ARTICLES

WHAT IS OLD IS NEW AGAIN: UNDERSTANDING *GROSS V. FBL FINANCIAL SERVICES, INC.* AND THE CASE LAW THAT HAS SAVED AGE DISCRIMINATION LAW

Nancy L. Zisk[*]

I. INTRODUCTION

On March 13, 2012, Senators Tom Harkin, Patrick Leahy, and Chuck Grassley introduced a bill to protect older workers from discrimination.[1] Their goal was to "revive vital civil rights protections for older workers that were limited following the Supreme Court's decision in *Gross v. FBL Financial*."[2] In *Gross*, the Supreme Court separated age discrimination claims from other discrimination claims by holding that Title VII's "mixed-motives" amendment does not apply to age discrimination claims—meaning that plaintiffs cannot prevail if they cannot prove that age was "the reason" for the employer's challenged action.[3] The Harkin bill marks Congress's second effort to circumvent the *Gross* holding.[4] However, because the future of this new bill is bleak, this Article offers a solution based on the body of case law that has developed

* J.D., Duke University; B.A., Duke University; Professor of Law, Charleston School of Law. The author wishes to thank Robert Quillinan for his research assistance.

1. Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/s2189.

2. Press Release, Senator Tom Harkin, Bipartisan Legislation Will Protect Older Workers from Discrimination (Mar. 13, 2012), *available at* http://harkin.senate.gov/press/release.cfm?i=336287.

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

4. *See id.*; Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bills/111/hr3721 (introduced on Oct. 6, 2009).

since *Gross,* instead of calling on Congress to act quickly to enhance the protection of victims of age discrimination as other articles have done.[5] Although the *Gross* holding imposed what appeared to be a new and onerous burden on plaintiffs trying to prove intentional discrimination based on age, a review of the cases decided before and after *Gross* suggests that courts are finding ways to fit the Supreme Court's mandate into firmly established discrimination law that provides age discrimination plaintiffs with their day in court.[6]

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Over thirty years ago, in *Texas Department of Community Affairs v. Burdine*, the Supreme Court announced in a Title VII sex discrimination case that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[7] Just over three years ago, in *Gross v. FBL Financial Services, Inc.*, the Court echoed this standard in an age discrimination case under the Age Discrimination in Employment Act (the ADEA)—announcing that the burden of persuasion never shifts to the party defending a discrimination claim under the ADEA where the plaintiff has produced some evidence that age was one

5. *See, e.g.,* William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 693 (2010) (noting that the *Gross* decision "has made the need for intervention far more urgent"); Mark R. Deethardt, *Life After Gross: Creating a New Center For Disparate Treatment Proof Structures*, 72 LA. L. REV. 178, 190 (2011) (noting that "congressional reform is necessary"); Michael C. 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, 74 (2010) (noting "why members of Congress who want the ADEA to be a strong tool against age discrimination in employment would want to overturn that decision").

6. *See, e.g.*, Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2d Cir. 2010) (deciding that plaintiff met her burden of showing a triable issue as to whether her age was a "but for" cause of her termination); Leibowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009) (overturning district court's granting of summary judgment in favor of defendant employer); Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441 (1st Cir. 2009) (vacating district court's granting of summary judgment in favor of defendant employer); Evans v. Sears Logistics Servs., Inc., No. 1:09-cv-2055, 2011 WL 6130885 (E.D. Cal. Dec. 8, 2011) (denying employer's motion for summary judgment on plaintiff's age claim); Duckworth v. Mid-State Mach. Products, 736 F. Supp. 2d 278 (D. Me. 2010) (denying employer's motion for summary judgment on plaintiff's age discrimination claim); Ferruggia v. Sharp Electronics Corp., No. 05-5992 (JLL), 2009 WL 2634925 (D.N.J. Aug. 25, 2009) (affirming district court's denial of summary judgment).

7. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

motivating factor in an employer's decision to take an adverse job action against the plaintiff.[8] Both of these pronouncements led to predictions of the end of discrimination claims.[9] It is clear now, however, with the benefit of more than thirty years of precedent, that the Court's pronouncement in *Burdine* did not spell the end of discrimination claims. Similarly, after approximately three years of case law interpreting *Gross*, courts are developing a workable standard to guide age discrimination claims. There is no question that the Supreme Court separated age discrimination claims from other discrimination claims by holding that Title VII's "mixed-motives" amendment does not apply to age discrimination claims—meaning that plaintiffs cannot prevail if they cannot prove that age was "the reason" for the employer's challenged action.[10] But, despite this ratcheting up of the

8. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

9. *See, e.g.*, Ellen M. Athas, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AM. U. L. REV. 755, 764 (1982) (commenting that, although the *Burdine* standard "seems legitimate on its face, the difficulty of proving discriminatory intent under such a standard is readily apparent"); Hannah Arterian Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 355 (1984) (observing, a year after *Burdine* was decided, that the decision "has profoundly affected the shape of Title VII litigation by forcing the plaintiff to prove more than previously required under the formula"); Harper, *supra* note 5, at 74 (calling for Congress to respond to ensure that the ADEA is a "strong tool against age discrimination in employment"); Jessica M. Scales, *Tipping the Balance Back: An Argument for the Mixed Motive Theory Under the ADEA*, 30 ST. LOUIS U. PUB. L. REV. 229, 242 (2010) (observing that the Gross decision "leaves a large segment of the population with weak protection against discrimination"); Alisa D. Shudofsky, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553, 569-70 (1982) (observing that, by announcing that the burden never shifts, the *Burdine* Court "thereby ensured that defendants in [T]itle VII disparate treatment actions would not be held to the difficult standard of proving by a preponderance of the evidence that legitimate reasons for their employment decisions existed"). For a critical assessment of *Burdine* shortly after it was decided, see Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1243 (1981) ("[T]he unanimous opinion in *Burdine* . . . demonstrates that the Court is still struggling with the problem of devising an appropriate and comprehensive framework on burdens allocation in discrimination cases."). *See also* Philip K. Miles III, *Gross Point Blank – Supreme Court Nixes ADEA Mixed Motive*, LAWFFICE.COM (June 21, 2009), http://www.lawfficespace.com/2009/06/gross-point-blank-supreme-court-nixes.html (observing that "[e]mployers will no doubt see *Gross* as a victory"); Daniel J. Venditti, *Supreme Court Rejects "Mixed-Motive" Burden-Shifting Under the ADEA*, THE METRO. CORPORATE COUNSEL (Nov. 2, 2009), http://www.metrocorpcounsel.com/articles/11889/supreme-court-rejects-mixed-motive-burden-shifting-under-adea ("Gross is a favorable opinion for employers.").

