011).

[147] Stephen V. Bomse et al., *Procedural Aspects of Private Antitrust Litigation*, *in* 47TH ANNUAL ADVANCED ANTITRUST SEMINAR —DISTRIBUTION & MARKETING, at 771 (PLI Corp. L. & Practice, Course Handbook Series No. 14482, 2008).

[148] Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268–69 (1992).

[149] Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 344 (2005).

[150] Bomse et al., *supra* note 147 ("Causality analysis in antitrust cases borrows from tort law conceptions of proximate cause.").

[151] *Id.*

[152] *Holmes*, 503 U.S. at 268–69.

In securities fraud claims, the Court requires a showing of damages proximately caused by deception. As with RICO claims, this proximate cause standard borrows from tort law.[153]

In *Gross* itself, the Supreme Court turned to tort law to help explain the "but-for" causation that it was requiring in the age discrimination context.[154] The Court's explanation that "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it" was borrowed from *Prosser and Keeton on Torts*.[155] It therefore seems appropriate to borrow from tort law—and, for that matter, from the same treatise—to provide a test for § 633a as well.

In tort law, under the substantial factor test "[t]he defendant's conduct is a cause of the event if it was a material element and a *substantial factor* in bringing it about."[156] Substantial factor is a self-explanatory phrase, not needing further clarification or jury instruction.[157] Generally, a showing that something is a substantial factor will also be sufficient to prove "but-for" causation, but this is not always the case.[158] Something will be considered a "substantial factor" where "it [is] so indispensable a cause that without it the result would not have followed."[159] While this is similar to a "but-for" requirement, it is not exactly the same. "But-for" is interpreted to mean that the adverse action would not have occurred unless discrimination was present, whereas "substantial factor" provides that discrimination was *material* to the adverse employment action, but not necessarily the deciding factor.

A "substantial factor" test is preferable to a "but-for" test or "mixed-motive" analysis for a number of different reasons. First, it ensures that Congress' intent to afford more protection against a broad array of discrimination is satisfied without leading to preposterous results. It does this by requiring that age be a material factor in the adverse employment action. Something cannot be so trivial as to be immaterial, nor must it be so clear-cut that it is determinative. Second, the "substantial factor" test

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[153] *Dura Pharm., Inc.*, 544 U.S. at 344.

[154] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009) (quoting KEETON ET AL., *supra* note 60).

[155] *Id.* at 177 (quoting KEETON ET AL., *supra* note 60).

[156] KEETON ET AL., *supra* note 60, § 41, at 267 (emphasis added).

[157] *Id.*

[158] *Id.* at 267–68.

[159] *Id.* at 268.

is not dependent upon anything in § 623, keeping the sections separate as Congress intended. It is instead based solely on an independent reading of § 633a. Third, a "substantial factor" test is consistent with long-held principles of tort law long adopted by the Court to resolve statutory ambiguity.

Finally, a "substantial factor" test makes sense in light of the unique evidentiary problems presented by employment discrimination cases. Such a test does not require a plaintiff to know things about her employer that would be impossible to discern. Instead, it allows an employee to proceed wherever there is proof that age was a substantial factor regardless of other circumstances at play. It holds federal employers to a higher burden than their non-federal counterparts in accordance with historical traditions. The "substantial factor" approach could help solve many of the problems associated with both "mixed-motive" and "but-for" causation.

In the hypothetical posed at the beginning of this Note,[160] an employee was fired after leaving a review upon being told that the office would "be better off with someone younger." The reason given for her termination was insubordination, stemming from her storming out of the office without permission.

Under the "mixed-motive" test, this employee would be able to meet her burden of proof at trial because the evidence suggests that age was a factor in her firing. However, an employee armed with much less evidence would also be able to bring the same claim, opening the employer up to a great deal of liability over even trivial matters.

Under the "but-for" test, this employee would not be able to meet her burden of proof at trial. She would be required to show that "but-for" her age, she would not have been fired. This would be difficult since age was not given as the reason for her firing, and her insubordination alone was reason enough to terminate her. Even if she can prove that her employer had an underlying discriminatory intent, this is irrelevant unless her firing would not have occurred without it. Her employer's discrimination would be irrelevant.

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[160] *See supra* Introduction (hypothesizing based on Harley v. Potter, 416 F. App'x 748 (10th Cir. 2011) *cert. denied sub nom.* Harley v. Donahoe, 132 S. Ct. 844 (2011)).

Under a "substantial factor" test, the fired post office employee could succeed in meeting her burden of proof at trial. She would have to show that her age was a substantial factor in her termination. Evidence of her supervisor's derogatory statements about her would likely suffice to meet this burden. The "substantial factor" test would let the employee prove that her supervisor's biased attitude toward her based on her age was *material* to her termination. Although she may not be able to show that she would not have been fired "but-for" her age, she would still be able to win because of the materiality of the discrimination to the end result. Of these three tests, the "substantial factor" test would therefore bring about the most just result and provide employees with a reasonable degree of protection, as intended by the ADEA.

CONCLUSION

Age discrimination is not an issue that is likely to go away any time soon; the average age of the American worker will continue to rise for years to come. The measures in place to deter age discrimination in the workplace are as important today as they were when the ADEA was enacted forty years ago. It is crucial that courts interpret the various sections of the ADEA consistently, so that plaintiffs know what is required of them when bringing an ADEA claim. While the tests for each section need not be the same, they should each be distinctly established. Although the Supreme Court took an important step toward causational clarity through its § 623 interpretation in *Gross*, the § 633a causation requirement is no clearer today than it was before *Gross* was decided.

Because of the textual differences between the two sections, as well as the different policies in play distinguishing federal employees from their non-federal counterparts, *Gross* should not be extended to § 633a, as several courts have already held. Rather than the § 623 "but-for" causation requirement, courts should consider a "substantial factor" test, as already developed and proved effective in tort law.

Because of the importance of this issue and the unfortunate continued prevalence of age discrimination in the workplace, a determinative legislative or judicial solution to the problems described above should occur in the near future. Until then, § 633a causation remains a *Gross* mess.