

A LACK OF “MOTIVATION,” OR SOUND LEGAL REASONING?  
 WHY MOST COURTS ARE NOT APPLYING EITHER *PRICE  
 WATERHOUSE*’S OR THE 1991 CIVIL RIGHTS ACT’S  
 MOTIVATING-FACTOR ANALYSIS TO TITLE VII  
 RETALIATION CLAIMS IN A POST-*GROSS* WORLD (BUT  
 SHOULD)

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## I. INTRODUCTION

When Congress enacted the Civil Rights Act of 1991 (the 1991 Act),<sup>1</sup> it did so in response to several Supreme Court decisions that weakened Title VII of the Civil Rights Act of 1964 (Title VII).<sup>2</sup> The 1991 Act addressed both disparate treatment and disparate impact claims, providing plaintiffs with easier routes to prevail in both of these types of claims.<sup>3</sup> The 1991 Act also provided certain plaintiffs with the right to a jury trial and the right to compensatory and punitive damages.<sup>4</sup>

While the 1991 Act clarified some issues regarding Title VII's *antidiscrimination* provisions, it failed to address significant issues regarding Title VII's *antiretaliation* provision, which prohibits employers

1. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified in various sections of 42 U.S.C.).

2. Specifically, Congress passed the 1991 Act in part as a result of the Supreme Court's decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074. See *The Civil Rights Act of 1991*, EEOC WEBSITE, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited May 13, 2013).

3. 42 U.S.C. § 2000e-2 (2006). Disparate treatment claims involve situations where a defendant takes an adverse employment action *because of* a particular factor such as race, religion, sex, or retaliation ("intentional" discrimination). See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Disparate impact claims involve situations where a defendant has a facially neutral employment practice that has a disparate effect on a particular class of individuals ("unintentional" discrimination). See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

4. 42 U.S.C. § 1981a.

from discriminating against individuals who either (1) oppose what they reasonably, and in good faith, believe to be unlawful employment practices or (2) participate in Title VII proceedings.<sup>5</sup> While the Court has answered some questions regarding Title VII’s antiretaliation provision since the 1991 Act,<sup>6</sup> it has failed to answer one very important question—whether Title VII retaliation<sup>7</sup> plaintiffs can benefit from the 1991 Act’s motivating-factor provision, 42 U.S.C. § 2000e-2(m) (2006), which allows plaintiffs to prevail if they can demonstrate a protected trait was only a motivating factor, rather than the but-for cause, for the adverse employment action.<sup>8</sup>

While this motivating-factor provision explicitly protects plaintiffs alleging *discrimination* based on protected traits, it is silent with respect to whether it protects plaintiffs alleging *retaliation* based on engaging in protected activity.<sup>9</sup> Initially, most courts believed the provision did *not* apply to retaliation claims; however, not all courts agreed.<sup>10</sup> Although this pro-defendant approach began to emerge soon after the 1991 Act, it really took hold after the Supreme Court’s opinion in *Gross v. FBL Financial Services, Inc.*,<sup>11</sup> which, although it was a claim brought under the Age Discrimination in Employment Act (ADEA), has been applied to Title

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5. See *id.* § 2000e-3(a); see also *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (noting that some courts have adopted a “good faith and reasonable belief” standard for determining whether an employee’s opposition qualifies as “protected activity,” but not definitively agreeing with that interpretation).

6. For example, the Supreme Court has, in recent years, decided whether third-party retaliation is actionable under Title VII, *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011); whether Title VII protects individuals who participate in internal EEO investigations, *Crawford v. Metro. Gov’t of Nashville*, 555 U.S. 271 (2009); whether retaliatory actions must be job-related to be actionable, *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006); and what constitutes an “adverse employment action” under Title VII’s antiretaliation provision, *id.*

7. For the purpose of brevity, I will not repeat “Title VII” every time I refer to a Title VII retaliation case; I will often simply use the word “retaliation.”

8. Compare *Hayes v. Sebelius*, 762 F. Supp. 2d 90 (D.D.C. 2011) (taking a pro-defendant approach), with *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (taking a pro-plaintiff approach). This Article will not address traditional “pretext” claims (claims where there is not a combination of legitimate and prohibited reasons for the adverse employment action), which follow variations of the *McDonnell Douglas* burden-shifting approach, where (1) the plaintiff establishes a prima facie case; (2) the burden of *production* shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action; and (3) the plaintiff must demonstrate the articulated reason is false, and the real reason for the adverse employment action was one prohibited by Title VII (or another antidiscrimination statute). For a discussion of *McDonnell Douglas* and other Supreme Court cases that address the Title VII burden-shifting analysis in pretext claims, see Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335 (2002).

9. See 42 U.S.C. § 2000e-2(m).

10. See *infra* Part V.

11. 557 U.S. 167 (2009).

VII's antiretaliation provision and to other antidiscrimination statutes and their antiretaliation provisions.<sup>12</sup>

Before *Gross*, courts reached opposite conclusions regarding what effect the 1991 Act's motivating-factor provision had on retaliation claims.<sup>13</sup> Some courts decided retaliation plaintiffs could utilize the 1991 Act and prevail if they could show retaliation was a motivating factor in the adverse employment action; these plaintiffs' remedies would be limited, however, if the defendant could demonstrate it would have made the same decision regardless of the retaliatory motive.<sup>14</sup> Most courts, however, decided the 1991 Act's motivating-factor provision did not apply, and plaintiffs could *not* establish Title VII liability if the defendant could demonstrate it would have made the same decision absent the retaliatory motive, even if the plaintiff could demonstrate retaliation was a motivating factor in the adverse employment action.<sup>15</sup>

The pro-defendant tide really turned after *Gross*, when most courts started (1) requiring retaliation plaintiffs to prove but-for causation and, relatedly, (2) keeping the burden of persuasion with the plaintiff; therefore, post-*Gross*, most courts decided it was no longer sufficient for a plaintiff to show retaliation was simply a motivating factor in the adverse employment action.<sup>16</sup> Some courts, however, continued to provide plaintiffs with slightly better chances of prevailing in retaliation claims.<sup>17</sup> For example, the Fifth Circuit decided but-for causation was *not* required; rather, a plaintiff could prevail if she could show retaliation was simply a motivating factor behind the adverse employment action *and* the employer could not demonstrate it would have taken the adverse employment action regardless of the retaliatory motive.<sup>18</sup> And while the Fifth Circuit's and some other

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12. See, e.g., *Zhang v. Children's Hosp. of Phila.*, No. 08-5540, 2011 U.S. Dist. LEXIS 26290 (E.D. Pa. Mar. 14, 2011) (involving Title VII's antiretaliation provision); *Hayes*, 762 F. Supp. 2d 90 (involving Title VII's antiretaliation provision); see also *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (involving the ADA's substantive prohibition against discrimination).

13. See *infra* Part V. As will be discussed later, even after *Gross*, courts are still coming to conflicting conclusions regarding what a plaintiff must establish to prove a retaliation claim. See *infra* Part VII.

14. See *infra* Part V.A.

15. See *infra* Part V.B.

16. See *infra* Part VII.B.

17. See *infra* Part VII.A.

18. *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010). The Fifth Circuit reaffirmed its position in *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448, 454 n.16 (5th Cir.), rehearing en banc denied, 688 F.3d 211 (5th Cir. 2012), and cert. granted, 133 S. Ct. 978 (2013), where the court indicated *Smith* was still applicable. In his dissenting opinion from the denial of a rehearing en banc in *Nassar*, Judge Smith expressed his strong belief the court had incorrectly decided *Smith* and that the court should have taken the opportunity in *Nassar* to revisit this issue and to "fix[] that mistake." See *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 688 F.3d 211, 212 (5th Cir. 2012) (Smith, J., dissenting). Although the Fifth Circuit decided against an en banc rehearing, the Supreme Court decided to hear this case. See *Nassar*, 133 S. Ct. 978 (2013).

courts’ pro-plaintiff approach has a solid foundation from a policy standpoint (and, to a lesser extent, a legal argument standpoint), the 1991 Act’s language<sup>19</sup> and the Court’s *Gross* opinion will most likely lead courts to the conclusion that but-for causation *is* now required for Title VII retaliation plaintiffs, and that the burden of persuasion remains with the plaintiff at all times.<sup>20</sup>

The starting point when analyzing this issue is Title VII’s language and the Court’s interpretation of it in *Price Waterhouse v. Hopkins*.<sup>21</sup> In *Price Waterhouse*, the Court answered whether a Title VII plaintiff could prevail in a sex discrimination claim if she demonstrated her sex was a factor in the adverse employment action, but the defendant was also able to demonstrate there were other, legitimate reasons for the adverse employment action.<sup>22</sup> The result in *Price Waterhouse* was met with congressional disappointment, and Congress addressed that disappointment with the 1991 Act.<sup>23</sup> Before the 1991 Act, however, courts interpreted *Price Waterhouse* as standing for the proposition that a plaintiff could establish Title VII liability if she proved a protected trait played a “motivating factor” in the adverse employment action;<sup>24</sup> however, the defendant could then *avoid* Title VII liability if it could demonstrate it would have made the same decision regardless of the protected trait.<sup>25</sup>

Unhappy with this result, Congress amended Title VII and decided a plaintiff could establish Title VII liability if she demonstrated a protected trait played a motivating factor in the adverse employment action.<sup>26</sup> Congress also decided if the defendant demonstrated it would have made the same decision regardless of the protected trait, the plaintiff’s remedies

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19. As will be discussed later, Congress did not explicitly include retaliation claims in the motivating-factor provision in the 1991 Act. 42 U.S.C. § 2000e-2(m) (2006).

20. One critical distinction between the *Gross* analysis and the *Price Waterhouse* analysis is that under *Gross*, the burden of persuasion never shifts to the defendant, while under *Price Waterhouse*, once the plaintiff demonstrates a protected trait played a motivating factor in the adverse action, the burden of persuasion shifts to the defendant to demonstrate it would have made the same decision absent consideration of the protected trait. Compare *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 172–73 (2009), with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

21. 490 U.S. 228.

22. *Id.*

23. See *The Civil Rights Act of 1991*, EEOC WEBSITE, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited May 13, 2013).

24. See, e.g., *McMillian v. Svetanoff*, 878 F.2d 186 (7th Cir. 1989).

25. This was not a surprise in light of Justice Brennan’s statement in *Price Waterhouse*:

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.

490 U.S. at 258.

26. 42 U.S.C. § 2000e-2(m) (2006).

would be limited.<sup>27</sup> Thus, while a defendant could *avoid* a Title VII violation under *Price Waterhouse* if it could prove it would have made the same decision after the plaintiff demonstrated a protected trait played a motivating factor in the adverse employment action, the defendant could *not* avoid liability under the 1991 Act under the same circumstances.<sup>28</sup> Under both scenarios, however, once the plaintiff demonstrated a protected trait played a motivating role in the adverse employment action, the burden of persuasion shifted to the defendant to demonstrate it would have made the same decision regardless of the protected trait.<sup>29</sup>

While it was clear the 1991 Act applied to *discrimination* claims, Congress did not indicate whether the 1991 Act's framework applied to *retaliation* claims.<sup>30</sup> This Article will address this issue by analyzing the relevant statutory provisions and the relevant case law decided during two critical time periods.<sup>31</sup> The first time period is the period between the effective date of the 1991 Act and the Court's opinion in *Gross*.<sup>32</sup> During this time, some courts applied the 1991 Act's motivating-factor provision and allowed plaintiffs to establish Title VII liability if they demonstrated retaliation played a motivating factor in the adverse employment action irrespective of whether the defendant could prove it would have made the same decision absent the retaliatory intent.<sup>33</sup> Most courts, however, followed *Price Waterhouse*—a defendant could *avoid* Title VII liability if it could demonstrate it would have made the same decision absent the retaliatory motive.<sup>34</sup>

The second time period this Article will address is the period between *Gross* and the present, where most courts have decided but-for causation is required for a Title VII retaliation plaintiff to prevail, and critically, the burden of persuasion never shifts to the defendant.<sup>35</sup> Before discussing these cases, however, the Article will address Title VII's language and *Price Waterhouse*'s interpretation of it.<sup>36</sup> The Article will then discuss the

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27. *Id.* § 2000e-5(g).

28. Compare *Price Waterhouse*, 490 U.S. at 258, with 42 U.S.C. § 2000e-2(m).

29. See 42 U.S.C. § 2000e-5(g); *Price Waterhouse*, 490 U.S. at 258.

30. 42 U.S.C. § 2000e-2(m). Throughout this Article, I will be using the term “discrimination” to refer to cases where an employer bases a decision on a protected trait; I will be using “retaliation” when referring to cases where an employer bases a decision on an employee's decision to engage in protected activity.

31. See *infra* Parts V and VII.

32. See *infra* Part V. The Article will not address cases decided during the time period between *Price Waterhouse* and the passage of the 1991 Act. During this time period, courts applied the *Price Waterhouse* framework to retaliation claims. See, e.g., *Daines v. City of Mankato*, 754 F. Supp. 681, 695 (D. Minn. 1990).

