Life After Gross: Creating a New Center for Disparate Treatment Proof Structures

Mark R. Deethardt

Repository Citation
Life After *Gross*: Creating a New Center for Disparate Treatment Proof Structures

TABLE OF CONTENTS

Introduction ............................................................................................................. 188

I. The Center and the Gyre of Disparate Treatment Proof Structures .................................................. 192
   A. The Center ............................................................................................................ 193
   B. The Gyre—The Spiraling Out of Control of Disparate Treatment Proof Structures ................. 197

II. The Aftermath of *Gross* and the Widening Gyre ................................................................. 200
   A. *Serwatka v. Rockwell Automation, Inc.: Gross* and the ADA ........................................... 200
   B. *Smith v. Xerox: Gross* and Title VII Retaliation ...................................................... 201

III. Reeling in the Gyre: The Practical and Theoretical Reasons for a New Center ....................... 203
   A. *Gross v. FBL Financial Services*: A Woeful Decision .................................................. 203
      1. Flaws in *Gross*’s Reasoning .............................................................................. 204
      2. Flaws in the Practical Application of *Gross* ......................................................... 207
   B. The Scope and Effects of *Serwatka* and *Smith* ...................................................... 209
      1. *Serwatka*: The Gyre Expands to Encompass the ADA ............................................ 209
      2. *Smith*: One Step Forward, Two Steps Back ....................................................... 214
   C. *Gross* Beyond the Context of Employment Discrimination Law ....................................... 216
   D. The Theoretical and Practical Reasons for a Mixed-Motives Framework ............................. 218

IV. The Protecting Older Workers Against Discrimination Act: A New Center .................................. 220

Conclusion ............................................................................................................... 223
One commentator has called disparate treatment law "fundamentally incoherent." A better description is incoherent and impractical. Consider a 55-year-old African-American employee who is fired after filing a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that he was denied a promotion based on his race. This employee also has evidence that the manager who fired him frequently made racist and ageist comments. This individual has Title VII and Age Discrimination in Employment Act (ADEA) disparate treatment claims and a Title VII retaliation claim. Under the current state of employment discrimination law, this employee would have to prove each claim.

2. The two types of employment discrimination claims are disparate treatment (intentional discrimination) and disparate impact (unintentional discrimination). The two claims are distinguished as follows: Broadly speaking, it may be said that there are two generic forms of employer conduct actionable under Title VII. First, there are a variety of forms of intentional discrimination, "disparate treatment" . . . More controversial is employer liability for neutral, that is facially nondiscriminatory, work practices that have greater adverse statistical impact on members of the plaintiff's protected group . . . than on others. Harold S. Lewis, Jr. & Elizabeth J. Norman, Employment Discrimination Law and Practice 164–65 (2nd ed. 2004); see also Martin J. Katz, The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law, 94 Geo. L.J. 489 (2006).
3. Title VII's retaliation provision states that if it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . 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.
using a different proof structure.\(^5\) The results of these conflicting evidentiary structures are that the employee may have difficulty pleading and determining how to prove his claims,\(^6\) the judge may have trouble evaluating the sufficiency of the evidence and instructing the jury on each method of proof, and the jury may misunderstand the instructions and reach erroneous conclusions. Furthermore, the current system for proving employment discrimination prevents the employee from recovering damages for some claims even if the jury finds that the employer intentionally discriminated.\(^7\) A system riddled with such impracticalities is ill-suited for achieving the lofty goal of employment discrimination law, which is to place all employees on an equal footing by deterring discrimination and compensating its victims.\(^8\)

How plaintiffs prove disparate treatment claims under Title VII, the Americans with Disabilities Act (ADA), and the ADEA is one of the most important concepts of employment discrimination law.\(^9\) The proof structures that the Supreme Court has developed to guide disparate treatment plaintiffs dictate every phase of litigation and are an integral part of the law’s overall scheme.\(^10\) These structures form

---

5. The term proof structure means the “paths for proving [employment] discrimination set out by different Supreme Court opinions and statutes.” Martin J. Katz, Gross Disunity, 114 Penn St. L. Rev. 857 n.1 (2010).

6. Since 2007, the Supreme Court has heightened the pleading requirements under the Federal Rules of Civil Procedure by stating that a complaint must allege enough factual matters to state a claim that is “plausible” on its face. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Since the Court adopted these new pleading standards, Title VII plaintiffs have had difficulty stating “plausible” employment discrimination claims. See Joseph A. Seiner, The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases, 101 U. Ill. L. Rev. 1011 (2009) (analyzing distinct court dismissal rates of employment discrimination claims in the year before and after Twombly and finding that a greater percentage of cases were dismissed when courts cited the new Supreme Court standards). When coupled with the various proof structures, the heightened federal pleading requirements make asserting and proving employment discrimination claims an arduous task.

7. See background infra Part III.A (discussing Serwatka).

8. See H.R. REP. NO. 102–40, pt. 2, at 17 (1991). The first goal of Title VII is to make whole the victims of discriminatory employment actions, and the second goal is to deter future discriminatory acts.


10. William R. Corbett, Fixing Employment Discrimination Law, 62 SMU L. Rev. 81, 115 (2009) (“[The proof structures] are used to draft pleadings, to conduct discovery, to move for summary judgment, to organize evidence for presentation at trial, to move for judgment as a matter of law, and to craft jury instructions.”).
the heart and soul of this vast body of law. If these proof structures are so fundamental, why, then, are they so incoherent?

Proving disparate treatment claims under federal anti-discrimination laws is such a vexing issue that Carter G. Phillips, a seasoned Supreme Court advocate, stated, "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is." Sorting out these proof structures is so difficult because the Supreme Court and lower courts have developed an amorphous body of case law to define these structures' applicability to Title VII, the ADEA, and the ADA. The Supreme Court has made these structures all the more confusing by sometimes not providing clear guidance and sometimes moving the law in unanticipated directions. This free-wheeling jurisprudence makes sorting out employment discrimination law a daunting task.

Commentators have developed various analogies to help sort out the history of disparate treatment proof structures. Most commentators, however, agree that this history has led the law to the undesirable destinations of disrepair and disunity. The scholarly consensus is that congressional reform is necessary to repair and unify these proof structures.


12. For an example of the Court not providing clear guidance, see background infra Part II.B (discussing Desert Palace); for an example of the Court moving the law in unanticipated directions, see background and discussion infra Parts II.B, III.A (discussing Gross).

13. See Corbett, supra note 10, at 115–16 (analogizing disparate treatment proof structures to a broken down car and Congress needing to repair the car by giving it a new engine); William R. Corbett, Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?, 12 U. PA. J. BUS. L. 683 (2010) [hereinafter Corbett, Babbling] (analogizing Congress to an architect crafting a Title VII blueprint, with the Supreme Court and federal courts acting as the subordinate builders who must read the blueprint and create proof structures to define what “because of” a protected characteristic means); Martin J. Katz, Unifying Disparate Treatment (Really), 59 HASTINGS L.J. 643, 645–52 (2008) (analogizing disparate treatment jurisprudence to a swamp in which commentators and courts are bogged down).

This Comment conceptualizes the history of disparate treatment law as marked by a sound center, followed by an expanding gyre of amorphous jurisprudence that has moved the law away from this center. The center of disparate treatment proof structures is the dual burden-shifting frameworks, *McDonnell Douglas* and *Price Waterhouse* (as modified by the Civil Rights Act of 1991). A series of Supreme Court decisions culminating in *Gross v. FBL Financial Services, Inc.* has caused employment discrimination law to spiral away from its center and the policy goals embodied within it. *Gross*’s holding—that a mixed-motives jury instruction is never proper in an ADEA disparate treatment case—has and will continue to have damaging consequences.

Two post-*Gross* appellate court decisions—*Serwatka v. Rockwell Automation, Inc.* and *Smith v. Xerox Corporation*—illustrate *Gross*’s potential to expand and engulf other anti-discrimination and anti-retaliation laws. *Gross*’s most severe consequence is that ADA and Title VII retaliation plaintiffs may soon be unable to prove claims using a mixed-motives analysis.

*Gross* and its progeny will ultimately expand the gyre of disparate treatment proof structures to the point where they will become severed from their center. *Serwatka* and *Smith* serve as windows through which to view *Gross*’s pernicious consequences. These two decisions, in different ways, illustrate the need for Congress to wheel in this gyre and create a new center for disparate treatment proof structures.

Congress’ best option for creating this new center is the Protecting Older Workers Against Discrimination Act (POWAD Act). Although this Act will overturn *Gross*, it is not flawless. In order to move employment discrimination law in a sensible direction, Congress should pass an amended version of the Act. If

---


15.  See background *infra* Part I.A.
18.  *Serwatka*, 591 F.3d 957 (7th Cir. 2010) (applying *Gross* to the ADA); *Xerox*, 602 F.3d 320 (5th Cir. 2010) (considering, yet refusing, to apply *Gross* to Title VII’s retaliation provision).
20.  See discussion *infra* Part IV.
21.  See discussion *infra* Part IV.
Congress passes the Act without any fine-tuning, it will allow employment discrimination law to continue marching out of step.

This Comment is divided into four parts. Part I traces the history of disparate treatment proof structures from their origins in *McDonnell Douglas* to their ultimate confusion in *Gross*. Part II continues this history, providing a brief exposition of *Serwatka* and *Smith*. Part III begins with a discussion of *Gross*’s flaws and why its effects are undesirable. Part III further discusses *Serwatka* and *Smith* and how these two decisions are illustrative of *Gross*’s expansive nature. Before discussing congressional reform to create a new center for disparate treatment proof structures, one must understand why a mixed-motives structure is desirable. Part III therefore analyzes the desirability of a unified mixed-motives proof structure. Part IV concludes this Comment with a discussion of the Protecting Older Workers Against Discrimination Act, its beneficial and undesirable qualities, and the changes Congress should consider before passing it as the new center for disparate treatment proof structures.

