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The New Definition of "Because of ": The Supreme Court Distinguishes Identical Causation Language in Title VII and the ADEA in Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009)

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Note*

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I. INTRODUCTION

Both Title VII of the Civil Rights Act (CRA) of 1964[1] and the Age Discrimination in Employment Act of 1967 (ADEA)[2] prohibit employers from making an adverse employment decision "because of" certain improper criteria.[3] The Supreme Court's opinion in *Gross v. FBL Financial Services, Inc.*[4] explored the plain meaning of "because of" to determine the threshold for causation required under the ADEA. Curiously, the *Gross* Court came to a different conclusion than the Justices who engaged in the same exploration of "because of" under Title VII in *Price Waterhouse v. Hopkins*.[5] The Court's underdeveloped plain meaning argument and failure to elevate its choice of statutory interpretation over the obvious and compelling alternatives call into question whether these portions of the opinion were determinative of the holding. The *Gross* Court's skepticism of the motivating factor standard and mixed-motive burden-shifting scheme that developed under the Title VII analysis, though not as thoroughly explored in the Court's opinion, provides a more intelligible rationale for the outcome in *Gross*.

In maintaining that this was an exercise in scrutinizing the language of the statute instead of explaining the persuasive force of the practical considerations, the Court created confusion over whether the *Price Waterhouse* analysis might still apply to other statutes with "because of" or other similar causation language. Some of the confusion in the Court's opinion also stems from the conflation of causation stan-

1. 42 U.S.C. §§ 2000e to e-17 (2006).
2. 29 U.S.C. §§ 621–634 (2006).
3. *Compare id.* at § 623(a)(1) (noting that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"), *with* 42 U.S.C. § 2000e-2(a)(1) (noting that it is an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").
4. 129 S. Ct. 2343 (2009).
5. 490 U.S. 228 (1989).

dards with burden schemes. While it makes sense that *Gross* addressed both causation and burdens, given that *Price Waterhouse* created the burden-shifting scheme in part to balance the plaintiff's lower, motivating-factor causation burden, this Note will attempt to separate the ideas in an effort to show how the respective opinions grappled with the proper allocation of the burden of persuasion in discrimination cases, the difficult problem of dissecting the motivations for an employment decision, and the heightened evidentiary requirement, if any, under a burden-shifting scheme.

After detailing the complex history of mixed-motive burden-shifting in discrimination cases that led to this particular brand of ambiguity over congressional intent and sampling the variety produced when lower courts have applied *Gross* to other statutes, this Note will make the case that the majority's decision was driven by an understanding of the practical difficulties that mixed-motive burden-shifting has created, a skepticism about how well the doctrine accomplishes justice, and a legal conservatism that favors traditional causation and burden schemes. Further, the Note will argue that *Gross* is not, as the Court's reasoning would suggest, about the *level of causation burden* that must be satisfied but rather about *who bears that burden*. Though Congress has codified the mixed-motive burden-shifting scheme in the language of Title VII through post-*Price Waterhouse* amendments,[6] *Gross* reverts to the allocation that speaks to simplicity and judicial restraint by applying the traditional default causation standard: that the plaintiff bears the burden of persuasion by a preponderance of the evidence.[7] Finally, the Note will make the case that while *Gross* appears to cast doubt on all Title VII burden-shifting precedents, the Court's attention to practical applications and inclination toward traditional burden structures might be compatible with the shifting burden of production under *McDonnell Douglas Corp. v. Green*,[8] which provides a sufficient guard against the inequities of asymmetric information, maintains the least restrictive burden on employers, provides for the most intuitive jury instructions, and maintains the traditional burden of persuasion.

II. BACKGROUND

A. History of Motivating Factor and the Direct Evidence Requirement

1. Title VII and the Age Discrimination in Employment Act

The law of discrimination and retaliatory discharge is highly intertwined and highly complex. During oral arguments in *Gross*, Carter

6. *Gross*, 129 S. Ct. at 2356–57.
7. *Id.* at 2351.
8. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

G. Phillips admitted, "[I]n 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."[9] Sometimes it is difficult to parse distinctions made between discharge claims for age discrimination, gender discrimination, discrimination based on disability, or exercise of First Amendment rights, but it is important to understand that these claims are based on related, but different, sources of law.

Title VII of the CRA of 1964 made it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[10] The ADEA is a separate statute, passed in 1967, that makes it unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[11] The similarity in language has led the courts to consistently apply Title VII precedents to the ADEA.[12] The strength of this practice is evidenced by the fact that courts often feel it necessary to justify any divergence from it. For example, when the Court decided the ADEA was intended to prohibit discrimination only against older and not younger workers, the Court distinguished the Title VII precedent that found protection for both male and female workers.[13] Notably, Justice Thomas dissented in that opinion based on the Title VII precedent.[14]

2. McDonnell Douglas v. Green

Percy Green, a black man, lost his job with McDonnell Douglas during a period of cost-cutting by company management.[15] After his discharge, he was involved in at least one protest of the company's hiring policies in which protestors blocked traffic in and out of a McDonnell Douglas plant during the morning shift change.[16] When the company started to add positions, it refused to rehire Green because of

9. Transcript of Oral Argument at 29, *Gross*, 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 832958 at *29.
10. 42 U.S.C. § 2000e-2(a)(1) (2006).
11. 29 U.S.C. § 623(a)(1) (2006).
12. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[I]nterpretation of Title VII of the Civil Rights Act of 1964 applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978))).
13. General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 597–98 (2004).
14. *Id.* at 608–12 (Thomas, J., dissenting). This is notable because Justice Thomas also authored *Gross*, an ADEA case, which fails to mention Title VII precedent that is directly on point.
15. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).
16. *Id.* at 794–95.

his involvement in the protest.[17] Green filed a complaint under Title VII claiming the decision not to rehire him was because of his race.[18]

In *McDonnell Douglas*, the Court established a pre-trial scheme in which the *burden of production* shifts in order to frame and clarify the issues for trial. First, the employee must show:

> (i) [T]hat he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[19]

Second, the defendant must articulate some legitimate reason for the employment action.[20] Finally, the employee must be given the opportunity to prove that the employer's professed reason is mere pretext and that the actual reason was discrimination.[21]

This pre-trial burden-shift achieves three primary advantages without shifting the *burden of persuasion* from the plaintiff at trial. First, simple cases involving obvious, legitimate reasons for the employment decision or where the defendant fails to articulate legitimate reasons can be dispensed with before trial. Also, there is no risk of confusing the jury with a complicated instruction because the burden-shifting ends before the trial begins. Most importantly, the plaintiff, armed with the information disclosed before trial, can attempt to meet its burden by attacking the defendant's professed reason as pretext in an effort to show that discrimination was the more likely motivation.

