

Casenote

***Gross v. FBL Financial Services, Inc.:* A Simple Interpretation of Text and Precedent Results in Simplified Claims Under the ADEA**

In *Gross v. FBL Financial Services, Inc.*,¹ the United States Supreme Court was asked to clarify whether the direct evidence requirement articulated in *Price Waterhouse v. Hopkins*²—later superseded by the Civil Rights Act of 1991³—applied to mixed-motive claims brought under the Age Discrimination in Employment Act of 1967 (ADEA).⁴ In an unexpected twist, the Court held that a plaintiff must prove by a preponderance of any evidence, direct or indirect, that age was the “but-for” or “determinative” cause of the adverse employment action.⁵ Accordingly, the employer bears no burden of persuasion on any issue in defending claims under the ADEA.⁶ If the plaintiff carries that heavy

1. 129 S. Ct. 2343 (2009).

2. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)).

3. 42 U.S.C. § 2000e-2(m); *see infra* text accompanying notes 52–60.

4. 29 U.S.C. §§ 621–634 (2006); *Gross*, 129 S. Ct. at 2346.

5. *Gross*, 129 S. Ct. at 2350, 2352.

6. *Id.* at 2352.

burden, there is liability; the defendant no longer has (or needs) the “same decision” defense that previously avoided ADEA liability once the plaintiff had shown that age played some part in the challenged employment decision.⁷ Because the Court’s decision in *Gross* requires ADEA plaintiffs to show that age played a decisive causative role, the ADEA defendant has no defense to carry and hence no burden of persuasion.⁸ Although it simplifies the analysis for ADEA mixed-motive claims, the decision, should it survive nascent congressional stirrings of opposition, will make it harder for plaintiffs to survive summary judgment motions or motions for judgment as a matter of law.⁹ Courts will now also be forced to consider whether *Gross* has an impact on the trial of claims under 42 U.S.C. § 1981¹⁰ and 42 U.S.C. § 1983.¹¹

I. FACTUAL BACKGROUND

In 1971 Jack Gross began working for FBL Financial Group, Inc. In 2003, when he was fifty-four years old, Gross was reassigned to a new position. Many of his former job responsibilities were assigned to a newly created position filled by Lisa Kneeskern, a woman in her early forties who had previously worked under Gross. Although Gross continued to receive the same compensation, he viewed the reassignment as a demotion.¹²

7. *See id.* at 2351.

8. *See id.* at 2351–52.

9. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court established the basic rule for lower courts when considering motions for summary judgment under Federal Rule of Civil Procedure 56. FED. R. CIV. P. 56; *see Anderson*, 477 U.S. at 256–57. A moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2). Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his favor.” *Anderson*, 477 U.S. at 256. Federal Rule of Civil Procedure 50(a) provides that a court should render judgment as a matter of law when “a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” *Id.*; *see* FED. R. CIV. P. 50(a). The Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), interpreted Rule 50(a) to mean that when “entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record,” not just the evidence favorable to the nonmoving party. *Id.* at 150. The standard for granting judgment as a matter of law mirrors the standard for granting summary judgment. *Id.* (citing *Anderson*, 477 U.S. at 250–51).

10. 42 U.S.C. § 1981 (2006).

11. 42 U.S.C. § 1983 (2006).

12. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2346–47 (2009).

Gross filed suit against FBL in the United States District Court for the Southern District of Iowa, arguing that his reassignment constituted an adverse employment action in violation of the ADEA.¹³ At the conclusion of the trial, the court instructed the jury to find in favor of Gross if he proved by a preponderance of the evidence that (1) he was demoted, and (2) age was a motivating factor in FBL's decision. According to the court, age was a motivating factor if it played a part in the demotion. Finally, the jury instructions dictated that the jury must find in favor of FBL if the defense proved that it would have made the same decision regardless of Gross's age. The jury returned a verdict for Gross.¹⁴

"The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*."¹⁵ According to the court of appeals, Gross failed to provide direct evidence of discrimination; therefore, he was ineligible for a mixed-motive jury instruction that would place the burden on FBL to prove that it would have reassigned Gross for lawful reasons alone.¹⁶

The question presented to the United States Supreme Court on certiorari was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case."¹⁷ Before reaching that question, however, the Court held in a 5-4 decision that the burden of persuasion never shifts to the party defending an alleged mixed-motive discrimination claim under the ADEA.¹⁸

II. LEGAL BACKGROUND

Congress passed the ADEA¹⁹ to prohibit employers from arbitrarily discriminating against employees based on age.²⁰ To accomplish this goal, the ADEA provides that it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate

13. 29 U.S.C. §§ 621-634 (2006); *Gross*, 129 S. Ct. at 2347.

14. *Gross*, 129 S. Ct. at 2347.

15. *Id.*; 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)); *see infra* notes 36-47 and accompanying text.

16. *Gross*, 129 S. Ct. at 2347.

17. *Id.* at 2348 (quoting Petition for Writ of Certiorari at i, *Gross*, 129 S. Ct. 2343 (No. 08-441)).

18. *Id.*

19. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2006)).

