

All Acts Are Not Created Equal: An Analysis of the Mixed Motive Claim Post *Gross v. FBL Financial Services*

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I. Introduction

Over the past five decades, Congress has enacted several landmark pieces of legislation designed, in part, to afford protection to employees from a variety of unscrupulous employment practices. Some of the most notable Acts include Title VII of the Civil Rights Act of 1964; the Age Discrimination Act (ADEA); the Americans with Disabilities Act (ADA); and the Family Medical Leave Act (FMLA). Each Act, modeled after the language contained in Title VII, prohibits employers from engaging in discriminatory practices “because” of a specified trait, such as race, sex, religion, age or disability.¹ The term “because” has been defined, under Title VII, to permit employees to bring a mixed motive case.² A mixed motive case arises when an employer takes an alleged action that was partially motivated by both permissible and impermissible considerations. Since the ADEA, ADA and FMLA contained parallel language with the original Title VII Act, most legal scholars and practitioners construed the judicial construction of Title VII as applicable to the other similarly worded Acts.³

In 2009, however, the U.S. Supreme Court issued a holding in *Gross v. FBL Financial Services*,⁴ whereby it abolished the availability of the mixed motive case under the ADEA, and cautioned against applying the analysis of one Act to other employment protection Acts. While this holding was issued in reference to the ADEA, it may have significant implications for other employment protection Acts, namely the ADA and FMLA. The purpose of this article is to discuss the availability of the mixed motive case under each Act post *Gross*, and to examine appellate treatment of mixed motives cases brought under the ADA and FMLA. Section II of this article will provide an overview of the mixed motive case under Title VII, including a synopsis of the burden shifting framework leading up to the development of the mixed motive cause of action. Section III will provide an analysis of the ADEA prior to the *Gross* holding. This section will include an analysis of the *Gross v. Financial* case, and what it means for the mixed motive cause of action under the ADEA. Section IV focuses on the availability of the mixed motive case under the ADA and FMLA. This section will then focus on how the circuit courts have been applying the *Gross* holding when presented with mixed motive causes of action under the ADA, FMLA, and retaliation acts in general. This article will conclude with a discussion of the practical implications for practitioners attempting to function in the post-*Gross* employment era, as well as discussing the current legislative proposal designed to ensure the preservation of the mixed motive cause of action under the various employment discrimination acts.

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¹ Leigh A. Van Ostrand, *A Close Look at ADEA Mixed motive Claims and Gross v. FBL Financial*, 78 *FORDHAM L. REV.* 399, 405 (2009).

² *Id.* at 258.

³ *Hunter v. Valley View Local Sch.*, 579 F. 3d 688, 691 (2009).

⁴ 129 S. Ct. 2343 (2009).

II. Title VII of the Civil Rights Act of 1964

Title VII states, in part, that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or 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 race, color, religion, sex, or national origin.”⁵ The purview of Title VII prohibits employers from making employment decisions because of an applicant or employee’s race, color, religion, sex, or national origin. While the definition clearly protects against discrimination based upon an enumerated protected attribute, the term “because” is ambiguous.⁶ Some practitioners believed that the term required the plaintiff to establish that an impermissible factor was the exclusive reason for the employment decision.⁷ Other practitioners contended that the term “because” required a mere showing that an impermissible consideration was factored into the employment decision.⁸ The judicial construction of the term was first addressed by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.⁹ The following subsection will provide an analysis of the *McDonnell Douglas* holding.

a. *McDonnell Douglas Corp. v. Green*

In bringing a cause of action under Title VII, plaintiffs encounter challenges in providing sufficient evidence to meet the prescribed burden of proof in order to prevail on the allegations of impermissible employment discrimination. This is a challenging burden to meet as most evidence in employment discrimination cases are in the form of indirect circumstantial evidence as opposed to direct evidence.¹⁰ This stringent requirement was lessened, however, when the U.S. Supreme Court issued a holding in *McDonnell Douglas* articulating a framework that assists the plaintiff with ferreting out surreptitious motives disallowed by Title VII by permitting circumstantial evidence to purge the most universal nondiscriminatory causes for the adverse employment decision.¹¹

Under the *McDonnell Douglas* framework, the plaintiff must establish a prima facie case of impermissible discrimination. This is satisfied by providing indirect, circumstantial evidence that (1) the plaintiff belongs to a racial minority; (2) that the employer was seeking applicants; (3) that the plaintiff applied for the position; (4) that the employer was seeking applicants; (5) that the plaintiff was qualified for the job; (6) that the plaintiff was rejected; and (7) that, following his rejection, the position remained open and the employer continued to seek applicants from persons with the complainant's comparative qualifications.¹² Once the plaintiff is able to establish a prima facie case, the burden then shifts to the defendant employer to proffer

⁵ Title VII, 42 U.S.C. § 2000e-2(a)(1)(1989).

⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

⁷ See Cassandra A. Giles, *Shaking Price Waterhouse: Suggestions for a more Workable Approach to Title VIII Mixed Motive Disparate Treatment Discrimination Claims*, 37 IND. L. REV. 815 (2004) providing an overview of the burden shifting analysis (reviewing the history of the burden shifting framework).