33. See *infra* Part V.A.

34. See *infra* Part V.B.

35. See *infra* Part VII; see also *supra* note 20.

36. See *infra* Parts II and III.

1991 Act’s motivating-factor provision.<sup>37</sup> Next, the Article will address the various ways courts analyzed cases during the two time periods referenced above.<sup>38</sup> Finally, the Article will explain why a plaintiff who can demonstrate that retaliation played a motivating factor in the adverse employment action *should* be able to prevail in a Title VII action, or at the very least should be able to shift the burden of persuasion to the defendant to prove it would have made the same decision regardless of the retaliatory intent.<sup>39</sup> If, however, courts are unwilling to reach this conclusion, Congress should either (1) amend the 1991 Act and explicitly include retaliation in the 1991 Act’s motivating-factor provision, or (2) enact legislation that would overturn *Gross* and allow for motivating-factor claims under all federal antidiscrimination statutes and their accompanying antiretaliation provisions.<sup>40</sup>

## II. TITLE VII’S RELEVANT PROVISIONS

For purposes of this Article, there are two critical Title VII provisions: (1) the prohibition against discrimination<sup>41</sup> and (2) the prohibition against retaliation.<sup>42</sup> Title VII’s prohibition against discrimination prevents employers from discriminating against individuals “because of” their race, color, religion, sex, or national origin.<sup>43</sup> Specifically, the statute provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because*

37. See *infra* Part IV.

38. See *infra* Parts V.A, V.B, VII.A, and VII.B. Immediately prior to Part VII, there will be a discussion regarding the Court’s *Gross* opinion. See *infra* Part VI.

39. See *infra* Part VIII. While I do not think this will happen, the last Part of the Article provides reasons how and why a court (or the Supreme Court) *could* reach one of these pro-plaintiff conclusions if it were inclined to do so.

40. See *infra* Part VIII.E.

41. 42 U.S.C. § 2000e-2(a) (2006).

42. *Id.* § 2000e-3(a).

43. *Id.* § 2000e-2(a).

of such individual's race, color, religion, sex, or national origin.<sup>44</sup>

While this statutory language seems straightforward, the Court eventually had to decide what the phrase "because of" meant.<sup>45</sup> Did it mean "solely because of," or did it mean a protected trait was one of several factors that led to the adverse employment action? When the Court addressed this in *Price Waterhouse*, it was clear the Justices had different ideas regarding this issue.<sup>46</sup>

The other relevant provision is Title VII's antiretaliation provision, which provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, *because* he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>47</sup>

Finally, there is one more provision that must be addressed, even though it was not a part of the original Title VII—the 1991 Act's "motivating-factor" provision, which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice" unless otherwise provided in the subchapter.<sup>48</sup>

As noted, the Court has not directly decided what effect, if any, this provision from the 1991 Act has on Title VII retaliation claims; however, before this Article addresses how courts have handled (and should handle) retaliation claims after the 1991 Act and *Gross*, this Article must first address *Price Waterhouse*.

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44. *Id.* (emphasis added).

45. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

46. *See id.* at 228; *see also infra* Part III.

47. 42 U.S.C. § 2000e-3(a) (emphasis added).

48. *Id.* § 2000e-2(m) (emphasis added).

III. THE *PRICE WATERHOUSE* CASE

One of the most important cases in Title VII’s history is *Price Waterhouse v. Hopkins*.<sup>49</sup> Not only did this case address burden shifting, gender stereotyping, direct evidence, and the meaning of “because of,”<sup>50</sup> it was also one of several cases that led to Congress’s passing of the 1991 Act.<sup>51</sup> After *Price Waterhouse* was decided, it was more difficult for plaintiffs to establish Title VII liability,<sup>52</sup> and Congress’s reaction to this case lowered that burden. Specifically, as a result of *Price Waterhouse*, if a plaintiff could demonstrate that a protected trait played a motivating factor in an adverse employment action, a defendant could *avoid* Title VII liability if it could demonstrate it would have made the same decision regardless of the protected trait.<sup>53</sup> Unhappy with this result, Congress amended Title VII to allow for a finding of liability but limited the available relief for plaintiffs who could demonstrate a protected trait was a motivating factor in the adverse employment action when the defendant could demonstrate it would have made the same decision regardless of the protected trait.<sup>54</sup> What Congress failed to do, however, was to explain whether this analysis applied to retaliation claims; this is because retaliation was not explicitly mentioned in the 1991 Act’s motivating-factor provision.<sup>55</sup>

In *Price Waterhouse*, Ann Hopkins, a senior manager, sued her employer after it put her partnership bid on hold and then decided not to re-propose her for partnership.<sup>56</sup> The Court’s opinions addressed several issues, but this Article will focus on the discussion regarding what “because of” meant under Title VII. This was important because Ms. Hopkins experienced the adverse employment actions for both legitimate reasons and for reasons prohibited by Title VII.<sup>57</sup> This was therefore a “mixed-motives” case.<sup>58</sup> Justice Brennan, who was joined by three other

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49. 490 U.S. 228.

50. See generally *Price Waterhouse*, 490 U.S. 228.

51. See *The Civil Rights Act of 1991*, EEOC WEBSITE, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited May 13, 2013).

52. *Price Waterhouse*, 490 U.S. at 244–46 (allowing a defendant to avoid liability by demonstrating it would have made the same decision absent consideration of the protected trait).

53. *Id.*

54. See 42 U.S.C. § 2000e-2(m) (2006) (establishing a Title VII violation when a plaintiff can demonstrate an impermissible trait played a motivating factor in the adverse employment action); *id.* § 2000e-5(g) (limiting remedies when the defendant can demonstrate it would have made the same decision regardless of the protected trait).

55. *Id.* § 2000e-2(m).

56. 490 U.S. at 231–32.

57. *Id.* at 232.

58. *Id.* Although “mixed-motives” is the term most courts usually use to describe situations where defendants consider both legitimate and unlawful reasons for an adverse action, I will use the term

Justices, addressed, among other issues, the meaning of “because of,” as that phrase was used in Title VII.<sup>59</sup> He believed this phrase “mean[t] that [the protected trait] must be *irrelevant* to employment decisions. To construe the words ‘because of’ as colloquial shorthand for ‘but-for causation,’ as does Price Waterhouse, is to misunderstand them.”<sup>60</sup> He continued:

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) (“to fail or refuse”), in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. Moreover, since we know that the words “because of” do not mean “*solely* because of,” we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. *When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.*<sup>61</sup>

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“motivating-factor” when describing these situations. The reasons for this are (1) the 1991 Act uses the “motivating-factor” language and (2) that language better reflects situations where defendants considered both legitimate and unlawful factors in the adverse employment action. Some courts distinguish between the phrases “mixed motives” and “motivating factor,” believing the phrase “mixed motives” applies when discussing the *Price Waterhouse* scenario, while “motivating factor” applies when discussing the 1991 Act. *See, e.g., Hayes v. Sebelius*, 762 F. Supp. 2d 90, 110 (D.D.C. 2011). As mentioned previously, however, I will not make that distinction; rather, I will use “motivating-factor” to describe all cases in which there are both legitimate and unlawful reasons for the adverse employment action.

59. *Price Waterhouse*, 490 U.S. at 240. This language is critical, as Title VII and many other antidiscrimination statutes and their antiretaliation provisions prohibit defendants from discriminating against certain individuals “because of” various protected traits (including engaging in protected activity). *See* 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 2000e-3(a).

60. *Price Waterhouse*, 490 U.S. at 240 (emphasis added).

61. *Id.* at 240–41 (emphasis added). Justice Brennan also noted the following:

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate

One reason for concluding “because of” did not mean “solely because of” was that when Congress was debating Title VII, it rejected a proposal that would have included the word “solely” in front of the words “because of.”<sup>62</sup> Thus, according to Justice Brennan, an employer acts “because of” a protected trait as long as that trait was one factor that went into the decision-making process.<sup>63</sup>

After next relying on Title VII’s “bona fide occupational qualification” provision as further support for his position,<sup>64</sup> Justice Brennan stated if a plaintiff can demonstrate a protected trait played a motivating factor in the adverse employment action, the defendant should have the opportunity to demonstrate it would have made the same decision regardless of that protected trait.<sup>65</sup> If the defendant accomplished this, it would be able to *avoid* Title VII liability.<sup>66</sup> Justice Brennan described the defendant’s burden as an affirmative defense, where once the plaintiff demonstrated a protected trait played a motivating part in the decision, the burden of persuasion would shift, and the defendant would have to demonstrate it would have made the same decision regardless of the protected trait.<sup>67</sup> In clarifying the phrase, “motivating part,” Justice Brennan wrote:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.<sup>68</sup>

There were three other opinions in *Price Waterhouse*,<sup>69</sup> but the takeaway from the case for purposes of this Article is that even if a plaintiff were able to demonstrate a protected trait played a motivating factor in the adverse employment action, the defendant could *avoid* Title VII liability if it could demonstrate it would have made the same decision regardless of

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motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

*Id.* at 241–42.

62. *Id.* at 241 n.7 (citing 110 CONG. REC. 2728, 13,837 (1964)).

63. *Id.* at 240–42.

64. *Id.* at 242–43. This provision allows defendants to discriminate on the basis of sex, national origin, and religion in circumstances where those traits are “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e).

65. *Price Waterhouse*, 490 U.S. at 242–45.

66. *Id.* at 244–45.

67. *Id.* at 246.

68. *Id.* at 250.

69. Specifically, in addition to Justice Brennan, Justices White, O’Connor, and Kennedy wrote opinions in this case. *See id.* at 228.

that trait.<sup>70</sup> It was this conclusion that caused Congress to amend Title VII to allow for a finding of liability if a plaintiff could demonstrate a protected trait played a motivating role in the adverse employment action, irrespective of whether the defendant could demonstrate it would have made the same decision regardless of the protected trait.<sup>71</sup> Unfortunately, because Congress did not mention retaliation in this motivating-factor provision, it did not address what should happen when that protected “trait” was “protected activity” under Title VII’s antiretaliation provision.<sup>72</sup>

#### IV. THE 1991 ACT

As a result of *Price Waterhouse* and other opinions that weakened Title VII, Congress passed the 1991 Act.<sup>73</sup> In the 1991 Act, Congress rejected part of *Price Waterhouse* and added a provision to address motivating-factor claims.<sup>74</sup> Specifically, Congress enacted the following provision:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin was a motivating factor* for any employment practice, even though other factors also motivated the practice.<sup>75</sup>

Under the 1991 Act, a defendant violates Title VII if it relies on a protected trait as a motivating factor in an adverse employment action.<sup>76</sup> The financial ramifications for taking the protected trait into account, however, are less burdensome if the defendant can demonstrate it would have made the same decision regardless of the protected trait.<sup>77</sup> Specifically, if the defendant demonstrates it would have made the same decision regardless of the protected trait, the plaintiff’s remedies would be

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70. *Id.* at 244–45 (plurality opinion).

71. *See The Civil Rights Act of 1991*, EEOC WEBSITE, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited May 13, 2013). As noted earlier, although a plaintiff could establish a Title VII violation under the 1991 Act under these circumstances, the plaintiff’s remedies would be limited if the defendant could demonstrate it would have made the same decision absent consideration of the protected trait. 42 U.S.C. § 2000e-5(g) (2006).

72. *See* 42 U.S.C. § 2000e-2(m).

73. *The Civil Rights Act of 1991*, EEOC WEBSITE, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited May 13, 2013).

74. 42 U.S.C. § 2000e-2(m).

75. *Id.* (emphasis added). As noted before, a defendant could not avoid Title VII liability if the plaintiff made this showing, but the defendant could limit remedies if it were able to demonstrate it would have made the same decision regardless of the protected trait. *Id.* § 2000e-5(g).

76. *Id.* § 2000e-2(m).

77. *Id.* § 2000e-5(g).

significantly limited.<sup>78</sup> The problem, however, for retaliation plaintiffs was Congress did not include retaliation in this motivating-factor provision.<sup>79</sup> As a result, it was unclear whether this provision applied to retaliation claims.<sup>80</sup> Some courts applied the 1991 Act and decided that if a plaintiff established retaliation was a motivating factor in an adverse employment action, Title VII liability was established regardless of whether the defendant could demonstrate it would have made the same decision without taking into account the retaliatory motive.<sup>81</sup> Most courts, however, determined the 1991 Act’s motivating-factor provision did *not* apply to retaliation claims, and they therefore continued to apply the *Price Waterhouse* analysis.<sup>82</sup> This Article will now address several of these cases.

#### V. HOW COURTS ANALYZED MOTIVATING-FACTOR CLAIMS AFTER THE 1991 ACT

As previously noted, courts could not agree on how to treat retaliation claims after the 1991 Act. Some courts applied the motivating-factor standard, allowing plaintiffs to establish liability once they demonstrated retaliation played a motivating factor in the adverse employment action.<sup>83</sup> Most courts, however, applied *Price Waterhouse*, finding Title VII liability *only* when a plaintiff demonstrated the defendant was motivated at least in part by a retaliatory motive, *and* the defendant could *not* demonstrate it would have made the same decision absent the retaliatory motive.<sup>84</sup> The next two Parts of this Article will discuss some of these cases and how the courts analyzed this issue.<sup>85</sup>

##### A. Courts that Applied the 1991 Act to Retaliation Claims

Although it was the minority position, and despite the fact retaliation was not specifically mentioned in the 1991 Act’s motivating-factor provision, some courts applied the 1991 Act’s motivating-factor provision to retaliation claims.<sup>86</sup> Many of these cases have been either extensively

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78. *Id.*

79. *Id.* § 2000e-2(m).

80. *See infra* Parts V.A and V.B.

81. *See infra* Part V.A.

82. *See infra* Part V.B.

83. *See infra* Part V.A.

84. *See infra* Part V.B.

85. *See infra* Parts V.A and V.B; *see also* 2 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 35.04[1]–[3] (2013), *available at* LEXIS (providing several case citations and describing how those cases have applied *Price Waterhouse*, the 1991 Act, and *Gross* to retaliation claims).