20. 29 U.S.C. § 621(b).

against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."²¹ The ADEA prohibits age discrimination in employment in a manner similar to how Title VII of the Civil Rights Act of 1964²² prohibits discrimination based upon race, color, religion, sex, or national origin.²³ Although not exactly the same, the language and structure of the ADEA, most notably its "because of" language, often mirrors that of Title VII.²⁴ Consequently, when addressing claims of age discrimination, courts have frequently used the same analysis that is used to decide Title VII claims of discrimination based upon race, color, religion, sex, or national origin.²⁵

The most common framework used for Title VII claims was set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.²⁶ In *McDonnell* the Court held that a Title VII plaintiff can establish a prima facie case of racial discrimination through indirect, circumstantial evidence by showing:

- (i) that 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.²⁷

If the plaintiff succeeds in proving a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."²⁸ Should the employer carry this burden, the plaintiff has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but rather a mere pretext for discriminatory reasons.²⁹ Ultimately, the plaintiff must prove that the employer made the decision because of the plaintiff's membership in a group.³⁰

Eight years after the decision in *McDonnell*, the Court in *Texas Department of Community Affairs v. Burdine*³¹ clarified the framework

21. *Id.* § 623(a)(1) (emphasis added).

22. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

23. *See id.* § 2000e-2(a).

24. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141–42 (2000).

25. *See, e.g., id.*

26. 411 U.S. 792 (1973).

27. *Id.* at 802.

28. *Id.*

29. *Id.* at 804.

30. *See id.* at 800–02.

31. 450 U.S. 248 (1981).

by emphasizing that the defendant's burden is simply one of production, not proof.³² In *Burdine* the Court stated that the plaintiff always retains "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff."³³ The Court also reiterated that the *McDonnell* framework was flexible and, because of the wide variety of factual scenarios that could present themselves under Title VII, may not apply in every situation.³⁴ Although the *McDonnell* framework was created in a Title VII case, its simplicity has led courts to apply its process of evidentiary analysis to age discrimination claims.³⁵ Since the passage of the ADEA every circuit has employed some variant of the framework to analyze ADEA claims that are based primarily on circumstantial evidence.³⁶

Because direct evidence of discrimination is usually "hard to come by" in employment discrimination cases,³⁷ the *McDonnell* framework serves the important function of using circumstantial evidence to "eliminate[] the most common nondiscriminatory reasons for the [employee's] rejection."³⁸ Once these nondiscriminatory reasons are eliminated, an inference of discrimination is raised because the court presumes that "these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."³⁹ However, the situation becomes complicated when the fact finder determines that the challenged employment decision was based on impermissible, discriminatory factors as well as permissible, nondiscriminatory factors.⁴⁰ The Court

32. *Id.* at 254–55.

33. *Id.* at 253.

34. *Id.* at 253 n.6.

35. See, e.g., *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 429 (4th Cir. 2000); *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 639 (2d Cir. 2000); *Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077–78 (D.C. Cir. 1999); *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990–91 (8th Cir. 1998); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1165 (10th Cir. 1998); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998); *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997); *Kaniff v. Allstate Ins. Co.*, 121 F.3d 258, 263 (7th Cir. 1997); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 456–57 (9th Cir. 1995); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993); *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982).

36. See *supra* note 35.

37. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B)).

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

39. *Id.* (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

40. The circuits took a variety of approaches prior to the Supreme Court's decision in *Price Waterhouse*. The First, Second, Sixth, and Eleventh Circuits held that once the plaintiff has shown that an impermissible factor played a substantial or motivating part

first addressed such a situation in *Price Waterhouse v. Hopkins*.⁴¹ In a plurality opinion written by Justice Brennan, the Court held that once a Title VII plaintiff proves that an impermissible factor played a *motivating part* in the defendant's employment decision, the defendant may avoid liability by proving by a preponderance of the evidence that it would have made the same decision in the absence of the impermissible factor.⁴² Unlike the concurring and dissenting opinions, Justice Brennan reasoned that the language of Title VII, which prohibits discrimination "*because of*" the employee's race, color, religion, sex, or national origin,⁴³ did not require a plaintiff to show that an impermissible factor was the "but-for" cause of an employment decision.⁴⁴ Furthermore, Justice Brennan did not specify the quantum of evidence required to shift the burden of proof in mixed-motive cases.⁴⁵

Justice O'Connor wrote a concurring opinion that some courts later followed as the authoritative view of the Court because it was the narrowest opinion necessary to form a majority.⁴⁶ Justice O'Connor disagreed with the plurality in two notable areas. First, Justice O'Connor asserted that the legislative history of Title VII and the plain meaning of the words "because of" indicated that an employer only

in an employment decision, the employer could avoid liability by proving that it would have made the same employment decision even in the absence of the impermissible criteria. *Price Waterhouse*, 490 U.S. at 238 n.2. These circuits either used the preponderance standard or did not mention the proper standard. *Id.* The United States Court of Appeals for the District of Columbia applied the same rule as the First, Second, Sixth, and Eleventh Circuits; however, the D.C. Circuit required the higher "clear and convincing" standard of proof. *Id.* The Third, Fourth, Fifth, and Seventh Circuits imposed the biggest challenge on plaintiffs, requiring them to prove that race, gender, or another impermissible factor was the "but-for" cause of termination. *Id.* The Ninth Circuit stood alone in only requiring the plaintiff in a Title VII case to show by clear and convincing evidence that an impermissible factor played a part in the employment decision. *Id.* At this point, the employer could have avoided reinstating the employee and awarding him backpay by proving that it would have made the same decision even without considering the impermissible factor. *Id.* The Eighth Circuit was similar to the Ninth Circuit in that it differentiated the liability and remedial aspects of Title VII litigation, but applied the preponderance of the evidence burden of proof. *Id.*

41. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B)).

42. *Id.* at 244-45, 253.

43. 42 U.S.C. § 2000e-2(a) (emphasis added).

44. *Price Waterhouse*, 490 U.S. at 240-41 ("Moreover, since we know that the words 'because of' do not mean 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." (Footnote omitted)).

45. *See id.* at 251-52.

46. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).

violated Title VII when an impermissible factor was the “but-for” cause of an adverse employment action.⁴⁷ Although Justice O’Connor did not explain how an employer could prove that it would have made the “same decision” for lawful reasons alone if the plaintiff had already proved that an impermissible factor was the “but-for” cause of the challenged decision, Justice O’Connor contended that the employer should bear that burden (on the same-decision defense) only when the plaintiff proves that “an illegitimate criterion was a *substantial factor* in the decision.”⁴⁸ Second, Justice O’Connor took issue with the plurality’s broad statements regarding the relative roles played by lawful and unlawful motives in determining what type of prima facie evidence suffices to impose that same-decision burden of persuasion on the employer.⁴⁹ Justice O’Connor stressed that the employer would bear that burden on the issue of causation only when “a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision.”⁵⁰ Combining these requirements, Justice O’Connor concluded that a plaintiff cannot impose a persuasion burden on the employer respecting the same-decision defense unless the plaintiff has proven “by direct evidence that an illegitimate criterion was a substantial factor in the decision.”⁵¹

47. *Price Waterhouse*, 490 U.S. at 262–63 (O’Connor, J., concurring) (“I disagree with the plurality’s dictum that the words ‘because of’ do not mean ‘but-for’ causation; manifestly they do.”). The dissenting opinion, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Scalia, agreed with Justice O’Connor that a plaintiff must show that an impermissible criterion was the “but-for” cause of an adverse employment action. *Id.* at 281 (Kennedy, J., dissenting). Justice Kennedy argued that the plurality opinion would cause confusion because, while it adopted a standard unrelated to but-for causation initially, it adopted a but-for standard once the burden has been placed upon the employer. *Id.* at 283. Unlike Justice O’Connor, the dissent would not allow any deviation from the framework established in *McDonnell* or *Burdine*. *Id.* at 290.

48. *Id.* at 276 (O’Connor, J., concurring) (emphasis added).

49. *See id.* at 276–77.

50. *Id.* at 276 (emphasis added). Some scholars have criticized Justice O’Connor’s direct-evidence requirement and the ambiguities it created. *See, e.g.*, Steven M. Tindall, *Do As She Does, Not As She Says: The Shortcomings of Justice O’Connor’s Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP. & LAB. L. 332, 336 (1996) (arguing that Justice O’Connor failed to articulate clearly “what she meant by *direct evidence*,” resulting in differing interpretations and applications of this standard by the lower courts).

51. *Price Waterhouse*, 490 U.S. at 276 (O’Connor, J., concurring). Justice O’Connor further states:

[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer’s burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the

Two years after the *Price Waterhouse* decision, Congress passed the Civil Rights Act of 1991,⁵² which was partly in response to the Court's recent interpretations of the Civil Rights Act of 1866⁵³ and of Title VII.⁵⁴ The 1991 Act—amending Title VII but not the ADEA—addressed the Court's decision in *Price Waterhouse* by “setting forth standards applicable in ‘mixed-motive’ cases.”⁵⁵ The 1991 Act codified part of the plurality's holding by adding 42 U.S.C. § 2000e-2(m),⁵⁶ which allows a plaintiff to prove an unlawful employment practice by simply demonstrating that “race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”⁵⁷ Notably, the 1991 Act did not specify that any particular type of evidence, direct or indirect, was required to establish liability under the new statutory provision.⁵⁸ Moreover, § 706(g) of Title VII⁵⁹ was amended by adding paragraph (2)(B), which dilutes a defendant's “same-decision” showing under Title VII from a complete affirmative defense to a device that merely relieves the employer who carries it from certain remedies, hiring or promotion requirements, or reinstatement orders, and from the compensatory and punitive damages newly authorized by the 1991 Act.⁶⁰

After the *Price Waterhouse* decision and the passage of the 1991 Act, the United States Courts of Appeal were divided on whether direct evidence was required in Title VII mixed-motive cases.⁶¹ In *Desert Palace, Inc. v. Costa*,⁶² a unanimous Supreme Court resolved the issue by holding that in order to obtain a mixed-motive jury instruction under 42 U.S.C. § 2000e-2(m), a plaintiff need present only sufficient evidence

same manner where there *is* direct evidence of intentional discrimination. Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that “the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.”

Id. at 271 (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)).

52. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.).

53. 42 U.S.C. §§ 1981–1992 (2006).

54. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250–51 (1994).

55. *Id.* at 251.

56. 42 U.S.C. § 2000e-2(m).

57. *Id.* (emphasis added).

58. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–99 (2003).

59. 42 U.S.C. § 2000e-5(g).

60. *See id.* § 2000e-5(g)(2)(B).

61. *Desert Palace*, 539 U.S. at 95. After *Price Waterhouse*, a number of circuits relied primarily on Justice O'Connor's concurrence and maintained that direct evidence was necessary to establish liability under § 2000e-2(m). *Id.*

62. 539 U.S. 90 (2003).

for a jury to conclude by a preponderance of either direct or indirect evidence that “race, color, religion, sex, or national origin was a motivating factor for any employment practice.”⁶³ The Court relied primarily on the statutory text, which did “not mention, much less require, that a plaintiff make a heightened showing through direct evidence.”⁶⁴ Justice Thomas, writing for the Court, also pointed to the “[c]onventional rul[e] of civil litigation” that is usually applied in Title VII cases, which requires a plaintiff to prove his case only by a preponderance of whatever evidence he could use—direct or indirect.⁶⁵