I. THE CENTER AND THE GYRE OF DISPARATE TREATMENT PROOF STRUCTURES

The history of proof structures for Title VII, ADEA, and ADA disparate treatment claims is convoluted. There are, however, several landmarks that one must visit in order to properly trace this history. This section traces the history of disparate treatment proof structures in two parts. The first part traces these structures’ core and developments through *McDonnell Douglas*, *Price Waterhouse*, and the Civil Rights Act of 1991. The second part discusses the structures’ expansions via *Desert Palace, Inc. v. Costa* and *Gross*.

Title VII of the Civil Rights Act of 1964 is the origin of the proof structures. In *McDonnell Douglas* and *Price Waterhouse*, the first two landmarks, the Supreme Court articulated two burden-shifting frameworks that plaintiffs could use to bring Title VII disparate treatment claims. The next important landmark is the Civil Rights Act of 1991, which amended Title VII to incorporate a modified version of the *Price Waterhouse* mixed-motives structure.

---

23. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). *McDonnell Douglas* and *Price Waterhouse* specifically addressed characteristics—race and gender—prohibited by Title VII, but this fact did not stop the Supreme Court and lower courts from applying both proof structures to the ADEA, the ADA, and Title VII retaliation claims. See Katz, supra note 13, at 668–69; Prenkert, supra note 14, at 547–56.
directly into the statute. The final stopping points are two Supreme Court cases that interpreted the 1991 Act. In Desert Palace and Gross, the Court interpreted and restricted the 1991 Act in ways that have confused courts and commentators as to which proof structure is applicable under each anti-discrimination statute.

A. The Center

In 1964 Congress passed Title VII of the Civil Rights Act. This statute is the foundation of federal employment discrimination law. By promulgating Title VII, "Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." Title VII's operative provision states that it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of" five protected characteristics—race, color, religion, sex, and national origin. Congress, however, did not define the term "because of" in the statute’s definitions provision. The chore of defining the phrase "because of" fell to the federal courts, which devised proof structures designed to guide plaintiffs in bringing disparate treatment claims and proving that an employer intentionally discriminated based on a protected characteristic.

The Supreme Court, in attempting to define "because of," created two frameworks that form the core of employment discrimination and retaliation claims. The Court created the first disparate treatment proof structure—the pretext proof structure—in McDonnell Douglas Corporation v. Green. McDonnell Douglas addressed what is and who bears the burden of proof in private, non-class-action employment discrimination suits. The Court created a three-part, burden-shifting structure to answer these two questions.

27. Price Waterhouse, 490 U.S. at 239.
30. Prof. Corbett articulated this development by analogizing Congress to an architect crafting a Title VII blueprint. The Supreme Court and federal courts, however, are the builders who must read the blueprint and create the proof structures that define what "because of" a protected characteristic means. Corbett, Babbling, supra note 13, at 683.
32. Id. at 801.
33. Id. at 802–04.
The first step of the McDonnell Douglas paradigm requires a Title VII disparate treatment plaintiff to establish a prima facie case of discrimination. Once the plaintiff establishes his prima facie case, he creates a legally mandatory, but rebuttable, presumption of discrimination. The burden then shifts to the defendant—employer to rebut this presumption by articulating a nondiscriminatory reason for the adverse employment action. If the employer can articulate a nondiscriminatory reason, the employee then has an opportunity to demonstrate that the articulated reason was a mere pretext given to disguise an unlawful, discriminatory act.

McDonnell Douglas remained the sole proof structure for Title VII disparate treatment claims until the Court decided Price Waterhouse v. Hopkins in 1989. In this seminal decision, the Court addressed the burdens of proof in a case where both legitimate and illegitimate factors played a role in an adverse employment decision. A plurality of the Court and two concurring justices agreed that a mixed-motives proof structure should be available to Title VII disparate treatment plaintiffs. The plurality created a proof structure in which the plaintiff could shift the burden of persuasion to the defendant by showing that a protected factor played a motivating role in the adverse employment decision. Under the Price Waterhouse analysis,

34. Id. McDonnell Douglas laid out a five-part prima facie case for racial discrimination. The Court, however, cautioned that the facts in each Title VII claim would vary, and therefore, the prima facie case the Court laid out would not be applicable to every Title VII claim. Id. at 802 n.13.
35. Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (“The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff’s rejection.”).
36. McDonnell Douglas, 411 U.S. at 802. The Court would later qualify McDonnell Douglas’ second step in Texas Department of Community Affairs v. Burdine. Burdine stated that the employer only bears the burden of producing a nondiscriminatory reason for the adverse employment action and that the ultimate burden of persuasion in the pretext analysis always remains with the plaintiff. 450 U.S. at 253, 259.
39. Id. at 232.
40. The mixed-motives designation comes from the fact that Price Waterhouse relied on both legitimate and illegitimate factors in its decision to deny Ann Hopkins a promotion. Hopkins claimed she was denied partner status because of “overtly sex-based comments of partners,” and Price Waterhouse claimed that it denied Hopkins a promotion due to her abrasive nature and lack of interpersonal skills. Id. at 231–35.
41. Id. at 258; id. at 276 (O’Connor, J., concurring); id. at 258–61 (White, J., concurring).
42. Id. at 244, 258.
once the burden shifts to the defendant, the defendant can avoid liability by proving that it would have made the same decision even if it had not considered the prohibited factor.43

Justice O’Connor’s concurrence, however, became the controlling opinion.44 Justice O’Connor stated that in order for a plaintiff to access the mixed-motives structure, the plaintiff would have to “show by direct evidence an illegitimate criterion was a substantial factor in the adverse employment decision.”445 Justice O’Connor’s concurrence prompted a fair amount of scholarly criticism.46

But, at least after Price Waterhouse, a solidified pattern for proving disparate treatment emerged: (1) if a plaintiff produced direct evidence, then a court would hear the claim under Price Waterhouse; and (2) if the plaintiff produced circumstantial evidence, then a court would hear the claim under McDonnell Douglas.47

This relatively strong core began to erode when Congress amended Title VII in 1991. Congress strongly disapproved of Price Waterhouse’s same-decision affirmative defense.48 The House Judiciary Committee chastised the Court for “undercut[ing] the prohibition against invidious discrimination, [and] threatening to undermine Title VII’s twin objectives of deterring employers

43. Id. at 258. The plurality referred to the defendant’s burden in this analysis as a same-decision affirmative defense. Id. at 246. The Price Waterhouse standard of causation is best characterized as motivating-factor causation for burden-shifting and but-for causation for liability. Katz, supra note 5, at 862.

44. See Griffith v. City of Des Moines, 387 F.3d 733, 743 (8th Cir. 2004) (Magnuson, J., concurring specially) (“Since Price Waterhouse . . . the analysis appropriate at the summary judgment stage depended on the evidentiary distinction made by Justice O’Connor.”). See also Michael J. Zimmer, The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?, 53 EMORY L.J. 1887, 1910 (2004) (“Had Justice Brennan garnered a majority, Price Waterhouse would have drastically expanded the possibilities for plaintiffs to prove discrimination, even if the exact relationship between McDonnell Douglas and Price Waterhouse was unclear. To construct a decision of the Court, however, it was necessary to look to one of the concurring opinions.”).

45. Price Waterhouse, 490 U.S. at 276 (O’Connor, J., concurring).

46. The major criticism of Justice O’Connor’s concurrence is that she did not define direct evidence and thereby caused appellate courts to split four ways over a proper definition. See Katz, supra note 13, at 647.

47. See Corbett, Babbling, supra note 13, at 703 (“[T]he pretext analysis created by McDonnell Douglas and the mixed-motives analysis created by Price Waterhouse were the twin pillars in disparate treatment litigation.”).

48. Price Waterhouse, 490 U.S. at 258. The Court defined the same-decision affirmative defense as follows: “[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.” Id.
from discriminatory conduct and redressing the injuries suffered by victims of discrimination." The Committee drove home its disapproval by stating that the same-decision affirmative defense sent "a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action."

Congress manifested its displeasure by enacting two amendments to Title VII. First, Congress codified the mixed-motives proof structure by writing it into Title VII's unlawful employment practices provision. Second, to combat the unwanted consequences of the same-decision affirmative defense, Congress changed the defense from a complete bar on recovery to a limitation on the damages plaintiffs could recover. With one swipe, Congress overruled the applicability of Price Waterhouse's same-decision affirmative defense to Title VII disparate treatment claims. But, because of the lingering effects of Justice O'Connor's direct/circumstantial evidence dividing line and the fact that there were now three proof structures—McDonnell Douglas, Price Waterhouse, and the 1991 Act—disparate treatment law began spiraling away from its core.

After the 1991 Act, confusion ensued as to how plaintiffs were supposed to bring claims under the various anti-discrimination statutes. District courts tried Title VII disparate treatment claims under the 1991 Act only if a plaintiff produced direct evidence. In cases where a plaintiff produced only circumstantial evidence, district courts continued to hear cases using McDonnell Douglas. Furthermore, even if courts used a burden-shifting framework to analyze ADA and ADEA disparate treatment claims and Title VII

51. See 42 U.S.C. § 2000e-2(m) (2006) ("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.").
52. See 42 U.S.C. § 2000e-5(g)(B) (2006) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief . . . and attorney's fees and costs . . . [and] (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."
54. Id. For the most succinct summation of the permutations of the proof structures and their effect on federal anti-discrimination employment statutes, see the tables in Prof. Katz's article Unifying Disparate Treatment (Really), supra note 13, at 647, 649–50, 654.
retaliation claims, they continued to apply the pre-1991
direct/circumstantial evidence dividing line.\textsuperscript{55}

The 1991 Act, while well-intentioned, ultimately marked the
beginning of employment discrimination law's spiral away from its
center. As the Supreme Court continued to interpret the 1991 Act,
this center would begin to crack, and an expanding gyre would
move away from these burden-shifting foundations and the dual
policy goals of compensation and deterrence.