86. Some of these cases will be discussed in further detail in this Part of the Article.

criticized or simply ignored,<sup>87</sup> and it is also important to note many of these cases did not *squarely* address the issue or provide much analysis; these courts simply *assumed* the 1991 Act's motivating-factor provision was applicable to retaliation claims.<sup>88</sup>

One court that initially appeared to utilize the pro-plaintiff, motivating-factor standard was the Seventh Circuit.<sup>89</sup> Although that court has since adopted a pro-defendant approach regarding this issue,<sup>90</sup> it appeared to adopt a pro-plaintiff position in one of its post-1991 Act decisions.<sup>91</sup> Specifically, in *Veprinsky*, the court addressed the motivating-factor issue, albeit without much analysis.<sup>92</sup> The plaintiff demonstrated his EEOC charge was a possible factor in the defendant's decision not to rehire him, and as a result, the court determined summary judgment was inappropriate.<sup>93</sup> After determining the plaintiff's evidence was sufficient to show the defendant took the adverse action against him "at least in part"<sup>94</sup> because of the protected activity, the court observed the following:

Indeed, proof that an improper motive *played a role* in the employer's decision is rarely stronger than this. In the face of this kind of direct evidence, [the defendant] must ultimately establish, by a preponderance of the evidence, *that it would not have rehired [the plaintiff] even if a desire to retaliate in no way tainted its decisionmaking.*<sup>95</sup>

Most important for the purpose of this Article was the court's citation to the 1991 Act's motivating-factor provision when discussing the parties'

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87. For example, *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (7th Cir. 1996), *Beinlich v. Curry Development, Inc.*, No. 94-1465, 1995 U.S. App. LEXIS 12109 (4th Cir. May 22, 1995), and *Heywood v. Samaritan Health System*, 902 F. Supp. 1076 (D. Ariz. 1995), were criticized by the Third Circuit in *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 n.27 (3d Cir. 1997). *Medlock v. Johnson & Johnson Co.*, No. 94-2317-JWL, 1996 U.S. Dist. LEXIS 18275 (D. Kan. Oct. 7, 1996), was eventually affirmed by the Tenth Circuit in *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 n.4 (10th Cir. 1999), but the court noted *Price Waterhouse*, not the 1991 Act, applied to retaliation claims. *Hall v. City of Brawley*, 887 F. Supp. 1333 (S.D. Cal. 1995), was criticized by *Norbeck v. Basin Electric Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000), *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 n.27 (3d Cir. 1997), and *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996). *De Llano v. North Dakota State University*, 951 F. Supp. 168 (D.N.D. 1997), was criticized by *Norbeck v. Basin Electric Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000).

88. See, e.g., *Veprinsky*, 87 F.3d at 896; *Beinlich*, 1995 U.S. App. LEXIS 12109.

89. *Veprinsky*, 87 F.3d at 895.

90. See, e.g., *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

91. *Veprinsky*, 87 F.3d at 895.

92. *Id.* at 892-93.

93. *Id.*

94. *Id.* at 893.

95. *Id.* (emphasis added).

shifting burdens.<sup>96</sup> The court also cited to the 1991 Act’s motivating-factor provision later in the opinion when addressing what role the plaintiff’s actions played in the adverse employment action, *suggesting*, but not specifically holding, the 1991 Act applied to retaliation claims.<sup>97</sup>

Another court that initially appeared to take a pro-plaintiff position was the Fourth Circuit.<sup>98</sup> In *Beinlich*, the court suggested the 1991 Act’s motivating-factor standard applied to retaliation claims.<sup>99</sup> The plaintiff had engaged in opposition activities and claimed she was terminated as a result of this opposition.<sup>100</sup> The court affirmed summary judgment in favor of the defendant, but most relevant to this Article is the following excerpt from the court’s opinion:

[The defendant] maintains that [the plaintiff] would be unable to carry her burden because the decision to terminate her had already been made before the Fuller incident occurred. According to [the defendant], this fact decisively refutes the possibility that *retaliation* was a “*motivating factor*” in the decision to terminate [the plaintiff]. *See 42 U.S.C. § 2000e-2(m)* (violation of Title VII established when plaintiff proves that unlawful discrimination “was a motivating factor for any employment practice, even though other factors also motivated the practice”).<sup>101</sup>

Therefore, although the court did not directly address the applicability of the 1991 Act to retaliation claims, by citing to the 1991 Act’s motivating-factor provision, the court certainly suggested the 1991 Act was the correct statute to use when addressing these retaliation claims.<sup>102</sup>

Some United States district courts also suggested the 1991 Act applied to retaliation claims.<sup>103</sup> For example, the United States District Court for the District of Kansas referred to the 1991 Act when it denied an employer’s motion for judgment as a matter of law (or, in the alternative,

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96. *Id.* The court also cited to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); however, later in the opinion, the court cited only to the 1991 Act. *Veprinsky*, 87 F.3d at 893–94.

97. *Veprinsky*, 87 F.3d at 893 (citing 42 U.S.C. § 2000e-2(m) (2006)). As was noted earlier, however, the court also cited to *Price Waterhouse*, so it is not 100% clear which standard the court believed was the applicable one.

98. *Beinlich v. Curry Dev., Inc.*, No. 94-1465, 1995 U.S. App. LEXIS 12109 (4th Cir. May 22, 1995). Several years after *Beinlich*, the Fourth Circuit took the opposite position, deciding *Price Waterhouse*, not the 1991 Act, applied to retaliation claims. *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 582 (4th Cir. 1999).

99. *Beinlich*, 1995 U.S. App. LEXIS 12109, at \*8.

100. *Id.* at \*2–3.

101. *Id.* at \*8 (emphasis added).

102. *Id.*

103. Some of those district court cases will be discussed in this Part of the Article.

for a new trial) in a post-1991 Act retaliation claim.<sup>104</sup> In *Medlock*, the employer argued the motivating-factor standard did not apply to retaliation claims,<sup>105</sup> but the court rejected that argument, noting:

[The employer] argues that a “motivating[-]factor” instruction is not appropriate for Title VII retaliation claims because 42 U.S.C. § 2000e-2(m)(1994), in which that standard is found, does not specifically refer to retaliation. For the reasons stated by the court at trial when it first considered this argument, the court disagrees and concludes that a new trial is not warranted on this basis. . . . *In particular, the court believes that the Tenth Circuit would in this case continue to apply similar standards for retaliation and other discrimination claims under Title VII.*<sup>106</sup>

The United States District Court for the Southern District of California and the United States District Court for the Northern District of Illinois also suggested the 1991 Act’s motivating-factor provision applied to retaliation claims.<sup>107</sup> In *Hall*, the court found the defendant took an adverse action against the plaintiff partially in retaliation for the plaintiff’s EEOC activity.<sup>108</sup> The court also found the defendant would have made the same decision regardless of the retaliatory motive.<sup>109</sup> The court then noted the plaintiff was entitled to limited remedies;<sup>110</sup> had the court followed *Price Waterhouse*, and not the 1991 Act, the defendant would have had a complete defense, and no remedies would have been available to the plaintiff.<sup>111</sup> Here, however, the court determined the plaintiff was entitled to the 1991 Act’s remedies, strongly suggesting the 1991 Act applied.<sup>112</sup> In *Jones–Bell v. Illinois Department of Employment Security*, the court reached a similar conclusion, deciding a plaintiff who created a genuine issue of material fact with her retaliation claim would be limited to the remedies in the 1991 Act’s provision that governed relief available to

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104. *Medlock v. Johnson & Johnson Co.*, No. 94-2317-JWL, 1996 U.S. Dist. LEXIS 18275, at \*8–9 (D. Kan. Oct. 7, 1996).

105. *Id.* at \*8–10.

106. *Id.* at \*8–9 (emphasis added) (citations omitted). On appeal, the Tenth Circuit stated the *Price Waterhouse* framework, not the 1991 Act’s framework, applied. *See Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 n.4 (10th Cir. 1999).

107. *Jones–Bell v. Ill. Dep’t of Emp’t Sec.*, No. 95 C 948, 1995 U.S. Dist. LEXIS 17344, at \*17–18 (N.D. Ill. Nov. 20, 1995); *Hall v. City of Brawley*, 887 F. Supp. 1333 (S.D. Cal. 1995).

108. 887 F. Supp. at 1345.

109. *Id.*

110. *Id.*

111. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (indicating a defendant could avoid liability if it could demonstrate it would have made the same decision regardless of the protected trait).

112. *Hall*, 887 F. Supp. at 1345.

motivating-factor plaintiffs.<sup>113</sup> The court in *Jones–Bell* often cited to the 1991 Act, strongly suggesting the 1991 Act applied to this retaliation case.<sup>114</sup>

Another district court determined the 1991 Act applied to retaliation claims.<sup>115</sup> Specifically, in *Heywood*, the plaintiff alleged she was terminated in retaliation for filing an EEOC charge.<sup>116</sup> It was during post-trial motions the issue of the appropriate standard for retaliation claims under the 1991 Act arose.<sup>117</sup> The court started its analysis with *Price Waterhouse* and the 1991 Act, and it acknowledged the 1991 Act’s motivating-factor provision’s language referred only to discrimination claims.<sup>118</sup> Despite there being no explicit mention of “retaliation,” the court noted: “[I]t is certainly reasonable to assume that the [c]ongressional policy articulated in the amendment and in the House [R]eport, reaches retaliation as well as the enumerated considerations.”<sup>119</sup> The court also observed:

If Title VII’s ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price[]Waterhouse* jeopardizes this fundamental principle. As Judith Lichtman testified, the decision “sends the message that a little overt sexism or racism is okay as long as it is not the only basis for the employer[’]s action.” . . . Legislation is needed to restore Title VII’s comprehensive ban on all impermissible consideration of race, color, religion, sex or national origin in employment.<sup>120</sup>

Then, applying the 1991 Act, the court observed it was “clear” the plaintiff “would only be required to prove that retaliation was *a motivating factor* for the discharge.”<sup>121</sup> Thus, this court also appeared to apply the 1991 Act to a retaliation claim.

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113. 1995 U.S. Dist. LEXIS 17344, at \*22–25.

114. *Id.* at \*17–25.

115. *Heywood v. Samaritan Health Sys.*, 902 F. Supp. 1076 (D. Ariz. 1995).

116. *Id.* at 1078.

117. *Id.*

118. *Id.* at 1080–81.

119. *Id.* at 1081 (citing 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 35.04[1]). Even though Larson’s argument is based on the structure of Title VII and its amendments, he has acknowledged there is a strong possibility the Court’s opinion in *Gross* will be applied to Title VII retaliation claims. See LARSON, *supra* note 85, § 35.04[3].

120. *Heywood*, 902 F. Supp. at 1080–81 (quoting H.R. REP. NO. 102-40, pt. I, at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 585). Although this excerpt does not mention retaliation, its reasoning can certainly apply to that type of employer behavior.

121. *Id.* at 1081 (emphasis added).

One more district court to apparently decide the 1991 Act applied to retaliation claims was the United States District Court for the District of North Dakota.<sup>122</sup> In *De Llano*, the plaintiff sued the defendant for discrimination and retaliation.<sup>123</sup> The jury found for the defendant on the discrimination claim, but it did find retaliation was a motivating factor in the decision to terminate the plaintiff.<sup>124</sup> The jury also found the defendant would have made the same decision regardless of the plaintiff's protected activity.<sup>125</sup> The court started its analysis with *Price Waterhouse* and the 1991 Act.<sup>126</sup> It noted the 1991 Act's language allowed for motivating-factor causes of action in discrimination cases but that it did not include a similar cause of action in retaliation cases.<sup>127</sup> The defendant argued that because of this omission, there were no motivating-factor retaliation claims.<sup>128</sup> The defendant also argued *Price Waterhouse* applied, and because the defendant demonstrated it would have made the same decision regardless of the retaliatory motive, there was no Title VII violation.<sup>129</sup>

The court disagreed and concluded it would allow a motivating-factor retaliation claim.<sup>130</sup> It did so based on the EEOC's position on this issue and on one commentator's analysis of this issue.<sup>131</sup> The court noted: "This court is of the view that it would be illogical and contrary to congressional intent to apply different standards of proof and accompanying relief provisions to retaliation claims as opposed to discrimination claims."<sup>132</sup> The court also relied on the model jury instructions for discrimination claims and retaliation claims; instructions that "[did] not differentiate between retaliation and discrimination."<sup>133</sup>

The above-referenced cases demonstrate even though the 1991 Act's motivating-factor provision did not specifically address retaliation claims, some courts believed the 1991 Act applied to those claims. This was the minority position, and many of these decisions have been extensively criticized or are no longer followed.<sup>134</sup> This Article will now address the way most courts handled retaliation claims after the 1991 Act, which was

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122. *De Llano v. N.D. State Univ.*, 951 F. Supp. 168 (D.N.D. 1997).

123. *Id.* at 169.

124. *Id.*

125. *Id.*

126. *Id.* at 169–70.

127. *Id.*

128. *Id.* at 170.

129. *Id.*

130. *Id.* at 170–71.

131. *Id.* at 171 (citing EEOC POLICY GUIDANCE NO. 915.002 § III(B)(2) n.14 (July 14, 1992) and 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 35.04[1]).

132. *Id.* at 170.

133. *Id.* at 171.