The Civil Rights Act of 1991, as subsequently interpreted, stipulated that the “motivating factor” standard of causation is adequate for liability in Title VII disparate treatment cases.⁶⁶ Less clear after the 1991 Act was the standard of causation in ADEA disparate treatment cases. In *Hazen Paper Co. v. Biggins*,⁶⁷ the Court explained that in cases arising under the ADEA, liability depended on whether age “actually motivated the employer’s decision.”⁶⁸ At first glance this language seems similar to that of the plurality in *Price Waterhouse* and the language in the Civil Rights Act of 1991. However, later in the opinion, the Court stated that a plaintiff alleging disparate treatment cannot succeed unless the plaintiff’s protected trait was a factor in the employer’s decision “and had a *determinative influence* on the outcome.”⁶⁹ The Court repeated this language in *Reeves v. Sanderson Plumbing Products, Inc.*⁷⁰ In that case, the Court specified that the plaintiff can use the *McDonnell* framework to rebut an employer’s evidence that its employment decision was based on a legitimate, nondiscriminatory reason.⁷¹ The Court also emphasized that although the intermediate evidentiary burden during trial could shift between the plaintiff and the employer (on different issues), “[t]he ultimate burden

63. *Id.* at 101 (internal quotation marks omitted) (quoting 42 U.S.C. § 2000e-2(m)).

64. *Id.* at 98–99.

65. *Id.* at 99 (alteration in original) (internal quotation marks omitted) (quoting *Price Waterhouse*, 490 U.S. at 253).

66. *See id.* at 101.

67. 507 U.S. 604 (1993).

68. *Id.* at 610. The Court noted that although it was clear from the statutory language that the disparate treatment theory was available under the ADEA, the Court had never decided whether a disparate impact theory of liability was available. *Id.* Because the parties in *Hazen* did not articulate a disparate impact theory, the Court did not address it. *Id.*

69. *Id.* (emphasis added).

70. 530 U.S. 133, 141 (2000).

71. *Id.* at 142. The Court assumed that the *McDonnell* framework applied without squarely addressing the issue. *See id.*

of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.⁷²

Accordingly, while the Court's decision in *Desert Palace* clarified mixed-motive cases under Title VII, it left unanswered whether a mixed-motive analysis under the ADEA survived the 1991 Act amendments to Title VII, and if so, whether a plaintiff had to offer direct evidence of age discrimination to place a same-decision burden on a defendant. Every circuit that addressed the issue held that mixed-motive analysis continued to apply in ADEA cases;⁷³ the circuits were split, however, as to whether direct evidence was needed for the plaintiff to obtain a mixed-motive jury instruction that would impose a same-decision burden of persuasion on the employer.⁷⁴ The Court granted certiorari in *Gross v. FBL Financial Services, Inc.*⁷⁵ to resolve the latter issue,⁷⁶ but the Court reached a broader conclusion than its grant of certiorari foretold.

III. THE COURT'S RATIONALE

In *Gross v. FBL Financial Services, Inc.*,⁷⁷ the United States Supreme Court held in a 5–4 decision that ADEA⁷⁸ plaintiffs must prove that age was the but-for or determinative factor in employment decisions, and consequently, mixed-motive jury instructions are never proper in cases arising under that statute.⁷⁹

72. *Id.* at 143 (alteration in original) (internal quotation marks omitted) (quoting *Burdine*, 450 U.S. at 253).

73. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2354–55 (2009) (Stevens, J., dissenting).

74. The Second, Third, and Eighth Circuits required direct evidence in mixed-motive cases. *See, e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343; *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir. 2005); *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 248 (3d Cir. 2002). The Fourth Circuit at least tacitly approved of the direct evidence requirement. *See, e.g.*, *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 164 n.2 (4th Cir. 2004). In contrast, the First, Fifth, Seventh, Ninth, and Tenth Circuits analyzed mixed-motive ADEA cases using the same analysis that the Supreme Court used in *Desert Palace*, allowing a plaintiff to present direct or indirect evidence to establish a mixed-motive claim and shift the burden. *See, e.g.*, *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004); *Estades-Negroni v. Assocs. Corp. of N. Am.*, 345 F.3d 25, 30 (1st Cir. 2003), *aff'd on reh'g*, 377 F.3d 58 (1st Cir. 2004); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90; *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999).

75. 129 S. Ct. 2343 (2009).

76. *See id.* at 2348.

77. 129 S. Ct. 2343 (2009).

78. 29 U.S.C. §§ 621–634 (2006).

79. *Gross*, 129 S. Ct. at 2352. Justice Thomas wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. *Id.* at 2346. Both

A. *The Majority*

The Court agreed to review whether the direct evidence requirement articulated by Justice O'Connor in *Price Waterhouse v. Hopkins*⁸⁰ applied to mixed-motive cases under the ADEA.⁸¹ Rather than answering this question at the outset of the opinion, Justice Thomas first addressed the “threshold inquiry” of whether the employer ever bears the burden of persuasion under the ADEA when the trial reveals that an employer may have based its employment decision on both lawful and unlawful motives.⁸² Justice Thomas rejected the petitioner’s argument that the Court should invariably rely on past decisions construing similar language of Title VII⁸³ when interpreting the ADEA’s substantive liability provisions governing disparate treatment.⁸⁴ Justice Thomas observed that unlike Title VII after the Civil Rights Act of 1991,⁸⁵ the ADEA’s text does not allow a plaintiff to prove unlawful discrimination simply by showing that age was a “motivating” factor in an adverse employment action.⁸⁶ Significantly, when Congress amended Title VII, Congress similarly did not relax the plaintiff’s required prima facie proof under the ADEA or even mention a “same-decision” defense in the ADEA, even as the Title VII amendments diluted the significance of a same-decision showing from an affirmative defense to a mere amelioration of remedy.⁸⁷ The 1991 Act therefore suggests Congress’s intent not to overturn pre-1991 Act interpretations of the ADEA, especially because other provisions of the ADEA were amended as part of the 1991 Act.⁸⁸ To base the Court’s interpretation of the liability provisions of the ADEA on pre-1991 Act decisions like *Price Waterhouse* or the post-1991 Act decision in *Desert Palace, Inc. v.*

Justice Stevens and Justice Souter wrote dissenting opinions. *Id.* at 2352.

