ARTICLES

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

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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.” 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

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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

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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


\(^9\) 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.metrocorpocounsel.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 McDonnell 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

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.”).

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, nondiscriminatory reason for the action taken, and then, in
order to prevail, the plaintiff must prove that the defendant’s preferred reason is
pretext for discrimination).

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


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,\textsuperscript{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 \textit{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.

\section*{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{23}

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\footnotesize
22. \textit{Id.} at 431-32.
23. \textit{Id.} at 432 (requiring employer to demonstrate that its challenged practice has “a manifest relationship to the employment in question”). \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975). The “touchstone” according to the Court is “business necessity.” \textit{Griggs}, 401 U.S. at 431.
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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. 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. These cases, however, are rare. 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. 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.

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

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. 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.

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.” 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.

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

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33. *Id.* at 802.
34. *Id.* at 804.
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.”

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.” 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.”

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. 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. 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.” In a “splintered” decision, 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).
42. Id. at 236-37.
43. Gross, 557 U.S. at 171.
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.” It also created confusion in the courts.

In response to that confusion, Congress amended Title VII. 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. 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.” 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. 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.

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”).


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.

51. Price Waterhouse, 490 U.S. at 245.
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limit, but not escape, liability by showing that it would have made the same decision “in the absence of the impermissible motivating factor.” 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.”

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. 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. Neither the statute nor that subsequent decision, however, offered any criteria to guide the analysis of mixed-motives claims.

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. 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. 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”).


52. Id.


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. 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

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).
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,

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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).
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.” The Court held that it did not.

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.” 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.” Although the Court did not specifically define the meaning of the “but-for” requirement, 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.”

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.”

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

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.
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.”

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. 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. 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. To save age discrimination claims from this threatened destruction, critics called for Congress to amend the ADEA. A bill was proposed shortly after Gross was passed.

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.\(^{91}\)


\(^{90}\) 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”).

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. This court apparently misunderstood the Supreme Court’s conclusion that the ADEA does not “authorize[] a mixed-motives age discrimination claim.” 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.”

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. 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.” 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

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.
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


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. 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.

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.” 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.” 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.

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

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.\textsuperscript{106} Before Gross, this framework was applied to all types of discrimination claims,\textsuperscript{107} but, after Gross, courts have questioned whether it still applies to age claims.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{112} In one case, the court avoided having to decide the issue by concluding that the plaintiff’s claims


\textsuperscript{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.).

\textsuperscript{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).


\textsuperscript{110} Id.

\textsuperscript{111} Id. at 180.

would fail to survive summary judgment regardless of whether the *McDonnell Douglas* framework applied. 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.” 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.”

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. 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.” 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

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

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.”

Rather, “the plaintiff . . . carries the full burden of persuasion to show that the defendant discriminated on [an] illegal basis.”

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.”

Under the McDonnell Douglas framework, the plaintiff's burden of stating a prima facie case is “not onerous” and “the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.” 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.

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.

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. 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. Accordingly, as is typical in many

126. Id. at 1278-79 (internal citations omitted).
127. See also Ferruggia, 2009 WL 2634925, at *3.
129. Burdine, 450 U.S. at 260.
130. Id. at 253.
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

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136. *Id*.
137. *Id*. at 691.
138. *Id*. (citing Texas Dept’t of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)).
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.\footnote{141}{Leibowitz v. Cornell University, the court considered claims of sex and age discrimination.\footnote{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.\footnote{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*.\footnote{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.\footnote{145}{Significantly, the court made clear that the “same evidentiary framework is used to evaluate claims of discrimination based upon gender or age.”\footnote{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.”\footnote{147}{Quoting *Burdine’s* rule that the “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated


142. \textit{See generally} Leibowitz, 584 F.3d 487.

143. \textit{Id.} at 498.

144. \textit{Id.} at 498 n.2.

145. \textit{Id.} at 499.

146. \textit{Id.} at 498.

147. \textit{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.

149. Liebowitz v. Cornell Univ., 584 F.3d 487, 499 (2d Cir. 2009)
152. Burdine, 450 U.S. at 253.
153. Id.