134. *See supra* note 87.

consistent with *Price Waterhouse* and (1) required the plaintiff to demonstrate retaliation played a motivating factor in the adverse employment action and then (2) forced the defendant to demonstrate it would have made the same decision absent the retaliatory motive; if the defendant was able to demonstrate this, there was no Title VII violation.<sup>135</sup>

*B. Courts that Did Not Apply the 1991 Act to Retaliation Claims*

The cases described below decided *Price Waterhouse*, not the 1991 Act’s motivating-factor provision, was applicable when analyzing motivating-factor retaliation claims. These cases allowed defendants to avoid liability if, after the plaintiff demonstrated retaliation played a role in the adverse employment action, the defendants were able to demonstrate they would have made the same decision absent any retaliatory motive.<sup>136</sup>

One court that rejected the idea of applying the 1991 Act to retaliation plaintiffs was the Third Circuit.<sup>137</sup> In *Woodson v. Scott Paper Co.*, the court addressed whether, after the 1991 Act, retaliation plaintiffs were entitled to prevail if they could prove retaliation was a motivating factor behind the adverse employment action.<sup>138</sup> The plaintiff argued the 1991 Act allowed for motivating-factor retaliation claims, while the defendant argued the 1991 Act did not allow such claims.<sup>139</sup> The court first noted the motivating-factor provision did not explicitly refer to retaliation claims.<sup>140</sup> The court then noted the 1991 Act referred to retaliation claims in other places (but not in the motivating-factor provision), leading the court to state the following: “It is generally the case that ‘where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”<sup>141</sup> The court then concluded: “[I]t would seem reasonable to assume that [the 1991 Act’s motivating-factor provision] does not apply to retaliation claims.”<sup>142</sup>

The court did, however, consider the plaintiff’s argument that because courts typically borrow rules from cases involving *discrimination* claims

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135. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

136. *See infra* notes 138–74 and accompanying text.

137. *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997). The district court’s opinion in this case, which appeared to support an application of the 1991 Act to retaliation claims, can be found at 898 F. Supp. 298, 306 (E.D. Pa. 1995).

138. *Woodson*, 109 F.3d at 931.

139. *Id.* at 931–32.

140. *Id.* at 933.

141. *Id.* at 934 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

142. *Id.* (citing *Tanca v. Nordberg*, 98 F.3d 680, 683–84 (1st Cir. 1996), and *Riess v. Dalton*, 845 F. Supp. 742, 745 (S.D. Cal. 1993)).

when analyzing *retaliation* claims, the 1991 Act's motivating-factor provision's analysis also applied to retaliation claims.<sup>143</sup> The court ultimately rejected this idea, however, determining the legislative history regarding this issue was "unclear."<sup>144</sup> The court also rejected the plaintiff's attempt to use pro-plaintiff language from *Price Waterhouse*, and it observed: "[A]bsent a clearly expressed legislative intent[] to the contrary[,] [the] language [of a statute] must ordinarily be regarded as conclusive."<sup>145</sup> The court concluded that because the 1991 Act's motivating-factor provision did not mention retaliation, the provision did not apply to retaliation claims.<sup>146</sup> The court did note some courts had reached the opposite conclusion; however, the court dismissed those cases due to their lack of analysis.<sup>147</sup>

The Third Circuit was not the only United States court of appeals to decide the 1991 Act's motivating-factor provision did not apply to retaliation claims.<sup>148</sup> The First Circuit in *Tanca* concluded *Price Waterhouse*, not the 1991 Act, applied to these claims.<sup>149</sup> In *Tanca*, the jury found the plaintiff's protected activity was a motivating factor behind the adverse action.<sup>150</sup> The jury also found the defendant would have made the same decision absent the plaintiff's protected activity.<sup>151</sup> As a result, the trial court granted the defendant's motion for judgment as a matter of law based on *Price Waterhouse*.<sup>152</sup>

On appeal, the court first relied on the statement from *Price Waterhouse* that, although that case involved sex discrimination, it extended to other unlawful employment practices such as "discrimination based on race, religion, or national origin."<sup>153</sup> The First Circuit also noted courts had extended *Price Waterhouse* to retaliation claims after the 1991 Act.<sup>154</sup> The court then discussed the 1991 Act, noting that while under

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143. *Woodson*, 109 F.3d at 934–35.

144. *Id.* at 934.

145. *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)).

146. *Id.* at 935.

147. *Id.* at 935 n.27. Some of the cases the court cited as examples of where a court applied the 1991 Act without much analysis include the previously discussed cases of *Vepriusky*, *Beinlich*, and *Hall*. *Id.*

148. *See, e.g.*, *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996).

149. *Id.* at 680.

150. *Id.* at 681.

151. *Id.*

152. *Id.*

153. *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (plurality opinion)).

154. With respect to this issue, the court noted the following:

Subsequent cases have extended the *Price Waterhouse* analysis to a series of other discrimination contexts, including retaliation claims. Indeed, at least one court has analyzed retaliation claims in terms of *Price Waterhouse* even subsequent to the passage of the 1991

*Price Waterhouse* the “same decision test” would be a bar to liability, under the 1991 Act, the “same decision test” only limits remedies.<sup>155</sup> The court then framed the critical issue as whether the “mixed[-]motive provisions of section 107(b) extend to Title VII retaliation claims brought under 42 U.S.C. § 2000e-3.”<sup>156</sup> Looking at the statutory language, the court observed the motivating-factor provision did *not* refer to retaliation.<sup>157</sup> The court then relied on the district court’s opinion, which stated: “[N]othing in the 1991 Act would appear to change any rule with respect to retaliation claims which existed prior to [the 1991 Act’s] enactment.”<sup>158</sup> After relying on the district court, the First Circuit observed: “On its face, then, the [1991 Act] seems to express an intent not to preclude application of *Price Waterhouse* in the context of [a] mixed-motive retaliation case[.]”<sup>159</sup>

The court then rejected the plaintiff’s argument that the 1991 Act’s history was clear that “Congress intended that other employment statutes modeled after Title VII adopt its new mixed[-]motive analysis.”<sup>160</sup> The court also rejected the plaintiff’s reliance on the 1991 Act’s language regarding the fact that the 1991 Act was enacted in response to the Court’s weakening of Title VII.<sup>161</sup> Next, the court rejected the plaintiff’s argument that because courts have applied the burden-shifting analysis from discrimination claims to retaliation claims in the past, there was no need for Congress to amend Title VII’s antiretaliation provision because Congress assumed courts would continue to utilize the discrimination burden-shifting frameworks for retaliation claims.<sup>162</sup> The plaintiff had support for some of these arguments:

The Committee intends that . . . other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the Americans with Disabilities Act (ADA) should be treated in the same manner as under Title VII.<sup>163</sup>

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Act. However, neither the Supreme Court nor this Circuit has held that *Price Waterhouse* applies to retaliation cases.

*Id.* (citations omitted).

155. *Id.* at 681–82.

156. *Id.* at 682. As noted earlier, I am using “motivating factor” rather than “mixed motives” throughout the Article. I did not, however, alter any quotations containing this terminology (unless noted with [ ]).

157. *Id.*

158. *Id.* (quoting *Tanca v. Nordberg*, No. 1:93-CV-10877, at \*8 (D. Mass. Mar. 15, 1995)).

159. *Id.* at 683 (citing *Riess v. Dalton*, 845 F. Supp. 742, 744 (S.D. Cal. 1993)).

160. *Id.*

161. *Id.* at 683 n.6.

162. *Id.* at 683–84.

163. H.R. REP. NO. 102-40, pt. II, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

The court rejected this argument, however, observing this legislative history suggested only that *other antidiscrimination statutes*, not *different provisions of Title VII*, should be interpreted consistently with the 1991 Act.<sup>164</sup>

The court then relied on a canon of statutory construction to reject the plaintiff's claim; specifically, the court noted: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>165</sup> According to the court, because Congress addressed Title VII's antiretaliation provision elsewhere in the 1991 Act but failed to address it in the motivating-factor provision, Congress must not have wanted to extend the motivating-factor provision's analysis to retaliation claims.<sup>166</sup> The First Circuit noted: "[B]ecause Congress addressed the retaliation section elsewhere in the 1991 Act, but chose not to do so in section 107(a) or (b), it would seem that 'where Congress intended to address retaliation violations, it knew how to do so and did so expressly.'"<sup>167</sup> Finally, the court addressed the plaintiff's reliance on the following legislative history: "'If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price Waterhouse* jeopardizes that fundamental principle."<sup>168</sup>

After mentioning this history, the court "punted" on the issue, concluding that, "Congress'[s] intent remains unclear regarding the application of the 1991 Act to Title VII mixed[-]motive retaliation claims."<sup>169</sup> The court then observed: "'Absent a clearly expressed legislative intention to the contrary[,] [the] language [of a statute] must ordinarily be regarded as conclusive.'"<sup>170</sup> The court then noted that because the statutory language was clear and not inconsistent with the context within which it was drafted, the 1991 Act's motivating-factor provision did not apply to retaliation claims.<sup>171</sup> Finally, the court dismissed the courts that had reached the opposite conclusion.<sup>172</sup> The First Circuit was thus

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164. *Tanca*, 98 F.3d at 683.

165. *Id.* (internal quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

166. *Id.* at 683–84.

167. *Id.* (quoting *Riess v. Dalton*, 845 F. Supp. 742, 745 (S.D. Cal. 1993)).

168. *Id.* at 684 (quoting H.R. REP. NO. 102-40, pt. I, at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585); *see supra* note 120.

169. *Id.*

170. *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)) (internal quotation marks omitted).

171. *Id.*

172. *Id.* at 684–85.

another of many courts to take a pro-defendant position on this issue and conclude *Price Waterhouse*, not the 1991 Act, applied to retaliation claims.<sup>173</sup>

Therefore, after the 1991 Act, most courts determined that because Congress did not include retaliation in the 1991 Act’s motivating-factor provision, *Price Waterhouse* applied to retaliation claims.<sup>174</sup> As a result, a defendant could avoid liability if it demonstrated it would have made the same decision absent the retaliatory motive.<sup>175</sup> Although this was a more pro-defendant position than an application of the 1991 Act, the burden placed on plaintiffs became even more difficult after the Court decided *Gross*.<sup>176</sup> The next few Parts of this Article will discuss *Gross* and how *Gross* has eroded motivating-factor retaliation claims even more.

#### VI. *GROSS V. FBL FINANCIAL SERVICES, INC.*<sup>177</sup>

Although the Supreme Court was not directly confronted with the Title VII retaliation motivating-factor issue in *Gross*, several courts have used *Gross* and the reasoning behind it to conclude that, in these retaliation claims, the burden of persuasion never shifts to the defendant and that retaliation plaintiffs must establish but-for causation to establish liability.<sup>178</sup> This, of course, differs from plaintiffs claiming *discrimination* who, in order to establish Title VII liability, have to demonstrate only that the protected trait played a motivating factor in the adverse employment action.<sup>179</sup>

In *Gross*, the Court initially agreed to decide whether direct evidence was required for an ADEA plaintiff to obtain a motivating-factor jury instruction.<sup>180</sup> In *Desert Palace, Inc. v. Costa*,<sup>181</sup> the Court decided direct

173. The First Circuit again took a pro-defendant position in the post-*Gross* case of *Palmquist v. Shinseki*, 689 F.3d 66, 68 (1st Cir. 2012), where the court required a Rehabilitation Act retaliation plaintiff to establish but-for causation. *See also* *Matima v. Celli*, 228 F.3d 68, 81 (2d Cir. 2000) (noting the 1991 Act does not apply to retaliation claims); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544 (4th Cir. 1999) (noting the 1991 Act does not apply to retaliation claims); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 549–50 (10th Cir. 1999) (noting *Price Waterhouse*, not the 1991 Act, applies to retaliation claims). The Fourth Circuit’s opinion in *Kubicko* therefore applied a different standard than the more pro-plaintiff standard the Fourth Circuit applied in the previously discussed case of *Beinlich v. Curry Dev., Inc.*, No. 94-1465, 1995 U.S. App. LEXIS 12109 (4th Cir. May 22, 1985). *See supra* Part V.A.

174. *See supra* notes 137–173 and accompanying text.

175. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

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

177. *Id.*

178. *See infra* Part VII.B.

179. 42 U.S.C. § 2000e-2(m) (2006).

180. 557 U.S. at 169–70.

181. 539 U.S. 90 (2003).

evidence was *not* required for a motivating-factor instruction in a Title VII discrimination claim,<sup>182</sup> and the Court in *Gross* was asked to answer that same question with respect to the ADEA.<sup>183</sup> The Court did not reach this question, however, concluding a motivating-factor cause of action did not exist under the ADEA.<sup>184</sup> The Court came to this conclusion for several reasons.<sup>185</sup> Most importantly, the Court noted while Congress created a motivating-factor cause of action for Title VII plaintiffs in the 1991 Act, it failed to add a similar provision to the ADEA, despite amending other provisions of the ADEA in the 1991 Act.<sup>186</sup> Because of this, the Court determined Congress intended to prohibit ADEA motivating-factor claims.<sup>187</sup> The Court concluded an ADEA plaintiff must prove that, but for his age, he would not have suffered the adverse employment action, and the burden of persuasion never shifts to the defendant.<sup>188</sup> This differed significantly from the post-1991 Act's Title VII discrimination standard, which allowed plaintiffs to prevail if they demonstrated the protected trait played a motivating factor in the adverse employment action, even if other factors also contributed to the decision.<sup>189</sup>

In *Gross*, the plaintiff argued a job reassignment constituted a demotion,<sup>190</sup> and he presented evidence his reassignment was based, in part, on his age.<sup>191</sup> The trial court gave a motivating-factor jury instruction,<sup>192</sup> and it also instructed the jury it should return a defense verdict if the defendant could demonstrate it would have made the same decision regardless of the plaintiff's age.<sup>193</sup> Thus, the trial court: (1) first placed the burden on the plaintiff to show age was a motivating factor and then (2) placed the burden on the defendant to prove it would have made the same decision regardless of the plaintiff's age.<sup>194</sup> The jury ruled in favor of the plaintiff.<sup>195</sup>

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182. *Id.*

183. 557 U.S. at 169–70.