⁸ *Id.*

⁹ 411 U.S. 792, 802-804 (1973).

¹⁰ Robert Fuller, *Gross V. FBL Financial Services, Inc.: A Simple Interpretation of Text and Precedent Results in Simplified Claims Under the ADEA*, 61 MERCER L. REV. 995, 999 (2010).

¹¹ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

¹² *McDonnell Douglas Corp.*, 411 U.S. at 793.

a justifiable, nondiscriminatory reason for the challenged action.¹³ If the employer is able to satisfy this burden, the burden shifts back to the employee to prove, by a preponderance of the evidence, that the employers' proffered rationale was a mere pretext for the impermissible discriminatory employment action based upon factors protected under Title VII.¹⁴ This burden shifting mechanism enables plaintiffs to attempt to prove discrimination indirectly by showing that the employer's proffered explanation is unjustified.

The *McDonnell Douglas* framework serves the important function of using circumstantial evidence to rule out the most frequent nondiscriminatory sources associated with adverse employment decisions.¹⁵ Once these nondiscriminatory motives are ruled out, an inference of discrimination is raised based upon the presumption that these actions, unless otherwise explained, are indicative of motives based upon impermissible considerations.¹⁶ The *McDonnell Douglas* framework, however, is futile when the employment decision was centered on both impermissible discriminatory factors as well as permissible, nondiscriminatory factors, known as a mixed motive.¹⁷

b. Mixed Motive Case

A mixed motive cause of action occurs when an employer makes a decision that is based upon both permissible and impermissible employment considerations.¹⁸ For example, if an employer terminated a 60 year old employee because the employee was more experienced and thus more expensive to retain, the case would be construed as a mixed motive action. In this situation, the employer may consider the costs associated with employment decisions, but would be prohibited from taking into consideration the age of the employee. Under the traditional analysis, courts utilize a two-prong test.¹⁹ The test first requires the employee to demonstrate that a protected characteristic (e.g., race, sex, national origin) was a substantial factor in an employer's adverse action.²⁰ If the employee successfully meets this burden, the burden shifts to the employer to establish that the same action would have occurred regardless of the employee's protected characteristic.²¹ In the example above, the employee would need to prove that the employer terminated him partially based upon his age. If the employee satisfies this burden, the employer would then need to prove that the same employment decision would have been made even if age was not considered in the employment decision. The applicable framework for reviewing a mixed motive case was first addressed in *Price Waterhouse v. Hopkins*,²² a Title VII case involving sexual discrimination.

c. *Price Waterhouse v. Hopkins*

¹³ *Id.* at 802

¹⁴ *Id.* at 804

¹⁵ Fuller, *supra* note 10, at 999.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Price Waterhouse*, 490 U.S. at 252.

¹⁹ *Id.* at 258

²⁰ *Id.*

²¹ *Id.*

²² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Price Waterhouse Coopers is a professional partnership that primarily engages in auditing and consulting services for large business and government agencies.²³ Each year, the partnership holds elections to determine which senior managers should be promoted to partner. The promotion process includes the review of formal nominations of the applicants as well as the supporting documentation which includes internal reviews and written evaluations.²⁴

In 1982, Ann Hopkins (plaintiff) was the only female candidate for partner within the firm.²⁵ During the preceding five years, Hopkins had generated more business for the firm than the other 87 applicants up for partner that year. Her accomplishments further included earning a contract from a client estimated at \$34-44 million. In addition, Hopkins generated more billable hours than the other applicants, and had great reviews from other partners. Even with these accomplishments, the board voted in favor of putting her nomination on hold for a period of one year. Many of the comments supporting this decision were based upon Hopkins' aggressive nature, which was perceived as being inconsistent with some of the board members' view of femininity.²⁶ As a result of the adverse employment decision, Hopkins initiated an action against her employer on the basis of sexual discrimination, under Title VII.

At trial, the Court determined that Hopkins established the prima facie elements of sexual discrimination.²⁷ The Court characterized the case as a mixed motive case that included both permissible and impermissible factors leading to the adverse employment decision.²⁸ The Court further concluded that Hopkins met the burden of proof establishing that a discriminatory factor influenced the promotional decision. Having met the burden of an improper factor, the Court held that the burden then shifted to the defendant to prove that the same decision would have been reached even if the impermissible factor had not been considered.²⁹ If the defendant was successful in meeting this burden, it would avoid equitable relief. In the *Price Waterhouse* holding, the Court concluded that the defendant failed to meet this burden and entered a judgment on behalf of Hopkins.³⁰

Price Waterhouse appealed the decision on the basis that the plaintiff should have to prove that the impermissible consideration was *the* cause of the adverse action.³¹ The Court of Appeals rejected Price Waterhouse's contention on the grounds that such a restrictive standard would be overly burdensome on an employee.³² The Court did, however, reverse the lower Court's holding that a defendant could avoid equitable relief by meeting the burden shifting requirement.³³ The Court of Appeals held that an employer who satisfies the burden by

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 233.

²⁶ *Id.* at 235.