10. *Gross*, 557 U.S. at 175-78. As discussed *infra* in Section II.B., the Supreme

plaintiff's burden, a review of subsequent case law suggests that courts have been protecting age claims from likely defeat in one of two ways. First, courts have simply refused to apply *Gross*.[11] Alternatively, courts have taken the bait left by *Gross* when it raised, but did not answer, the question of whether the burden-shifting framework of *McDonnell Douglas v. Green* utilized in other discrimination claims could be applied to ADEA cases,[12] and have begun analyzing claims as single-motive, or "pretext" claims, rather than mixed-motives claims. Indeed, most courts are applying the burden-shifting framework of *McDonnell Douglas* in age discrimination claims.[13] Because the amendment to Title VII shifts the burden of persuasion in mixed-motives cases, and Mc*Donnell Douglas* shifts only the burden of production, there is a growing body of law supporting the conclusion that *Gross* poses no obstacle to the application of *McDonnell Douglas* to age claims through the summary judgment

Court held in *Price Waterhouse v. Hopkins*, that if a Title VII plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. 490 U.S. at 258 (plurality opinion). In response to confusion that followed the *Price Waterhouse* decision, discussed *infra* in Section II.B, Congress amended Title VII to allow a plaintiff to state a claim if he or she demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012). As amended, Title VII allows an employer to limit, but not escape, liability by showing that it would have made the same decision "in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

11. *See, e.g.*, Diaz v. Jiten Hotel Mgmt., Inc., 671 F.3d 78 (1st Cir. 2012) (affirming the ongoing validity of the mixed-motive framework in all state discrimination claims); Harth v. Daler-Rowney USA Ltd., No. 09–5332 (MLC), 2012 WL 893095 (D. N.J. Mar. 15, 2012) (deciding that *Gross* did not preclude a mixed motive analysis under New Jersey statute prohibiting discrimination on the basis of age, sex, race, and other traits); Wagner v. Bd. of Trustees of Conn. State Univ., 2012 WL 669544, at *11 (Conn. Super. Ct. 2012) (deciding that *Gross* did not preclude mixed motive analysis under Connecticut state statute prohibiting discrimination on age, and other traits, including sex, race, and national origin). *See also* Riley v. Vilsack, 665 F. Supp. 2d 994, 1006 (W.D. Wis. 2009) (denying employer's motion to dismiss noting that the "difference between 'motivating factor' and 'but for' causation might be important at trial, but it does not matter in the complaint.").

12. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 n.2 (2009) (citing McDonnell Douglas v. Green, 411 U.S. 792 (1973)) (defining a three-step process under which the plaintiff must state a prima facie case that raises an inference that he or she was treated differently because of his or her protected trait; then the defendant must articulate a legitimate, nondiscriminatiory reason for the action taken, and then, in order to prevail, the plaintiff must prove that the defendant's proferred reason is pretext for discrimination).

13. *See infra* Section IV for a discussion of the case law after *Gross*.

stage.[14] Although some claims have not survived summary judgment, the reason is not *Gross*; it is failure of proof under *McDonnell Douglas*, as applied to Title VII as well as ADEA claims.[15]

This Article, therefore, proposes that the solution to the *Gross* problem is to rely on the law we already have. There is no reason to wait for Congress to abrogate *Gross*, because current law requires plaintiffs in every case of alleged employment discrimination—age or otherwise—to prove discriminatory intent.[16] It is not easy, and sometimes not even possible, to prove an employer's discriminatory intent, but *McDonnell Douglas* and its progeny give courts, as well as employees and employers, the framework they need to ferret out discrimination.[17] Section II reviews the development of the burden-shifting framework in single and mixed-motives cases prior to *Gross*, and Section III discusses the Supreme Court's holding in *Gross*. Section IV reviews the cases decided under the ADEA since *Gross* and shows that, although some of the decisions may be inconsistent and

14. *See, e.g.*, Jones v. Okla. City Pub. Sch., 617 F.3d 1273, 1278 (10th Cir. 2010) (concluding that *Gross* does not "preclude" the Tenth Circuit's "continued application of *McDonnell Douglas* to ADEA claims"); Grimsley v. Charles River Labs., No. 3:08-CV-00482-LRH-VPC, 2011 WL 4527415, at *6 (D. Nev. Sept. 28, 2011) (noting that the "*Gross* Court's rejection of the Title VII burden-shifting framework of *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), was not a rejection of the *McDonnell Douglas* burden-shifting evidentiary framework"). *Accord* Phillips v. Pepsi Bottling Grp., 373 F. App'x 896 (10th Cir. 2010); Leibowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009); Smith v. City of Allentown, 589 F.3d 684 (3d Cir. 2009); Geiger v. Tower Automotive, 579 F.3d 614, 622 (6th Cir. 2009); Guinto v. Exelon Generation Co., LLC, 341 F. App'x, 240 (7th Cir. 2009); Smith v. Napolitano, 626 F. Supp. 2d 81 (D. D.C. 2009).

15. *See, e.g.*, *Leibowitz*, 584 F.3d 487; *Smith*, 589 F.3d 684; *Grimsley*, 2011 WL 4527415; Keffer v. Kroger Ltd. P'ship I, No. 5:10–CV–554–FL, 2011 WL 6396553 (E.D. N.C. Dec. 20, 2011). To survive summary judgment under the burden-shifting framework of *McDonnell Douglas*, a plaintiff under either Title VII or the ADEA face the same "ultimate burden" of proving that he or she was "the victim of intentional discrimination." *See* Tex. Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Surviving summary judgment often amounts to a victory for plaintiffs because "it can make or break a case." Vivian Berger, Michael Finkelstein, & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45 (2005), *available at* http://www.vberger-mediator.com/mediation/benchmarks.html.

16. *See Burdine*, 450 U.S. at 253.

17. Vélez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 446-47 (1st Cir. 2009) (noting that ADEA plaintiffs who do not have "smoking gun" evidence of their employer's discriminatory motives may nonetheless prove their cases by using the three stage burden-shifting framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

confused,[18] the case law as a whole suggests a consistent and workable theme that can guide the future development of age discrimination law. Accordingly, Section V concludes that, although the *Gross* holding separates age claims from the mixed-motives claims under Title VII, the case law that has developed around that decision offers victims of age discrimination the avenue through which they can state and win single or mixed-motives claims.

II. THE DEVELOPMENT OF THE BURDEN-SHIFTING FRAMEWORK IN SINGLE-MOTIVE AND MIXED-MOTIVES CASES

In 1964, Congress enacted Title VII, which prohibited employers from taking adverse employment actions against employees or prospective employees "because of such individual's race, color, religion, sex, or national origin."[19] In 1967, Congress extended this protection when it enacted the Age Discrimination in Employment Act (ADEA), which barred employers from taking such action "because of" an individual's age.[20] Two theories of recovery evolved from these acts: disparate impact and disparate treatment.

The disparate impact theory makes employers liable for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation."[21] Although not easy to prove, these claims do not require a plaintiff to prove that the employer intended to discriminate, but, rather, that a particular practice or policy caused a disparate impact on a protected class.[22] If an employee plaintiff establishes disparate impact, the defendant employer may avoid liability only by proving that the policy or procedure is related to job performance.[23]

18. *See, e.g.*, DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 578 (E.D. Pa. 2010) (citing inconsistencies in decisions after *Gross*).

19. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012).

20. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) (2012).

21. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

22. *Id.* at 431-32.

23. *Id.* at 432 (requiring employer to demonstrate that its challenged practice has "a manifest relationship to the employment in question"). *Accord* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The "touchstone" according to the Court is "business necessity." *Griggs*, 401 U.S. at 431.

Much more difficult to prove are "disparate treatment" claims in which the plaintiff must prove "that the defendant had a discriminatory intent or motive" for taking a job-related action.[24] This section will first explore the development of the burden-shifting framework that aids plaintiffs in drawing out evidence of disparate treatment. Then, the use of this framework in mixed-motives cases will be considered.