184. *Id.* at 173.

185. *Id.* at 173–79.

186. *Id.* at 174.

187. *Id.*

188. *Id.* at 177.

189. 42 U.S.C. § 2000e-2(m) (2006).

190. 557 U.S. at 170.

191. *Id.*

192. *Id.* at 170–71.

193. *Id.* at 171. These instructions appear to have adopted the *Price Waterhouse* framework. *Id.* at 171–72.

194. *Id.* at 170–71.

195. *Id.* at 171.

The Eighth Circuit reversed, concluding the jury instructions were faulty under *Price Waterhouse*.<sup>196</sup> The court found that because the trial court did not instruct the jury on the relevance of direct evidence and its effect on whether to shift the burden to the defendant, the trial court had erred.<sup>197</sup> According to the Eighth Circuit, “the jury thus should have been instructed only to determine whether [the plaintiff] had carried his burden of ‘prov[ing] that age was the determining factor in [the defendant’s] employment action.’”<sup>198</sup>

While both parties asked the Court to address whether direct evidence was needed for an ADEA motivating-factor jury instruction, the Court determined it did not have to reach that question because a motivating-factor instruction was *never* appropriate in an ADEA case.<sup>199</sup> The plaintiff argued *Price Waterhouse* and *Desert Palace* applied to the ADEA, but the Court disagreed.<sup>200</sup> The Court noted that when interpreting a statute, a court “‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’”<sup>201</sup> Although the Court had applied Title VII rules to ADEA claims in the past,<sup>202</sup> it had never held that doing so was required.<sup>203</sup> The Court then noted the differences between Title VII and the ADEA and how those differences applied in cases involving motivating-factor claims.<sup>204</sup> The Court observed the ADEA does not contain a motivating-factor provision similar to Title VII.<sup>205</sup> In fact, not only is there no similar provision in the ADEA, but Congress amended the ADEA in other ways in the 1991 Act but did not add a motivating-factor provision, which was further evidence the motivating-factor language in the 1991 Act does not apply to the ADEA<sup>206</sup>:

We cannot ignore Congress’[s] decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. Furthermore, as the Court has explained, “negative implications raised by disparate

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196. *Id.* The Eighth Circuit’s opinion can be found at 526 F.3d 356 (8th Cir. 2008).

197. *Gross*, 557 U.S. at 172.

198. *Id.*

199. *Id.* at 173–74.

200. *Id.*

201. *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

202. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

203. *Id.* at 142. The Court in *Reeves* noted it had never decided whether the Title VII analysis applied to ADEA cases, but because the parties did not dispute this, the Court was willing to assume it did apply. *Id.*

204. *Gross*, 557 U.S. at 173–79.

205. *Id.* at 174.

206. *Id.* at 174–75.

provisions are strongest” when the provisions were “considered simultaneously when the language raising the implication was inserted.” As a result, the Court’s interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.<sup>207</sup>

The Court then focused on the ADEA’s text and concluded it did not provide for a motivating-factor cause of action.<sup>208</sup> Quoting the ADEA’s prohibition against discrimination “because of such individual’s age,”<sup>209</sup> the Court began an analysis of what “because of such individual’s age” meant.<sup>210</sup> The Court looked to various dictionary definitions of “because of.”<sup>211</sup> According to *Webster’s Third New International Dictionary*, “because of” meant “by reason of: on account of.”<sup>212</sup> According to the *Oxford English Dictionary*, “because of” meant “[b]y reason of, on account of.”<sup>213</sup> Finally, according to the *Random House Dictionary of the English Language*, “because of” meant “by reason; on account.”<sup>214</sup> The Court then concluded: “[T]he 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.”<sup>215</sup>

Thus, the Court concluded an ADEA plaintiff must prove age was the but-for cause of the adverse action.<sup>216</sup> The Court continued: “It follows, then, that under [the ADEA], the plaintiff retains the burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action.”<sup>217</sup> The Court then relied on ADEA cases to support this conclusion, and it also relied on other cases for the proposition that unless otherwise noted, the burden of persuasion rests with the plaintiff.<sup>218</sup> The Court ended this part of its discussion this way:

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate treatment action. A plaintiff must prove by a

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207. *Id.* (citations omitted).

208. *Id.* at 175–77.

209. *Id.* at 176 (emphasis added) (quoting 29 U.S.C. § 623(a)(1) (2006)).

210. *Id.* (emphasis omitted).

211. *Id.*

212. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)).

213. *Id.* (emphasis omitted) (quoting OXFORD ENGLISH DICTIONARY 746 (1933)).

214. *Id.* (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966)).

215. *Id.* (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

216. *Id.* at 177.

217. *Id.*

218. *Id.* (citing *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135 (2008), and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 143 (2000)).

preponderance of the evidence (which may be direct or circumstantial), that age was the “*but-for*” cause of the challenged employer decision.<sup>219</sup>

Finally, the Court rejected the plaintiff’s reliance on *Price Waterhouse*.<sup>220</sup> Noting that *Price Waterhouse* was over twenty years old, the Court stated it was “far from clear that the Court would have the same approach were it to consider the question today in the first instance.”<sup>221</sup> It also criticized *Price Waterhouse* as being “difficult to apply.”<sup>222</sup> The Court observed even if *Price Waterhouse* was “doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.”<sup>223</sup> The Court then held an ADEA plaintiff:

must prove, by a preponderance of the evidence, that age was the “*but-for*” cause of the challenged adverse employment action. The 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.<sup>224</sup>

Four justices dissented,<sup>225</sup> arguing the majority changed the meaning of “because of” and answered a question not presented to the Court.<sup>226</sup> Relying mostly on *Price Waterhouse*, the dissent argued but-for causation was *not* required, stating that “[t]he most natural reading of this [phrase] prohibits adverse employment actions motivated in whole or in part by the age of the employee.”<sup>227</sup> Noting the Court had rejected but-for causation in *Price Waterhouse*, the dissent argued placing such a burden on an ADEA plaintiff was incorrect.<sup>228</sup> The dissent also noted Congress rejected but-for causation in the 1991 Act, providing further evidence the majority was incorrect.<sup>229</sup> Again relying on *Price Waterhouse*, the dissent argued the

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219. *Id.* at 177–78 (emphasis added).

220. *Id.* at 178–79.

221. *Id.*

222. *Id.* at 179.

223. *Id.*

224. *Id.* at 180 (emphasis added).

225. There were two dissenting opinions in this case. One dissent was authored by Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer), and the other dissent was authored by Justice Breyer (joined by Justices Souter and Ginsburg). *See id.* For purposes of this Article, I will focus on Justice Stevens’ dissent.

226. *Id.* at 180–89 (Stevens, J., dissenting).

227. *Id.* at 180 (emphasis omitted).

228. *Id.* at 180–81.

229. *Id.* at 185.

phrase “because of” should not have a different meaning under the ADEA than it does under Title VII.<sup>230</sup> The dissent argued that “the most natural reading [of ‘because of’] proscribes adverse employment actions motivated in whole or in part by the age of the employee.”<sup>231</sup> The dissent observed that in *Price Waterhouse*, “because of” meant the protected trait needed to be *irrelevant* to employment decisions.<sup>232</sup> Quoting *Price Waterhouse*, the dissent stated: “When ‘an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex.’”<sup>233</sup> The dissent also believed to equate “because of” with but-for causation was to misunderstand the terms.<sup>234</sup> Criticizing the majority for equating “because of” with “colloquial shorthand for ‘but-for’ causation,” the dissent continued its attack.<sup>235</sup> The dissent argued that simply because *Price Waterhouse* involved Title VII and *Gross* involved the ADEA, this was not a sufficient reason to interpret the phrase “because of” any differently when interpreting both statutes<sup>236</sup>: “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.’”<sup>237</sup>

The dissent concluded that because Congress did not amend the ADEA with respect to motivating[-]factor claims, the logical conclusion was “*Price Waterhouse*’s construction of ‘because of’ remains the governing law for ADEA claims.”<sup>238</sup>

The dissent then analogized this situation to *Smith v. City of Jackson*,<sup>239</sup> in which the Court decided that the ADEA allowed for disparate impact claims, but that the pre-1991 Act disparate impact rules applied to those

230. *Id.* at 180–83.

231. *Id.* at 182.

232. *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)).

233. *Id.* at 183 (quoting *Price Waterhouse*, 490 U.S. at 241).

234. *Id.* (quoting *Price Waterhouse*, 490 U.S. at 240).

235. *Id.* (quoting *Price Waterhouse*, 490 U.S. at 240).

236. *Id.*

237. *Id.* (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978))).

238. *Id.* at 186. The dissent also noted there was legislative history that supported the idea that the motivating-factor analysis provided for in the 1991 Act applied to the ADEA:

“[A] number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), are modeled after and have been interpreted in a manner consistent with Title VII,” and that “these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act,” including the mixed-motives provisions.

*Id.* at n.6 (alteration in original) (citation omitted) (quoting H.R. REP. NO. 102-40, pt. II, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697).

239. 544 U.S. 228 (2005).

claims.<sup>240</sup> In *Smith*, the Court noted that Congress failed to amend the ADEA with respect to disparate impact claims even though it amended Title VII’s disparate impact provision, and as a result, the Court determined the pre-1991 Act’s analysis of disparate impact claims governed post-1991 Act ADEA disparate impact claims.<sup>241</sup> The dissent in *Gross* believed that because that situation was analogous to this one, the pre-1991 Act’s interpretation of “because of” (*Price Waterhouse*) applied to the ADEA.<sup>242</sup> In conclusion, the dissent stated the majority’s “resurrection of the but-for causation standard is unwarranted. *Price Waterhouse* repudiated that standard 20 years ago, and Congress’[s] response to our decision further militates against the crabbed interpretation the Court adopts today.”<sup>243</sup>

Nonetheless, despite the strength of the *Gross* dissent, it is just that—the dissent. ADEA plaintiffs must now prove but-for causation and retain the burden of persuasion.<sup>244</sup> More relevant to this Article, however, is that although there is a split of authority, many courts are now applying *Gross* to antidiscrimination statutes other than the ADEA and to those statutes’ antiretaliation provisions, placing a much higher burden on plaintiffs.<sup>245</sup> Several of these post-*Gross* cases will now be discussed.

## VII. COURTS’ INTERPRETATIONS OF MOTIVATING-FACTOR CLAIMS AFTER *GROSS*

Although *Gross* was not a Title VII case, many courts have used it for the proposition that motivating-factor retaliation claims no longer exist under Title VII; even if retaliation was a motivating factor in the adverse employment action, a retaliation plaintiff would lose if that retaliatory motive was not the but-for cause of the adverse employment action.<sup>246</sup> Since *Gross*, this has been the majority approach, with only a few courts suggesting there is still a Title VII retaliation motivating-factor cause of action.<sup>247</sup>

240. *Gross*, 557 U.S. at 186.

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

242. *Gross*, 557 U.S. at 180, 185–88 (Stevens, J., dissenting).

243. *Id.* at 187.

244. *Id.* at 177 (majority opinion).

245. See, e.g., *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (applying *Gross*’s but-for standard to an ADA claim); *Hayes v. Sebelius*, 762 F. Supp. 2d 90 (D.D.C. 2011) (applying *Gross*’s but-for standard to a Title VII retaliation claim).

246. See, e.g., *Hayes*, 762 F. Supp. 2d 90. This district court from within the D.C. Circuit clearly had a different opinion about this issue than did another district court from within the D.C. Circuit. See *Nuskey v. Hochberg*, 730 F. Supp. 2d 1 (D.D.C. 2010) (adopting a pro-plaintiff approach to handling retaliation claims post-*Gross*); see *infra* Part VII.A.

247. One example of this approach came from the Fifth Circuit, which rejected the but-for causation standard for retaliation claims in its opinion in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010). See *supra* note 18.