²⁷ *Id.* at 236.

²⁸ *Id.* at 237.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 237

³² *Id.*

³³ *Id.*

establishing that the same decision would have been made absent the impermissible factor avoids all liability.³⁴ The case was then appealed to the U.S. Supreme Court.

In a plurality opinion, the U.S. Supreme Court established a new approach for adjudicating Title VII cases involving mixed motives. The Court concluded that an employer could avoid liability by proving that it would have made the same decision had it not taken the impermissible factor into account.³⁵ In a concurring opinion, Justice O'Connor contended that the legislative history of Title VII and the plain meaning of the words "because of" should be construed to signify that an employer only violates Title VII when an impermissible discriminatory factor was the "but-for" cause of an adverse employment action.³⁶ O'Connor further contended that the burden of evidence should only switch to an employer when the employee is able to produce direct evidence that impermissible factors were considered by the employer and that those factors were a substantial factor in the adverse employment decision.³⁷ The O'Connor opinion was subsequently followed by some lower courts as the appropriate standard for mixed motive cases.³⁸

Two years later with the passing of the 1991 Act, Congress amended Title VII to address the *Price Waterhouse*.³⁹ One amendment provides that "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 employment action."⁴⁰ The 1991 Act further amended Title VII by providing that even if an employer establishes it would have taken the same action absent an impermissible motive, the court may award the plaintiff declaratory and injunctive relief.⁴¹ Another function of the 1991 Act was to address the holding in *Price Waterhouse* by establishing principles applicable in mixed motive cases.⁴² The 1991 Act permits the plaintiff to establish a discriminatory employment practice by providing evidence that an impermissible discriminatory criterion was a motivating factor for any employment action.⁴³ The Act did not establish a new cause of action, but rather codified the question of causation under Title VII, serving as the congressional interpretation of the meaning "because" as used within the Act.⁴⁴ While the Amendments were drafted within the language contained in Title VII, a question remained as to whether the Amendments would be applied with equal force to other employment protection acts modeled after Title VII. The following section will discuss the ADEA as well as the recent

³⁴ *Id.*

³⁵ *Id.* at 258.

³⁶ *Price Waterhouse*, 490 U.S. at 262-63 (O'Connor, J., concurring)

³⁷ *Id.*

³⁸ See Fuller, *supra* note 10, at 1001 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003)).

³⁹ Mathew Brod, *Gross v. FBL Financial Services, Inc.: Determining the Evidentiary Requirements for Bringing a Non-Title VII Mixed motive Case*, 4 DUKE J. CONST. LAW AND PUB. POL'Y SIDEBAR 349, 355 (2009).

⁴⁰ 42 U.S.C.A. §2000e-2m (2009).

⁴¹ Brod, *supra* note 39 at 355.

⁴² *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

⁴³ Title VII, 42 U.S.C. § 2000e-2(m)(1989).

⁴⁴ Michael Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFFALO LAW REVIEW 69, 92 (2010)

Gross holding, addressing the appropriate framework for mixed motives cases arising under the ADEA.

III. Age Discrimination in Employment Act (ADEA)

The ADEA was passed by Congress in 1967 in order to prevent employers from discriminating against older workers.⁴⁵ The legislative intent of the ADEA was designed to help displaced workers who are 40 years of age or older to regain employment as well as to prohibit employers from taking adverse action against an older employee, based upon age.⁴⁶ The ADEA provides that “it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”.⁴⁷ Since the ADEA contains the analogous “because of” language contained within Title VII, the consensus among practitioners was that a plaintiff could bring a mixed motive claim under the ADEA, based upon twenty years of precedents in the form of uniform circuit court decisions.⁴⁸ This position, however, changed in 2009 when the U.S. Supreme Court issued a holding in *Gross v. FBL Financial Services*.⁴⁹

Gross v. FBL Financial Services

In *Gross v. FBL Financial Services*, the plaintiff (Gross) had been employed by FBL Financial Group, Inc. (FBL) for thirty years. In 2001, Gross was promoted to the position of claims administrator which he held for two years before being reassigned, at the age of 54, to the position of claims project coordinator. At the time of the reassignment, FBL created a new position, claims administrator manager, containing many of Gross’s former responsibilities. The claims administrator position was given to Lisa Kneeskern, who had previously been supervised by Gross and who was then in her early 40’s. While Gross and Kneeskern received the same level of compensation, Gross perceived the reassignment as a demotion. As a result, Gross filed a lawsuit against FBL under the ADEA.⁵⁰

The District Court, in accordance with *Price Waterhouse*, required Gross to establish that FBL demoted him to claims project coordinator and that his age was a motivating factor in the adverse employment decision.⁵¹ The Court further held that age would qualify as a motivating factor if it was a consideration in FBL’s decision to demote him.⁵² The Court concluded that if Gross established the above requirements, the burden would shift to FBL to establish that Gross would have been demoted regardless of his age.⁵³

⁴⁵ B. Johnson, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 304-06. (2000).

⁴⁶ Older Americans Act of 2006, 29 U.S.C.A. § 621, (2006). (Amending the ADEA). 29 USCA § 621, 2006.