The Supreme Court later clarified that *McDonnell Douglas* is only to be applied in cases where the plaintiff fails to provide direct evidence of discrimination.[22] In cases where the plaintiff does prove discrimination by direct evidence, courts before *McDonnell Douglas* were already shifting the burden to the defendant to show that the same decision would have been made absent discrimination.[23] The additional protection provided by *McDonnell Douglas* was to arm the plaintiff who lacked direct evidence with the defendant's professed legitimate reasons before trial so that, in addition to trying to prove discrimination by circumstantial evidence, the employee could rebut alternative legitimate reasons given by his employer.

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17. *Id.* at 796.
18. *Id.*
19. *Id.* at 802.
20. *Id.* at 802–03.
21. *Id.* at 804.
22. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Fields v. Clark Univ., 817 F.2d 931, 935 (1st Cir. 1987), *abrogated by* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
23. *See, e.g.*, Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (per curiam).

3. Price Waterhouse v. Hopkins

In 1982, Ann Hopkins was considered for partnership at Price Waterhouse but was ultimately rejected.[24] Unlike pretext cases under *McDonnell Douglas*, in which the defendant puts forth a legitimate reason for the dismissal and the plaintiff attacks the credibility of that reason as pretext for discrimination, the evidence was clear that Price Waterhouse considered gender in its decision to reject Hopkins: the plaintiff had direct evidence.[25]

Less clear, was whether the discrimination actually *caused* Hopkins' partnership bid to be rejected. While much of the Court's analysis focused on how to read Title VII's causation language ("because of"), the Court clearly had a broader agenda in hearing the case: "We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[26] The Court was ultimately concerned with striking the "balance between employee rights and employer prerogatives."[27]

Title VII of the CRA of 1964 made it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."[28] The Court's inquiry was framed largely as whether Price Waterhouse's decision to fire Hopkins was made *because of* gender, as required under the statute.[29]

At first glance, "but for" causation seems sufficient to answer this question: if removing the improper motive from the process would have changed the employer's decision, it was a cause of the employment decision, even if it had a relatively small, incremental effect.[30] The plaintiff would offer evidence that discrimination, while not the only factor, was a determinative factor in the employment decision, the defendant would rebut that evidence by offering evidence showing that other legitimate reasons wholly accounted for the firing, and the finder of fact would determine whether the causation element was satisfied. This process is consistent with the Court's interpretation of the statute. The Court read Title VII's use of "because of" "to mean that gender must be irrelevant to employment decisions" and explicitly re-

24. *Price Waterhouse*, 490 U.S. at 231–32.
25. *Id.* at 258.
26. *Id.* at 232.
27. *Id.* at 239.
28. 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added).
29. *Price Waterhouse*, 490 U.S. at 239–40.
30. *See id.* at 240.

jected the construction of "because of" as meaning "*solely* because of."[31] This reading contemplates that even partial reasons can be causal factors.

However, the Court based its holding on a more complex understanding of mixed motives. The Court describes the problem in a classic *Anderson v. Minneapolis*-type[32] concurrent cause example:

> Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. [Under strict "but for" causation], *neither* physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved . . . . [E]vents that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.[33]

The Court found in the statute not simply an intent to prevent the harms associated with discrimination but rather an "intent to forbid employers to take gender into account in making employment decisions."[34] To the bafflement of the dissent, the majority argued that use of the present tense suggested that Congress intended to look at the events as they happened, in contrast to traditional "but for" analysis which looks back in an attempt to determine what might have happened if the improper motive were removed.[35]

While seemingly innocuous, this move underpinned the burden-shifting for which the decision is so well-known. In place of "but for" causation, the Court places on the plaintiff only the burden of showing that the improper reason "was a factor in the employment decision *at the moment it was made*."[36] Confusingly, the "but for" requirement is restored "later, in the context of litigation," when the defendant is allowed to present as a defense that the employment decision would have occurred even if the improper reason were not included.[37] Under

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31. *Id.* at 240–41.

32. Anderson v. Minneapolis, St. Paul & Sault Saint Marie Ry. Co., 179 N.W. 45, 49 (Minn. 1920) ("If a fire set by the engine of one railroad company unites with a fire set by the engine of another company, there is joint and several liability, even though either fire would have destroyed plaintiff's property."), *overruled in part by* Borsheim v. Great N. Ry. Co., 183 N.W. 519 (Minn. 1921); *see also* RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.").

33. *Price Waterhouse*, 490 U.S. at 241.

34. *Id.* at 239.

35. *Id.* at 240–41; *see also id.* at 283–84 (Kennedy, J., dissenting) (noting that statutes are generally written in the present tense, adding no useful basis for statutory interpretation).

36. *Id.* at 241 (majority opinion). The dissent, understandably, charged the majority with divesting "because of" of any causal significance. *Id.* at 284 (Kennedy, J., dissenting).