A. *McDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK

In some disparate treatment cases, a plaintiff may have direct evidence of discriminatory animus, through eyewitness testimony or other "smoking gun" evidence of discriminatory intent, and, in these cases, the plaintiff may prevail by offering this proof.[25] These cases, however, are rare.[26] In most discrimination suits, plaintiffs do not possess the direct evidence of discriminatory animus needed to prove disparate treatment claims, and must, therefore, rely on circumstantial evidence to state their claims.[27] In a typical discriminatory discharge claim, for example, this evidence might include

> the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in . . . degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge.[28]

24. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988).

25. Trop v. Sony Pictures Entm't, Inc., 129 Cal. App. 4th 1133, 1144 (2005) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)), (holding that the burden-shifting framework of *McDonnell Douglas* does not apply when the plaintiff presents direct evidence of discrimination). *Accord* Vélez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 446 (1st Cir. 2009); Evans v. Sears Logistics Servs., Inc., No. 1:09-cv-2055, 2011 WL 6130885 (E.D. Cal. Dec. 8, 2011).

26. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Vélez*, 585 F.3d at 446 (quoting Arroyo-Audifred v. Verizon Wireless, Inc., 527 F.3d 215, 218-19 (1st Cir. 2008)) (noting that "ADEA plaintiffs rarely possess 'smoking gun' evidence to prove their employers' discriminatory motivations").

27. *Trop*, 29 Cal. App. 4th at 1144 (noting that "direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially") (internal quotation omitted).

28. Leibowitz v. Cornell Univ., 584 F.3d 487, 502 (2d Cir. 2009) (quoting Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994)) (internal citations

Because no two cases are the same, "[t]his model has been altered to fit the particular circumstances of a wide variety of claims,"[29] which have been controlled, since 1973, by the Supreme Court's decision in *McDonnell Douglas v. Green*.[30]

In *McDonnell Douglas*, the Supreme Court defined a burden-shifting framework for proof in cases in which the plaintiff alleges that he or she was denied an employment opportunity "because of" a trait like sex or race, but lacks direct evidence of discriminatory intent.[31] The first step in the burden-shifting process is for the plaintiff to show

> (i) that he belongs to a [protected class]; (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.[32]

If the plaintiff can make this prima facie case, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[33] Finally, if the employer makes its showing, the burden shifts back, affording the plaintiff a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.[34]

To prove pretext, a plaintiff must show "that the employer's proffered reason for acting adversely towards him is unworthy of belief."[35] Pretext can be shown by "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action,"[36] and by examining various factors including "prior treatment of plaintiff; the

omitted).

29. Bradley v. Denver Health and Hosp. Auth., 734 F. Supp. 2d 1186, 1195 (D. Colo. 2010).

30. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

31. *Id.* at 801. *See* Jones v. Okla. City Pub. Sch., 617 F.3d 1273, 1277-78 (10th Cir. 2010); Vélez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 446-47 (1st Cir. 2009); Leibowitz v. Cornell Univ., 584 F.3d 487, 502 (2d Cir. 2009).

32. *McDonnell Douglas*, 411 U.S. at 802.

33. *Id.* at 802.

34. *Id.* at 804.

35. Adamson v. Multi Cmty. Diversified Servs., Inc., 514 F.3d 1136, 1146 (10th Cir. 2008).

36. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

employer's policy and practice regarding . . . employment [of plaintiff's class] (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating criteria); and the use of subjective criteria."[37]

Critical to an understanding of the impact of the *Gross* decision on age discrimination law is an understanding that the plaintiff's burden of proving pretext under *McDonnell Douglas* "merges with the ultimate burden of persuading the court that [he or] she has been the victim of intentional discrimination."[38] At this point in the framework, "the *McDonnell Douglas* framework—with its presumptions and burdens—disappears, and the sole remaining issue is discrimination *vel non*."[39]

B. THE DEFINITION OF A MIXED-MOTIVES CASE

As will be discussed in Section IV, many lower courts are applying the *McDonnell Douglas* burden-shifting framework to age discrimination claims despite the Supreme Court's direction in *Gross* that the burden never shifts.[40] Before addressing *Gross* and its progeny, however, the law of mixed-motives cases must be addressed. In a 1989 case, *Price Waterhouse v. Hopkins*, the Supreme Court reviewed a sex discrimination case in which a female plaintiff alleged that she was denied partnership because of her sex.[41] Previously, the district court had noted the plaintiff's evidence of the defendant employer's reliance on the "impermissibly cabined view of the proper behavior of women," but also the employer's evidence that it "legitimately emphasized interpersonal skills in its partnership decisions."[42] In a "splintered" decision,[43] six Justices agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible

37. Simms v. Okla. *ex rel.* Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1328 (10th Cir. 1999).

38. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

39. Smith v. Napolitano, 626 F. Supp. 2d 81, 88 (D. D.C. 2009) (quoting Lathram v. Snow, 336 F.3d 1085, 1088 (D.C. Cir. 2003)).

40. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).

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

42. *Id.* at 236-37.

43. *Gross*, 557 U.S. at 171.

consideration.[44] This decision gave birth to mixed-motives disparate treatment claims in cases where "it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[45] It also created confusion in the courts.[46]

In response to that confusion, Congress amended Title VII.[47] The amendment retained the statute's originally defined method for establishing liability for employment practices based upon the impermissible use of race, sex, or other proscribed criteria.[48] Additionally, the amendment codified *Price Waterhouse's* mixed-motives claim by explicitly providing 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 practice."[49] The statute abrogated the part of *Price Waterhouse* that allowed the employer in a mixed-motives case to escape liability completely when its decision was motivated, at least in part, by an illegitimate, discriminatory reason.[50] Under the statute, an employer can

44. Price Waterhouse v. Hopkins, 490 U.S. 228, 258-60, 276 (1989) (plurality opinion and concurring opinions). Justice O'Connor further found that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." *Id.* at 276 (O'Connor, J., concurring).

45. *Id.* at 232. *See* Smith v. City of Allentown, 589 F.3d 684, 690 (3d Cir. 2009) (observing that the *Price Waterhouse* burden-shifting framework "has become known as the mixed motive doctrine"). Consistent with its prior decisions, and reinforcing how the lower courts are applying *Gross*, as discussed in Section IV *infra*, the *Price Waterhouse* Court explicitly noted that its

> holding casts no shadow on *Burdine*, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason.

Price Waterhouse, 490 U.S. at 245.

46. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179 (2009) (citing cases grappling with the *Price Waterhouse* standard, the Court noted that "it has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply").

47. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012).

48. *Id.* § 2000e-2(a).

49. *Id.* § 2000e-2(m). The 1991 amendment offers "alternative ways of establishing liability under Title VII." Fogg v. Gonzales, 492 F.3d 447, 454 (D.C. Cir. 2007).