⁴⁷ Older Americans Act of 2006, 29 U.S.C.A. §623 (a), 2006.

⁴⁸ Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross!* 40 MEMPHIS L. REV. 681, 685 (2010).

⁴⁹ 129 S. Ct. at 2358-2359.

⁵⁰ *Id.*

⁵¹ *Id.* at 2347.

⁵² *Id.*

⁵³ *Id.*

On appeal, the U.S. Supreme Court addressed the issue as to whether a mixed motive case was even permitted under the ADEA, given that the ADEA does not possess the burden shifting mechanism used in Title VII mixed motive cases as contained in the 1991 Amendment to Title VII.⁵⁴ The central focus of the case centered on the statement contained within the ADEA which provides that “it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”.⁵⁵ The analysis focused on the degree of the term “because”.⁵⁶

The U.S. Supreme Court held that while there are many similarities between Title VII and the ADEA, the ADEA does not possess the same burden shifting mechanism that Title VII possesses.⁵⁷ Moreover, even though the two Acts possessed the same language at the time the U.S. Supreme Court addressed the burden switching mechanism, the Court held that it is essential not to apply frameworks from one Act to another without careful analysis.⁵⁸ The majority interpreted Congress’ disregard to amend the ADEA when it amended Title VII as evidence that it did not intend to extend the *Price Waterhouse* motivating factor standard to the ADEA.⁵⁹ The Court concluded that absent the burden shifting mechanism, an employee could not sustain a mixed motive case against an employer.⁶⁰ As a result, the U.S. Supreme Court expressly rejected the viability of a mixed motive cause of action under the ADEA, and replaced it with the new but-for analysis.⁶¹ Under the but-for analysis, the employee bears the burden of proving that age played a determinant factor in the adverse employment decision, not a mere motivating factor.⁶²

Under the but-for framework, the employee is not required to prove that an illegitimate motive was the sole reason for the adverse action, but must establish that it was a primary motivating reason for the employment decision.⁶³ The impermissible factor must be of sufficient significance that, without consideration of it, the legitimate reasons proffered by the employer as justification for the adverse action would not have resulted in the same employment decision.⁶⁴ The heart of the but-for standard, which is a hypothetical paradigm, is that the employee must establish the principal factor motivating the adverse action.⁶⁵ By requiring conclusive proof of actual causation, but-for causation is significantly more challenging to establish than the mixed

⁵⁴ *Id.* at 2348.

⁵⁵ Older Americans Act of 2006, 29 U.S.C.A. § 623 (a), (2006).

⁵⁶ *Gross*, 129 S. Ct. at 2350.

⁵⁷ *Id.* at 2348.

⁵⁸ *Id.* at 2350.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2351.

⁶² *Id.*

⁶³ Bran Noonan, *The Impact of Gross V. FBL Financial Services, Inc. and the Meaning of the But-For Requirement*, 43 *Suffolk U. L. Rev.* 921, 928 (2010).

⁶⁴ *Id.*

⁶⁵ *Id.* at 929.

motive cause of action.⁶⁶ This heightened standard is further magnified in that employees generally lack empirical evidence to support their claims.⁶⁷

The *Gross* decision disregards twenty years of precedent of uniform circuit court decisions where the circuit courts continually applied the *Price Waterhouse* standard in ADEA claims based upon the identical "because of" terminology contained in both Title VII and the ADEA.⁶⁸ Moreover, as Justice Stevens held in his *Gross* dissent, the Court has routinely construed the identical language contained in both Title VII and the ADEA with equal force as the ADEA was derived in *haec verba* from Title VII.⁶⁹

While the majority in the *Gross* case interpreted Congress' disregard to amend the ADEA when it amended Title VII as evidence that it did not intend to incorporate the *Price Waterhouse* motivating factor standard to the ADEA, it ignores the spirit of the Amendment.⁷⁰ Moreover, the judicial construction as articulated in *Gross* may serve as precedents that anytime Congress acts to amend existing case law in one Act, it must concomitantly amend analogous statutes, even if those other statutes were modeled on the amended statute and interpreted in a consistent manner with the amended statute.⁷¹

As a result of the *Gross* case, employees are unable to bring a mixed motive cause of action when claiming a violation under the ADEA.⁷² The employee must now provide conclusive evidence that the impermissible factor was the principal factor motivating the employment decision.⁷³ While the *Gross* case forecloses upon the opportunity for employees to bring mixed motive cases under the ADEA, the Court was silent as to whether the holding extends to other acts modeled after Title VII.

IV. Application to the Americans With Disabilities Act and FMLA

While the *Gross* holding has changed the framework under the ADEA, it also has the potential of having long reaching implications for practitioners stretching beyond the ADEA.⁷⁴ By holding that the ADEA does not contain the same burden shifting mechanism found within Title VII, the interpretation of the same language in the ADA and FMLA must now be revisited by the courts. The following subsections will address how the *Gross* case may eliminate the mixed motive cause of action in both the Americans with Disabilities Act (ADA), Family Medical Leave Act (FMLA) and other retaliation Acts.