80. 490 U.S. 228, 276 (1989) (O’Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)).

81. *Gross*, 129 S. Ct. at 2348.

82. *Id.* at 2348 & n.1.

83. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

84. *Gross*, 129 S. Ct. at 2348.

85. Pub. L. No. 102-66, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.).

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

87. *Id.*

88. *Id.* (“When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”).

*Costa*⁸⁹ would ignore the apparent congressional intent to treat ADEA claims differently.⁹⁰

Justice Thomas then focused on the language of the ADEA, mainly section 29 U.S.C. § 623(a)(1),⁹¹ which prohibits employers from discriminating against a plaintiff “because of such individual’s age.”⁹² According to Justice Thomas, the ordinary meaning of § 623(a)(1) indicates that a plaintiff must prove that his age was the “reason” why the employer took an adverse employment action.⁹³ The term *reason* signifies but-for causation, meaning that the ADEA plaintiff retains the burden to establish that age was the but-for cause of the adverse employment action.⁹⁴ Justice Thomas noted that this interpretation is consistent with language in the Court’s previous ADEA decisions that require a plaintiff to prove not only that age was a factor in the employer’s decision but also that it had a “determinative influence on the outcome.”⁹⁵

Finally, Justice Thomas rejected the argument made by the plaintiff and the dissent that ADEA interpretation should be controlled by the Court’s analysis in *Price Waterhouse*.⁹⁶ While he conceded that the Court had applied pre-1991 interpretations of Title VII to the ADEA in *Smith v. City of Jackson, Mississippi*⁹⁷ with respect to disparate impact claims, Justice Thomas distinguished the current statutory picture of ADEA disparate treatment claims.⁹⁸ For disparate treatment claims, the 1991 Act eased the Title VII plaintiff’s job of establishing a prima facie case by providing for liability upon a showing that race, sex, color, national origin, or religion simply motivated the challenged decision.⁹⁹ The 1991 Act also partially superseded *Price Waterhouse* by denying employers in Title VII cases the complete affirmative defense that that decision afforded them if they carried the same-decision showing, substituting instead the mere remedy alleviation in 42 U.S.C. § 2000e-

89. 539 U.S. 90 (2003).

90. *Gross*, 129 S. Ct. at 2349. Justice Thomas stressed the danger of applying rules mandated under one statute to a different statute without a careful analysis to determine whether Congress intended such an application. *Id.* (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

91. 29 U.S.C. § 623(a)(1).

92. *Id.* (emphasis added); *Gross*, 129 S. Ct. at 2350.

93. *Gross*, 129 S. Ct. at 2350.

94. *Id.*

95. *Id.* at 2350–51 (emphasis omitted) (internal quotation marks omitted) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

96. *Id.* at 2351.

97. 544 U.S. 228 (2005).

98. *Gross*, 129 S. Ct. at 2351 & n.5.

99. *Id.*

5(g)(2)(B).¹⁰⁰ Justice Thomas reasoned that these statutory changes suggested two things: First, that proof that an impermissible criterion was simply a motivating factor was not sufficient under Title VII prior to the 1991 Act.¹⁰¹ Second, because Congress could have specified motivating-factor liability under the ADEA in the 1991 Act but failed to do so, Congress did not intend pre-1991 interpretations of Title VII to apply to the ADEA.¹⁰² Justice Thomas noted that regardless of any flaws in the *Price Waterhouse* reasoning, its burden-shifting framework had become difficult to apply.¹⁰³ Thus, even if it were “doctrinally sound,” the difficulties in applying *Price Waterhouse* in the courtroom counseled against extending that burden-shifting framework to ADEA claims.¹⁰⁴

Almost as an afterthought, in a footnote, Justice Thomas finally addressed part of the question addressed by the Court’s grant of a writ of certiorari.¹⁰⁵ Justice Thomas explained that although a plaintiff will always have the burden of persuasion on the only ultimate issue in an ADEA disparate treatment claim—whether age was the determinative factor in the employer’s challenged decision—a plaintiff may meet this burden by any evidence, direct or indirect.¹⁰⁶ Justice Thomas reasoned

100. 42 U.S.C. § 2000e-5(g)(2)(B); *Gross*, 129 S. Ct. at 2351 n.5.

101. *Gross*, 129 S. Ct. at 2351 n.5 (reasoning that “[i]f such ‘motivating factor’ claims were already part of Title VII, the addition of § 2000e-5(g)(2)(B) alone would have been sufficient”).

102. *Id.* The main difference between Justice Thomas’s opinion and the dissent on whether pre-1991 interpretations of Title VII should apply to ADEA cases seems to hinge on the impact congressional ratification or abrogation has on a court’s previous interpretation of statutory text. To Justice Thomas, the fact that Congress failed to amend the ADEA in the manner that it amended Title VII was controlling. *See id.* In contrast, the dissent argued that congressional amendment of Title VII in fact endorses the Court’s pre-1991 interpretation of Title VII (and thus of the ADEA). *See id.* at 2356 (Stevens, J., dissenting).

103. *Id.* at 2352 (majority opinion) (casting doubt on whether the Court would have taken the same approach that the Court in *Price Waterhouse* took if it had the chance to consider the question for the first time).