50. *Compare Price Waterhouse*, 490 U.S. at 242 (holding that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person"), *with* 42 U.S.C.

limit, but not escape, liability by showing that it would have made the same decision "in the absence of the impermissible motivating factor."[51] Remedies in the cases where the employer carries this burden are limited to "declaratory relief, injunctive relief . . . and attorney's fees and costs" and do not include "any admission, reinstatement, hiring, promotion, or payment."[52]

Although Congress amended Title VII to clarify mixed-motives cases, a review of the case law suggests that the statute has done little to accomplish that goal.[53] Twelve years after Congress added the mixed-motives language to Title VII, the Supreme Court, in *Desert Palace, Inc. v. Costa*, further defined the nature of a plaintiff's burden of proof and explained that a plaintiff may rely on direct or circumstantial evidence to establish a mixed-motives claim.[54] Neither the statute nor that subsequent decision, however, offered any criteria to guide the analysis of mixed-motives claims.[55]

Indeed, a review of the cases decided after the enactment of the 1991 mixed-motives amendment and the Supreme Court's decision in *Desert Palace* suggests that courts continue to find it difficult to make the initial decision whether a claim is a mixed-motives case or a single-motive, pretext case.[56] Moreover, for those cases in which courts determine there is evidence of mixed-motives, there is no clear standard for determining whether the plaintiff has carried the burden necessary to shift the burden to the employer to limit its liability.[57] Courts have taken different approaches to determine how to handle each claim, including relying on the plaintiff's complaint, allowing the employer's defense to define the claim, deferring to the jury's decision, and

§ 2000e-5(g)(2)(B) (2012) (limiting plaintiff's remedies if employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor").

51. 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

52. *Id.*

53. *See* Haddad v. Wal-Mart Stores, Inc., 914 N.E.2d 59, 77 n.27 (2009) ("Experience with the mixed motive analysis in the [f]ederal courts generated considerable controversy and criticism and resulted in splits in the United States Courts of Appeals.").

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

55. *See* 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, 927 (2010).

56. *Id.*

57. *See id.* (pointing out the lack of consistency in the case law for determining how to handle any particular claim).

reviewing both single-motive and mixed-motives claims together.[58] Some courts avoid the mixed-motives analysis altogether by analyzing claims as single-motive, pretext claims under the *McDonnell Douglas* framework, despite evidence suggesting that an employer was motivated by more than one reason when it took the adverse job action being challenged.[59]

In the midst of this confusion, the Supreme Court elected to consider the nature of proof needed to establish a violation of the ADEA, which was not amended to include the mixed-motives language that Congress had inserted into Title VII.[60] Noting the confusion inherent in mixed-motives claims, and wanting to avoid it, the Supreme Court announced in *Gross* that mixed-motives analysis is not applicable to ADEA cases and that the burden never shifts to the employer in an ADEA case.[61] The next section describes the Court's decision and the burden it apparently placed on ADEA plaintiffs, and Section IV then presents the various approaches courts are taking to avoid the decision's reach.

III. *GROSS V. FBL FINANCIAL SERVICES, INC.*

Jack Gross sued his employer, FBL Financial Services, Inc., for age discrimination.[62] At trial, Mr. Gross, who was 54 years old at the time, introduced evidence that he was reassigned to a job that he considered a demotion and that his former job was given to another—younger—employee, whom he had previously supervised.[63] Gross also offered evidence that the job action taken against him was motivated because of his age.[64] FBL defended its decision to reassign Gross on the grounds that the reassignment was "part of a corporate restructuring and that

58. *See* Noonan, *supra* note 55, at 927 n.45.

59. *See, e.g.*, Byrnie v. Bd. of Ed., 243 F.3d 93 (2d Cir. 2001) (applying *McDonnell Douglas* to age and gender claims under Title VII and the ADEA); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1170-71 (10th Cir. 1985) (applying *McDonnell Douglas* even in light of evidence that employer was motivated by more than one reason when taking the adverse action being challenged). *But see* White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008) (refusing to apply *McDonnell Douglas* to a mixed-motives claim).

60. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

61. *Id.* at 178-80.

62. *Id.* at 170.

63. *Id.*

64. *Id.*

Gross' new position was better suited to his skills."[65] Confronted by these "opposing factual contentions," the court might have handled the case as a typical single-motive or pretext case to which courts have applied the Supreme Court's *McDonnell Douglas* burden-shifting framework since 1973.[66]

The District Court, however, instructed the jury that it should return a verdict for Gross if he proved that FBL demoted him and that his "age was a motivating factor" in the decision to demote him.[67] The court further instructed the jury "that Gross' age would qualify as a 'motivating factor' if [it] played a part or a role in [FBL]'s decision to demote [him]."'[68] Finally, the court instructed that the "'verdict must be for [FBL] . . . if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age."'[69] The jury returned a verdict for Gross, awarding him $46,945 in lost compensation.[70]

FBL challenged the jury instruction on appeal, and the United Stated Court of Appeals for the Eighth Circuit reversed and remanded, holding that the district court should not have given the mixed-motives instruction pursuant to *Price Waterhouse v. Hopkins*.[71] In light of the evidence in the case, the Eighth Circuit opined that Gross "should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims" as defined in *McDonnell Douglas* and that "the jury thus should have been instructed only to determine whether Gross had carried his burden of 'prov[ing] that age was the determining factor in FBL's employment action."'[72]

In their petition for certiorari, the parties asked the Supreme Court to decide "whether a plaintiff must 'present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case."'[73] The Supreme Court,

65. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 170 (2009).

66. McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973).

67. *Gross* 557 U.S. at 170-71 (citing 8th Cir. R. 9-10).

68. *Id.* at 171 (quoting 8th Cir. R. 10).

69. *Id.* (quoting 8th Cir. R. 10).

70. *Id.* (citing 8th Cir. R. 8).

71. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 358 (8th Cir. 2008), *aff'd*, 557 U.S. 167 (2009).

72. *Gross*, 557 U.S. at 172 (quoting Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 360 (8th Cir. 2008)).

73. *Id.* at 173 (citing Petition for Writ of Certiorari, Gross v. FBL Fin. Servs., 555 U.S. 1066 (2008) (No. 08-441)).

however, did not answer this question, but rather considered "whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[74] The Court held that it did not.[75]

The Court distinguished the ADEA from Title VII based on the language Congress used to amend Title VII, but not the ADEA, observing that, "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."[76] Based on this distinction, the Court held that a plaintiff "must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but-for' cause of the challenged employment decision."[77] Although the Court did not specifically define the meaning of the "but-for" requirement,[78] the Court based its decision on the statutory language that provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."[79] Reviewing dictionary definitions of "because of," the Court concluded that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[80]

Distinguishing the ADEA from Title VII, based on the language of each, the Supreme Court refused to shift the burden to the employer.[81] In an effort to avoid the confusion that followed *Price Waterhouse*,[82] the Court decided that "even when a

74. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).

75. *Id.*

76. *Id.* at 174. Justice Stevens, in dissent, pointed out:

> That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII.

Id. at 183 (Stevens, J., dissenting) (internal quotations omitted).

77. *Id.* at 177-78 (plurality opinion).

78. *See* Noonan, *supra* note 55, at 923.

79. 29 U.S.C. § 623(a)(1) (2012) (emphasis added).

80. *Gross*, 557 U.S. at 176 (internal citations omitted).

81. *Id.* at 180.