⁶⁶ *Id.*

⁶⁷ Richard Moberly, *The Supreme Courts Anti-Retaliation Principle*, 61 CASE W. RES. L. REV. 60 (forthcoming Jan. 2011).

⁶⁸ Allison P. Sues, *Gross 'ed Out: The Seventh Circuit's Over-Extension of Gross v. FBL Financial Services into the ADA Context*, 5 SEVENTH CIRCUIT REV. 356, 361 (2010) (citing *Gross*, 129 S. Ct. at 2354-55 (Stevens, J., dissenting)).

⁶⁹ *Gross*, 129 S. Ct. at 2351.

⁷⁰ *Id.*

⁷¹ Foreman, *supra* note 49, at 695.

⁷² *Gross*, 129 S. Ct. at 2350.

⁷³ *Noonan*, 43 SUFFOLK U. L. REV. at 929.

⁷⁴ *See Fuller, supra* note 10.

a. Americans With Disabilities Act (ADA)

The ADA, passed in 1990 was expected to serve as a safeguard for the estimated 43 million Americans with a qualifying disability.⁷⁵ The purpose of the ADA was to prohibit discrimination by covered entities against employees that either have, or are perceived as having, a disability.⁷⁶ A prima facie case of discrimination is comprised of the following three elements: (1) that the plaintiff suffers from a real or perceived disability; (2) is otherwise qualified to perform the essential functions of the position, with or without reasonable accommodations; and (3) suffers from discrimination because of the disability.⁷⁷ The “because” language contained within the elements mirrors the language contained within the original Title VII Act as well as the language contained within the ADEA. In light of the recent judicial construction of the term “because” in the ADEA, practitioners need to be concerned about the viability of a mixed motive claim under the ADA, which already have a low success rate.⁷⁸ Since the *Gross* holding, the issue as to whether the *Gross* holding applies to the ADA was addressed by the Seventh Circuit Court of Appeals in *Serwatka v. Rockwell Automation, Inc.*⁷⁹

Serwatka v. Rockwell Automation, Inc.

The Seventh Circuit addressed the viability of the mixed motive case on January 15th, 2010 when it issued an opinion in *Serwatka v. Rockwell Automation, Inc.* In that case, Serwatka filed suit against her former employer, Rockwell Automation, Inc., under the Americans with Disabilities Act alleging that she was terminated based upon her disability, despite her capability to execute the essential functions of her position.⁸⁰ The jury concluded this was a mixed motive case, finding that Serwatka’s termination was based upon both permissible and impermissible factors. On appeals, the issue before the Court was whether a mixed motive holding entitles the plaintiff to judgment in her favor, in light of the *Gross* holding.⁸¹

On appeal, the Seventh Circuit acknowledged that the *Gross* holding was controlling precedent and must be followed.⁸² The Court elected to follow the *Gross* ruling as opposed to the interpretation to Title VII on the basis of the limited amendment argument. The limited amendment argument occurs when the Court rationalizes that if Congress amends one Act, but neglects to amend another Act with similar language, then Congress must have intended that the Acts be interpreted differently.⁸³ Since the ADA was not amended by Congress when Title VII

⁷⁵ Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment*, 6 U. PA. J. LAB. & EMP. L. 735, 736, (2004).

⁷⁶ *Id.* at 758.

⁷⁷ Polesnak v. R.H. Management Systems, Inc., 1997 WL 109245.

⁷⁸ See Kaiser, *supra* note 75, at 736. (describing the low success rate; in one study, it was determined that between 1992 and 1998, defendants prevailed in 93% of reported ADA discrimination cases decided at the trial court level.⁷⁸ In addition to enjoying high success rate at the trial level, defendants were often successful at the appellate level, where the defendant prevailed in 84% of the reported cases. In an additional study, Colker discovered that defendants succeeded in 86% of appellate cases between 1994 and 1999).

⁷⁹ 591 F.3d 957 (7th Cir. 2010).

⁸⁰ *Id.* at 959.

⁸¹ *Id.*

⁸² *Id.* at 693.

⁸³ Martin J. Katz, *Gross Indignity*, 114 PENN ST. L. REV. 857, 870 (2010).

was amended, the Court applied the *Gross* holding.⁸⁴ By adopting the *Gross* holding, the Court reversed their its decisions which permitted mixed motive cases.⁸⁵ The Court further held that unless a statute provides otherwise, demonstrating but-for causation is a component of the plaintiff's burden in all suits under federal law.⁸⁶ The Court did, however, acknowledge in dicta that the ADA Amendments Act of 2008 may permit mixed motive cases as it changed the “because” language originally contained in the ADA. The Court, however, refused to further address the issue as the Amendments did not go into effect until 2009, five years after Serwatka was terminated from her position.

In addition to the primary case addressing the viability of the mixed motive cause of action, the Fifth Circuit acknowledged in a footnote that the *Gross* case raises the question as to whether the mixed motive framework is available in any act outside of Title VII.⁸⁷ While this remains an issue of first impression for many circuits, the limited precedent thus far has been to extend the *Gross* holding to ADA cases in which the alleged discrimination occurred prior to the enactment of the Amendments Act of 2008.