\textbf{B. The Gyre—The Spiraling Out of Control of Disparate Treatment
Proof Structures}

In 2003, the Court decided \textit{Desert Palace, Inc. v. Costa}.\textsuperscript{56} In
\textit{Desert Palace}, the Court jettisoned Justice O'Connor's
direct/circumstantial evidence dividing line for Title VII disparate
treatment claims.\textsuperscript{57} Pointing to the 1991 Act's silence as to the
evidentiary requirements necessary to access the mixed-motives
structure, a unanimous Court reasoned that it should not deviate
from the general principles of civil litigation, which allow a
plaintiff to prove his claim through a preponderance of either direct
or circumstantial evidence.\textsuperscript{58} Given the difficulty in obtaining
direct evidence of an employer's discriminatory intent, the Court's
holding was encouraging for potential Title VII disparate treatment
claimants.\textsuperscript{59}

The Court did not cause confusion by what it said, but rather
by what it failed to say. In a footnote, the Court stated that the case
did not require a ruling on whether its holding applied to claims
outside of the 1991 Act's framework.\textsuperscript{60} By remaining tacit, the
Court left two questions unanswered. First, in the absence of a
direct/circumstantial evidence dividing line, when, if ever, is the
\textit{McDonnell Douglas} framework applicable? And second, does the

\begin{footnotes}
\footnote{55. \textit{Id.} at 648-49.}
\footnote{56. 539 U.S. 90.}
\footnote{57. \textit{Id.} at 101 (holding, "In order to obtain an instruction under § 2000e-3(m), 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 nation origin' was a motivating factor for any employment practice.").}
\footnote{58. \textit{Id.} at 99.}
J., concurring) ("[D]irect evidence of intentional discrimination is hard to come
by."); \textit{Corbett, Babbling, supra} note 13, at 702 ("Generally, Desert Palace moved
the law in a positive direction for employees/plaintiffs under Title VII . . . .")}.
\footnote{60. \textit{Desert Palace}, 539 U.S. at 94 n.1 ("This case does not require us to
decide when, if ever, § 107 applies outside of the mixed-motives context.").}
\end{footnotes}
dissolution of the direct/circumstantial evidence dividing line have applicability outside of the 1991 Act framework? 61

*Desert Palace*’s silence put lower courts in a precarious position. Lower courts had to ask whether there were two or three proof structures and when these structures applied. 62 Ultimately, *Desert Palace* left lower courts with no guidance to help claw their way out of this pit. 63 The lower courts could not heed the directions of the Supreme Court, because the Court refused to direct. 64

*Desert Palace* furthered employment discrimination law’s movement away from a relatively simple core of dual burden-shifting paradigms. The outward movement caused by *Desert Palace* began a period of uncertainty in employment discrimination law that continues today. 65 The fundamental question of how plaintiffs prove disparate treatment claims has now become undecipherable and unanswerable.

This trend of the law moving away from its foundations reached an apex in 2009 when a divided Court decided *Gross v. FBL Financial Services, Inc.* 66 In *Gross*, the Court granted certiorari to address whether, in the aftermath of *Desert Palace*, the direct/circumstantial evidence dividing line was still applicable to

---

61. See Corbett, Babbling, supra note 13, at 701. Some courts, however, applied *Desert Palace*’s dissolution of the direct/circumstantial evidence dividing line to statutes—the ADA, the ADEA, and anti-retaliation provisions—other than the 1991 Act. For an exhaustive list of cases that applied *Desert Palace* outside of the 1991 Act framework see Katz, supra note 13, at 650 n. 30.

62. Corbett, Babbling, supra note 13, at 706. After *Desert Palace*, appellate courts were left to ponder whether to apply only *Price Waterhouse* and the 1991 Act framework or whether to apply these two frameworks plus *McDonnell Douglas* to disparate treatment claims.

63. Corbett, supra note 10, at 99.

64. The Fifth Circuit’s decision in *Rachid v. Jack in the Box* is paradigmatic of the dilemma of lower courts post-*Desert Palace*. 376 F.3d 305 (5th Cir. 2004). The Fifth Circuit, left with only its ingenuity, articulated a modified *McDonnell Douglas* approach in which it fused the pretext and mixed-motives proof structures into one analysis. Id. at 312. *Rachid* articulated this hybrid test in an ADEA disparate treatment case. Id. at 308. The first two phases of this unified structure followed *McDonnell Douglas*. Id. at 312. At the third phase, however, the plaintiff could exercise two options: (1) show that the employer’s proffered reason was a mere pretext for covering up a discriminatory act; or (2) show that the employer’s proffered reason, while true, was only a motivating factor that worked in conjunction with a prohibited factor. Id. *Rachid* is illustrative of the post-*Desert Palace* landscape, in which lower courts were left to their own devices in applying the various proof structures to different anti-discrimination statutes.

65. See generally Corbett, Babbling, supra note 13; Corbett, supra note 10; Katz, supra note 13; and Katz, supra note 5.

66. 129 S. Ct. 2343.
ADEA disparate treatment claims.\textsuperscript{67} Many observers justifiably thought that \textit{Gross} would be \textit{Desert Palace II}.\textsuperscript{68} The Court, however, answered a much broader question.\textsuperscript{69} The majority held a mixed-motives framework is never applicable in ADEA disparate treatment cases.\textsuperscript{70} Instead, an ADEA disparate treatment plaintiff must prove his claim by showing that age was the but-for cause of the challenged employment action.\textsuperscript{71} Justice Thomas based the majority’s holding on three arguments: (1) a limited amendment argument, which stated that Congress had the opportunity to amend the ADEA in 1991 to include a mixed-motive framework but failed to do so;\textsuperscript{72} (2) an argument that the phrase “because of,” in its ordinary use, means “but-for” causation; and (3) an argument that the \textit{Price Waterhouse} analysis is doctrinally unsound, difficult to apply, and should be discarded.\textsuperscript{73}

Justice Stevens, in a forceful dissent, countered the majority by attacking the plain language argument, stating that “because of” is not “colloquial short-hand for but-for causation.”\textsuperscript{74} Justice Stevens’ most cogent counterargument was the fact that the majority’s definition of “because of” stood in direct contrast to the \textit{Price Waterhouse} and 1991 Act definitions, both of which defined “because of” as including motivating-factor causation.\textsuperscript{75}

Justice Breyer, in a separate dissent, emphasized the difference between standards of causation in the context of tort and employment discrimination law, and the inappropriateness of but-for

\textsuperscript{67} Id. at 2346 (“The question presented by petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed motives jury instruction in a suit brought under the . . . [ADEA].”).

\textsuperscript{68} Corbett, \textit{Babbling}, supra note 13, at 702.

\textsuperscript{69} See infra note 108.

\textsuperscript{70} \textit{Gross}, 129 S. Ct. at 2352.

\textsuperscript{71} \textit{Id}.

\textsuperscript{72} \textit{Id.} at 2349. Using the limited amendment argument, the Court presumed that Congress acted intentionally in its failure to simultaneously amend Title VII and the ADEA. This intentional difference, the Court reasoned, indicated a different standard of causation under each of the statutes. \textit{Id}.

\textsuperscript{73} \textit{Id}. at 2349–52.

\textsuperscript{74} \textit{Id}. at 2354 (Stevens, J., dissenting). Justice Stevens rightfully characterized the majority’s holding as “an unabashed display of judicial lawmaking.” \textit{Id}. at 2358.

\textsuperscript{75} \textit{Id}. at 2358 (“The Court’s endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in \textit{Price Waterhouse} and by Congress in the Civil Rights Act of 1991. Yet today, the Court resurrects the standard in an unabashed display of judicial lawmaking.”).
causation in the latter.\textsuperscript{76} Both dissents highlight the fact that, from the beginning, the majority's reasoning was riddled with flaws.

The \textit{Gross} Court caused the proof structures to spiral further away from their burden-shifting center. In the aftermath of \textit{Gross}, one can only be certain that a mixed-motives analysis is applicable to disparate treatment claims brought under the 1991 Act. Unfortunately, \textit{Gross}'s limited amendment argument has broad applicability. Lower courts have used and potentially will use \textit{Gross}'s reasoning to further fragment disparate treatment proof structures.

\section*{II. The Aftermath of Gross and the Widening Gyre}

Since \textit{Gross}, two appellate courts have decided cases that take divergent paths in interpreting the decision.\textsuperscript{77} These two appellate court decisions could have a significant impact on the way lower courts may or may not apply \textit{Gross} to employment discrimination statutes outside of the ADEA.\textsuperscript{78}

\textbf{A. Serwatka v. Rockwell Automation, Inc.: Gross and the ADA}

In 2010, the Seventh Circuit decided \textit{Serwatka v. Rockwell Automation, Inc.}\textsuperscript{79} In \textit{Serwatka}, an employee, Kathleen Serwatka, brought an ADA disparate treatment claim, alleging that her employer Rockwell Automation fired her because it perceived her as disabled.\textsuperscript{80} The district court allowed Serwatka to assert her claim using the \textit{Price Waterhouse} mixed-motives framework.\textsuperscript{81} A jury found that Rockwell partially based its decision to terminate Serwatka on a perceived disability.\textsuperscript{82} Using the \textit{Price Waterhouse} analysis, however, the jury concluded that Rockwell would have fired Serwatka even if Rockwell had not considered the perceived

\footnotesize{
\textsuperscript{76} \textit{Id.} at 2358–59 (Breyer, J., dissenting) (“But it is an entirely different matter to determine a ‘but-for’ relation when we consider, not physical forces, but the mind-related characterizations that constitute motive.”).
\textsuperscript{77} \textit{Compare} \textit{Serwatka v. Rockwell Automation, Inc.}, 591 F.3d 957, 962 (7th Cir. 2010) (holding that \textit{Gross}'s construction of “because of” as but-for causation under the ADEA is applicable to the ADA) \textit{with} \textit{Smith v. Xerox Corp.}, 602 F.3d 320, 329–30 (5th Cir. 2010) (declining to apply \textit{Gross} to Title VII retaliation claims and stating that “the \textit{Price Waterhouse} holding remains our guiding light.”).
\textsuperscript{78} \textit{See} discussion \textit{infra} Parts III.B, III.C.
\textsuperscript{79} 591 F.3d 957.
\textsuperscript{80} \textit{Id.} at 958.
\textsuperscript{81} \textit{Id.} at 958–59.
\textsuperscript{82} \textit{Id.} at 960.
}
disability. Therefore, the district court determined that Serwatka was only entitled to the limited damages provided by § 2000e(5)—declaratory and injunctive relief and attorneys fees.