104. *Id.* at 2351–52. It would appear that the analysis used by Justice Kennedy and Justice Scalia when interpreting the pre-1991 Title VII (and thus the pre-1991 ADEA) finally won out. Justice Kennedy and Justice Scalia are the only remaining members of the Court who dissented in *Price Waterhouse*. Much of the reasoning they used in that case regarding pre-1991 Title VII is present in *Gross*. The problems with applying the burden-shifting analysis were predicted by Justice Kennedy in *Price Waterhouse*. *See Price Waterhouse*, 490 U.S. at 291–92 (Kennedy, J., dissenting) (“[C]ourts will . . . be saddled with the task of developing standards for determining when to apply the burden shift.”). In fact, Justice Kennedy predicted that the problems inherent in the burden-shifting framework would be most acute in cases brought under the ADEA. *Id.* at 292.

105. *See Gross*, 129 S. Ct. at 2351 n.4.

106. *Id.*

that no heightened evidentiary requirement should be injected unless Congress clearly mandates one.¹⁰⁷

B. *The Dissenting Opinions*

In a dissent, Justice Stevens contended that there was no reason to interpret the *because of* language of § 623(a) any differently from the way it was interpreted in pre-1991 Title VII cases such as *Price Waterhouse*.¹⁰⁸ Justice Stevens relied on the fact that the relevant *because of* text in both statutes—the ADEA and pre-1991 Title VII—is identical.¹⁰⁹ “[T]he substantive provisions of the ADEA were derived *in haec verba* from Title VII.”¹¹⁰ Therefore, as the plurality had concluded in *Price Waterhouse*, the most natural reading of § 623(a) prohibits adverse employment actions based wholly or even partly on the age of an employee.¹¹¹ The fact that the Court here was construing the ADEA rather than Title VII did not, in Justice Stevens’s mind, justify deviation from precedent.¹¹²

Ironically, Justice Stevens also used the Civil Rights Act of 1991 to reinforce his interpretation of the phrase *because of*.¹¹³ Justice Stevens reasoned that when Congress added the *motivating factor* language to Title VII, Congress ratified the *Price Waterhouse* plurality’s view regarding the plaintiff’s “motivating” standard of causation and rejected the contention of the *Price Waterhouse* dissent.¹¹⁴ Presumably Justice Stevens reasoned that Congress agreed with Justice O’Connor’s

107. *Id.* (“Congress has been unequivocal when imposing heightened proof requirements.”). Justice Thomas concluded, as a corollary of the Court’s “determinative factor” holding, that ADEA defendants, unlike Title VII defendants, never bear the burden of showing that they would have reached the same decision for lawful, nondiscriminatory reasons alone. *Id.* at 2351.

108. *Id.* at 2352–53 (Stevens, J., dissenting). Justice Stevens was joined by Justice Souter, Justice Ginsberg, and Justice Breyer. *Id.* at 2352.

109. *See id.* at 2353.

110. *Id.* at 2354 (Stevens, J., dissenting) (internal quotation marks omitted) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)). In response to this contention, Justice Thomas noted that the Court has not always interpreted the ADEA in light of Title VII. *Id.* at 2349 n.2 (majority opinion). For instance, the Court refused to interpret the “because of . . . age” language of “§ 623(a) to bar discrimination against people of all ages, even though the Court had previously [held that the] ‘because of . . . race [or] sex’ in Title VII [prohibited] discrimination against . . . all races and both sexes.” *Id.* (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004)).

111. *See id.* at 2354 (Stevens, J., dissenting).

112. *Id.*

113. *See id.* at 2355–56.

114. *Id.* at 2355.

statement, that *because of* meant but-for, determinative causation.¹¹⁵ Justice Stevens acknowledged that Congress had amended only Title VII, and not the ADEA, with respect to mixed-motive claims, meaning that the Court should decline to apply the mixed-motive provisions of the new Title VII amendments to the ADEA.¹¹⁶ (For example, the remedy reduction consequences of a defendant's same-decision showing would not apply in ADEA cases.)¹¹⁷ However, Justice Stevens contended that the interpretation of *because of* in *Price Waterhouse* should still govern claims brought under the ADEA.¹¹⁸ Justice Stevens pointed to *Smith v. City of Jackson, Mississippi*,¹¹⁹ as an example of a pre-1991 interpretation of Title VII that had been held applicable to a claim brought under the ADEA even though the corresponding provisions of Title VII—but not those of the ADEA itself—were amended by the 1991 Act.¹²⁰

Justice Stevens addressed the question proposed on certiorari by adopting the Court's decision in *Desert Palace*.¹²¹ Like the majority, Justice Stevens would not require a plaintiff to present direct evidence of age discrimination;¹²² unlike the majority, Justice Stevens would allow a plaintiff who demonstrated through any evidence that age was a motivating factor to obtain a mixed-motive jury instruction.¹²³

Justice Breyer issued a separate dissent, agreeing with Justice Stevens that mixed-motive instructions are appropriate under the ADEA.¹²⁴ Justice Breyer wrote separately to criticize the majority's determination that the *because of* language in § 623(a) meant but-for causation.¹²⁵ Justice Breyer noted that in certain instances, but-for causation may be appropriate.¹²⁶ For example, in tort cases objective and scientific rules governing physical forces make but-for causation a relatively easy standard to understand and apply.¹²⁷ In contrast, age

115. *See id.*

116. *See id.* at 2356.

117. *See id.*

118. *Id.*

119. 544 U.S. 228 (2005).

120. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting) (relating to disparate impact claims).

121. *Id.* at 2357.

122. *Id.* at 2358 (observing that a clear and unequivocal directive from Congress would have been necessary to require direct evidence of age discrimination).