While the Appellate Courts have addressed the status of the mixed motive framework in light of *Gross*, the holdings have been reserved to cases arising prior to the enactment of the ADA Amendments Act of 2008. The ADA Amendments Act of 2008 went into effect on January 1st, 2009. The primary amendment, in reference to the *Gross* holding, was the expansion of the “because” language which previously mirrored the language within Title VII and the ADEA leading to the *Gross* holding. Under the ADA Amendments Act of 2008, the amendment substituted the “because of” language with “on the basis of”.⁸⁸ As a result, employers may not discriminate against an employer on the basis of a disability. While the viability of the mixed motive case under the ADA Amendments Act of 2008 has not yet been addressed by an appellate court, the Seventh Circuit has acknowledged that the change of language may warrant a different framework.⁸⁹

b. Family Medical Leave Act

The FMLA is a mandate passed by Congress requiring employers with more than 50 employees within a 75 mile radius of the employees’ worksite to offer 12 weeks a year of unpaid leave to qualified employees for qualified purposes.⁹⁰ The Act further prohibits employers from retaliating against an employee for exercising his or her rights under that Act.⁹¹ In 2005, it was

⁸⁴ Serwatka, 591 F.3d at 961.

⁸⁵ *Id.* at 963.

⁸⁶ *Id.* at 961.

⁸⁷ *Crouch v. J.C. Penney Corporation, Inc.*, 337 Fed. Appx. 399 (5th Cir. 2009).

⁸⁸ Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (as amended by ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(1) (2008).

⁸⁹ *Serwatka*, 591 F.3d at 962.

⁹⁰ Family and Medical Leave Act, 29 U.S.C. § 2601 .

⁹¹ Maria Greco Danaher, *Court Uses Mixed Motive Analysis in FMLA Discrimination Case*, 8 No. 2 LAWYERS J. 3 (2006).

estimated that 76 million employees were covered under the FMLA.⁹² Of those 76 million employees, approximately 6 – 13 million took leave under the Act.⁹³

The FMLA prohibits employers from using the FMLA as a negative factor in employment decisions. The language is comparable to the language contained under the original Title VII provisions as well as the ADEA. While the availability of a mixed motive case has previously been recognized under the FMLA, it was issued pre-*Gross*.⁹⁴ Since the interpretation in *Gross* serves to eliminate the mixed motive cause of action, it has the potential of drastically affecting the number of employees seeking protection under the FMLA. For example, an employee may have reservations about taking time off as the employer may retaliate against the employee while claiming to have discovered the employee is dispensable, after temporary restructuring of the organizational structure while the employee is on unpaid leave. If the court holds that the burden shifting mechanism does not exist within the FMLA, as it held under the ADEA, an employer would prevail even if partially motivated by a retaliatory intent.

Since the *Gross* holding, the Sixth Circuit has issued a holding in *Hunter v. Valley View Local Schools*.⁹⁵ In the case at hand, Hunter was hired by the defendant, Valley View Local Schools, in 1999 to serve as a night custodian.⁹⁶ Hunter served in that capacity for four years when she suffered a car accident, unrelated to her employment, in June 2003.⁹⁷ As a result of the accident, Hunter suffered nerve damage in her right hand, arm, and foot, as well as aggravating the arthritis in her right knee.⁹⁸ Due to the extent of the injuries in her foot, Hunter underwent surgery and was forced to miss 60 days of work. Hunter was able to return to work in August 2003, but was placed on restrictions limiting her to four hours per day, five days a week.⁹⁹ The restrictions were removed on November 2004, but were subsequently reinstated in the spring of 2004, for a period of 30 days.¹⁰⁰ At that point, Hunter underwent two additional surgeries forcing her to take a 90 day leave, returning to work, on a reduced schedule, in July 2004.¹⁰¹ Hunter was able to resume her full time in August 2004, which she worked under until June 2005.¹⁰² In June of 2005, Hunter underwent a knee surgery necessitating a forty-five day.¹⁰³ When Hunter returned from the surgery in August 2005 she had permanent restrictions of no lifting, pushing, or pulling more than ten pounds; and no climbing stairs or ladders.¹⁰⁴ The

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Oby v. Baton Rouge Marriott*, 329 F. Supp. 2d 772 (2004) (finding the mixed motive case was available as of 2004).

⁹⁵ *Hunter*, 579 F.3d at 692-93.