On appeal, Rockwell argued that a mixed-motives analysis is inapplicable to the ADA. The Seventh Circuit therefore had to decide whether Gross’s holding encompassed ADA disparate treatment claims. The Serwatka court answered this question with an emphatic “yes,” holding that, under Gross, a mixed-motives theory of causation is never applicable to ADA disparate treatment claims.

The Serwatka court fully embraced Gross’s limited amendment argument to hold that the phrase “because of” in the ADA, like the phrase “because of” in the ADEA, necessitates a but-for standard of causation. Therefore, in order for an ADA disparate treatment plaintiff to succeed, he must show that the forbidden characteristic—in this case, the perceived disability—was the but-for cause of the adverse employment action. The court stated that because Serwatka could not show the perceived disability was the but-for cause of Rockwell’s employment decision, she was not entitled to relief under the ADA. Even though a jury found that Rockwell discriminated based on a perceived disability, Kathleen Serwatka, like Jack Gross, could not recover any damages due to the court’s rigid application of a but-for standard of causation.

B. Smith v. Xerox: Gross and Title VII Retaliation

In 2010, Gross reared its head again, but this time the Fifth Circuit determined whether to apply the limited amendment argument to Title VII’s retaliation provision. In Smith v. Xerox, the Fifth Circuit addressed two separate questions. The first question was whether the Desert Palace holding was applicable to

83. Id.
84. Id. The enforcement provision of the ADA states that the remedies available to an ADA plaintiff are the same as the remedies provided by 42 U.S.C. § 2000e-5 (Title VII’s enforcement provision). 42 U.S.C. § 12117 (2006).
85. Serwatka, 591 F.3d at 960.
86. Id. at 959.
87. Id.
88. Id. at 961–62.
89. Id. The ADA’s operative provision states that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112 (a) (2006).
90. Serwatka, 591 F.3d at 963.
91. Smith v. Xerox Corp., 602 F.3d 320, 322–23 (5th Cir. 2010).
Title VII retaliation claims, and the second question was whether, after Gross, a mixed-motives framework was even still applicable to these claims. In response to the first question, the Smith court found that Desert Palace was applicable to Title VII retaliation claims and erased the direct/circumstantial evidence dividing line that was previously applicable to them. In response to whether Gross’s holding was broad enough to engulf Title VII’s retaliation provision, the court found that Gross was limited to the ADEA and did not overrule prior Fifth Circuit precedent applying Price Waterhouse to Title VII retaliation claims. The Smith decision could have caused the gyre of disparate treatment jurisprudence to spiral further out of control. Fortunately, the Fifth Circuit drew a line in the sand and refused to expand the holding of Gross.

In holding that Gross was inapplicable to Title VII retaliation claims, the Smith court was inventive in its reasoning. The court stated that if Gross was premised on an aversion to intermingling statutory schemes, then extending Gross to retaliation claims and further intermingling the schemes of Title VII and the ADEA would be contrary to this “admonition against intermingling.” The Smith court further reasoned that because the Supreme Court never overruled Price Waterhouse, it would not, as an inferior court, overturn Price Waterhouse’s previous application to Title VII retaliation claims. The court emphasized that Gross did not overrule Fifth Circuit precedent applying Price Waterhouse to Title VII’s retaliation provision. The Fifth Circuit, in the absence of an express overruling of Price Waterhouse, refused to overturn its precedents.

Smith, however, contained a forceful dissent. The dissent lamented the majority’s creation of a split with the Seventh

92. Id. at 329, 332.
93. Id. at 332 (“[T]o the extent we have previously required direct evidence of retaliation in order to obtain a mixed-motives jury instruction in a Title VII case, our decisions have been necessarily overruled by Desert Palace. Smith therefore was not required to present direct evidence of retaliation in order to receive a mixed-motives jury instruction.”).
94. Id. at 329–30 (“[T]he Price Waterhouse holding remains our guiding light. Although the dissent would extend Gross into the Title VII context, we think that would be contrary to Gross’s admonition against intermingling interpretations of the two statutory schemes.”).
95. Id. at 329.
96. Id. at 330 n.30 (citing Rodriguez de Quijas v. Shearson, 490 U.S. 477, 484 (1989)).
97. Id. at 330.
98. Id.
99. Id. at 336 (Jolly, J., dissenting).
The dissent adopted Gross’s plain language and limited amendment arguments. Pointing to the fact that Title VII’s retaliation provision has the same “because of” language that Gross defined as but-for causation, the dissent argued that Title VII retaliation plaintiffs should have to prove but-for causation in order to prevail. The dissent also embraced the limited amendment argument, stating that the “carefully tailored” amendments made to Title VII in 1991 should be read as limiting the mixed-motives analysis to the statutory provision under which it was codified... Title VII discrimination only.

The Smith dissent took Gross to its logical extreme. By adopting the Seventh Circuit’s position that Gross holds but-for causation is part of a plaintiff’s burden under all federal statutes not providing otherwise, the dissent articulated the most expansive interpretation of Gross. This interpretation translates into a bar on mixed-motives in all non-Title VII disparate treatment claims. The Smith dissent clearly embraced this total bar on mixed-motives: “[T]he ‘because of’ language requires a plaintiff to demonstrate but-for causation. This is the standard that claimants under Title VII’s retaliation provision must meet in the post-Gross world.”

III. REELING IN THE GYRE: THE PRACTICAL AND THEORETICAL REASONS FOR A NEW CENTER

Gross and its progeny have the potential to expand the gyre of employment discrimination law to the point where it becomes severed from its foundation. In differing ways, Serwatka and Smith illustrate the need for congressional reform. Due to Gross’s expansion within employment discrimination law, Congress needs to reel this area of the law back in and create a new center for disparate treatment claims.

A. Gross v. FBL Financial Services: A Woeful Decision

Before one can understand why the spread of Gross is undesirable, one must first understand why Gross’s holding is undesirable. The criticisms of Gross are myriad and come from

100. Id.
101. Id. at 336–37.
102. Id. at 336.
103. Id. at 338.
104. Id. at 337 (citing Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010) and Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009)).
105. Id. at 338.
many sources. Several commentators have dissected Gross’s flaws, and House members have proposed legislation to overturn it. So far, Gross has not pushed employment discrimination law in a desirable direction. Rather, this woeful decision has created uncertainty and jeopardized the policy goals of employment discrimination law.

1. Flaws in Gross’s Reasoning

The major flaw in Gross’s reasoning—particularly with respect to its different construction of the same “because of” language in Title VII and the ADEA—is that it violates a fundamental canon of


107. See generally Corbett, Babbling, supra note 13; Harper, supra note 14; Katz, supra note 5.

108. An obvious criticism of Gross, though it falls outside the scope of this Comment, is that the Court answered a different question than the one for which it granted certiorari. Gross v. FBL Fin. Serv., Inc., 129 S. Ct. 2343, 2352 (2009) (Stevens, J., dissenting). Jack Gross asked the Court to address whether Desert Palace’s holding was applicable to ADEA disparate treatment claims. Id. at 2346. The Court, instead of answering this specific question, held that not only is Desert Palace inapposite in ADEA disparate treatment claims, but the entire mixed-motives framework is also inapposite. Id. at 2349. FBL Financial Services first asked the Court to overrule Price Waterhouse with respect to the ADEA in its merits brief. Brief for Respondent at 26, Gross v. FBL Fin. Serv., 129 S. Ct. 2343 (2009) (No. 08-441).

The Court, however, has previously stated that when a respondent intends to argue for dramatic changes in the law, the respondent should give notice of such arguments in its opposition to certiorari. See Alabama v. Shelton, 535 U.S. 654, 660 n.3 (2002). The purpose of requiring a respondent to assert such arguments in its opposition to certiorari is to give adequate time for the petitioner and potential amici curiae to prepare informed responses. Id. Justice Stevens lamented the fact that by addressing FBL’s argument, the Court answered a question that neither Gross nor his amici curiae had briefed. Gross, 129 S. Ct. at 2353 (Stevens, J., dissenting). The fact that the Court chose to answer a question that was not presented in the petition for certiorari reveals an underlying flaw of the decision, which is that Gross and his amici were not given fair notice of the fundamental issue the Court intended to resolve.
statutory interpretation, the unification canon. This canon is grounded in the presumption that when Congress uses a phrase, such as “because of,” in an earlier statute—Title VII—and then uses the same phrase in a later statute—the ADEA—it intends the phrase to have the same meaning. The unification canon’s guiding principle is that when Congress borrows language from one statute to draft another statute, courts should interpret the similar language of the two statutes consistently. The Court has endorsed this canon in dicta, stating that similarity in the language of two statutes “is . . . [a] strong indication that the two statutes should be interpreted pari passu.” Justice Stevens’ dissent further echoed this principle, stating that the majority’s different interpretation of the same critical language in two statutes was “unwise.”