37. *Id.* at 241 (majority opinion).

the Court's holding, the employer is completely relieved of liability if it meets its burden.[38]

In summary, the Court first established that the plaintiff's burden is satisfied by proving only that the improper motive was relied upon at the time of the decision rather than proving it was a determinative factor in reaching the decision. Then, the Court allowed the defendant to completely relieve itself of liability by proving that the employment decision would have happened in the absence of the improper motive. The Court went so far as to declare its holding to have maintained the plaintiff's burden of proving causation and characterized the defendant's relief as an affirmative defense.[39] This effectively left "but for" causation in place, but switched the traditional burden of persuasion regarding causation from the plaintiff to the defendant for the narrow set of cases involving mixed motives—the Court admitted as much: "[A] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision."[40]

Aside from the unusual statutory interpretation, the rational for this burden-shifting lies in the public policy dealing with asymmetric information: the plaintiff in a mixed-motive employment discrimination case cannot be expected to identify the exact mix of proper and improper causal forces in the employment decision.[41] The defendant, as the one who made the decision, is in a much better position to prove that the improper reason was not part of their decision.[42] Further, it is fair for the defendant to bear the risk that he will not be able to meet the burden because "'[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. . . . [H]e knowingly created the risk and . . . the risk was created not by innocent activity but by his own wrongdoing.'"[43]

It should also be noted that part of the confusion in applying *Price Waterhouse* to any particular case is that it was a plurality opinion which many circuits would interpret by the most narrow holding.[44] In this case, the most narrow holding was that of Justice O'Connor's concurrence which, in an effort to balance the uncommon shift of the burden of persuasion to the defendant, required that the plaintiff provide "direct evidence" of discrimination.[45] What exactly constitutes direct evidence is the subject of much debate but might be informed by the

38. *Id.* at 244–45.
39. *Id.* at 246.
40. *Id.* at 249.
41. *Id.* at 238–39.
42. *Id.*
43. *Id.* at 250 (quoting NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983)).
44. Gross v. FBL Fin. Serv., Inc., 129 S. Ct. 2343, 2357 (2009) (citing Marks v. United States, 430 U.S. 188 (1977)).
45. *Price Waterhouse*, 490 U.S. at 276.

pre-*McDonnell Douglas* cases that immediately shifted the burden to the defendant where the plaintiff proved direct evidence of discrimination.

Just as the holdings of other employment discrimination actions were applied across the breadth of discrimination cases, the holding of *Price Waterhouse* was seen as applicable to other discrimination statutes.[46] The Seventh Circuit applied the *Price Waterhouse* motivating factor framework to age discrimination under the ADEA before the 1991 amendment to the CRA,[47] and other circuits have continued to apply the framework to the ADEA, even after the amendment.[48]

4. The Civil Rights Act of 1991

The process of applying doctrines across discrimination statutes was complicated by the CRA of 1991. As noted above, the CRA of 1964 made it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[49] The *Congressional Record* associated with the 1964 Act indicated that "[t]o discriminate is to make a distinction, to make a difference in treatment or favor."[50] Before *Price Waterhouse*, the Court used language equating "because of" under the statute to "but for" causation under a traditional burden scheme.[51] The *Price Waterhouse* Court insisted it had maintained "but for" causation.[52] As amended, the Act clearly reflects congressional approval of, at least, the burden-shifting in *Price Waterhouse*, and arguably, the

46. *See supra* subsection II.A.1.
47. *See* Visser v. Packer Eng'g Assocs., Inc., 909 F.2d 959, 961 (7th Cir. 1990) (en banc), *reh'g granted and opinion vacated* 924 F.2d 655 (7th Cir. 1991).
48. *See* EEOC v. Warfield-Rohr Casket Co., 364 F.3d 160 (4th Cir. 2004); Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564 (6th Cir. 2003); Febres v. Challenger Caribbean Corp, 214 F.3d 57 (1st Cir. 2000); Lewis v. YMCA, 208 F.3d 1303 (11th Cir. 2000) (per curiam); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995); Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995); Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171 (2d Cir. 1992).
49. 42 U.S.C. § 2000e-2(a)(1) (2006).
50. 110 CONG. REC. 7213 (1964).
51. *See* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) (noting a violation of Title VII occurs if a plaintiff "was denied an employment opportunity on the basis of a discriminatory criterion"); Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 683 (1983) (recognizing a violation of Title VII if an employer treated an employee "in a manner which but for that person's sex would be different" (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978))); Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (finding a violation of Title VII if the employment action was "based on" discrimination).
52. Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989).

opinion's interpretations of "because of" and "but for" causation. The CRA of 1991 included a new provision for Title VII: "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."[53] While this seems like a major change in the law, to an extent, this language was unnecessary. Motivating factor was already the law of the land under the Supreme Court's decision in *Price Waterhouse*.[54] However, Congress also added a provision making a significant change to the effect of the affirmative defense created under the mixed-motive framework. Rather than the defendant fully avoiding liability, the amended CRA limited the plaintiff's remedies to declaratory relief, injunctive relief, attorney's fees, and costs associated with bringing the claim.[55] The new provision specifically denied admission, reinstatement, hiring, promotion, or back pay where the defendant meets the burden of persuasion under the affirmative defense.[56]

5. Desert Palace, Inc., v. Costa

The Court granted certiorari in *Desert Palace* to determine whether the language of the 1991 amendment to the CRA supported *Price Waterhouse*'s direct evidence requirement.[57] Ignoring the complicated plurality opinion that suggested the direct evidence requirement, the Court found the lack of any explicit heightened standard in the language of the 1991 Act determinative.[58] The Court explained that Congress has been "unequivocal" in creating higher burden requirements, and that the lack of an explicitly stated heightened burden must lead to application of the "conventional rule of civil litigation that generally applies in Title VII cases"[59]: that the plaintiff proves his case by a preponderance of the evidence.[60] *Desert Palace* left open, until *Gross*, whether other discrimination statutes based on the earlier 1964 Title VII language and unchanged by the 1991 Act would continue to follow *Price Waterhouse* or would also jettison the direct evidence requirement under the shared doctrine principal.[61]

53. 42 U.S.C. § 2000e-2(m) (2006).
54. *See supra* subsection II.A.3.
55. *Id.* § 2000e-5(g)(2)(B)(i).
56. *Id.* § 2000e-5(g)(1).
57. Desert Palace, Inc., v. Costa, 539 U.S. 90, 98 (2003).
58. *Id.* at 98–99 ("[o]n its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.").
59. *Id.* at 99 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)).
60. *Id.* at 99 (citing *Price Waterhouse*, 490 U.S. at 253).
61. *See supra* subsection II.A.1.