82. *Id.* at 179.

plaintiff has produced some evidence that age was one motivating factor in that decision," the employer would not be liable unless the plaintiff carried the burden of proving that age was "the 'but-for cause' of the challenged adverse employment action."[83]

Despite the fact that the Court was motivated to avoid the confusion that had followed *Price Waterhouse* and the burden-shifting framework it defined, the *Gross* decision actually led to more confusion in age discrimination claims.[84] Indeed, many observers predicted that the limitations imposed by the *Gross* Court and the confusion that followed would spell the end of age discrimination claims.[85] A review of the decisions following *Gross* notes this confusion, but also suggests a consistency that breathes life back into age discrimination claims.

IV. AGE DISCRIMINATION CLAIMS AFTER *GROSS*

Initially appearing to confirm that age discrimination claims were dead, at least one court applied *Gross* to dismiss an ADEA claim in the pleading stage.[86] To save age discrimination claims from this threatened destruction, critics called for Congress to amend the ADEA.[87] A bill was proposed shortly after *Gross* was

83. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

84. DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 578 (E.D. Pa. 2010) (citing cases that have reached "contradictory conclusions") (internal citations omitted). *See* Henry L. Chambers, Jr., *The Wild West of Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 588 (2010) (noting that the Court's interpretation of "because of" in the ADEA and its treatment of mixed motives cases was not done "in any fashion that has been recognized in the past twenty years or so").

85. *See, e.g.,* Meghan C. Cooper, *Reading Between the Lines: The Supreme Court's Textual Analysis of the ADEA in* Gross v. FBL Financial Services, Inc., 45 NEW ENG. L. REV. 753, 755 (2011) (arguing that the *Gross* Court "overturned decades of precedent, . . . engaged in judicial activism . . . , and . . . created an illogical and unduly burdensome evidentiary standard for plaintiffs alleging age discrimination in the workplace); Noonan, *supra* note 55, at 921 (noting shortly after *Gross* was decided that the decision "raises more questions than it answers"); Scales, *supra* note 9, at 242 (observing that the *Gross* decision "leaves a large segment of the population with weak protection against discrimination"); Miles, *supra* note 9 (observing that "[e]mployers will no doubt see *Gross* as a victory").

86. *See* Culver v. Birmingham Bd. of Educ., 646 F. Supp. 2d 1272 (N.D. Ala. 2009) (holding that the plaintiff who alleged race and age claims must abandon one or the other to comport with *Gross*), discussed *infra* in Section IV.A.

87. *See, e.g.,* Corbett, *supra* note 5, at 693 (noting that the *Gross* decision "has made the need for intervention far more urgent"); Deethardt, *supra* note 5, at 190 (observing that "[t]he scholarly consensus is that congressional reform is necessary to repair and unify" the burden of proof in disparate treatment claims); Harper, *supra*

decided, but it was never enacted into law.[88] Another bill, proposed by Senators Harkin, Leahy, and Grassley, is pending before Congress now,[89] but the lower courts have not waited for Congress to act.[90] Despite the limitation that *Gross* placed on age discrimination claims, an overview of the case law reveals that courts are interpreting state discrimination law, as well as the law under the ADEA, in ways to preserve an age discrimination victim's day in court.[91]

note 5, at 144 (calling for Congress to "meet the challenge to federal employment law posed by the Court's decision in Gross").

88. Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bills/111/hr3721.

89. Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/s2189.

90. Stephen L. Tatum, *Complying with Employment Regulations, A Balancing Act: The Evolving Judicial Analysis of Employment Discrimination Claims*, 2011 WL 4452114, at *7 (2011) (noting the likelihood that Congress will not act and concluding that "for the time being, it remains in the hands of the courts to decide how to analyze discrimination claims outside the context of Title VII").

91. *See, e.g.*, Diaz v. Jiten Hotel Mgmt., Inc., 671 F.3d 78 (1st Cir. 2012) (affirming the ongoing validity of the mixed-motive framework in all state discrimination claims); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010) (deciding that plaintiff met her burden of showing a triable issue as to whether her age was a "but for" cause of her termination); Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441 (1st Cir. 2009) (vacating district court's granting of summary judgment in favor of defendant employer); Leibowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009) (overturning district court's granting of summary judgment in favor of defendant employer); Evans v. Sears Logistics Servs., Inc., No. 1:09-cv-2055, 2011 WL 6130885 (E.D. Cal. Dec. 8, 2011) (denying defendant's motion for summary judgment on age discrimination claim); Ray v. Forest River, Inc., No. 2:07 CV 246, 2010 WL 3167426 (N.D. Ind. Aug. 10, 2010) (denying defendant's motion for summary judgment on age discrimination claim); Duckworth v. Mid-State Mach. Products, 736 F. Supp. 2d 278 (D. Me. 2010); Harth v. Daler-Rowney USA Ltd., No. 09–5332 (MLC), 2012 WL 893095, at *3 (D. N.J. Mar. 15, 2012) (deciding that *Gross* did not preclude a mixed motive analysis under New Jersey statute prohibiting discrimination on the basis of age, sex, race, and other traits); Ferruggia v. Sharp Electronics Corp., No. 05–5992, 2009 WL 2634925 (D. N.J. Aug. 25, 2009) (affirming district court's denial of summary judgment); Wagner v. Bd. of Trustees for Conn. State Univ., 2012 WL 669544, at *11 (Conn. Super. Ct. Jan. 30, 2012) (deciding that Gross did not preclude mixed-motive analysis under Connecticut state statute prohibiting discrimination on age, and other traits including sex, race, and national origin). *See also* Kevin Vance, *Senators Introduce Bill to Overturn Gross v. FBL ADEA Decision*, DUANE MORRIS INST., http://blogs.duanemorrisinstitute.com/thefloridaemployer/entry/senate_bill_introduced_to_overturn (last visited Mar. 15, 2012) (noting that the *Gross* decision "has not made it easier for defendants to get age discrimination cases dismissed (via summary judgment or any other avenue) before trial").

A. ONE COURT'S LITERAL APPLICATION OF *GROSS* REQUIRED DISMISSAL OF AN AGE DISCRIMINATION COMPLAINT

Before addressing the majority of cases that have limited the reach of *Gross*, it must be noted that the United States District Court for the Northern District of Alabama dismissed an ADEA claim in the pleading stage because the complaint contained more than one reason for an employer's adverse action.[92] This court apparently misunderstood the Supreme Court's conclusion that the ADEA does not "authorize[] a mixed-motives age discrimination claim."[93] Interpreting the Court's language literally, the court explained: "Prior to *Gross*, it was permissible to allege alternative proscribed employer motives, one of which is plaintiff's age. That permission has now been withdrawn by the Supreme Court."[94]

This case is in the distinct minority and does not properly take into account the actual holding in *Gross*, or the extent of its coverage, because *Gross* did not address the pleading stage of a case, but, rather, the propriety of a mixed-motives jury instruction given to the jury after trial.[95] As one court characterized the reach of the *Gross* holding: "[T]he case had reached its final phases, and the issue involved the plaintiff's ultimate burden to convince a fact-finder of the defendant's liability."[96] Indeed, in response to a defendant employer's argument that a complaint must be dismissed if it alleges more than one reason for the alleged adverse action, the United States District Court for the Western District of Wisconsin made clear that *Gross* "had nothing to do with pleading, but rather the proper standard of *proof* under the ADEA. The difference

92. Culver v. Birmingham Bd. of Educ., 646 F. Supp. 2d 1272 (N.D. Ala. 2009) (alleging race and age discrimination claims).