A. *The Minority Position—Gross Does Not Apply to Retaliation Claims*

The Fifth Circuit is one court to refuse to apply *Gross*'s but-for causation standard to a retaliation claim.<sup>248</sup> With what some have called weak (or as the dissent in *Smith* called it, “lame”) analysis,<sup>249</sup> *Smith* essentially ignored *Gross* by relying on the fact that *Gross* was an ADEA claim while *Smith* was a Title VII retaliation claim.<sup>250</sup> In *Smith*, the jury found the plaintiff's protected activity played a motivating factor in her termination.<sup>251</sup> The jury also found the defendant did not demonstrate it would have made the same decision without taking into account the prohibited factor.<sup>252</sup> One of the questions on appeal was whether retaliation plaintiffs must satisfy *Gross*'s but-for standard.<sup>253</sup>

The court first observed Title VII's antiretaliation provision prohibits discrimination “because” an employee engaged in protected activity.<sup>254</sup> Relying on *Price Waterhouse*, the court noted a plaintiff can show an adverse action took place “because” of a particular trait by showing the trait was a “motivating” or “substantial” factor in the defendant's decision.<sup>255</sup> The court then observed how Congress responded to *Price Waterhouse*, noting a plaintiff could establish liability by showing a protected trait was a motivating factor behind the adverse employment action.<sup>256</sup> When addressing *Gross*, the Fifth Circuit first noted the Court did not answer the question raised on certiorari—whether direct evidence was needed for a motivating-factor jury instruction under the ADEA.<sup>257</sup> The court then conceded the *Gross* analysis “could be applied in a similar manner” to the *Smith* case.<sup>258</sup> It also noted the 1991 Act's motivating-factor provision does not mention retaliation.<sup>259</sup> Ultimately, however, despite *Gross*'s reasoning and Congress's failure to add retaliation to the 1991

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248. *Smith*, 602 F.3d at 320; see also *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir.), *rehearing en banc denied*, 688 F.3d 211 (5th Cir. 2012), *and cert. granted*, 133 S. Ct. 978 (2013); *Porter v. Quest Diagnostics*, No. 3:10-CV-888-M, 2012 U.S. Dist. LEXIS 36567 (N.D. Tex. Feb. 10, 2012); *Pulliam v. Comcorp of Baton Rouge*, No. 08-236-BAJ-SCR, 2010 U.S. Dist. LEXIS 126066 (M.D. La. Oct. 28, 2010). Both *Porter* and *Pulliam* are district court opinions from within the Fifth Circuit.

249. *Smith*, 602 F.3d at 337 (Jolly, J., dissenting).

250. *Id.* at 329–30 (majority opinion).

251. *Id.*

252. *Id.*

253. *Id.* at 325.

254. *Id.* at 326.

255. *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion)).

256. *Id.* at 327.

257. *Id.* at 328.

258. *Id.* (emphasis added).

259. *Id.*

Act’s motivating-factor provision, the court in *Smith* concluded *Gross* did not apply to retaliation claims.<sup>260</sup>

The court noted *Gross* involved the ADEA, not Title VII, and that “when conducting statutory interpretation, courts ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’”<sup>261</sup> It then relied on *Price Waterhouse*, rather than on *Gross*, and noted<sup>262</sup>:

In other words, the decision before us is how to proceed in light of *Price Waterhouse*, which specifically provided that the “because of” language in the context of Title VII authorized the mixed-motive framework, and *Gross*, which decided that the same language in the context of the ADEA meant “but-for,” but also refused to incorporate its prior Title VII decisions as part of the analysis. We believe that under these circumstances, the *Price Waterhouse* holding remains our guiding light. Although the dissent would extend *Gross* into the Title VII context, we think that would be contrary to *Gross*’s admonition against intermingling interpretations of the two statutory schemes.<sup>263</sup>

Feeling *Price Waterhouse* controlled, the court concluded the pre-*Gross* standard applied to motivating-factor retaliation claims.<sup>264</sup> Therefore, the relevance of this case is that it provided retaliation plaintiffs within the Fifth Circuit with a slightly better chance of prevailing.<sup>265</sup>

Judge Jolly dissented, arguing the majority created an unnecessary split among the circuits regarding this issue.<sup>266</sup> The dissent used the “ordinary meaning” of “because of” and concluded the phrase required but-for

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260. *Id.* at 329–30.

261. *Id.* at 329 (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)). Ironically, the Court in *Gross* used the same reasoning when deciding not to apply Title VII case law to an ADEA claim. *See* 557 U.S. at 176–79.

262. *Smith*, 602 F.3d at 330.

263. *Id.*

264. *Id.* Although this conclusion was less plaintiff-friendly than an application of the 1991 Act would have been, it was at least more plaintiff-friendly than an application of *Gross* would have been.

265. *Id.* Six months after *Smith*, a district court within the Fifth Circuit similarly rejected *Gross*’s but-for causation standard in a case involving a retaliation claim. *See Pulliam v. Comcorp of Baton Rouge, Inc.*, No. 08-236-BAJ-SCR, 2010 U.S. Dist. LEXIS 126066, at \*15–17 (M.D. La. Oct. 28, 2010); *see also Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir.), *rehearing en banc denied*, 688 F.3d 211 (5th Cir. 2012), *and cert. granted*, 133 S. Ct. 978 (2013); *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App’x 926, 931 (11th Cir. 2012) (agreeing with the Fifth Circuit’s approach); *Porter v. Quest Diagnostics*, No. 3:10-CV-888-M, 2012 U.S. Dist. LEXIS 36567, at \*32 (N.D. Tex. Feb. 10, 2012) (citing *Smith*, 602 F.3d at 329–30, and observing that Title VII motivating-factor retaliation causes of action exist).

266. *Smith*, 602 F.3d at 336 (Jolly, J., dissenting).

causation.<sup>267</sup> The dissent criticized the majority's distinction between the ADEA and Title VII, noting: "The majority disagrees, however, asserting the lame distinction that, although the language is identical, *Gross* was an age discrimination case under the ADEA and the case today is a retaliation case under Title VII."<sup>268</sup> The dissent then noted other courts had required but-for causation in all cases unless a statute provided otherwise.<sup>269</sup>

The dissent then took issue with the statement that courts should be careful when applying rules adopted for one statute to another statute.<sup>270</sup> The dissent argued the majority ignored part of the Court's statement on this issue—that courts should not apply a set of rules from one statute to a different statute "*without careful and critical examination.*"<sup>271</sup> The dissent concluded a "careful and fair consideration" of *Gross* required a contrary result.<sup>272</sup> Specifically, the dissent noted neither Title VII nor the 1991 Act has a motivating-factor provision for retaliation claims, meaning no such cause of action exists.<sup>273</sup> The dissent then criticized the majority by stating: "It is only by *avoiding* a 'careful and critical examination' that the majority concludes that *Gross* does not control our analysis today."<sup>274</sup> Finally, the dissent noted that when evaluating *Price Waterhouse*, the 1991 Act, and *Gross*, the only logical conclusion was that the motivating-factor analysis applies only to Title VII *discrimination* claims.<sup>275</sup>

Although the Fifth Circuit's position is the minority position, other courts have also rejected *Gross*'s but-for requirement for retaliation claims.<sup>276</sup> In *Nuskey*, the plaintiff alleged discrimination and retaliation and argued these issues played motivating factors in her termination.<sup>277</sup> Rejecting precedent from a district court within the D.C. Circuit which had noted that "a 'mixed[-]motive' theory is never available in a retaliation case and therefore . . . the 'motivating[-]factor' instruction is never appropriate in such a case,"<sup>278</sup> the court in *Nuskey* decided to follow *Smith*.<sup>279</sup> The court

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267. *Id.* at 336–37.

268. *Id.* at 337.

269. *Id.* (quoting *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010)).

270. *Id.* at 337–38.

271. *Id.* at 337 (emphasis added).

272. *Id.* at 337–38.

273. *Id.* at 338.

274. *Id.*

275. *Id.*

276. *See, e.g., Nuskey v. Hochberg*, 730 F. Supp. 2d 1 (D.D.C. 2010). As will be discussed later in this Part of the Article, another district court from within the D.C. Circuit came to the opposite conclusion, rejecting and strongly criticizing the Fifth Circuit's *Smith* opinion and applying *Gross*. *See Hayes v. Sebelius*, 762 F. Supp. 2d 90 (D.D.C. 2011).

277. 730 F. Supp. 2d at 2.

278. *Id.* at 5 (citing *Beckford v. Geithner*, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009)).

279. *Id.*

observed the Fifth Circuit had rejected *Gross*'s but-for requirement, and that *Price Waterhouse* still “remain[ed] the touchstone for analysis in a Title VII retaliation case.”<sup>280</sup> The court also observed other courts had determined *Price Waterhouse* was the appropriate way to analyze retaliation claims.<sup>281</sup> The court then noted under *Price Waterhouse*, “[A] mixed[-]motive theory and thus an [sic] ‘a motivating[-]factor’ instruction are available in retaliation cases. But in a retaliation case, it is a *complete* defense for the employer to show . . . that it would have taken the same action in the absence of the illegitimate factor.”<sup>282</sup> Therefore, under this interpretation, retaliation plaintiffs have a motivating-factor cause of action; however, the defendant would have a complete defense if it could establish the “same decision” defense.<sup>283</sup> Thus, the court used *Price Waterhouse*, which allowed a plaintiff to prevail if the defendant could not meet its burden of proving it would have made the same decision absent the retaliatory motive.<sup>284</sup>

The court in *Brantley v. Unified School District No. 500* also determined that motivating-factor retaliation causes of action exist under Title VII.<sup>285</sup> Although the court reached a pro-plaintiff outcome, the court relied on a pre-*Gross* case for this conclusion.<sup>286</sup> Without ever mentioning *Gross*, the court in *Brantley* noted the motivating-factor analysis was applicable to retaliation claims.<sup>287</sup> The court observed: “To prevail on a Title VII retaliation claim, plaintiffs must establish ‘that retaliation *played a part* in the employment decision.’”<sup>288</sup> The court continued: “[P]laintiffs must first directly show ‘retaliation played a motivating part in the employment decision at issue.’ Once plaintiffs show that retaliation played a motivating part, ‘the burden of persuasion shifts to the defendant to prove that it would have taken the same action absent the retaliatory motive.’”<sup>289</sup> Thus, this was one more court that chose not to apply *Gross* to motivating-factor retaliation claims.

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280. *Id.* (citing *Smith*, 602 F.3d at 329).

281. *Id.* (citing *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Speedy v. Rexnord Corp.*, 243 F.3d 347, 401–02 (7th Cir. 2001); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000), and *Kubicko v. Ogdan Logistics Servs.*, 181 F.3d 544, 552–53 nn.7–8 (4th Cir. 1999)). As is clear from the dates of these opinions, they all predate *Gross*.

282. *Id.*

283. *Id.*

284. *See* 490 U.S. 228, 258 (1989).

285. 405 F. App'x 327, 331 (10th Cir. 2010).

286. *Id.* (citing *Fye v. Okla. Corp. Comm.*, 516 F.3d 1217, 1224 (10th Cir. 2008)).

287. *Id.*

288. *Id.* (emphasis added) (quoting *Fye*, 516 F.3d at 1224).

289. *Id.* (quoting *Fye*, 516 F.3d at 1225–26); *see also* *Meno v. FedEx Corporate Servs., Inc.*, No. 11-cv-00874-CMA-MJW, 2012 U.S. Dist. LEXIS 103376, at \*3 n.3 (D. Colo. July 25, 2012) (allowing a plaintiff to pursue a Title VII motivating-factor retaliation claim).

Therefore, post-*Gross*, some courts still follow some type of motivating-factor framework for retaliation claims. The most pro-plaintiff approach would be to apply the 1991 Act to these claims, while the less plaintiff-friendly approach simply uses *Price Waterhouse*. Regardless, either of these approaches is more pro-plaintiff than the approach most courts take, which is to follow *Gross* and require but-for causation and to never shift the burden of persuasion to the defendant.<sup>290</sup> The next Part of this Article will address some of those cases.

*B. The Majority Position—Gross Does Apply to Retaliation Claims*

Although some courts endorse a motivating-factor retaliation cause of action after *Gross*, that position is the minority approach.<sup>291</sup> As will be addressed below, most courts have adopted the *Gross* approach for most non-Title VII discrimination claims (and retaliation claims) and have required plaintiffs to prove but-for causation without ever shifting the burden of persuasion to the defendant.

Just over six months after the *Gross* opinion, the Seventh Circuit in *Serwatka v. Rockwell Automation, Inc.*, applied *Gross*'s reasoning to an ADA claim and rejected a jury verdict in favor of an ADA plaintiff.<sup>292</sup> In *Serwatka*, the jury found the plaintiff was discharged because of her perceived disability, and the jury also found the employer would have made the same decision without the discriminatory animus.<sup>293</sup> As a result, the trial court entered judgment in favor of the plaintiff, but it limited her relief.<sup>294</sup> Although *Serwatka* did not involve a Title VII claim, the Seventh Circuit's subsequent opinion in this case demonstrates that within the Seventh Circuit, *Gross*'s but-for causation requirement most likely exists for Title VII retaliation plaintiffs.<sup>295</sup>

Specifically, on appeal, the Seventh Circuit started its analysis with *Price Waterhouse*, noting that after that case, an employer violated Title VII if it relied on a protected trait, even if other reasons played a role in the

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290. See *infra* Part VII.B.

291. See *supra* Part VII.A and *infra* notes 292–340 and accompanying text.

292. 591 F.3d 957 (7th Cir. 2010) (rejecting a motivating-factor analysis in an ADA claim). As noted earlier, the Seventh Circuit initially took a more pro-plaintiff approach. See *supra* Part V.A. Although the first case discussed in this Part of the Article is an ADA case, the two cases that follow the discussion of *Serwatka* are Title VII retaliation cases. I am starting with an ADA case because it was decided before the other two cases, and it also laid the groundwork for applying *Gross* to all cases involving statutes containing “because of” language and not containing motivating-factor provisions.

293. *Serwatka*, 591 F.3d at 958.

294. *Id.* at 959.