6. Smith v. City of Jackson

In *Smith*, the Court faced a similar doctrinal problem as the one left open by *Desert Palace* but on a different issue. *Griggs v. Duke Power Co.*[62] laid out a theory of recovery for disparate impact claims under Title VII of similar significance to *Price Waterhouse*'s theory of recovery for mixed-motive claims under Title VII.[63] *Wards Cove Packing Co., Inc. v. Antonio*[64] narrowly construed the employer's liability under *Griggs*, and the CRA of 1991 abrogated the narrowing by *Wards Cove* by changing the language of Title VII.[65] However, it did not change the ADEA.[66]

The decision before the Court in *Smith* was whether the CRA of 1991 abrogated *Wards Cove* for Title VII alone, or whether Congress was expressing its dissatisfaction with *Wards Cove* in general.[67] The Court found the difference in the contemporaneous treatment of the statutes evidenced an intent to abrogate *Wards Cove*'s narrowing for Title VII but to leave *Wards Cove* intact for the ADEA.[68]

B. *Gross v. FBL Financial Services, Inc.* Facts and Holding

1. Facts and Procedural History

Jack Gross was fifty-four years old and had worked for FBL Financial for over thirty years when he was reassigned to a position with less responsibility.[69] Many of his former responsibilities were assigned to one of Gross's former subordinates who was promoted to a newly created position.[70] Gross filed suit under the ADEA, alleging that FBL demoted him because of his age.[71] In its defense, FBL asserted that the reassignment was part of larger corporate restructuring and that Gross's new responsibilities were best suited to his skills.[72]

The trial court instructed the jury under the mixed-motive framework of *Price Waterhouse*: that they must find for Gross if he proved by a preponderance of the evidence that FBL demoted him and that his "age was a motivating factor" in the decision.[73] The jury was in-

62. 401 U.S. 424 (1971).
63. Smith v. City of Jackson, 544 U.S. 228, 230 (2005).
64. 490 U.S. 642 (1989).
65. *Smith*, 544 U.S. at 240.
66. *Id.*
67. *Id.*
68. *Id.; see also* Jamie Darin Prenkert, *Bizzaro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217 (2007) (questioning *Smith*'s holding).
69. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2346–47 (2009).
70. *Id.*
71. *Id.* at 2347.
72. *Id.*
73. *Id.*

structed that age was a "'motivating factor' if [it] played a part or a role in [FBL]'s decision to demote [him]."[74] Finally, the trial court instructed the jury regarding FBL's affirmative defense: the defense is established "if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age."[75] The jury found for Gross and awarded $46,945 in lost compensation.[76]

The United States Court of Appeals for the Eighth Circuit heard FBL's appeal challenging the jury instruction.[77] The Eighth Circuit reversed and remanded on the ground that the trial court did not properly apply the holding of *Price Waterhouse* to the jury instruction.[78] It held the instruction should have included the requirement from Justice O'Connor's *Price Waterhouse* concurrence that the plaintiff show by "direct evidence" that the inappropriate criteria played a "substantial role" (was a motivating factor) in the adverse employment decision.[79] The Eighth Circuit refused to apply *Desert Palace* to the ADEA.[80] Though *Desert Palace* held the direct evidence requirement inapplicable to Title VII after the 1991 amendments, the decision was based on changes in the burden language of Title VII that were not changed in the ADEA.[81] The Supreme Court granted certiorari on the narrow question of whether direct evidence is necessary to shift the burden in a mixed-motive ADEA case.[82]

2. Majority Opinion

The Court almost immediately set aside the propriety of the direct evidence requirement to answer the "threshold question" of whether *Price Waterhouse* applied to the ADEA at all.[83] The Court's holding, supported by five justices, was that the ADEA required the plaintiff to prove "but-for" causation, and, therefore, the *Price Waterhouse* mixed-motive burden-shifting instructions were given in error.[84] The Court refused to apply *Price Waterhouse* to the ADEA. The holding was supported by three major arguments.

The first argument was that the plain meaning of "because of" in the ADEA requires "but for" causation and is therefore inconsistent with both motivating factor analysis and burden shifting.[85] The Court

74. *Id.*
75. *Id.*
76. *Id.*
77. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356 (8th Cir. 2008).
78. *Id.* at 360.
79. *Id.*
80. *Id.* at 361–62.
81. *Id.*
82. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348 (2009).
83. *Id.* at 2348.
84. *Id.* at 2350–51.
85. *Id.* at 2350.

started with dictionary definitions ("by reason of" and "on account of"), from which it gleaned that the ordinary meaning of "because of" in the ADEA is that "age was the 'reason' that the employer decided to act."[86] The Court then cited its own analysis of "because of" language in *Hazen Paper Co. v. Biggens* which equated "reason" with having "a determinative influence on the outcome."[87] From this progression of definitions, the Court concluded the ADEA must require "but for" causation and traditional burden shifting.[88] This is confusing considering the parallel analysis in *Price Waterhouse* that led to the conclusion that "because of" *does not* require "but for" causation or, at least, does not require the plaintiff to prove it.[89] The Court never directly addressed this conflict. The analysis is also confusing because mixed-motive burden-shifting is not necessarily inconsistent with requiring the employment decision to have "a determinative influence on the outcome."[90] In fact, the majority in *Price Waterhouse* insisted it had maintained "but-for" causation.[91]

The Court's strongest argument invoked one of the most clear and accessible rules of statutory interpretation: if two statutes are contemporaneously modified and a provision is added to one but omitted from the other, there is a presumption that the omission was intentional.[92] The addition in 1991of the "motivating factor" framework to the statutory language of Title VII but not the ADEA, which was altered contemporaneously, led the majority to the conclusion that Congress intended the two statutes to operate differently.[93] Namely, the ADEA was not intended to utilize mixed-motive burden-shifting.[94]

The more practical-minded argument put forth by the Court was that *Price Waterhouse* burden-shifting is too confusing for juries and, therefore, impedes the proper administration of justice.[95] The Court pointed to both specific cases in which lower courts have struggled with formulating an accurate jury instruction and to the high frequency of judgments notwithstanding the verdict in ADEA cases generally.[96]