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

94. *Culver*, 646 F. Supp. 2d at 1272 (holding that the plaintiff must abandon either his age or race discrimination claim to comport with *Gross*). *See also* Whitaker v. Tenn. Valley Auth. Bd. of Dirs., No. 08–1225, 2010 WL 1493899, at *9 (M.D. Tenn. Apr. 14, 2010) (noting that "[p]ost-*Gross*, it is incongruous to posit such alternate theories because the very presentation of different reasons for an action suggest that age was not the *sole* reason for the action," but allowing case to proceed to summary judgment).

95. *Gross*, 557 U.S. at 171.

96. Ray v. Forest River, Inc., No. 2:07 CV 246, 2010 WL 3167426, at *7 (N.D. Ind. Aug. 10, 2010).

between 'motivating factor' and 'but for' causation might be important at trial, but it does not matter in the complaint."[97]

B. THE MAJORITY OF COURTS ARE AVOIDING THE LIMITATIONS OF *GROSS*

The majority of other courts that have faced ADEA claims after *Gross* are avoiding the limitations of the decision in one of two ways: (1) by relying on state law to distinguish the cases from *Gross*, or (2) by analyzing cases as single-motive rather than mixed-motives claims. Each of these approaches is discussed separately below, and a review of the case law leads ultimately to the conclusion that most courts are applying the burden-shifting framework of *McDonnell Douglas* to age discrimination claims without addressing whether they are single-motive or mixed-motives claims.

1. RELYING ON STATE LAW TO CIRCUMVENT *GROSS*

Interpreting state laws that are similar to the ADEA, some courts have decided that *Gross* simply does not control the state law claims.[98] In one case, the United States Court of Appeals for the First Circuit construed a Massachusetts statute that prohibited both age and sex discrimination.[99] Relying on a sex discrimination case in which the Massachusetts Supreme Court allowed a mixed-motives claim, the First Circuit decided that *Gross* did not preclude mixed-motives age discrimination claims.[100] A Connecticut Superior Court, interpreting a similar

97. Riley v. Vilsack, 665 F. Supp. 2d 994, 1006 (W.D. Wis. 2009) (denying employer's motion to dismiss). *See also* Ferruggia v. Sharp Electronics Corp., No. 05-5992, 2009 WL 2634925, at *3 (D. N.J. Aug. 25, 2009) (holding that "*at trial* the plaintiff bears the ultimate burden of *persuasion* to prove that the impermissible motive").

98. Diaz v. Jiten Hotel Mgmt., Inc., 671 F.3d 78, 83-84 (1st Cir. 2012) (construing the Massachusetts discrimination statute, MASS. GEN. LAWS ANN. ch. 151B, § 4 (2012)); Harth v. Daler-Rowney USA Ltd., No. 09–5332 (MLC), 2012 WL 893095 (D. N.J. Mar. 15, 2012) (construing the New Jersey antidiscrimination statute, N.J. STAT. ANN. § 10:5-(12)(a) (2012)); Wagner v. Bd. of Trustees for Conn. State Univ., 2012 WL 669544, at *11 (Conn. Super. Ct. Jan. 30, 2012) (construing CONN. GEN. STAT. § 46a-60 (2012)).

99. *Diaz*, 671 F.3d at 82-84.

100. *Id.* at 84. The court reviewed state supreme court law and decided the Massachusetts Supreme Court implicitly affirmed the ongoing validity of the mixed-motive framework in *all* state discrimination claims, although it noted the possibility that Massachusetts might not retain that framework "indefinitely." *Id.* at 83 (emphasis in original).

state statute that prohibited discrimination in employment "because of" an individual's membership in a protected class, "including race, color, religious creed, age, sex, marital status and national origin," also decided that *Gross* did not apply.[101] The United States District Court for the District of New Jersey similarly refused to apply *Gross* to a claim under state statute prohibiting employers from discriminating against an individual in employment "because of" the individual's age.[102]

2. AVOIDING *GROSS* BY CLASSIFYING CASES AS SINGLE-MOTIVE CLAIMS

Other courts are avoiding the dictates of *Gross* by analyzing claims as single-motive or pretext claims, rather than mixed-motives claims, and they are applying the burden-shifting framework of *McDonnell Douglas* to guide the proof in age discrimination claims. In many cases, a claim of discrimination may appear to be a mixed-motives claim based on evidence that the employer was motivated by more than one reason when it took the challenged action against the plaintiff, but it may not be until the case is well under way "before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision."[103] As the United States Court of Appeals for the Eighth Circuit explained: "Whether a case is a pretext case or a mixed-motives case is a question for the court once all the evidence has been received."[104] Accordingly, courts need a workable framework that can guide the presentation of evidence and the production of proof in all cases, without regard to what kind of claim it may be, and the *Gross* Court actually invited courts to use the *McDonnell Douglas* framework to do just that.[105]

Since 1973, courts have used the Supreme Court's three-step burden shifting framework established in *McDonnell Douglas v.*

101. Wagner v. Bd. of Trustees for Conn. State Univ., 2012 WL 669544, at *11-12 (Conn. Super. Ct. Jan. 30, 2012) (construing CONN. GEN. STAT. § 46a-60 (2012)).

102. Harth v. Daler-Rowney USA Ltd., No. 09–5332 (MLC), 2012 WL 893095, *3 (D. N.J. Mar. 15, 2012). The New Jersey statute also proscribes discrimination on the basis of other traits including race, sex, and national origin. *See* N.J. STAT. ANN. § 10:5-(12)(a) (2012).

103. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989).

104. Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir. 1993).

105. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 n.2 (2009) (noting that "the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas v. Green* utilized in Title VII cases is appropriate in the ADEA context") (internal citation omitted).

Green to "allocat[e] the burden of production and . . . order . . . the presentation of proof" in cases where the plaintiff has only circumstantial evidence of discrimination.[106] Before *Gross*, this framework was applied to all types of discrimination claims,[107] but, after *Gross*, courts have questioned whether it still applies to age claims.[108] The *Gross* Court certainly did not foreclose its application when it noted that "the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green* utilized in Title VII cases is appropriate in the ADEA context."[109] However, the Court did invite confusion when it raised this issue but failed to resolve it, stating only that "it is the textual differences between Title VII and the ADEA that prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims."[110] Based on these textual differences, the Court concluded that, in ADEA cases, the burden-shifting analysis of *Price Waterhouse* and *Desert Palace* does not apply, and, therefore, that "[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[111]

Based on this language in *Gross*, at least two courts have questioned whether the burden could ever shift to a defendant in an ADEA case and whether the *McDonnell Douglas* framework could apply to an age claim.[112] In one case, the court avoided having to decide the issue by concluding that the plaintiff's claims

106. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (citing McDonnell Douglas v. Green, 411 U.S. 792 (1973) for the application of the three-step framework to Title VII cases).

107. *See, e.g.*, *Hicks*, 509 U.S. 502 (applying *McDonnell Douglas* to a race claim under Title VII); Byrnie v. Bd. of Educ., 243 F.3d 93 (2d Cir. 2001) (applying *McDonnell Douglas* to age and gender claims under Title VII and the ADEA); Kiel v. Select Artificials, Inc., 169 F.3d 1131 (8th Cir. 1999) (applying *McDonnell Douglas* to a disability claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*).