Why then did Gross deviate from this canon and interpret “because of” in Title VII and the ADEA differently? This question is more perplexing given the fact that Price Waterhouse did not define “because of” as requiring a Title VII plaintiff to prove but-for causation, but rather as requiring a plaintiff to show that a protected characteristic motivated the employer’s adverse action. Moreover, the parties in Gross were not fighting over whether the 1991 Act definition applied to the ADEA, but rather whether the Price Waterhouse definition applied. After the passage of the 1991 Act, courts generally applied the Price Waterhouse framework to non-1991 Act cases. Because the parties in Gross were fighting over the 1964 meaning of “because of” under Title VII and the 1967 meaning of “because of” under the ADEA, Congress’ intent in the 1991 Act should have been irrelevant to the outcome of the case. Price Waterhouse clearly did not define

---

109. See Katz, supra note 5, at 866. When one compares Title VII and the ADEA, one can readily see that the “because of” language in the two statutes is identical. Title VII states that it unlawful for an employer to take certain adverse employment actions “because of . . . [an] individual’s race, color, religion, sex or nation origin.” 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added). The ADEA states that it is unlawful for an employer to take certain adverse employment actions “because of . . . [an] individual’s age.” 29 U.S.C. § 623(a)(1) (2006) (emphasis added).
110. Katz, supra note 5, at 868.
115. Katz, supra note 5, at 870.
116. See background supra Part I.A.
117. Katz, supra note 5, at 870.
“because of” as but-for causation.\textsuperscript{118} Gross, therefore, ignored a widely accepted canon of statutory interpretation with no justification for doing so.\textsuperscript{119}

Two other criticisms of Gross are the Court’s use of the ordinary meaning argument and its insistence that the Price Waterhouse framework is unworkable.\textsuperscript{120} The Gross Court looked to several dictionaries and a canonical torts treatise to conclude that “because of” means that the plaintiff’s age was the but-for cause of the adverse employment action.\textsuperscript{121} The Gross Court’s definition of “because of” is problematic for two reasons. The first reason is that people do not use “because of” and “but-for” interchangeably in everyday speech. Justice Stevens noted this point, stating that we do not think of the phrase “because of” as being “colloquial short-hand for but-for causation.”\textsuperscript{122} When one says an event occurred “because of” a certain factor, one may be referring to the most substantial causal factor, but one also implicitly realizes that many other factors contributed to causing the event.

The Senate debates on Title VII further illustrate the absurdity of defining “because of” as but-for causation.\textsuperscript{123} In response to Senator McClellan’s proposal to define Title VII violations as occurring only when a prohibited factor was the sole motivation for an adverse employment action, Senator Case stated, “If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.”\textsuperscript{124} Senator Case’s statement highlights a fundamental truth about causation that the Gross Court failed to acknowledge, which is that, especially in the subjective context of employment discrimination, many factors play a role in an adverse employment decision.

The second problem with Gross’s definition of “because of” is that while it is well-suited for tort law, it is ill-suited for employment discrimination law.\textsuperscript{125} In tort law, which deals with physical forces—a car smashing into another car or a fist smashing

\textsuperscript{118} Price Waterhouse, 490 U.S. at 240.
\textsuperscript{119} Katz, supra note 5, at 871.
\textsuperscript{120} Gross v. FBL Fin. Serv., Inc., 129 S. Ct. 2343, 2350, 2352 (2009).
\textsuperscript{121} Id. at 2350 (citing 1 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966); 1 OXFORD ENGLISH DICTIONARY 746 (1933); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966); and W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).
\textsuperscript{122} Id. at 2354 n.4 (Steven, J., dissenting).
\textsuperscript{123} 110 CONG. REC. 13,837–38 (1964).
\textsuperscript{124} Id.
\textsuperscript{125} See Gross, 129 S. Ct. at 2358–59 (Breyer, J., dissenting).
into a face—but-for causation is established through the objective, scientific process of eliminating all other possible causes.\footnote{126} In the contrasting context of employment discrimination law, one is not eliminating possible physical causes, but rather, one is searching for “the mind-related characterizations that constitute motive.”\footnote{127} A subjective motive, which works in concert with a host of other motives, is much more difficult to pinpoint than an objective physical action as the sole cause of an event.\footnote{128} This difficulty arises from the fact that individuals can perceive objective, physical events, whereas evidence of an employer’s subjective motives is often locked within the confines of the employer’s mind and inaccessible to an inquisitive plaintiff. Therefore, requiring an ADEA disparate treatment plaintiff to pinpoint age as the sole motive of an adverse employment action is nearly impossible and antithetical to the subjective nature of discriminatory employment actions.

The Gross Court further argued that Price Waterhouse should not apply to the ADEA because of the supposed practical difficulties in its application.\footnote{129} The Court, however, did not support this assertion with any actual examples of these difficulties.\footnote{130} By refusing to extend Price Waterhouse to ADEA disparate treatment claims, Gross created, rather than alleviated, practical difficulties in the application of the law. The practical effect of having two different standards of causation for Title VII and ADEA disparate treatment claims is to confuse judges, practitioners, and juries when plaintiffs assert multiple claims.\footnote{131}

2. Flaws in the Practical Application of Gross

The preceding points illustrate the flaws in Gross’s reasoning, but Gross is also undesirable because of its practical effects. Gross’s holding has caused several undesirable consequences that threaten the underlying policy goals of employment discrimination law.

Title VII’s dual policy goals are “deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination.”\footnote{132} These policy goals underlie and inform the ADEA as well.\footnote{133} Gross’s first practical consequence is

\begin{itemize}
  \item \footnote{126} \textit{Id.}
  \item \footnote{127} \textit{Id.}
  \item \footnote{128} Harper, supra note 14, at 84.
  \item \footnote{129} Gross, 129 S. Ct. at 2352.
  \item \footnote{130} \textit{Id.}
  \item \footnote{131} \textit{Id.} at 2357 (Stevens, J., dissenting); see introduction supra.
\end{itemize}
that it jeopardizes the goal of victim compensation. Gross, by defining “because of” as but-for causation, created a standard that allows discriminators to avoid liability more easily.\(^{134}\) Under the Gross standard, an employer can avoid liability as long as it can articulate some independently sufficient reason for the adverse employment decision.\(^{135}\) This standard is problematic because it provides would-be age discriminators with a shield from liability. Gross’s strict standard thus thwarts the ADEA’s underlying policy goal of victim compensation.

Gross’s second practical consequence is that a but-for standard of causation insufficiently deters age discrimination.\(^{136}\) If an employer knows that it can avoid liability by pointing to some independently sufficient reason—tardiness, failure to comply with company policies, insubordination—for an adverse employment action, then the employer will be less likely to second-guess taking an action that is based partially on age. Allowing employers to escape liability when making a decision based on both legitimate and illegitimate factors “sends a message that a little overt sexism or racism [or ageism] is okay, as long as it was not the only basis for the employer’s action.”\(^{137}\)

Gross’s holding also unfairly allocates a windfall to the defendant–employer.\(^{138}\) The but-for standard of causation puts the defendant–employer in a better position than it would have been absent a second, legitimate factor for the adverse employment action.\(^{139}\) The Gross standard lets the defendant–employer avoid all liability if it can articulate a legitimate reason, whereas the 1991 Act standard holds the defendant–employer liable for some damages even if it can articulate a legitimate reason.\(^{140}\) Gross, by

---

134. Katz, supra note 5, at 880, 884.
135. Id. at 884.
136. Id.
139. Id.

Suppose that a defendant considers age in its decision to demote the plaintiff (as Jack Gross alleged FBL did). And suppose that consideration of age alone would have resulted in the decision to demote. Absent a second, independent factor, the defendant would be liable and have to pay the plaintiff for the cost of his demotion. But suppose that the defendant were presented with a second, independently sufficient reason for its decision (such as corporate restructuring, as alleged by FBL). In such a case, a but-for standard would result in no liability—in a windfall for the defendant.
allowing the defendant–employer to escape all liability even when it is partially at fault, is antithetical to another general goal of the law, which is to prevent a windfall to either party. 141

Letting discriminators get away with discrimination, under-deterred discrimination, and unfairly allocating windfalls to defendant–employers are Gross’s practical, microscopic consequences. Gross, however, has made a serious macroscopic impact on the overall shape of disparate treatment litigation. Gross’s overarching effect is that it has exacerbated the state of confusion surrounding disparate treatment law. 142 Confusion and disarray in employment discrimination law are undesirable because they make the law more difficult to understand and create a sense of public distrust in the entire scheme. 143

In order to avoid confusion and public distrust in a scheme that protects one class of people more than another, Congress must stem the tide of Gross. Unfortunately, Congress has not yet acted. Currently, Gross and its ill effects have spread to the ADA and are threatening to spread to Title VII’s retaliation provision. If Gross’s spread is to be halted, then Congress must act swiftly and overturn this decision.

B. The Scope and Effects of Serwatka and Smith

1. Serwatka: The Gyre Expands to Encompass the ADA

Gross’s flawed reasoning and ill effects are currently spreading to other anti-discrimination laws, specifically the ADA. Serwatka, in interpreting the ADA as necessitating a but-for standard of causation, took Gross one step further. 144 Serwatka ultimately took Gross to its logical extreme, stating that a mixed-motives

Katz, supra note 5, at 886.

141. Katz, supra note 5, at 888 (“If the goal of the law is to minimize windfall to one party, the simple . . . but-for standard adopted by Gross is not as good as the . . . sufficiency standard with damages apportionment used in modern tort law—the area of the law Gross purports to use as a model.”).

142. One could argue that the Court did not create confusion and uncertainty because it established a clear but-for standard of causation for ADEA disparate treatment claims. Gross, 129 S. Ct. at 2352. This assertion, while true, overlooks the implicit confusion of Gross’s holding. The Gross Court created confusion and uncertainty not through its explicit holding but rather through its alteration of long-practiced applications of the mixed-motives analysis and through uncertainty as to the scope of its holding.