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86. *Id.*
87. *Id.* (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).
88. *Id.*
89. *See supra* subsection II.A.3 (discussing the reasoning of *Price Waterhouse*).
90. *See Gross*, 129 S. Ct. at 2355 (Stevens, J., dissenting).
91. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).
92. *Gross*, 129 S. Ct. at 2349.
93. *Id.*; *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (explaining the "super-strong presumption" against overruling statutory precedents).
94. *Gross*, 129 S. Ct. at 2349.
95. *Id.* at 2352.
96. *Id.* One of these cases was *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992), where the court, in an age discrimination suit, undertook an extensive analysis of the holding of *Price Waterhouse*, the differences between pretext and

3. Dissenting Opinion

The dissent presented three counter-arguments. First, the similarity of the causation language in Title VII and the ADEA suggested they should be interpreted consistently.[97] Second, the history of treating Title VII decisions as weighty precedent in ADEA claims cautioned against abandoning *Price Waterhouse*.[98] Third, the 1991 amendments to the CRA affirmed the wisdom of *Price Waterhouse* burden-shifting for all discrimination claims, not exclusively for Title VII.[99]

C. Lower Court Treatment Since *Gross*: The Confusion

Many courts have had the opportunity to apply *Gross* to other statues. The outcomes vary widely. Most accept that, after *Gross*, courts must look to the language of the statute for explicit authorization before applying elements of *Price Waterhouse* that, prior to *Gross*, were routinely incorporated into other discrimination and retaliation claims. This has left some statutes "in" and some "out" depending on whether the court reads the language as consistent with mixed-motives or requiring "but for" causation.

In *Fairley v. Andrews*, focusing on the *Gross* Court's comparison of ADEA language to the explicit authorization for mixed-motives in Title VII, the Seventh Circuit read *Gross* as requiring the plaintiff to prove "but for" causation unless the statute expressly directs otherwise.[100] The court found that First Amendment retaliation claims cannot include burden-shifting because no statute specifically authorizes it.[101] The court reached a similar conclusion in *Serwatka v. Rockwell Automation, Inc*., finding the ADA does not contain explicit authorization for mixed-motive analysis.[102]

The Sixth Circuit, in *Hunter v. Valley View Local School District*, focused on the Department of Labor regulation interpreting the word "opposing" in the Family Medical Leave Act (FMLA).[103] Since the regulation described an employer's consideration of opposition conduct as the use of "negative factors," the court found the regulation contemplated that other *legitimate factors* might also have influenced the em-

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mixed-motive cases, and what constitutes direct evidence of discrimination due to Bethlehem Steel's challenge to the jury instruction as a *Price Waterhouse* instruction). *Id*. at 1179.

97. *Id.* at 2353–54 (Stevens, J., dissenting).
98. *Id.*
99. *Id.*
100. 578 F.3d 518, 525–26 (7th Cir. 2009).
101. *Id.*
102. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).
103. 579 F.3d 688, 691–92 (6th Cir. 2009).

ployment decision.[104] The court held the language fit the statutory authorization for mixed-motive burden-shifting required by *Gross*.[105] Interpreting the same statute, an Illinois district court found the "opposing" language of the FMLA was capable of supporting the mixed-motive instruction but did not clearly include the explicit authorization required by *Gross*.[106] Regardless, the court applied mixed-motive burden-shifting to the opposition clause of the FMLA based on authoritative Seventh Circuit precedent while anticipating the Seventh Circuit might reverse this precedent in the wake of *Gross*.[107]

In *Smith v. Xerox Corp.*, the Fifth Circuit, without much reasoning, refused to read *Gross* as requiring comparison between the discrimination and retaliation provisions of Title VII.[108] Instead, the court found the reasoning of *Price Waterhouse* controls across all provisions of Title VII, despite the lack of express authorization for mixed-motive analysis in the retaliation provision.[109] The District Court for the District of New Mexico, in *Torres v. McHugh*, did distinguish across different provisions of the ADEA.[110] It found the section of the ADEA dealing with federal employees that used "free from" rather than "because of" left room for the use of mixed-motive claims under that section.[111]

Finally, in *Jones v. Oklahoma City Public Schools*, the Tenth Circuit, in the narrowest reading of *Gross*, held the opinion does not prohibit mixed-motive claims under the ADEA, rather it only prevents burden-shifting.[112]

III. ANALYSIS

When the *Gross* majority's three major arguments are scrutinized, two are revealed to be less than persuasive. The contemporaneously-amended-statutes argument is diminished by a failure to distinguish strong alternative readings, and the Court's determinative definition of "because of" is not only convoluted but ignores important precedent. What remains is the Court's concern that mixed-motive burden-shifting is difficult to implement. While this is likely the source of the Court's motivations, the effects of the case on statutory discrimination

104. *Id.*
105. *Id.*
106. Rasic v. City of Northlake, No. 08-C-104, 2009 WL 3150428, at *17 (N.D. Ill. Sept. 25, 2009).
107. *Id.*
108. 602 F.3d 320, 329 (5th Cir. 2010).
109. *Id.*
110. 701 F. Supp. 2d 1215, 1222 (D. N.M. 2010).
111. *Id.* at 1222.
112. 617 F.3d 1273, 1277 (10th Cir. 2010).

cases can only be gleaned from the maneuvering the Court makes when defining "because of."

A. Interpreting the Civil Rights Act of 1991

The Court's most compelling interpretive tool in *Gross* was drawing a distinction between the changes made to contemporaneously amended statutes.[113] While this interpretive doctrine is undoubtedly sound when Congress writes statutes, it is less clear that it applies when Congress amends statutes with the express purpose of overriding judicial interpretation.[114] At the time Congress prepared the 1991 amendments, "motivating factor" was already the law of the land. The Supreme Court's interpretation of the original CRA in *Price Waterhouse* established the precedent under Title VII, and lower courts already applied it to other discrimination statutes in conformance with the court's tradition.[115] The most obvious way for Congress to overrule such an interpretation in the ADEA would be to add explicit restrictive language to the text of the ADEA itself. By contrast, it seems strange to think Congress would express its intention to override the motivating factor framework under the ADEA by confirming that it should persist under Title VII.