123. *Id.*

124. *Id.* (Breyer, J., dissenting). Justice Breyer was joined by Justice Souter and Justice Ginsburg. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

discrimination cases often focus on thought-related characterizations in an effort to find an employer's motive.¹²⁸ Justice Breyer contended that in cases when an employer bases a decision on two factors—one legitimate and one impermissible—the but-for causation standard requires the court or jury to engage in a “hypothetical inquiry” about what the decision would have been had the employer's thoughts and surrounding circumstances been different.¹²⁹ Because the employer knows all of the reasons why an employment decision was made, and the employees generally do not, the employer is in a stronger position to answer the hypothetical inquiry for the court.¹³⁰ Justice Breyer suggested that to level the playing field, a plaintiff should be required to show only that age played a role in the employer's decision or that the employer took an adverse employment action “because of” age and other reasons.¹³¹ At this point the ADEA defendant would have the opportunity to avoid liability altogether by showing that it would have made the adverse employment decision regardless of the impermissible factor.¹³² Justice Breyer concluded that it is logical for this same-decision burden to be an affirmative defense, rather than part of the liability phase, because the employer is better situated from an evidentiary standpoint to show how it would have acted in the hypothetical inquiry.¹³³

IV. IMPLICATIONS

Perhaps the most significant implication of the holding in *Gross* is its logical simplification of mixed-motive claims brought under the ADEA.¹³⁴ As Justice Thomas noted, courts often struggled with the burden-shifting framework, especially when crafting jury instructions.¹³⁵ By eliminating that framework¹³⁶ for age discrimination cases, the Supreme Court substantially simplified the analysis used when fact finders in ADEA disparate treatment cases determine that an employer's decision was based on both permissible and age-related reasons.

128. *Id.*

129. *Id.* at 2359.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. 29 U.S.C. §§ 621–634 (2006).

135. *Id.* at 2352; *see, e.g.*, Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1179 (2d Cir. 1992) (mentioning the “murky water of shifting burdens in discrimination cases”).

136. The burden shifting in this context only refers to the burden of persuasion.

The analysis tracks the “determinative” language used in earlier ADEA cases. Although the issue of whether the burden of persuasion should shift in a mixed-motive situation was hotly contested, ADEA precedent had consistently suggested, if not clearly held, that the plaintiff must prove not only that age influenced the employer’s decision to some degree, but also that it was a “determinative” factor.¹³⁷ If *determinative* is accorded its standard dictionary definition as connoting conclusive or but-for causation,¹³⁸ and if a plaintiff is able to meet the burden of showing that age was the determinative factor in the employer’s decision, then no ADEA defendant could logically demonstrate that its lawful motives alone would have generated the challenged decision. After *Gross* ADEA defendants will introduce evidence of legitimate motives simply to prevent plaintiffs from carrying their burden of demonstrating that age was a determinative factor. If the ADEA plaintiff does carry that heavy burden on causation, then no affirmative defense will be available. This logical simplification of mixed-motive claims should be especially helpful to lower courts trying ADEA cases in which the plaintiff relies on highly indirect evidence, because the courts will not need to administer the same-decision burden shifting that had been superimposed on the primary burden-shifting framework developed by *McDonnell Douglas Corp. v. Green*¹³⁹ and *Reeves v. Sanderson Plumbing Products, Inc.*¹⁴⁰

Conversely, although the holding in *Gross* simplifies the analysis for claims brought solely under the ADEA, it may complicate cases in which a plaintiff asserts violations of both the ADEA and Title VII.¹⁴¹ In

137. See, e.g., *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

138. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (5th Cir. 1979) (interpreting *determinative factor* to mean but-for causation); *Mulle v. McCauley*, 927 A.2d 921, 929 (Conn. App. Ct. 2007) (explaining the difference between *important* and *determinative* in an issue unrelated to employment discrimination); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 616 (2002).

139. 411 U.S. 792 (1973).

140. 530 U.S. 133 (2000); see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting) (noting that because courts already have trouble applying *McDonnell* and *Burdine*, adding the burden-shifting, mixed-motive analysis is not likely to clarify what is required of courts in mixed-motive claims), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)).

141. See *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) (“Were the Court truly worried about difficulties faced by trial courts and juries . . . it would not reach today’s decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.”).

cases in which both age and an impermissible criterion under Title VII are found to be motivating factors in an employer's decision, the burden of proving how lawful factors affected the decision would shift to the employer for the Title VII claim, but the burden would remain with the plaintiff for the ADEA claim to show that the age factor was not merely motivating but determinative.¹⁴² In general, cases with both ADEA and Title VII allegations will force judges to take pains to ensure that the jury instructions enable the members of the jury to understand and apply the evidence properly under each statute.¹⁴³

The Court's decision in *Gross* will also make it harder for ADEA disparate treatment plaintiffs to survive motions for summary judgment as well as motions for judgment as a matter of law. Before *Gross* an ADEA plaintiff could avoid summary judgment if the judge concluded that a reasonable person could find, by a preponderance of the potentially admissible evidence unearthed by discovery, that age was a factor to some uncertain degree in the employer's decision.¹⁴⁴ Now a plaintiff must convince the court that a reasonable person could find by a preponderance of the same evidence that age was the but-for or determinative cause of the employer's decision.¹⁴⁵ The same substantive burden must be overcome by a plaintiff facing a defendant's motion for judgment as a matter of law.¹⁴⁶ This higher barrier at the summary judgment stage may curtail the growing number of ADEA actions filed in recent years.¹⁴⁷

142. See *id.* at 2352 (majority opinion); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100-01 (2003).

143. Of course, the Supreme Court has always stressed the importance of clearly separating statutory causes of action. See, e.g., *Hazen*, 507 U.S. at 612 (distinguishing causes of action by noting that an impermissible reason for termination such as race or gender is not an impermissible reason under the ADEA).