143. Corbett, Babbling, supra note 13, at 691–92.

144. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 964 (7th Cir. 2010).
framework is never applicable under any anti-discrimination statute without express, congressional incorporation of such a framework within the statute.\footnote{145}{Id. at 961; See also background supra Part II.A.}

One can hardly fault the \textit{Serwatka} court for reaching its conclusion. Although the court articulated an uncritical parroting of \textit{Gross}'s limited amendment argument, the Supreme Court's supervisory jurisdiction dictates that federal appellate courts follow binding precedent.\footnote{146}{See Hopwood v. State of Tex., 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., dissenting from a denial of rehearing en banc) ("The Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it. We may not reject, dismiss, disregard or deny Supreme Court precedent, even if, in a particular case, it seems pellucidly clear to litigants, lawyers, and lower court judges alike that, given the opportunity, the Supreme Court would overrule its precedent.")}

While doctrine dictated that \textit{Serwatka} follow \textit{Gross}, the case nevertheless is illustrative of the limited amendment argument's expansive scope. \textit{Serwatka} illustrates how easily \textit{Gross} can affect other anti-discrimination statutes. Ultimately, \textit{Serwatka} elevates the spiraling of employment discrimination law to more extreme heights.

After \textit{Serwatka}, courts within the Seventh Circuit have adhered to the misguided notion that a mixed-motives analysis is always improper in suits brought under anti-discrimination laws without a provision comparable to the Civil Rights Act of 1991.\footnote{147}{See Hung Nam Tran v. Kriz, No. 09-4132, 2010 WL 1811741, slip op. at 2 (7th Cir. May 6, 2010) (holding that the district court properly dismissed an ADA disparate treatment claim on summary judgment because the appellant never proved that he suffered mistreatment because of his disability); Serafinn v. Local 722, International Brotherhood of Teamsters, 597 F.3d 908, 915 (7th Cir. 2010) (citing \textit{Serwatka}:' Mixed-motives theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act's authorization of claims that an improper consideration was a 'motivating factor' for the contested action.')); Lougheed v. Village of Mundelein, No. 09 C 1683, 2010 WL 2836973, slip op. at 2 (N.D. Ill. July 19, 2010) (citing \textit{Serwatka}’s holding); Canon-Stokes v. Potter, No. 07 C 6283, 2010 WL 2166806, slip op. at 4 (N.D. Ill. May 27, 2010) (citing \textit{Serwatka}’s holding); Matthews v. U.S. Steel Corp., No. 2:08-CV-37-PRC, 2010 WL 2076814, slip op. at 10 n.2 (N.D. Ind. May 24, 2010) (stating \textit{Serwatka} is applicable to ADA disparate treatment claims even with recent congressional amendments to the ADA.); Gray v. Keystone Steel and Wire Co., No. 08-1197, 2010 WL 1849803, slip op. at 5 (C.D. Ill. May 7, 2010) ("... [T]he ADA does not permit mixed motives cases."); Basset v. Potter, No. 07-1172, 2010 WL 914412, slip op. at 13 (C.D. Ill. March 10, 2010) ("... [T]his Court is obliged to follow \textit{Serwatka}. This case does not even approach but-for causation.").}
holding has and may continue to spread to other circuits.\textsuperscript{148} Therefore, at worst, Serwatka's holding will deny ADA disparate treatment plaintiffs access to a mixed-motives framework. At best, not all circuits will adopt Serwatka, and there will be a circuit split. In either case, Serwatka threatens to further disorient the law of disparate treatment proof structures.

The ADA and Title VII do, however, have different origins, and some courts have pointed to this fact to argue that the ADA does necessitate a but-for standard of causation.\textsuperscript{149} The argument that the ADA's standard of causation should be different than Title VII's standard of causation stems from the fact that the ADA is a hybrid statute, borrowing its main provisions from both the Rehabilitation Act of 1973 and Title VII.\textsuperscript{150} The Rehabilitation Act requires a plaintiff to show that his disability was the sole factor motivating an employer's adverse decision.\textsuperscript{151} Some courts cling to the Rehabilitation Act to argue that an ADA disparate treatment plaintiff must show that his disability was the sole cause of an adverse employment decision.

Another facet of the ADA that potentially makes it incompatible with a mixed-motives framework is the statute's direct threat defense.\textsuperscript{152} This defense states that an employer can set qualification standards for employing individuals, which "may include that an individual shall not pose a direct threat to the health

\begin{footnotesize}
\begin{itemize}
\item[149.] Id. at 552 ("[T]he ADA's definition of disability is patterned after the Rehabilitation Act's definition, the ADA . . . incorporates Title VII's enforcement provisions. Therefore, the interpretation and application of both of those predecessor statutes has been used to inform and guide ADA jurisprudence.").
\item[152.] Prentak, supra note 14, at 553 ("[S]ome courts relied on the ADA's Rehabilitation Act heritage to incorporate a sole cause requirement into the ADA. Clearly, if a sole cause requirement is read into the ADA, that statute can give rise to no mixed-motives claims.").
\item[153.] 42 U.S.C. § 12113(b) (2006).
\end{itemize}
\end{footnotesize}
or safety of other individuals in the workplace."\textsuperscript{154} This defense allows employers, in certain circumstances, to use an individual’s disability as a motivating factor for making an adverse employment decision. By allowing employers to make decisions based on disability status, the direct threat defense makes the mixed-motives framework “seem incompatible with the ADA.”\textsuperscript{155} Therefore, the ADA’s direct threat defense, coupled with its Rehabilitation Act heritage, could lead one to conclude that the statute does not support a mixed-motives analysis.

There are, however, strong counterarguments to the assertion that the ADA is incompatible with a mixed-motives framework. The first counterargument is that Congress amended the ADA in 2008.\textsuperscript{156} Congress’s most pertinent amendment for the purpose of defining a standard of causation under the ADA was its alteration of the phrase “because of” in §§ 12112(a) and (b) to “on the basis of.”\textsuperscript{157} While “because of” means “by reason of,” “basis” means the “underlying support for an idea, argument, or process.”\textsuperscript{158} Congress’s shift in language, though it preceded Gross, signals an implicit disapproval of a but-for standard of liability for ADA disparate treatment claims. After these 2008 amendments, one could no longer point to the canon of uniformity to link Title VII’s “because of” language to the ADA. One could, however, point to these amendments as an indication that Congress wished to align the ADA with a phrase—“on the basis of”—that more clearly signaled a mixed-motives analysis.

Title VII, like the ADA, also has a defense provision that allows employers to intentionally use prohibited factors as a basis for making adverse employment decisions.\textsuperscript{159} Title VII’s bona fide occupational qualification (BFOQ) defense undercuts the argument that the ADA’s direct threat defense restricts the application of a mixed-motives framework to the ADA. The BFOQ defense states that “it shall not be an unlawful employment practice for an employer to hire and employ employees” when religion, sex, or national origin is a BFOQ necessary for the normal performance of a job.\textsuperscript{160} If the 1991 Act allows Title VII discrimination plaintiffs

\textsuperscript{154} Id.
\textsuperscript{155} Prenkart, supra note 14, at 553.
\textsuperscript{157} Id. at 3557.
\textsuperscript{158} \textit{CONCISE OXFORD ENGLISH DICTIONARY} 112, 119 (11th ed. 2004).
\textsuperscript{160} Id. This defense does not extend to race or color, and under Title VII, an employer is categorically prohibited from intentionally discriminating on the basis of these two categories. Id.
to use a mixed-motives framework despite the BFOQ defense, then one should not use the ADA’s direct threat defense as an argument against allowing ADA plaintiffs access to a mixed-motives analysis.

A final argument for treating the ADA and Title VII similarly is that discrimination based on a disability is more analogous to the types of discrimination protected by Title VII than age discrimination. Congress and the Supreme Court have distinguished age discrimination from race and gender discrimination by stating the former is based on inaccurate stereotypes about older workers’ abilities, whereas the latter is based on employers’ inherent animus towards protected groups. Discrimination based on a perceived disability is closer to age discrimination in that an employer discriminates on the basis of a disability due to ill-informed stereotypes about the disabled worker’s capabilities. Unlike age, a disability is closer to race or gender because the disability is unique to an individual, whereas everyone will age. Therefore, given the nature of disabilities, the argument that we should treat disability discrimination in a way that is analogous to race and gender discrimination is a strong one. Congress can treat disability and Title VII discrimination analogously by extending a mixed-motives proof structure to ADA disparate treatment plaintiffs.

Congress enacted the ADA to ensure “a disabled individual's right to operate on equal terms within the workplace” and to eliminate discrimination against individuals with disabilities. If Congress wishes to achieve these goals, then it should extend a mixed-motives framework to ADA disparate treatment claims. To fail to do so would lead to the same harmful consequences as stripping ADEA disparate treatment plaintiffs of a mixed-motives analysis: (1) it would under-deter disability discrimination; (2) it would allow discriminators to get away with discrimination; and (3) it would unfairly allocate a windfall to defendants.

Ultimately, Congress should stop Gross from engulfing other anti-discrimination laws such as the ADA. If Congress is serious about eradicating discrimination in the work place, then it should not favor one type of victim over another. Cases like Serwatka

163. See discussion supra Part III.A.1.
threaten to create this type of favoritism by placing ADA claimants at a judicial disadvantage when compared with Title VII claimants.

2. Smith: One Step Forward, Two Steps Back

Smith was a positive step in halting employment discrimination law from spiraling further away from its core. The case, however, does not mark the end of Gross's possible expansion to Title VII retaliation claims. Xerox vigorously urged that Gross dictates a Title VII retaliation plaintiff, like an ADEA plaintiff, must prove his claim using a but-for standard of causation. What is to stop defendants in other circuits from asserting an argument similar to Xerox's argument? With Gross in mind, astute defense lawyers will continue to assert Xerox's argument whenever an employee brings a Title VII retaliation claim using a mixed-motives framework.