Perhaps a more natural interpretation of Congress's intent is found in the context of the actual change to the law. In creating the mixed-motive burden-shifting scheme, *Price Waterhouse* provided an employer a complete defense if it could show that it would have made the same decision in the absence of discriminatory influences.[116] After the CRA of 1991, the mixed-motive burden-shifting framework remained intact, but a defendant could no longer *completely* avoid liability by showing that it would have made the same employment decision in the absence of the improper factor.[117]

The context of the change might imply that Congress simply wanted to adjust the affirmative defense by holding employers responsible not only for employment decisions hinging solely on an improper factor, but also (to a lesser degree) for decisions in which the improper factor was relied upon but did not determine the outcome. This would explain why Congress would add motivating factor language to a statute that was already being implemented with motivating factor analy-

113. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009).
114. *See* Prenkert, *supra* note 68, at 253 (arguing that Congress's intention to overrule *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 659 (1989) in the CRA of 1991 for Title VII cases should not have led to the application of *Wards Cove* in the ADEA case *Smith v. City of Jackson*, 544 U.S. 228 (2005), but rather should have led to deciding *Smith* as a matter of first impression).
115. *See supra* subsection II.A.4 (discussing the application of *Price Waterhouse* to other discrimination statutes).
116. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).
117. *Id.*

sis under *Price Waterhouse*.[118] The motivating factor language was only added as context to the substantive change in the law: narrowing the effect of the affirmative defense. Under this interpretation, Congress's clear approval of mixed-motive burden-shifting could be a confirmation that courts should continue its application in other similar discrimination statutes (the confirmation interpretation).

On the other hand, Congress might have intended the two statutes to be handled differently. One possibility is that Congress intended what the Court in *Gross* effected: Title VII claimants can shift the burden of persuasion regarding causation if they can establish motivating factor, but claimants under the ADEA must bear the burden of persuading the finder of fact on causation along with the other elements[119] (the broad distinction interpretation). The other possibility is that Congress intended to provide limited damages for Title VII claimants but intended to leave *Price Waterhouse* in place for other discrimination claims (the narrow distinction interpretation). The narrow distinction interpretation is bolstered by the Court's own precedent under highly similar circumstances in *Smith v. City of Jackson,* where it held the CRA of 1991 abrogated *Wards Cove* for Title VII but left it in place for the ADEA.[120]

Looking back to the reasoning in *Smith*, the *Gross* Court might have found a distinction between the statutes based on the differing contemporaneous treatment but left *Price Waterhouse* intact for the ADEA.[121] However, instead of reading the 1991 Title VII amendments as aimed solely at Title VII, the Court went beyond its interpretative framework in *Smith* and declared *Price Waterhouse* totally inapplicable to the ADEA.[122] Given that the same four-Justice core made up the majority in *Smith* and the dissent in *Gross*, perhaps it was the divergence from *Smith* that the *Gross* dissent referred to when it accused the majority of "unnecessary lawmaking."[123] Regardless, the persuasive weight of the Court's statutory interpretation argument is diminished by the Court's failure to justify its rejection of the confirmation interpretation and the narrow distinction interpretation in favor of the broad distinction interpretation.

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118. *Id.*

119. *Gross*, 129 S. Ct. at 2349.

120. Smith v. City of Jackson, 544 U.S. 228, 240 (2005); s*ee also supra* subsection II.A.6 (discussing the reasoning of *Smith*).

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

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

123. *Id.* at 2353 (Stevens, J., dissenting). The four justice core in the *Smith* majority and *Gross* dissent were Justices Stevens, Souter, Ginsberg, and Breyer.

B. *Price Waterhouse* as Precedent: Determining Causation and the Burden of Persuasion by Defining "Because Of"

The majority makes quite clear that it believes "because of" requires "a determinative influence on the outcome."[124] The fact the Court quoted a 1993 case is evidence that this is not a new idea.[125] In fact, despite the Court's protests to the contrary, this is really consistent with, if not the same as, the conclusion the Court came to in *Price Waterhouse*. As noted, the *Price Waterhouse* majority seemed to be saying that "because of" means relied upon in the employment decision regardless of its causal significance,[126] but it restored the showing of "but for" causation in the defendant's opportunity to avoid liability by disproving causal significance.[127] The dissent in *Price Waterhouse* is informative:

> One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. . . [T]he plurality's theory of Title VII causation is ultimately consistent with a but-for standard.[128]

This is a source of confusion not only in *Price Waterhouse* but in *Gross*: the causation requirement is conflated with the placing of the burden. *Price Waterhouse* retained "but for" causation but required the defendant to bear the final burden of persuasion as to the causal significance of the discriminatory factor.[129] *Gross* also focused on the "but for" requirement but read "but for" as requiring a specific burden of persuasion as well as a specific level of causation.[130] Under the confusion of the conflation, the Court found a way to contain the reaches of *Price Waterhouse*'s suspect burden-shifting to the statutes in which Congress has specifically adopted it.[131] The Court admitted that, regarding *Price Waterhouse*, "it is far from clear that the Court would have the same approach were it to consider the question today in the first instance."[132] The Court's opinion really amounts to, and should be treated as, an overturning of *Price Waterhouse*.

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124. *Id.* at 2350 (quoting Hazen Paper Co. v. Biggens, 507 U.S. 604, 610 (1993)).
125. *Id.*
126. *See supra* subsection II.A.3.
127. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).
128. *Id.* at 283 (Kennedy, J., dissenting).
129. *Id.* at 241.
130. *Gross*, 129 S. Ct. at 2351.
131. *Id.* at 2350–51. The effectiveness of this limitation, given the confusion it engendered, is questionable. *See supra* section II.C; *see also* Martin J. Katz, Gross *Disunity*, 113 PENN ST. L. REV. 857 (2010) (framing the confusion as a problem of disunity among similar causes of action).
132. *Gross*, 129 S. Ct. at 2351-52.

In this way, *Gross* is a return to conventional burden placement. In shifting the burden of persuasion regarding causation to the defendant *Price Waterhouse* departed from what Justice O'Connor called "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[133] Generally, as a matter of fairness, the burden should only shift to the defendant for affirmative defenses or exemptions.[134] This is not a matter of policy but of judicial restraint.[135] For better or for worse, the Court in *Price Waterhouse* gave in to the temptation to adjust the default rules based on an intuition that it was not fair for a plaintiff to bear the burden "of establishing facts peculiarly within the knowledge of his adversary."[136] The Court in *Gross* merely attempted to reestablish the default where Congress has not expressly stated otherwise.