⁹⁶ *Id.* at. 689

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

following month, Hunter was informed by the school district that she was being placed on unpaid medical leave for up to one year due to excessive absenteeism and the employment restrictions inhibiting her ability to perform her job.¹⁰⁵ In June of 2008, Hunter filed a civil action against Valley View, alleging in part, violations of the FMLA.¹⁰⁶

At the trial court level, representatives from Valley view testified that Hunter's use of the FMLA was one of two factors motivating Hunter's placement on involuntary leave.¹⁰⁷ While the District Court found that Hunter presented direct evidence that Valley View had impermissibly considered Hunter's use of FMLA leave, the Court concluded that Valley View was entitled to summary judgment as it would have placed Hunter on involuntary leave even without considering the impermissible factor, due to Hunter's permanent medical restrictions.¹⁰⁸ On appeal, the Sixth Circuit repudiated the but-for test, opting to apply the original Price Waterhouse mixed motive approach to a Family Medical Leave Act (FMLA) retaliation action.¹⁰⁹ The Court distinguished the language in Title VII and the ADEA from the language in the FMLA on the basis that the FMLA prohibits employers from using family medical leave as a "negative factor" in employment actions.¹¹⁰ The Court concluded that the language contained within the FMLA leaves open the possibility that the employment decision could also rest on other permissible factors falling outside the scope of the FMLA.¹¹¹ As a result, the court relied upon the *Price Waterhouse* holding.¹¹²

c. Retaliation Claims

While the ADA currently follows the *Gross* holding prohibiting mixed motive cases, there have been several circuit courts that have addressed the appropriate framework under the various retaliation claims. The following section will discuss *Smith v. Xerox*,¹¹³ a Fifth Circuit case focusing on a Title VII retaliation claim.

Smith v. Xerox

In the Fifth Circuit, the Court in *Smith v. Xerox* considered the issue as to whether the *Gross* holding was controlling in a Title VII retaliation case. In said case, Smith was employed by Xerox for 22 years before being terminated in 2006. During that time Smith had received the President's Club, an annual award presented to the top eight most productive employees in the country.¹¹⁴ Within two years of receiving the award, a new manager was assigned to Smith's region.¹¹⁵ Moreover, the sales territories in Smith's region were realigned.¹¹⁶ As a result, Smith

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 690.

¹⁰⁸ *Id.*

¹⁰⁹ Hunter, 579 F.3d at 692-93.

¹¹⁰ Noonan, *supra* note 63, at 933.

¹¹¹ Hunter, 579 F.3d at 692-93.

¹¹² Noonan, *supra* note 63, at 933.

¹¹³ *Smith v. Xerox*, 602 F.3D 320, 323 (5th Cir. 2010).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

was unable to reach her sales goals as the number of agents she supported was reduced.¹¹⁷ Smith subsequently received a letter from her new supervisor informing her that she had only met 70% of her sales projections and that she could be terminated if she did not meet or exceed the sales forecast.¹¹⁸ Three weeks after receiving the letter, Smith filed a discrimination charge with the EEOC, claiming discrimination based upon age, race and gender.¹¹⁹ A few days after filing the discrimination charge, her supervisor began the termination process. Smith's employment was eventually terminated in January of 2005 at the conclusion of her probationary period.¹²⁰

Smith sued Xerox claiming that she was discriminated against based on race and gender under Title VII as well as in retaliation for filing a complaint with the EEOC in violation of Title VII, which prohibits employers from discriminating against an employee because she has made charges against an employer for engaging in practices prohibited by Title VII.¹²¹ The jury returned a verdict for Xerox on the race, gender, and age claims, but found for Smith on the retaliation claim.¹²² Xerox appealed on the retaliation claim arguing that the District Court should not have given a mixed motive instruction based upon the holding in *Gross*.¹²³

The Fifth Circuit affirmed the District Court's decision for Smith finding that the *Gross* holding is inapplicable in Title VII retaliation claims, electing to follow *Price Waterhouse* and as the controlling precedents.¹²⁴ While the Appellate Court recognized the language contained within the anti-retaliation provision mirrored that of *Gross*, the majority concluded that *Gross* stood for the proposition that courts should be cautious about applying judicial construction from one Act to other Acts. As a result, the majority elected to disregard *Gross* and continue using *Price Waterhouse*.¹²⁵ While the majority refused to adopt the *Gross* holding, Justice Jolly wrote a dissenting opinion. In the dissent, Justice Jolly decries the majority's rationale in distinguishing the ADEA and Title VII retaliation claim as lame.¹²⁶ According to the dissent, the Court should have followed the holding in *Serwatka* and applied the *Gross* holding to the *Xerox* case.¹²⁷

V. Implications

The *Gross* case has caused a split of authority at the circuit court level when focusing on other federal employment protections.¹²⁸ As it currently stands, the Fifth and Seventh Circuits

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 324

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 326

¹²² *Id.* at 325

¹²³ *Id.*

¹²⁴ *Id.* at 330

¹²⁵ *Id.*

¹²⁶ *Id.* at 337 (Jolly, J., dissenting).