295. *Id.* at 961–64. This pro-defendant approach was a departure from the pro-plaintiff approach the Seventh Circuit took in *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (7th Cir. 1996). See *supra* Part V.A.

adverse employment action.<sup>296</sup> But the court *also* noted that under *Price Waterhouse*, a defendant could avoid liability if it could demonstrate it would have made the same decision, regardless of the protected trait.<sup>297</sup> The court then noted that although *Price Waterhouse* was a Title VII case, its principles have been applied in cases involving other statutes.<sup>298</sup> The court then focused on Congress’s response to *Price Waterhouse*, the 1991 Act, which added the motivating-factor cause of action to Title VII.<sup>299</sup>

The court then addressed *Gross*.<sup>300</sup> The court acknowledged *Gross* was an ADEA case while *Serwatka* was an ADA case, but it believed this distinction was irrelevant.<sup>301</sup> It reiterated *Gross*’s reasoning that because Congress amended Title VII by adding a motivating-factor provision while not adding a similar provision to the ADEA, no such cause of action exists under the ADEA.<sup>302</sup> The court then noted *Gross* interpreted “because of” as meaning but-for causation, and a plaintiff could prevail in an ADEA discrimination claim only if she could prove but-for causation.<sup>303</sup>

Although the *Gross* decision construed the ADEA, the importance that the [C]ourt attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute. Our recent decision . . . reflects that understanding of the Supreme Court’s [*Gross*] decision: “*Gross . . . holds that, unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff’s burden in all suits under federal law.*”<sup>304</sup>

Thus, under the Seventh Circuit’s reasoning in *Serwatka*, unless the ADA contained a motivating-factor provision, but-for causation was required, and the burden of persuasion rested with the plaintiff at all times.<sup>305</sup> Unfortunately for the plaintiff in *Serwatka*, the ADA does not contain such a provision, and therefore, the plaintiff was required to prove

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296. *Serwatka*, 591 F.3d at 961–64.

297. *Id.*

298. *Id.* (citing *McNutt v. Bd. of Trustees of Univ. of Ill.*, 141 F.3d 706, 707 (7th Cir. 1998)).

299. *Id.* at 959–60.

300. *Id.* at 961.

301. *Id.* at 961–62.

302. *Id.* at 961.

303. *Id.*

304. *Id.* (emphasis added) (quoting *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009)).

305. *Id.* at 961–62; *see also* *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (applying *Gross* and requiring but-for causation in another claim brought under the ADA). *But see* *Hamilton v. Okla. City Univ.*, No. CIV-10-1254-D, 2012 U.S. Dist. LEXIS 168752 (W.D. Okla. Nov. 28, 2012) (declining to adopt “but-for” causation in an ADA claim).

but-for causation.<sup>306</sup> Relying on *Gross*, the court noted: “*Gross* makes clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute’s ‘because of’ language demands proof that a forbidden consideration . . . was a ‘but[-]for’ cause of the adverse action complained of.”<sup>307</sup> Because there was no such provision in the ADA, the plaintiff’s claim in *Serwatka* failed.<sup>308</sup>

The court also analyzed another Seventh Circuit case, *McNutt v. Board of Trustees of the University of Illinois*,<sup>309</sup> which was decided before *Gross*.<sup>310</sup> *McNutt* was a Title VII retaliation case, and the jury found the plaintiff established a motivating-factor claim.<sup>311</sup> On appeal, the court reversed, noting that, although Congress authorized motivating-factor causes of action for discrimination cases, it did not do so for retaliation cases.<sup>312</sup> According to the court in *Serwatka*, “the omission of retaliation from [the 1991 Act’s motivating-factor provision] meant that such relief was unavailable to a plaintiff who had shown that retaliation was a motivating but not a but-for cause of the adverse employment action taken against him.”<sup>313</sup> Before concluding the plaintiff in *Serwatka* did not establish but-for causation, the court observed: “Only by proving that a forbidden criterion was a but-for cause of the decision can the plaintiff avail herself of relief. In that respect, *McNutt* is consistent with . . . *Gross*.”<sup>314</sup> This language will hinder, and has hindered, retaliation plaintiffs, even when a defendant admits it acted with some retaliatory intent.<sup>315</sup> The Seventh Circuit is not, however, the only court to place this barrier in front of retaliation plaintiffs.<sup>316</sup>

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306. *Serwatka*, 591 F.3d at 962 (citing *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 336–37 (2d Cir. 2000)).

307. *Id.*

308. *Id.* at 962–64.

309. 141 F.3d 706 (7th Cir. 1998).

310. *Serwatka*, 591 F.3d at 962–63.

311. *McNutt*, 141 F.3d at 707.

312. *Id.*

313. *Serwatka*, 591 F.3d at 963 (citing *McNutt*, 141 F.3d at 708–09).

314. *Id.*

315. See *Ensuring Fairness for Older Workers: Hearing on S. 1756 Before the S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 7–12 (2010) [hereinafter *Hearing*] (statement of Jacqueline A. Berrien, Chairwoman, U.S. Equal Emp’t Opportunity Comm’n), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56416/pdf/CHRG-111shrg56416.pdf> (last visited May 13, 2013).

316. See *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012), where the First Circuit rejected a motivating-factor claim under the Rehabilitation Act. Some additional cases where courts have erected a high barrier in front of plaintiffs alleging Title VII retaliation claims will now be addressed.

While *Serwatka* was an ADA case that used *Gross*'s but-for standard, several courts have applied *Gross* to Title VII retaliation claims.<sup>317</sup> One such court is the United States District Court for the Eastern District of Pennsylvania, where the court had to decide whether a retaliation plaintiff would be entitled to a motivating-factor jury instruction.<sup>318</sup> The court in *Zhang* believed this was a “difficult” question, and it then set out both parties’ positions: (1) the plaintiff believed such an instruction was permissible under a 1997 Third Circuit case and under the Third Circuit’s Model Jury Instructions; and (2) the defendant argued that under a different 1997 Third Circuit case and *Gross*, Title VII motivating-factor retaliation claims do not exist.<sup>319</sup> The court looked at the Model Jury Instructions, which indicated motivating-factor instructions were permissible in retaliation claims;<sup>320</sup> however, the court also noted the comments to the Model Jury Instructions had “not yet determined what implications . . . *Gross* may have on the continued viability of [motivating-factor] claims under Title VII.”<sup>321</sup> Thus, the court felt compelled to consider whether *Gross* affected retaliation claims.<sup>322</sup>

After discussing *Gross*, the court noted the *Gross* reasoning had been extended to cases involving other antidiscrimination statutes.<sup>323</sup> The court then expressed its belief that because the 1991 Act’s motivating-factor language does not mention retaliation, the remaining question was whether a plaintiff alleging a motivating-factor retaliation claim could pursue such a claim under *Price Waterhouse*.<sup>324</sup> Noting the similarity in language among the ADEA, the ADA, and Title VII, the court decided it could find “no compelling reason to define ‘because,’ as used in Title VII’s antiretaliation provision, any differently than the Supreme Court defined the phrase ‘because of’ in *Gross*.”<sup>325</sup> As a result, the court decided a retaliation plaintiff must prove but-for causation and “may not satisfy his burden merely by showing that his protected activity was a ‘motivating factor’ in the employer’s decision, since [motivating-factor] retaliation claims are no longer viable under Title VII after *Gross*.”<sup>326</sup>

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317. Two of these cases, *Zhang v. Children’s Hospital of Philadelphia*, No. 08-5540, 2011 U.S. Dist. LEXIS 26290 (E.D. Pa. Mar. 14, 2011), and *Hayes v. Sebelius*, 762 F. Supp. 2d 90 (D.D.C. 2011), will be addressed in this Part of the Article.

318. *Zhang*, 2011 U.S. Dist. LEXIS 26290, at \*2.

319. *Id.* at \*2–3.

320. *Id.* at \*3.

321. *Id.* at \*4.

322. *Id.*

323. *Id.* at \*5–6.

324. *Id.* at \*7.

325. *Id.* at \*8.

326. *Id.*

Another court to reach a pro-defendant outcome regarding this issue was the United States District Court for the District of Columbia.<sup>327</sup> Like the court in *Zhang*, the court in *Hayes* rejected a motivating-factor retaliation claim.<sup>328</sup> The court first noted the D.C. Circuit had the opportunity to address this question twice before, but the court had not definitively answered the question.<sup>329</sup> The court next gave a brief history of Title VII, *Price Waterhouse*, the 1991 Act, and the applicable case law.<sup>330</sup> After that, the court noted that within the D.C. Circuit, “[I]t is now an open question whether Title VII plaintiffs may bring mixed-motives retaliation claims under *Price Waterhouse* or motivating-factor retaliation claims under the 1991 Act.”<sup>331</sup> While some courts were not convinced *Gross* applied to retaliation claims, the court in *Hayes* was convinced *Gross* provided “a clear answer” to the question of how to handle such claims.<sup>332</sup> The court went into a lengthy discussion of *Gross* and its effect on how the Court defined “because of” in *Price Waterhouse*.<sup>333</sup> The court in *Hayes* noted the decision in *Gross* “makes clear that *Price Waterhouse*’s interpretation of ‘because of’ is flatly incorrect.”<sup>334</sup> The *Hayes* court continued to focus on how *Gross* dismantled *Price Waterhouse*, and it also noted the majority in *Gross* questioned whether *Price Waterhouse* would have been decided the same way if that case had been decided today.<sup>335</sup>

The court then looked to the 1991 Act’s text and its omission of retaliation in the motivating-factor provision.<sup>336</sup> Then, relying on the rule of statutory construction that Congress is presumed to have acted intentionally when it amends one section of a statute but not another, the court continued its assault on motivating-factor retaliation claims.<sup>337</sup> The court focused on several other arguments to reach its conclusion that retaliation plaintiffs must establish but-for causation: (1) the interplay among various provisions of Title VII and the 1991 Act; (2) the remedies provision of the 1991 Act;

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327. *Hayes v. Sebelius*, 762 F. Supp. 2d 90 (D.D.C. 2011). *But see* *Nuskey v. Hochberg*, 730 F. Supp. 2d 1 (D.D.C. 2010) (adopting a pro-plaintiff approach for retaliation claims post-*Gross*).

328. *Hayes*, 762 F. Supp. 2d at 115.

329. *Id.* at 109.

330. *Id.* at 109–10.

331. *Id.* at 110. The court in *Hayes* distinguished “mixed-motive” claims from “motivating-factor” claims. *Id.* According to this court’s interpretation, mixed-motive claims are ones analyzed under the *Price Waterhouse* framework, while motivating-factor claims are ones analyzed under the 1991 Act framework. *Id.* As noted earlier, I am not making this distinction, and I am using the term “motivating-factor” when referring to any case where there are both legitimate and unlawful motives for the at-issue adverse employment action. *See supra* note 58.

332. *Hayes*, 762 F. Supp. 2d at 111.

333. *Id.* at 111–12.

334. *Id.* at 111 (emphasis added).

335. *Id.* at 111–12.

336. *Id.* at 112–14.

337. *Id.* at 112.

and (3) the absence of retaliation in the 1991 Act’s motivating-factor provision.<sup>338</sup> Finally, the court attacked the Fifth Circuit’s reasoning in *Smith*.<sup>339</sup> After criticizing *Smith*, the *Hayes* court reiterated its conclusion that plaintiffs must prove but-for causation in retaliation claims; that the burden is always on the plaintiff; and that neither *Price Waterhouse* nor the 1991 Act applied to retaliation claims.<sup>340</sup>

Since *Gross*, most courts have concluded that retaliation plaintiffs must prove but-for causation and that the motivating-factor analysis does not apply.<sup>341</sup> The courts rely on the 1991 Act’s failure to include retaliation in the motivating-factor provision, and they also rely on *Gross*. While this approach certainly does have support, victims of retaliation will now pay the price either by staying quiet when wronged in the workplace or by having to meet a higher burden if they pursue their claims in court. Because of this, courts should lower the burden placed on plaintiffs, or Congress should either (1) simply amend the 1991 Act to explicitly include retaliation claims or (2) enact legislation that would overturn *Gross* and its applicability to other antidiscrimination statutes and their antiretaliation provisions.

#### VIII. HOW AND WHY COURTS SHOULD USE EITHER THE 1991 ACT OR *PRICE WATERHOUSE* AND ALLOW TITLE VII MOTIVATING-FACTOR RETALIATION CLAIMS<sup>342</sup>

Courts do have options when deciding whether a Title VII motivating-factor retaliation claim exists. Courts can apply *Gross*’s strict, but-for requirement (and never shift the burden of persuasion to the employer); they can go back to the pre-1991 Act analysis and apply *Price Waterhouse*; or they can take a very pro-plaintiff approach and apply the 1991 Act’s motivating-factor provision to these claims. In light of the 1991 Act’s language (and its *omission* of language regarding motivating-factor retaliation claims), the Court’s opinion in *Gross*, and the trend among the federal courts, it is likely most courts will continue to apply *Gross*’s but-for standard, and it is least likely the courts will apply the 1991 Act’s

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338. *Id.* at 113–14.

339. *Id.* at 114–15.

340. *Id.* at 115.

341. *See supra* notes 292–340 and accompanying text; *see also* Jones v. Alpha Rae Pers., Inc., No. 3:11-cv-0302, 2012 U.S. Dist. LEXIS 150566, at \*22–26 (N.D. Ind. Oct. 18, 2012) (noting in dicta that but-for causation is required for retaliation claims).

342. Although I do not believe the Supreme Court *will* allow Title VII retaliation plaintiffs to pursue a motivating-factor claim under either the 1991 Act or under *Price Waterhouse*, the following Parts of this Article simply provide ways in which the Court *could* reach either of these pro-plaintiff conclusions (more likely *Price Waterhouse*) if the Court were inclined to reach such a result.

motivating-factor provision to these claims. This, of course, will make it more difficult for retaliation plaintiffs, as they will retain the burden of proving that, but for their protected activity, they would not have suffered an adverse employment action. There are, however, several reasons courts can, and should, take one of the two more pro-plaintiff approaches. This Article will now address some of those reasons.