C. Burden Shifting After *Gross*

While it is certainly accepted that the burden of persuasion may be shifted under certain circumstances, it is typically reserved for circumstances of unfairness that cannot be mitigated through other mechanisms.[137] The *Gross* Court made clear that "because of" will not bear an interpretation that shifts the burden of persuasion in the ADEA and probably indicated hostility to such burden shifting in general.[138] While the (non-Title VII) discrimination claimant after *Gross* is at a disadvantage trying to prove mechanisms of causation better known and understood to the employer, there exists another mechanism to safeguard the plaintiff against unequal access to information: shifting the burden of *production*.

Under *McDonnell Douglas*, the plaintiff must first make an evidentiary showing that suggests discrimination was the cause of the adverse employment action.[139] Next, the defendant must then produce evidence that discrimination was not the true cause of the action.[140] Finally, the plaintiff may then prove its case by persuading the fact finder that discrimination was the true reason and that the employer's

133. Schaffer *ex rel*. Schaffer v. Weast, 546 U.S. 49, 56 (2005).
134. *Id.* at 57.
135. For an argument that *Gross* is judicial policy making, see Catherine Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279 (2010).
136. *Schaffer*, 546 U.S. at 60 (quoting United States v. New York N.H. & H.R. Co., 355 U.S. 253, 256, n.5 (1957)); *see also* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 626 (1993) (stating that it is sensible to burden the party more likely to have information relevant to the facts).
137. Price Waterhouse v. Hopkins, 490 U.S. 228, 238–39 (1989).
138. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009).
139. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
140. *Id.* at 802–03.

professed reason is merely pretext for discrimination.[141] Broadened slightly for mixed-motive cases, this would simply require the plaintiff make a showing that suggests discrimination was part of the reason for the adverse employment action; the defendant would then be required to either produce evidence of the real reason for the action or produce evidence that they would have carried out the action anyway; and, finally, the plaintiff would have to persuade the fact finder that discrimination was both a factor in the decision and that it was a determinative factor.

This has three primary effects. First, the employer's burden of production gives employees information regarding the employment action that they need to prove their case. Second, it protects the employer in cases in which the evidence is equally balanced.[142] This is important because, in most jurisdictions and in most employment relationships, the employer is not required to have a good reason, or any reason at all, to lawfully fire the employee.[143] Even in this tempered form, discrimination statutes put a burden on employers to produce evidence of lawful reasons for employment actions when they are named as defendants. Tipping the balance in their favor when the evidence is equally weighted recognizes that the employer is not legally required to document his reasons or have any reason at all. Finally, it recognizes that mixed-motive cases are consistent with the determinative requirements of "but for" causation and the traditional burden of persuasion in which the ultimate burden for proving determinative causation is on the plaintiff.

A return to *McDonnell Douglas* as the primary equalizing tool also rolls back some unnecessary complications of mixed-motive litigation. Given the technical legal aspects of the mixed-motive jury instruction some have wondered, "what difference does it make?"[144] In other words, the basic issue for the fact finder will remain the same regardless of the shift in burden. Additionally, some have questioned whether such fine-tuned legal standards have any effect when implemented by lay jurors who are unaware of the subtle differences in the standards.[145] The *Gross* Court might also have considered this an ap-

141. *Id.* at 804.

142. Note that the burden of persuasion should really only matter when the evidence is equally balanced under a "preponderance of the evidence" standard. If the evidence tips in one direction, that side should prevail regardless of which side has the burden. However, the question remains whether the burden has a psychological effect that pushes juries to favor one side over the other in cases for which there is complicated evidence.

143. "At will" employment is the statutory default in every state but Montana. *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. Rev. 1, 4 n.9 (2010).

144. Transcript of Oral Argument at 25, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 832958 at *27 (statement by Justice Souter).

145. *See id.* at 23–24 (statement by Justice Souter).

propriate change in position because, at the time of *Price Waterhouse*, Title VII cases were still bench trials in which judges, versed in the subtleties of burden-shifting, made the final decision—since the 1991 amendments, Title VII cases have generally been tried to juries.[146] After *Gross*, juries will only be faced with the more subtle "motivating factor" standard in certain Title VII claims.[147] Because the shifting burden of production under *McDonnell Douglas* takes place before trial, juries deciding statutory discrimination cases in which *Gross* applies will only have to determine whether the plaintiff meets the causation burden at trial.

D. Concurrent Motivations

Though confusing, the Court's concern in *Price Waterhouse* regarding concurrent motivations was addressed by its holding.[148] The Court limited the plaintiff's burden of persuasion to proving that the improper motive was relied upon in making the decision[149] but cut off liability for defendants who proved that legitimate factors that were also *actually* relied upon would have caused the same outcome.[150] The problem is that the mixed-motive framework applied to shift the burden not only to defendants that actually relied upon improper motives, but also to defendants who considered improper motives but did not allow them to play a causal role.[151] The first class of defendants could fairly be punished under a concurrent cause theory, and there-

146. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 436–37 (2004), *available at* http://scholarship.law.cornell.edu/lsrp_papers/1.

147. At the very least, "motivating factor" will remain the standard for the primary discrimination provision under Title VII because the amended language of that provision explicitly incorporates motivating factor. 42 U.S.C. § 2000e-2(m) ("[A]n 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."). It is uncertain whether *Gross*'s "but for" standard or the more generous "motivating factor" standard will be applied to Title VII provisions that do not explicitly adopt it. *See supra* section II.C. (noting the lower court treatment applying "motivating factor" across all of Title VII, though *Gross* might suggests a different result).

148. *See supra* subsection II.A.3.

149. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

150. *Id.*

151. This was precisely the argument made by respondent's attorney at oral argument:

> You go through the entirety of the trial saying to the jury . . . there is no evidence of age discrimination, and then at the last minute, not because you have asserted an affirmative defense — because we didn't assert an affirmative defense — one is foisted on us by the jury instruction that the plaintiff asked for. . . .