Smith's forceful dissent is also indicative of a judicial impulse to extend Gross's limited amendment and ordinary meaning arguments to all statutes other than Title VII's discrimination provision. Several district court decisions illustrate this impulse through their willingness to extend Gross to Title VII retaliation claims. In Awand v. National City Bank, an Ohio district court refused to extend the 1991 Act framework to a Title VII retaliation claim, choosing instead to analyze the case using McDonnell Douglas. The Awand court reached its conclusion by looking to appellate court decisions that used a limited amendment argument to deny Title VII retaliation plaintiffs access to the 1991 Act framework. In Beckford v. Geithner, the D.C. District Court cited Gross approvingly, stating that the ordinary meaning argument prohibited the 1991 Act's application to Title VII retaliation claims. These cases illustrate the judicial impulse to

164. Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010).
165. See also Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010); Fairley v. Andrews, 578 F.3d 518, 526 (7th Cir. 2010).
168. Id. at 10 n.4.
169. 661 F. Supp. 2d at 25 n.3 ("...[T]he reasoning of the Supreme Court in Gross...finding that the Age Discrimination in Employment Act does not authorize mixed-motives claims on the ground that the statute only prohibits discrimination 'because of' an individual's age, appears applicable to the anti-retaliation provision of Title VII, which also prohibits discrimination only 'because' the employee has engaged in a protected act.") (internal citations omitted).
latch onto Gross's arguments. While Smith made strides in stemming the tide of Gross, Awand and Beckford illustrate how Gross's ill effects will continue to threaten Title VII retaliation plaintiffs until Congress acts.

Prior to Gross, many appellate courts adopted a limited amendment argument to hold that the 1991 Act framework did not apply to Title VII retaliation claims. Instead of saying that the limited amendment argument barred the application of a mixed-motives framework to Title VII's retaliation provision, these courts continued to apply Price Waterhouse. Will these Circuits—the First, Third, Seventh, Eighth, and Eleventh—like the Fifth Circuit in Smith, adhere to their prior precedent, or will these Circuits adopt Gross and say that the mixed-motives framework, in the context of Title VII retaliation claims, is dead? Regardless of the answer to this question, these Circuits' pre-Gross approach creates a chink in the armor of the limited amendment argument. These decisions illustrate that courts can easily use the limited amendment argument to reach the opposite conclusion of Gross. Courts can use the limited amendment argument to validate the continuing viability of Price Waterhouse, rather than using it to create a complete bar on mixed-motives. Despite Gross's holding, the limited amendment argument should not sound the death knell of mixed motives for all anti-discrimination laws not amended in 1991.

Allowing Gross to extend to Title VII's retaliation provision would be undesirable because of the interconnectedness of Title VII's discrimination and retaliation provisions. Anti-

170. Speedy v. Rexnord Corp., 243 F.3d 397, 401–02 (7th Cir. 2001) (stating that Price Waterhouse, not the 1991 Act framework applies to Title VII retaliation claims); Pennington v. City of Huntsville, 261 F.3d 1262 (11th Cir. 2001) ("Although the 1991 Act overruled in part the mixed-motive defense with respect to discrimination suits based on race, color, sex, and national origin, this circuit and other circuits have held that the mixed-motive defense is still available in retaliation cases."); Norbeck v. Basin Elec. Power Coop., 215 F.3d 848, 852 (8th Cir. 2000) ("We . . . conclude that the Civil Rights Act of 1991 did not change the . . . Price Waterhouse analysis applicable to retaliation claims under the Act . . . ."); McNutt v. Bd. of Tr. of the Univ. of Ill., 141 F.3d 706, 709 (7th Cir. 1998) ("It is enough here that Congress clearly stated its decision to overrule Price Waterhouse only with respect to claims under § 2000e-2(m) and did not make a similar provision for retaliation claims under § 2000e-3(a)"); Woodson v. Scott Paper Co., 109 F.3d 913, 933 (3d Cir. 1997) ("Section 107 on its face does not apply to retaliation claims. It amends only 42 U.S.C. § 2000e-2, which prohibits discrimination . . . and does not mention § 2000e-3, the retaliation provision."); Tanca v. Nordberg, 98 F.3d 680, 685 (1st Cir. 1996) ("We also believe that the Price Waterhouse rule does apply to mixed motive retaliation claims.").

171. "The primary purpose of anti-retaliation provisions in any employment statute is to secure the underlying rights promised by the statute by protecting
discrimination laws contain retaliation provisions to protect the fundamental rights promised by their discrimination counterparts. Therefore, courts should not require a higher burden of persuasion in a Title VII retaliation claim than in a discrimination claim when the two types of claims "do not pose different consideration[s] for causation." Courts should strive to make anti-discrimination laws' discrimination and retaliation provisions work in unison. Gross's spread to Title VII's retaliation provision would prevent it from ensuring the underlying rights promised by the discrimination provision and cause the two provisions to work in a discordant fashion.

Gross has expanded more readily to the ADA than Title VII's retaliation provision. Most courts apply Price Waterhouse to Title VII retaliation claims, and the provision seems more resistant than the ADA to Gross's limited amendment argument. The fact that Gross has not yet spread to Title VII's retaliation provision should not, however, prevent Congress from acting preemptively. The fact that Smith did not extend Gross to Title VII's retaliation provision does not mean that other circuits will act similarly. If Congress should halt the spread of Gross to the ADA, then it should also preemptively halt the spread of Gross to Title VII's retaliation provision.

C. Gross Beyond the Context of Employment Discrimination Law

Gross's holding is not limited to disparate treatment claims brought under federal employment discrimination statutes. While Gross's immediate impact is on disparate treatment claims in the context of employment discrimination, the decision, nevertheless, threatens to expand and affect all disparate treatment claims under federal law. The logical extrapolation of the limited amendment argument is that any statute without a specific standard of causation will necessarily a but-for standard for liability.

Lower courts can easily apply Gross and reach this conclusion in disparate treatment claims brought under employment discrimination laws. Courts can make this logical jump so easily because the only statute that Congress amended to add a mixed-
motives analysis in 1991 was Title VII. If courts read Gross's limited amendment argument literally, then the only anti-discrimination statute with a mixed-motives framework is Title VII. According to Gross, unless Congress expressly amends the ADEA, the ADA, and other anti-retaliation provisions, the limited amendment argument dictates that Title VII is the sole statute with a mixed-motives framework. The Fifth Circuit recognized and anticipated this conclusion, stating: "The Supreme Court's opinion in Gross . . . raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework." Courts may take Gross's limited amendment argument even one step further by extending it outside of employment discrimination law. The Seventh Circuit, for example, stated that Gross holds that "unless a statute provides otherwise . . . demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law." Such statements are indicative of the limited amendment argument's expansive sweep. Williams v. District of Columbia is a concrete example of Gross's extension outside of employment discrimination law. In Williams, the D.C. Circuit Court applied Gross to hold that a plaintiff bringing a disparate treatment claim under the Federal Jury Improvement Act must prove his claim using a but-for standard of causation. Williams stated that the Act's "because of" language necessitates a but-for standard and bars a mixed-motives standard of causation. Williams is illustrative of Gross's ultimate danger, which is that the decision, if not overturned, will reach beyond the boundaries of employment discrimination.

Gross has primarily had an adverse effect on employment discrimination law, but this decision will have similar effects on other types of disparate treatment claims. If Congress is not motivated to overturn Gross based on its harmful effects on employment discrimination law, then the fact that Gross may envelope other types of disparate treatment claims should nudge Congress in the direction of overturning this decision.

178. Id. at 109.
179. Id. ("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.").
Before advocating a congressional response to Gross, an initial question that one may ask is, "Why favor a mixed-motives analysis?" The answer is there are theoretical and practical reasons why a mixed-motives framework mirroring the 1991 Act is favorable. Gross and its progeny render mixed-motives inapplicable to ADEA, ADA, and potentially Title VII retaliation claims. In so doing, these decisions jeopardize one of the fundamental goals of employment discrimination law—deterrence.

Therefore, in order to deter discriminatory conduct, the law should allow disparate treatment plaintiffs to proceed under a mixed-motives framework for several theoretical reasons. First, the employer caused the uncertainty about whether an impermissible criterion played a role in the adverse employment action. Justice O'Connor articulated this concern, stating that a mixed-motives analysis is apt "in cases . . . where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion." The truth is that the employer is the alleged wrongdoer, and as such, the employer should bear the risk that it will not be able to untangle its permissible from its impermissible motives.

A second theoretical reason for favoring a mixed-motives analysis is that the defendant has the best access to the evidence of its motives for firing an employee. Human resource files and the recollections of supervisors and co-employees will often contain probative value as to an employer's subjective motivations in taking

180. Katz, supra note 5, at 883 ("Gross departs from these principles, requiring the plaintiff to shoulder the entire burden without regard for the difficulty of proving but-for causation, the fact that most of the evidence on the issue is under the control of the defendant, or the fact that the defendant has engaged in wrongdoing. The Gross standard is therefore normatively problematic."). Gross is "normatively problematic" when applied to the ADEA, the ADA, and Title VII's retaliation provisions for the same reasons.

181. Id.


183. See NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983) ("The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.").

184. Katz, supra note 5, at 883.
an adverse employment action. Therefore, since the employee, who is the alleged victim of discrimination, cannot easily access this evidence, fairness dictates that the burden of persuasion should, at some point, shift to the defendant–employer.

Finally, the defendant has the best information about any nondiscriminatory reason that may have informed its actions. Since the employer has the best access to evidence, it will also have the best information about any nondiscriminatory reasons for an adverse employment action. Given the employer’s access to this information, the employer should have the opportunity to show that it acted in a nondiscriminatory manner. This theoretical consideration favors the employer and acts as a counterbalance to favoring the employee because of the employer’s ease of access to evidence.

In addition to these theoretical underpinnings, several practical considerations should sway Congress in the direction of favoring a mixed-motives analysis for all disparate treatment claims. One mixed-motives structure would make the law easier to understand for employers, employees, lawyers, judges, and juries. In conjunction with this simplification, a single structure would increase judicial efficiency.

Finally, having a single mixed-motives analysis would help instill public confidence in anti-discrimination laws. If the goal of employment discrimination law is to put people similarly situated on an equal playing field, then the public may not understand why one law should have a more favorable proof

185. While discovery mechanisms are available to disparate treatment plaintiffs, the law should favor burden-shifting over discovery for several reasons: (1) probing an employer’s subjective state of mind is difficult; (2) the employer is in a superior position to know its processes and who is responsible for making employment decisions; and (3) the new heightened federal pleading standards often prevent plaintiffs from advancing to the discovery phase of litigation. See supra note 6. Discovery, therefore, is an inadequate procedural mechanism for sifting out an employer’s subjective intent from potential evidence.