¹²⁷ *Id.*

¹²⁸ See *Xerox*, 602 F.3d 320 (Gross does not apply to Title VII retaliation claims); *Serwatka*, 591 F.3d 957 (Gross controlling in ADA claims).

have both held that there is a question as to whether the mixed framework exists outside of Title VII.¹²⁹ Moreover, the Seventh Circuit applied the *Gross* holding in *Serwatka*, holding that the mixed motive case is unavailable in ADA cases. The Court did, however, acknowledge that the holding was limited to pre-2009 cases.¹³⁰ While the Fifth Circuit refused to apply the *Gross* holding to the Title VII retaliation claims, the Seventh Circuit has stated that *Gross* should apply to all federal Acts unless there is specific statutory language that would prohibit its application. Following this lead, the Seventh Circuit applied the *Gross* holding in *Fairly v. Andrews*, a First Amendment case under 42 U.S.C. S. § 1983.¹³¹

While the Fifth and Seventh Circuits have both expressed reservations as to whether the mixed motive causes of action survive outside Title VII, the Third Circuit did not extend the *Gross* holding in a 1981 claim, holding that the language utilized within the Act contained expansive language, prohibiting discrimination against “all persons”.¹³² Moreover, as previously discussed, the Sixth Circuit has refused to apply the *Gross* holding to the FMLA.¹³³ While a few circuit courts have started to address the purview of the *Gross* holding, early holdings have been inconsistent. While an established body of case law will eventually emerge, the process will take a significant amount of time to develop, leaving practitioners with uncertainty as they manage their businesses. Moreover, it is unlikely that the U.S. Supreme Court will revisit the issue in the near future, having recently issued the *Gross* holding. As a result, Congress will need to act if the *Gross* holding has circumvented their legislative intent.

In response to the U.S. Supreme Court’s decision in *Gross*, Congress is currently considering the Protecting Older Workers Against Discrimination Act (POWADA),¹³⁴ which has been proposed to overrule *Gross*.¹³⁵ The amendment would establish the motivating factor standard as the appropriate standard in all federal discrimination statutes, absent an explicit statement adopting another framework.¹³⁶ In addition, the amendment would reinstate the mixed motive cause of action in any federal law prohibiting employment discrimination and any law forbidding retaliation against an employee for engaging in federally protected activity.¹³⁷

By incorporating the motivating factor language into the proposed Protecting Older Workers Against Discrimination Act, Congress will make it somewhat easier for plaintiffs to bring an action when impermissible factors are considered.¹³⁸ This is further accomplished by expressly permitting direct or circumstantial evidence, which was the original issue brought

¹²⁹ *Crouch v. J.C. Penney Corporation, Inc.*, 337 Fed. Appx. 399, 402 (5th Cir. 2009); *Serwatka*, 591 F.3d at 962..

¹³⁰ *Serwatka*, 591 F.3d at 962.

¹³¹ See 578 F. 3d. 518 ((7th Cir. 2009).

¹³² See *Brown v. J. Kaz, Inc*, 581 F.3d 175 (2009), (concluding that the *Gross* holding does not apply).

¹³³ *Hunter*, 579 F.3d at 692-93.

¹³⁴ H.B. 371, 111th Cong. (2009).

¹³⁵ Sean Graham, *Gross V. FBL Financial Services, Inc.: Supreme Court Requires Plaintiffs to Prove Age is a “But-For” Cause in Disparate-Treatment Claims Under the Age Discrimination in Employment Act (ADEA)*, 30 BERKELEY J. EMP. & LAB. L. 571, 587 (2009).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ S. 1756, 111th Cong., 1st Sess. (2009); H.R. 3721, 111th Cong., 1st Sess. (2009). Retrieved at <http://lawyersusaonline.com/wp-files/pdfs/protecting-older-workers-against-discrimination-act.pdf>

before the Court in *Gross*.¹³⁹ By drafting the definition of the term “because” into the Act, as well as expressly mandating that mixed motive cases are permissible in all federal employment Acts unless otherwise stated, Congress is avoiding many of the issues that occurred in the 1991 Amendment to the ADEA, such as judicial opinions narrowly construing the Amendment.¹⁴⁰

VI. Conclusion

The *Gross* holding has the potential of serving as precedent for courts to deviate from the current standards for prevailing on a mixed motive case under the ADA, FMLA, and other retaliation Acts. Prior to the *Gross* case, the consensus among most practitioners was that the ADEA, ADA, and FMLA would be construed consistently with Title VII, thus incorporating the burden shifting mechanism. As a result, many practitioners incorrectly believed that employers were prohibited from taking into consideration discriminatory factors when considering an employment decision. Instead, the *Gross* case opens the doors to the potential of allowing employers more latitude in making employment decisions, even though there may be a correlation between the decision and discriminatory purposes.

While the *Gross* case does open the possibility to such interpretations under the ADA and FMLA, practitioners must be careful about applying cases designed for one Act to another Act. This cautionary warning was issued in the *Gross* case to practitioners who mistakenly applied the Title VII interpretation and burden shifting mechanism to the ADEA. As a result, practitioners should continue to maintain their current employment practices, which fall under the traditional interpretation of the mixed motive case. If the court does apply the *Gross* analysis to the ADAAA or FMLA, it would only serve expand protections afforded to the employer.

Since the *Gross* holding is a recent case, future research should be conducted over the next couple years to assess how lower courts are applying the holding. Moreover, practitioners should also monitor the political climate to determine whether Congress will take the same measures used in the amendment of Title VII. More specifically, research should focus on the proposed Protecting Older Workers Against Discrimination Act which would expand the mixed motive cause of action to most Acts.

¹³⁹ *Id.*

¹⁴⁰ See Michael Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010) (providing a discussion on cases limiting the scope of § 107).