Transcript of Oral Argument at 32, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 832958 at *32.

fore could fairly be saddled with the risk of failing to prove determinative causation.[152] These defendants discriminated even if their discrimination did not cause the employee harm. The second class of defendants did not discriminate in the original decision and so should not be saddled with the burden of persuasion to basically disprove the bald assertion of the plaintiff that they would still be employed if not for the employer's discrimination. Justice O'Connor's "direct evidence" requirement mitigated this concern by requiring the plaintiff to have some higher level of proof before the burden would shift.[153]

Regardless, a clear articulation of this subtle distinction eluded the Court in *Price Waterhouse*, and has eluded courts who have tried to draft comprehensible jury instructions. Thus, the *Gross* Court's practical complaints about the difficulty of applying *Price Waterhouse*[154] speak not only to abrogating the mixed-motive standard in the ADEA context but also in the other discrimination and retaliation regimes in which it has been applied. Thus, it is likely the Court will continue the abrogation in other discrimination statutes as well.

E. The Direct Evidence Requirement

Though the Court dismissed the direct evidence requirement for which it granted certiorari to answer the threshold question of whether *Price Waterhouse* burden-shifting applies to the ADEA, its holding does indirectly address whether direct evidence is required.[155] As noted above, *Desert Palace* made clear that *Price Waterhouse*, construed as including Justice O'Connor's direct evidence requirement, was unique in "restrict[ing] a litigant to the presentation of direct evidence absent some affirmative directive in a statute," and, in fact, held that no such direct evidence was required by the language of the statute.[156]

Gross argued reasonably that *Desert Palace* was decisive in determining whether a heightened evidentiary burden was required under the ADEA.[157] The Court's reasoning in *Desert Palace* seems to concentrate on whether the statute specifically requires a heightened

152. *See Price Waterhouse*, 490 U.S. at 240–42, 258. Defendants who allowed improper motives to have an effect on their decision can only avoid liability by proving, by a preponderance of the evidence, that they would have made the same decision even if they had not taken the plaintiff's gender into account. *Id.* Thus, to the extent they can't meet that burden, and considered both legitimate and illegitimate reasons in making the decision, those defendants will not avoid liability.

153. *Id.* at 276–79.

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

155. *Id.* at 2348.

156. Desert Palace, Inc., v. Costa, 539 U.S. 90, 100–02 (2003).

157. Brief for the Petitioner at 17, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441).

burden,[158] and the language of the ADEA has no heightened requirement.[159] However, the *Gross* Court, in oral argument, seemed unwilling to give weight to *Desert Palace* because it was a Title VII case that turned on the fact the Title VII causation language was changed *after Price Waterhouse* was decided.[160] Since the ADEA causation language remained unchanged since *Price Waterhouse*, the *Gross* Court was unwilling to separate *Price Waterhouse*'s original heightened evidentiary requirement from the burden-shifting scheme when it considered how mixed-motive burden-shifting might apply to the ADEA.[161]

This left the Court with two options. It could accept the heightened evidentiary requirement that *Price Waterhouse* requires, or it could reject the application of *Price Waterhouse* to ADEA claims. As the historical practice recited in *Desert Palace* made clear, Congress has manifested its intent to specify when a heightened burden is necessary,[162] making any attempt by the Court to impose a higher burden inappropriate, if not unconstitutional.[163] Instead, the Court opted to use the differences in the contemporaneous changes to Title VII and the ADEA to distinguish the statutes and find *Price Waterhouse* inapplicable to the ADEA.[164] Since *Price Waterhouse* introduced the direct evidence requirement, rejecting *Price Waterhouse* also extinguished the need for direct evidence. Though not mentioned in the opinion, the avoidance of the heightened evidentiary requirement likely influenced the Court to reject *Price Waterhouse*. Given the Court's hostility toward decoupling the heightened evidentiary requirement from the burden-shifting scheme, trial and appellate courts should also avoid the Tenth Circuit's approach allowing mixed-motive claims but refusing to shift the burden of persuasion.[165]

IV. CONCLUSION

Courts should understand the holding of *Gross* to limit *Price Waterhouse* to Title VII claims and to revert to *McDonnell Douglas* for all other discrimination claims, including claims involving "mixed mo-

158. *Desert Palace*, 539 U.S. at 100–02.

159. 29 U.S.C. § 623(a) (1967).

160. Transcript of Oral Argument at 9, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 832958 at *9.

161. *Id.* at 13.

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

163. *See* Transcript of Oral Argument at 47, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441) (suggesting that there might be a separation of powers problem if the Court were to incorporate Title VII jurisprudence into the ADEA in ways that deny the differences in the language of the statutes).

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

165. Jones v. Oklahoma City Pub. Sch., 617 F.3d 1273, 1277 (10th Cir. 2010).

tives".[166] Beyond mixed-motives burden-shifting, the other two primary innovations of *Price Waterhouse* that would still be applicable to Title VII were the complete defense for the defendant and the contentious requirement for "direct evidence," but they were overridden by the CRA of 1991 and *Desert Palace* respectively.

Courts should avoid the Sixth Circuit's extension[167] of mixed-motive jurisprudence to statutes that do not mirror the "motivating factor" language of the post-1991 version of Title VII.[168] The Court's statutory analysis in *Gross* suggests that it would distinguish not only the ADEA's "because of" causation element, but also any element that does not specifically mention "motivating factor."[169]

While it conflates the issue of the required causation with the proper allocation of the burden of production, *Gross* successfully returns the burden of persuasion to the plaintiff. This reversion to the default rule is consistent with the principle of judicial restraint that keeps judges from making policy decisions that govern the employment relationship. Instead, courts should look for ways to mitigate inequities through shifts in the burden of production. For many claims, *McDonnell Douglas* is up to the dual task of equalizing the inequity of asymmetric information while protecting the discretion of employers to make employment decisions by imposing the minimum burden.

166. For an argument that *Gross* calls even *McDonnell Douglas* into question, see Michael Foreman, Gross v. FBL Financial Services–*Oh So Gross!*, 40 U. MEM. L. REV. 681, 689 (2010).

167. Hunter v. Valley View Local Sch., 579 F.3d 688, 691–92 (6th Cir. 2009).

168. 42 U.S.C. § 2000e-2(m) (1991).

169. *Gross*, 129 S. Ct. at 2349.