144. See, e.g., *Bell v. Town of Port Royal, S.C.*, 586 F. Supp. 2d 498, 513 (D.S.C. 2008).

145. See, e.g., *Fuller v. Seagate Tech., LLC*, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009) (indicating that a plaintiff meets its burden of production on a motion for summary judgment when a "reasonable jury could find that Plaintiff's termination would not have occurred but for Defendant's desire to discriminate"); *Woehl v. Hy-Vee, Inc.*, 637 F. Supp. 2d 645, 656 (S.D. Iowa 2009) (noting that at the summary judgment stage, the issue is "whether after viewing all the evidence in a light most favorable to the plaintiff, there is a genuine issue of material fact that age was the 'but-for' cause of [the employer's] adverse employment decision").

146. See *Reeves*, 530 U.S. at 150 (observing that the standard for summary judgment is the same as the standard for granting judgment as a matter of law); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

147. See U.S. Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act Charges*, <http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (last visited Mar. 31, 2010) (showing that the number of ADEA actions filed has increased sixty-one percent in the last ten years).

The decision in *Gross* may also have a significant impact on discrimination claims brought under 42 U.S.C. § 1981¹⁴⁸ or 42 U.S.C. § 1983.¹⁴⁹ Most circuits have held that the burden-shifting framework of *Price Waterhouse v. Hopkins*¹⁵⁰ applies to both § 1981 and § 1983 claims.¹⁵¹ Courts have also held that the substantive elements of a § 1981 claim are identical to the elements of an employment discrimination claim brought under Title VII.¹⁵² In a recent decision by the United States Court of Appeals for the Third Circuit, the court held that Justice O'Connor's concurrence in *Price Waterhouse* governed the mixed-motive analysis for claims brought under § 1981.¹⁵³ In a footnote, the court mentioned that it had asked what impact *Gross* might have on the case, but both sides had agreed that *Gross* had no impact.¹⁵⁴ Accordingly, the court declined to address the matter, but it observed in dictum that § 1981 does not contain the *because of* language used in the ADEA and relied upon by the majority in *Gross*.¹⁵⁵ The court concluded that the *Price Waterhouse* framework makes more sense than the one from *Gross* in light of the broad range of contractual arrangements covered by § 1981.¹⁵⁶ Concurring in the judgment, Circuit Judge Jordan wrote separately to express his concern that the Supreme Court's decision in *Gross* may very well have an impact on employment discrimination claims brought under § 1981.¹⁵⁷ While Judge Jordan admitted he was

148. 42 U.S.C. § 1981 (2006).

149. 42 U.S.C. § 1983 (2006).

150. 490 U.S. 228 (1989).

151. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 (3rd Cir. 2009); *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001); *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357, 1357 (11th Cir. 1999); *Gray v. Bd. of Higher Educ.*, 692 F.2d 901, 905 (2d Cir. 1982); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967 & n.5 (8th Cir. 1981); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976). Although most circuits have held that the *Price Waterhouse* burden-shifting framework analysis applies to claims brought under § 1981 and § 1983, the Ninth Circuit stands alone in holding that the 1991 amendments apply to § 1981. *Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192, 199 (D. Conn. 2009); see *Metoyer v. Chassman*, 504 F.3d 919, 932–34 (9th Cir. 2007).

152. See, e.g., *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 499 (3d Cir. 1999).

153. See *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009). The court noted that although the Civil Rights Act of 1991 amended § 1981 in other ways, it did not make the mixed-motive amendments applicable to § 1981 claims. *Id.* The court concluded that the decision in *Price Waterhouse*, not the 1991 Act, controlled the case. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* ("If race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case . . . because the plaintiff has not enjoyed 'the same right' as other similarly situated persons.")

157. *Id.* at 185 (Jordan, J., concurring).

not certain on the matter,¹⁵⁸ he noted that it was ironic that the Third Circuit majority recognized the textual distinction between the ADEA and § 1981 while at the same time ignoring the textual distinctions between Title VII and § 1981.¹⁵⁹ Judge Jordan cautioned that the majority should heed the Supreme Court's admonition in *Gross* to not simply transpose analytical constructions "from one statute to another without a thorough and thoughtful analysis."¹⁶⁰ Judge Jordan concluded that given the broad language of the Supreme Court in *Gross*, a careful examination of Third Circuit precedent was needed.¹⁶¹

In any event, the holding in *Gross* may be short-lived. Members of Congress in both the Senate and the House have introduced bills to supersede the ruling in *Gross* in favor of a more employee-friendly cause of action under the ADEA.¹⁶² If successful, the additions to the ADEA will mirror those added to Title VII by the Civil Rights Act of 1991, essentially creating the same burden-shifting framework that currently exists for mixed-motive cases brought under Title VII.¹⁶³

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158. *Id.*

159. *Id.* at 186.

160. *Id.*

161. *Id.* at 187. A case decided recently by the United States District Court for the District of Connecticut also addressed the issue briefly. Noting that although it was bound by Second Circuit precedent that applied *Price Waterhouse* to § 1981 claims, the district court in *Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192 (D. Conn. 2009), predicted that the United States Court of Appeals for the Second Circuit may revisit the issue. *Id.* at 200. The district court stated that the Supreme Court's reasoning in *Gross* may not extend to § 1981 claims, pointing to the *because of* language in the ADEA that was absent from § 1981. *Id.*

162. S. 1756, 111th Cong., § 2 (2009); H.R. 3721, 111th Cong., § 2 (2009).

163. Compare 42 U.S.C. § 2000e-5(g)(2)(B), with S. 1756, § 3, and H.R. 3721, § 3.