186. Katz, supra note 5, at 883.

187. Id.

188. See Corbett, Babbling, supra note 13, at 691–92.

189. See Katz, supra note 13, at 643–44 ("Doctrinal confusion is expensive and inefficient. Parties often engage in gamesmanship and protracted litigation merely to determine the applicable framework. The uncertainty over the applicable framework often prevents early settlement, further increasing the costs for litigants (as well as the courts). And such a state of affairs breeds cynicism about the law in this area, as it suggests that outcomes depend more on technicalities than on merits of a particular case.").

190. See Corbett, Babbling, supra note 13, at 691–92.
Esoteric and theoretical differences between certain types of discrimination may exist, but the public may not understand, or care, about these differences. Employment discrimination law, as it now stands, leaves the public wondering why an African-American or female worker should be more protected than an older or disabled worker.

As _Gross_ and its progeny expand the gyre of employment discrimination law, these theoretical and practical underpinnings will become more pertinent. _Gross_ threatens to eradicate the mixed-motives analysis in all disparate treatment claims except Title VII discrimination. _Gross_ has not simply caused employment discrimination law to become more confusing. Rather, it has pushed this body of law to the brink of being altered for the worse. These theoretical and practical reasons for favoring a mixed-motives analysis are just one more reason why Congress must act to pull this area of the law away from this dangerous precipice.

IV. THE PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT: A New Center

Congress stands poised to reel in the expanding gyre _Gross_ created. Congress recognizes that "_Gross_ . . . has eroded . . . [a] long held understanding of consistent interpretation and circumvented well established precedents." This erosion and circumvention must stop, especially now that _Gross_ is affecting other anti-discrimination statutes and disparate treatment claims.

The Protecting Older Workers Against Discrimination Act (POWAD Act) is a step in the right direction for employment discrimination law. There are, however, several flaws with the Act that Congress must address, or Congress, not the Court, will cause employment discrimination law to spiral out of control. The POWAD Act, if repaired, has the potential to provide employment discrimination law with a solid core, a veritable Rosetta Stone for judges and lawyers to point to as a guide to proving disparate treatment claims.

Commentators have long espoused the idea that employment discrimination law needs to be unified in order to be more sensible.

---

191. _Id_.
192. For an example of the esoteric nature of arguments distinguishing different types discrimination see Rhonda M. Reaves, _One of These Things is Not Like the Other: Analogizing Ageism to Racism In Employment Discrimination Cases_, 38 U. RICH. L. REV. 839 (2004).
194. _Id_. § 2(a)(3).
With each progression in the history of disparate treatment proof structures, these cries for uniformity have grown louder. 195 After Gross, these cries reached a crescendo. 196 This Comment joins the chorus, arguing that the spread of Gross into the context of the ADA and possibly Title VII retaliation makes the case for congressional reform more urgent. 197 Congress no longer should act, but rather it must act to establish a center for this confused area of the law.

The POWAD Act proposes to make several important changes to disparate treatment claims brought under the ADEA. The latest version of the Act states that its purpose is to apply the 1991 Act framework to the ADEA and other anti-discrimination and anti-retaliation laws. 198 The Act’s operative provision overturns Gross and applies the 1991 Act framework to the ADEA. 199 The Act also eradicates the direct/circumstantial evidence dividing line with respect to the ADEA by allowing an ADEA plaintiff to prove his claim using any “evidence sufficient for a reasonable trier of fact to conclude that a violation occurred.” 200

The Act’s most important change, however, is a catchall provision that states that the Act is applicable to “any Federal law forbidding employment discrimination” and “any law . . . forbidding other retaliation against an individual for engaging in, or interfering with, any federally protected activity including the exercise of any right established by Federal law.” 201 This provision is a game changer because it extends the 1991 Act framework to the ADA and Title VII’s retaliation provision. With this one inconspicuous provision, Congress can erase all the patchwork solutions to employment discrimination law by allowing one mixed-motives proof structure—the 1991 Act framework—to govern all disparate treatment claims.

195. See Corbett, Babbling, supra note 13, at 693; Corbett, supra note 10, at 115–16; Katz, supra note 5, at 888–89; Harper, supra note 14, at 144: Katz, supra note 2; Katz, supra note 13, at 680; Prenkert, supra note 14, at 560–64.

196. See Corbett, Babbling, supra note 13; Harper, supra note 14; Katz, supra note 5.

197. See discussion supra Parts III.A–D.

198. H.R. 3721, 111th Cong. § 2(b) (2009) (stating the purpose of the Act is “to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under Title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991.”).

199. Id. §§ 3(g)(1)–(g)(2). This provision also extends the 1991 Act’s same-decision, damages-limiting defense to ADEA defendants.

200. Id. § 3(g)(3).

201. Id. §§ 3(g)(5)(B), 3(g)(5)(C).
Despite its beneficial qualities, Congress should not pass the POWAD Act in its present form. The current version of the Act would perpetuate flaws that have riddled employment discrimination law for the past 20 years. The Act’s flaws are that it does not expressly overrule Price Waterhouse and that it maintains McDonnell Douglas without specifying this framework’s applicability.\(^2\)

Congress states that its purpose in passing the POWAD Act is to make the standard of proof for all anti-discrimination and anti-retaliation claims no different than the standard of “the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991.”\(^2\) Through this statement of intent, Congress wishes to align all anti-discrimination laws with the Civil Rights Act of 1991.\(^2\) Congress, however, still refuses to directly overturn Price Waterhouse. Congress’s inaction leaves the door open for arguments that Price Waterhouse has continuing viability in non-1991 Act disparate treatment cases. Given Congress’s disapproval of Price Waterhouse in 1991, the sensible conclusion is that Congress would not want to preserve this framework through any new act.\(^2\) Congress, therefore, should explicitly overrule Price Waterhouse and clearly state that only the 1991 Act framework is applicable under the POWAD Act.

The POWAD Act’s major flaw is that it preserves McDonnell Douglas without giving guidance as to when this framework is applicable. The Act states that every proof structure shall be available to an ADEA plaintiff “including the evidentiary framework set forth in McDonnell-Douglas Corp. . . .”\(^2\) Through this provision, Congress preserves McDonnell Douglas without providing any guidance as to when plaintiffs should proceed under the 1991 Act or under the pretext analysis. Congress, by preserving McDonnell Douglas, puts employment discrimination law back where it was post-Desert Palace, with two frameworks and no guidance as to when plaintiffs should proceed under one or the other.\(^2\)

The POWAD Act is beneficial because it overturns Gross and ultimately stops employment discrimination law from spiraling further away from its core. The Act, however, is a regression to the post-2003 Desert Palace landscape. The current version of the Act

\(^{202}\) See id. §§ 2(b), 3(g)(4).
\(^{203}\) Id. § 2(b) (emphasis added).
\(^{204}\) Id.
\(^{205}\) See background supra Part II.A.
\(^{206}\) H.R. 3721, 111th Cong. § 3(g)(4) (2009).
\(^{207}\) See background supra Part II.B.
will put employment discrimination law back in the untenable position of having several proof structures and no guiding principles governing their application. If Congress were to pass the current version of the POWAD Act, it would simultaneously move employment discrimination law one step forward and two steps back.

Thus, Congress should revise the POWAD Act and clearly state that the 1991 Act framework governs and that Price Waterhouse and McDonnell Douglas are no longer viable. If Congress wishes to preserve McDonnell Douglas, then it should expressly state when this framework is applicable. Given the superiority and appropriateness of the mixed-motives analysis in employment discrimination law, Congress should apply the 1991 Act framework to all disparate treatment claims. By making these changes before passing the Act, Congress will finally alleviate the problems of Desert Palace and Gross.

CONCLUSION

The history of proof structures for disparate treatment claims in employment discrimination law has been a perplexing, at some times nonsensical, journey. Gross and its progeny may cause employment discrimination law to spiral completely out of control and away from its burden-shifting center. The further Gross causes employment discrimination law to drift from this core, the more in jeopardy the policy goals of victim compensation and deterrence will become. The expansion of Gross to encompass other anti-discrimination and anti-retaliation statutes is the decision’s worst consequence. If Gross’s ill-effects were not enough to compel Congress to legislate, then the way in which its holding has and threatens to spread should provide Congress with the extra impetus to stem the tide of this regrettable decision. Ultimately, Serwatka and Smith illustrate the undesirable consequences of Gross and act as further illustrations of the need for one mixed-motives proof structure.

Generally, a mixed-motives analysis mirroring the 1991 Act framework is the most appropriate method of proving the subjective realm of an employer’s discriminatory intent. Gross’s willingness to strip ADEA plaintiffs of a mixed-motives analysis makes a plaintiff’s task in proving age discrimination daunting. When lower courts expansively apply Gross, they place potential ADA and Title VII retaliation plaintiffs in an equally tenuous position. If Congress is serious about combating all forms of

208. See discussion supra Part III.D.
employment discrimination, then it should not endorse proof structures that put plaintiffs at such serious disadvantages.

The ultimate solution to the proof structure problem is for Congress to pass an amended version of the POWAD Act. The Act is beneficial because it overturns Gross and seemingly applies the 1991 Act framework to all anti-discrimination and anti-retaliation laws. But employment discrimination law cannot continue to advance with multiple proof structures and no guidance on when each structure is applicable. Congress, therefore, should amend the POWAD Act to abolish the excess proof structures. If Congress passes the Act without these amendments, it will move employment discrimination law one step forward and two steps back into the post-Desert Palace landscape.

Mark R. Deethardt


The author would like to thank Professor William R. Corbett and Roy L. Bergeron, Jr. for their invaluable guidance and insight. The author would also like to thank his parents, Richard and Mary Beth, for their unwavering support.