108. *See, e.g.*, Bradley v. Denver Health and Hosp. Auth., 734 F. Supp. 2d 1186, 1207 (D. Colo. 2010) (noting that "courts have struggled somewhat in deciding whether the *McDonnell Douglas* tripartite framework continues to apply to ADEA cases," and citing to a number of district court cases).

109. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 n.2 (2009) (internal citation omitted).

110. *Id.*

111. *Id.* at 180.

112. *See, e.g.,* Woehl v. Hy–Vee, Inc., 637 F. Supp. 2d 645 (S.D. Iowa 2009); Wagner v. Geren, No. 8.08 CV 208, 2009 WL 2105680, at *5 (D. Neb. July 9, 2009).

would fail to survive summary judgment regardless of whether the *McDonnell Douglas* framework applied.[113] In the other case, the court granted summary judgment in favor of the employer because the plaintiff failed to present sufficient evidence from which a reasonable finder of fact could conclude that the defendant intentionally discriminated against the plaintiff "because of his age."[114] Although the holding in this case appears to interpret *Gross* as foreclosing any burden-shifting analysis, the court stated explicitly that it "need not address" whether *McDonnell Douglas* applies and even cited an Eighth Circuit decision acknowledging the application of *McDonnell Douglas'* burden-shifting framework to cases "where [the] plaintiff presents indirect evidence of discrimination."[115]

In contrast to the hesitation shown by these few courts, several other courts have readily applied the *McDonnell Douglas* burden-shifting framework, despite the fact that the Supreme Court in *Gross* determined that "[t]he burden of persuasion does not shift to the employer" in a claim under the ADEA.[116] The United States District Court for the District of Columbia, for example, quoted *Gross* without analyzing its reach and then proceeded to apply the framework defined in *McDonnell Douglas*, noting that "a plaintiff bringing a disparate treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but for' cause of the challenged adverse employment action."[117] While it might appear that the plaintiff in an age case then faces a higher burden at this third stage of the *McDonnell Douglas* framework, the court offered guidance appropriate for courts considering all types of discrimination: "The district court need resolve only one question: 'Has the employee produced sufficient evidence for a reasonable

113. Woehl v. Hy–Vee, Inc., 637 F. Supp. 2d 645, 656 (S.D. Iowa 2009).

114. Wagner v. Geren, No. 8.08 CV 208, 2009 WL 2105680, at *5-6 (D. Neb. July 9, 2009).

115. *Id.* at *5 n.4 (citing King v. United States, 553 F.3d 1156, 1160 (8th Cir. 2009)).

116. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009). *See, e.g.*, Phillips v. Pepsi Bottling Group, 373 F. App'x 896, 899 (10th Cir. 2010); Jones v. Okla. City Pub. Sch., 617 F.3d 1273, 1277 (10th Cir. 2010). Leibowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009); Smith v. City of Allentown, 589 F.3d 684, 689 (3d Cir. 2009); Geiger v. Tower Automotive, 579 F.3d 614, 622 (6th Cir. 2009); Guinto v. Exelon Generation Co., LLC, 341 F. Appx. 240, 244 (7th Cir. 2009); Smith v. Napolitano, 626 F. Supp. 2d 81 (D. D.C. 2009).

117. *Napolitano*, 626 F. Supp. 2d at 87 (quoting *Gross*, 557 U.S. at 177).

[factfinder] to find that the employer's asserted nondiscriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis' of his or her protected status?"[118] The court also noted that, even after *Gross*, these principles apply equally to cases under the ADEA.[119]

Similarly, in *Jones v. Oklahoma City Public Schools*, the United States Court of Appeals for the Tenth Circuit, which had applied the "but for" standard even before the Supreme Court decided *Gross*, made clear that, under the ADEA, a plaintiff is not required "to show that age was the sole motivating factor in the employment decision."[120] Rather, as the court explained, to satisfy the "but for" standard, a victim of age discrimination must prove that "age must have been the only factor."[121] To establish this fact, the court allowed the plaintiff to rely on the *McDonnell Douglas* framework, despite the fact that its burden-shifting analysis is in apparent conflict with the dictates of *Gross*.[122] Thus, in *Jones*, the Tenth Circuit held that the burden on plaintiffs in ADEA claims after *Gross* is no different than the burden imposed by the *McDonnell Douglas* framework in all discrimination claims.[123] Acknowledging that *Gross* held that "the burden of persuasion [n]ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA,"[124] the court noted that *McDonnell Douglas* "does not shift

118. Smith v. Napolitano, 626 F. Supp. 2d 81, 88-89 (D. D.C. 2009) (quoting Brady v. Office of the Sergeant at Arms, U.S. House of Representatives, 520 F.3d 490, 494 (D.C. Cir. 2008)).

119. *Id.* at 89 (citing Chappell-Johnson v. Bair, 574 F. Supp. 2d 103, 106 (D. D.C. 2008)) (observing that the principles articulated in *Brady* apply equally in the ADEA).

120. Jones v. Okla. City Pub. Sch., 617 F.3d 1273, 1277 (10th Cir. 2010) (quoting Wilkerson v. Shinseki, 606 F.3d 1256, 1266 (10th Cir. 2010)).

121. *Id.* *See also* Ferruggia v. Sharp Electronics Corp., No. 05-5992, 2009 WL 2634925, at *2 (D. N.J. Aug. 25, 2009) (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)) (noting that "the plaintiff must prove not that the illegitimate factor was the sole reason for the decision, but that the illegitimate factor was a determinative factor in the adverse employment decision, that is, that *but for* the protected characteristic, the plaintiff would have been hired (or promoted)").

122. *Jones,* 617 F.3d at 1278 (citing ADEA cases decided before *Gross* in which the Tenth Circuit applied the *McDonnell Douglas* framework and decided it applied with equal force after *Gross*). *See also Ferruggia*, 2009 WL 2634925, at *3 (citing a "majority of courts" applying *McDonnell Douglas* to post *Gross* ADEA claims).

123. *Jones,* 617 F.3d at 1278.

124. *Id.* (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009)).

the burden of persuasion from the plaintiff to the defendant."[125] Rather, "the plaintiff . . . carries the full burden of persuasion to show that the defendant discriminated on [an] illegal basis."[126] Accordingly, the court concluded that "the rule articulated in *Gross* has no logical effect on the application of *McDonnell Douglas* to age discrimination claims," and that, therefore, "*McDonnell Douglas* applies to ADEA claims."[127]

Under the *McDonnell Douglas* framework, the plaintiff's burden of stating a prima facie case is "not onerous"[128] and "the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."[129] Accordingly, the resolution of many cases depends on the plaintiff's ability to carry the "ultimate burden" of proving that he or she has been the victim of intentional discrimination."[130] In *Smith v. City of Allentown*, the United States Court of Appeals for the Third Circuit considered this standard to be consistent with *Gross*, deciding, as the Tenth Circuit in *Jones* did, that *Gross* posed no obstacle to applying *McDonnell Douglas* to an age discrimination case.[131]

Smith is a good case to illustrate this point because the complaint in that case was filed prior to the Supreme Court's issuance of *Gross*, and the appeal was decided afterward, placing the impact of the Court's holding directly before the appellate court.[132] In the district court, the parties had stipulated, pursuant to the *McDonnell Douglas* framework, that the plaintiff stated a prima facie case and that the defendant employer articulated a legitimate, non-discriminatory reason for the employee's termination.[133] Accordingly, as is typical in many

125. Jones v. Okla. City Pub. Sch., 617 F.3d 1273, 1278 (10th Cir. 2010).

126. *Id*. at 1278-79 (internal citations omitted).

127. *Id. See also Ferruggia*, 2009 WL 2634925, at *3.

128. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Martin v. Toledo Cardiology Consultants, Inc., 548 F.3d 405, 410-11 (6th Cir. 2008); Evans v. Sears Logistics Servs., Inc., No. 1:09-cv-2055, 2011 WL 6130885, at *9 (E.D. Cal. Dec. 8, 2011) (quoting Aragon v. Republic Silver State Disposal, 292 F.3d 654, 660 (9th Cir. 2002)). *See also* Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 107 (2d Cir. 2010) (citing Carlton v. Mystic Transp., Inc., 202 F.3d 129, 134 (2d Cir. 2000)) (noting that the burden of stating a prima facie case is "not a heavy one").

129. *Burdine*, 450 U.S. at 260.

130. *Id.* at 253.

131. Smith v. City of Allentown, 589 F.3d 684, 691 (3d Cir. 2009).

132. *Id.* at 690.

133. *Id.*

cases, the court considered whether the plaintiff carried his burden under the third step of *McDonnell Douglas* by proving that the employer's proffered reason was pretext for discrimination and that, therefore, the plaintiff "was the victim of intentional discrimination."[134] Applying this well-established standard, the *Smith* district court granted summary judgment in favor of the defendant employer, finding that the plaintiff's "evidence did not cast doubt upon the performance-related reasons that [the defendant] proffered for Smith's discharge."[135]

After the district court granted the employer's motion, the Supreme Court decided *Gross*.[136] The Third Circuit considered the decision's impact on the case before it and concluded that "the but-for causation standard required by *Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases."[137] Significantly, the circuit court relied on the Supreme Court's language in *Texas Department of Community Affairs v. Burdine*, and its holding offers perhaps the best guidance for clarifying and unifying age cases with other discrimination cases, even after *Gross*.[138] As the court noted: "Throughout this burden-shifting exercise, the burden of persuasion, 'including the burden of proving 'but for' causation or causation in fact, remains on the employee.'"[139] Understanding that *Gross* "stands for the proposition that it is improper to shift the burden of persuasion to the defendant in an age discrimination case," the court pointed out that *McDonnell Douglas* "imposes no shift in that particular burden" and concluded that "*Gross* . . . does not forbid our adherence to precedent applying *McDonnell Douglas* to age discrimination claims."[140]

The United States Court of Appeals for the Second Circuit

134. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

135. Smith v. City of Allentown, 589 F.3d 684, 690 (3d Cir. 2009).

136. *Id.*

137. *Id.* at 691.

138. *Id.* (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)).

139. *Id.* (quoting Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 n.4 (3d Cir.1995); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

140. *Id.* The court noted that "[d]ecisions of our sister circuits are in accord." *Smith*, 589 F.3d at 691 (citing Leibowitz v. Cornell Univ., 584 F.3d 487, 498 n.2 (2d Cir. 2009); Geiger v. Tower Auto., 579 F.3d 614, 622 (6th Cir. 2009)). *Accord* Wojtanek v. IAM Union Dist. 8, No. 08 C 3080, 2011 WL 1002847, at *5 (N.D. Ill. Mar. 17, 2011).

also has decided that *Gross* poses no obstacle to age discrimination claims in which a plaintiff alleges more than one reason for the defendant employer's decision to take adverse action.[141] In *Leibowitz v. Cornell University*, the court considered claims of sex and age discrimination.[142] Although the plaintiff alleged that the defendant university was motivated by more than one reason when it failed to renew her contract, the court made no mention of the fact that alleging both claims could defeat the age claim or that *Gross* prohibited mixed-motives cases.[143] The court noted *Gross'* dictate that the plaintiff prove that age was the "but for" cause of the challenged job action but then proceeded to consider both of the plaintiff's claims under *McDonnell Douglas*.[144] Applying the three-step burden-shifting framework, the Second Circuit overturned the district court's granting of summary judgment in favor of the defendant employer.[145] Significantly, the court made clear that the "same evidentiary framework is used to evaluate claims of discrimination based upon gender or age."[146]

Perhaps even more significantly, the court imposed the same burden on the plaintiff to prove both the sex and age claims: Once the employer proffers a legitimate, non-discriminatory reason for its action, the plaintiff then carries "the ultimate burden of persuasion and must produce evidence such that a rational finder of fact could conclude that the adverse action taken against her was more likely than not a product of discriminatory animus."[147] Quoting *Burdine's* rule that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated

141. Liebowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009) (alleging sex and age discrimination). *Accord* Siegel v. Inverness Med. Innovations, Inc., No. 09-CV-01791, 2010 WL 1957464, at *6 (N.D. Ohio May 14, 2010); Belcher v. Serv. Corp. Int'l, No. 2:07-CV-285, 2009 WL 3747176, at *3 (E.D. Tenn. Nov. 4, 2009). *See also* Mandengue v. ADT Sec. Sys., Inc., No. ELH-09-3103, 2012 WL 892621 (D. Md. Mar. 14, 2012) (applying the *McDonnell Douglas* framework to claims of sex, race, national origin, and age with no mention of the employer's mixed motives); Houchen v. Dallas Morning News, Inc., No. 08-1251, 2010 WL 1267221, at *3 (N.D. Tex. Apr. 1, 2010) (noting that "the court does not find the mere fact of pleading sex and age discrimination claims together a basis for dismissing the age discrimination claims").

142. *See generally Liebowitz*, 584 F.3d 487.

143. *Id.* at 498.

144. *Id.* at 498 n.2.

145. *Id.* at 499.

146. *Id.* at 498.

147. *Id.* at 504.

against the plaintiff remains at all times with the plaintiff,"[148] the Second Circuit concluded that *Gross* posed no obstacle to the plaintiff's age discrimination claim.[149]

V. CONCLUSION

Despite the hue and cry that followed *Gross*, the developing case law suggests that age discrimination plaintiffs are being heard. The Supreme Court did not prohibit mixed-motives claims, but instead asked "whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[150] By answering in the negative, the *Gross* decision fit within well-established discrimination law.[151] Explaining the burden-shifting framework defined in *McDonnell Douglas*, the Court in *Texas Department of Community Affairs v. Burdine* left no room for doubt that the "ultimate" burden of proof in all cases "remains at all times with the plaintiff."[152] Accordingly, *McDonnell Douglas'* burden-shifting framework is entirely consistent with the holding in *Gross* and "serves to bring the litigants and the court expeditiously and fairly to this ultimate question."[153] The courts that have considered age discrimination claims since *Gross* have effectively relied on this framework to determine these age claims, and the body of case law that has developed since *Gross* should reassure victims of age discrimination that they can have their day in court.

148. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

149. Liebowitz v. Cornell Univ., 584 F.3d 487, 499 (2d Cir. 2009)

150. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).

151. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); *Burdine*, 450 U.S. at 253; McDonnell Douglas v. Green, 411 U.S. 792 (1973).

152. *Burdine*, 450 U.S. at 253.

153. *Id.*