*A. Gross Involved the ADEA, Not Title VII, and that Case Should Therefore Not Apply to Title VII Retaliation Claims*

Before *Gross*, the Court had not decided whether Title VII's burden-shifting frameworks applied to the ADEA.<sup>343</sup> In fact, when the Court had the opportunity to address this issue, it decided not to specifically answer the question, but rather it decided to continue its practice of applying the various Title VII burden-shifting frameworks to ADEA claims.<sup>344</sup> However, in *Gross*, an ADEA case, the Court departed from *Price Waterhouse*, a Title VII case, and adopted a different meaning of the phrase "because of."<sup>345</sup> It is this change which has made it much more difficult for Title VII retaliation plaintiffs to prevail.

One of the most compelling reasons *not* to apply *Gross* to Title VII retaliation claims is that *Gross* involved the ADEA, not Title VII.<sup>346</sup> The Fifth Circuit based its *Smith* opinion on this distinction, making the valid point that Title VII and the ADEA are separate statutes:

To state the obvious, *Gross* is an ADEA case, not a Title VII case. The *Gross* Court cautioned that when conducting statutory interpretation, courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." The Court's comparison of Title VII with the ADEA, and the textual differences between those two statutory schemes, led it to conclude that Title VII decisions like *Price Waterhouse* and *Desert Palace* did not govern its interpretation of the ADEA. But we *are* concerned with construing Title VII, albeit in the retaliation context, so those decisions, along with our own precedent recognizing the application of mixed-motive analysis in Title VII retaliation cases, are not unimportant.<sup>347</sup>

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343. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

344. *Id.*

345. *See supra* Part VI.

346. Smith v. Xerox Corp., 602 F.3d 320, 329 (5th Cir. 2010).

347. *Id.*

With the following language, the Fifth Circuit ended its analysis of why *Price Waterhouse*, and not *Gross*, applied to a retaliation claim:

It is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court. The Supreme Court recognized that Title VII and the ADEA are “materially different with respect to the relevant burden of persuasion.” *Because the Court recognized this difference but was not presented in Gross with the question of how to construe the standard for causation and the shifting burdens in a Title VII retaliation case, we do not believe Gross controls our analysis here.*

As noted above, we have previously recognized that the motivating[-]factor analysis and burden[-]shifting scheme of *Price Waterhouse* may be applicable in Title VII mixed-motive retaliation cases, although we have held that direct evidence is necessary to shift the burden to the defendant. We are bound by our circuit precedent, as we may not “overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent.” Although Title VII and *Price Waterhouse* provided the backdrop for its decision, the *Gross* Court made clear that its focus was on ADEA claims. *We conclude therefore that Gross did not overrule our prior decisions addressing Title VII retaliation. Because we believe that Gross does not unequivocally control whether a mixed-motive jury instruction may be given in a Title VII retaliation case, we must continue to allow the Price Waterhouse burden shifting in such cases unless and until the Supreme Court says otherwise.*<sup>348</sup>

Therefore, the Fifth Circuit concluded *Price Waterhouse* still controlled retaliation claims, both because (1) *Gross* was an ADEA case and not a Title VII case, and (2) disallowing motivating-factor retaliation claims was not *unequivocally* required under *Gross*.<sup>349</sup> So, despite the Court’s extensive criticism of *Price Waterhouse* in *Gross*,<sup>350</sup> the Fifth

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348. *Id.* at 330 (emphasis added) (citations omitted).

349. *Id.* at 329–30.

350. *See supra* Part VI. Whether the Court in *Gross* could have affirmatively overruled *Price Waterhouse* is questionable in light of the fact that the *Price Waterhouse* burden-shifting question (or even a question involving the same statute involved in *Price Waterhouse*) was not directly before the Court in *Gross*. Nonetheless, the attacks on *Price Waterhouse* in *Gross* certainly suggest *Price Waterhouse* is most likely on its last legs, as many post-*Gross* courts have concluded. *See supra* Part VII.B. This is most likely one reason there is currently an attempt to legislatively overturn *Gross*. *See infra* Part VIII.E. Some courts, however, still apply *Price Waterhouse*, even after *Gross*, perhaps

Circuit decided to conclude *Price Waterhouse* was still applicable to Title VII retaliation claims.<sup>351</sup> While only a few courts have agreed with this,<sup>352</sup> the argument does provide support for allowing motivating-factor retaliation claims under Title VII (using *Price Waterhouse*), especially after the Supreme Court's own admonition that courts should be careful when applying analytical frameworks from one statute to a different statute.<sup>353</sup>

*B. Smith v. City of Jackson and the Gross Dissent Could Support Applying Price Waterhouse to Retaliation Claims*

Another issue the 1991 Act failed to specifically address was whether a disparate impact cause of action existed under the ADEA.<sup>354</sup> Prior to the Court's opinion in *Hazen Paper Co. v. Biggins*,<sup>355</sup> most courts believed such a cause of action did exist.<sup>356</sup> After *Hazen Paper*, however, many courts rejected such a cause of action.<sup>357</sup> Eventually, the Court answered this question.<sup>358</sup> The strongest argument against recognizing a disparate impact cause of action under the ADEA was similar to the argument defendants now use to deny the existence of a Title VII motivating-factor retaliation cause of action: in the 1991 Act, Congress had the opportunity to clarify whether such a cause of action existed, and because Congress did not do so, ADEA disparate impact claims were not cognizable.<sup>359</sup> The Court rejected this argument in *Smith* and determined that, although Congress did not specifically address the ADEA disparate impact cause of action in the 1991 Act, such a cause of action did exist, but the pre-1991 Act standards for analyzing disparate impact causes of action applied to these claims.<sup>360</sup>

Applying that type of analysis here, because Congress did not add retaliation to the motivating-factor provision in the 1991 Act, courts *could*

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believing that if the Court in *Gross* wanted to overrule *Price Waterhouse*, it should have explicitly done so. *See supra* Part VII.A.

351. *See supra* notes 18 & 248.

352. *See supra* Part VII.A.

353. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (noting the analysis of Title VII claims does not necessarily apply to ADEA claims). If this is true, then how the Court interprets the ADEA should not necessarily apply to how it interprets Title VII (and thus there is an argument *Gross* should not apply to Title VII retaliation claims).

354. *Smith v. City of Jackson*, 544 U.S. 228, 239–240 (2005).

355. 507 U.S. 604 (1993).

356. *See, e.g.*, *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111 (3d Cir. 1983) (assuming, but not deciding, a disparate impact cause of action exists under the ADEA).

357. *See, e.g.*, *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996) (rejecting the proposition that the ADEA allows for disparate impact claims).

358. *Smith*, 544 U.S. 228.

359. *Id.* at 240.

360. *Id.*

return to the pre-1991 Act *Price Waterhouse* analysis: the plaintiff could prevail provided she demonstrated retaliation was a motivating factor in the adverse employment action and the defendant could not demonstrate it would have made the same decision regardless of the retaliatory motive.<sup>361</sup> The benefit this gives a plaintiff is that once she shows retaliation played a motivating factor in the decision, the burden of persuasion shifts to the defendant to show it would have made the same decision regardless of the retaliatory motive.<sup>362</sup> If, however, courts apply *Gross*, the burden of persuasion would never shift to the employer, and courts handling retaliation claims would most likely use some type of *McDonnell Douglas* framework, which, at most, switches only the burden of production to a defendant.<sup>363</sup>

Similar to the analysis used in *Smith*, the dissent in *Gross* argued that instead of not recognizing ADEA motivating-factor causes of action, the Court should simply retreat to its pre-1991 Act approach to this issue.<sup>364</sup> As was previously mentioned, although the issue the Court was supposed to address in *Gross* was the necessity of direct evidence for a motivating-factor jury instruction in an ADEA case, the Court used *Gross* as an opportunity to eliminate ADEA motivating-factor claims and to require but-for causation.<sup>365</sup> The *Gross* dissent, however, pointed out that (1) the majority was ignoring *Price Waterhouse*'s definition of “because of,” and (2) the majority was ignoring *Smith*.<sup>366</sup> The dissent in *Gross* also stated: “The most natural reading of [the ADEA] prohibits adverse employment actions motivated in whole or in part by the age of the employee.”<sup>367</sup> The dissent also observed *Price Waterhouse* had rejected the but-for standard, and Congress also rejected it in the 1991 Act<sup>368</sup>:

Not only did the Court reject the but-for standard in [*Price Waterhouse*], but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an

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361. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). The one problem with this argument, however, is the Supreme Court's intervening opinion in *Gross*, which, as has been discussed, has been applied to Title VII retaliation claims. See *supra* Part VII.B.

362. *Price Waterhouse*, 490 U.S. at 258.

363. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 172 (2009). For a discussion of *McDonnell Douglas* and other Supreme Court cases that address the Title VII burden-shifting analysis in pretext cases, see Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335 (2002).

364. *Gross*, 557 U.S. at 186–187 (Stevens, J., dissenting).

365. *Id.* at 168, 173 (majority opinion).

366. *Id.* at 184–89 (Stevens, J., dissenting).

367. *Id.* at 180.

368. *Id.* at 180–82.

interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII.<sup>369</sup>

After continuing to criticize the majority's decision to downplay and criticize *Price Waterhouse*, the dissent in *Gross* addressed the 1991 Act.<sup>370</sup> Specifically, the dissent highlighted its motivating-factor provision and acknowledged it did not address ADEA claims.<sup>371</sup> The dissent believed the majority failed to reach the correct conclusion—that “*Price Waterhouse*’s construction of ‘because of’ remains the governing law for ADEA claims.”<sup>372</sup> Relying on *Smith*, the dissent noted:

Our recent decision in *Smith v. City of Jackson* is precisely on point, as we considered in that case the effect of Congress’[s] failure to amend the disparate[.]impact provisions of the ADEA when it amended the corresponding Title VII provisions in the 1991 Act. Noting that “the relevant 1991 amendments expanded the coverage of Title VII [but] did not amend the ADEA or speak to the subject of age discrimination,” we held that “*Wards Cove*’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA.” If the *Wards Cove* disparate[.]impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies.<sup>373</sup>

The dissent continued:

[T]he fact that Congress endorsed this Court’s interpretation of the “because of” language in *Price Waterhouse* (even as it rejected the employer’s affirmative defense to liability) provides all the more reason to adhere to that decision’s motivating-factor test. *Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII.*<sup>374</sup>

The dissent ended this analysis by observing that the “Court’s resurrection of the but-for causation standard is unwarranted. *Price Waterhouse* repudiated that standard 20 years ago, and Congress’[s] response to our

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369. *Id.* at 180–81 (emphasis omitted).

370. *Id.* at 182–88.

371. *Id.* at 185–87.

372. *Id.* at 186.

373. *Id.* (citations omitted).

374. *Id.* at 186–87 (emphasis added).

decision further militates against the crabbed interpretation the Court adopts today.”<sup>375</sup>

Therefore, the reasoning behind both the *Smith* opinion and the *Gross* dissent provides more support for the proposition that *Price Waterhouse*, not *Gross*, applies to retaliation claims. Of course, the Court’s majority opinion in *Gross* significantly weakens this position. Although applying *Smith*’s reasoning and applying *Price Waterhouse* to retaliation claims is not as pro-plaintiff as an application of the 1991 Act’s motivating-factor provision would be, the *Price Waterhouse* standard is still more beneficial to retaliation plaintiffs than *Gross*’s but-for standard is. As a result, victims of retaliation would much rather have courts apply *Price Waterhouse* instead of *Gross*.

*C. At Least One Scholar Has Concluded the 1991 Act Applies to Retaliation Claims*

Admittedly, the 1991 Act did not include retaliation in the motivating-factor provision; nonetheless, one employment law scholar has concluded that by reading all relevant provisions of Title VII and its amendments together, motivating-factor retaliation causes of action do exist.<sup>376</sup> Admittedly, Larson came to this conclusion prior to *Gross*; however, because Larson’s analysis is based on the structure of Title VII and its amendments, rather than on the Court’s interpretation of the ADEA in *Gross*, it is possible some courts might still follow Larson’s rationale.

In his treatise, Larson noted the following: “The mixed[-]motive clause describes the conditions under which an ‘unlawful employment practice’ is established, and the antiretaliation provision of Title VII appears under the specific heading of ‘[o]ther unlawful employment practices.’”<sup>377</sup> As a result of this, and relying on the EEOC’s position on this issue at the time he addressed this issue, Larson concluded that the motivating-factor provision does apply to retaliation claims.<sup>378</sup> The United States District Court for the District of Arizona relied on this idea when addressing whether retaliation plaintiffs could benefit from the 1991 Act’s motivating-factor provision.<sup>379</sup> Specifically, in *Heywood*, the court relied on Larson when it noted: “[I]t is certainly reasonable to assume that the [c]ongressional policy articulated in the amendment and in the House Report . . . reaches retaliation as well as

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375. *Id.* at 187.

376. LARSON, *supra* note 85, § 35.04[2].

377. *Id.*

378. *Id.*

379. *Heywood v. Samaritan Health Sys.*, 902 F. Supp. 1076, 1081 n.1. (D. Ariz. 1995).

the enumerated considerations.”<sup>380</sup> Another portion of Larson’s treatise upon which the *Heywood* court relied is almost identical to what the United States District Court for the District of North Dakota in *De Llano* relied on:

This is important because the “mixed[-]motive” clause of the CRA does apply to retaliation cases. The section does not state this explicitly, but the mixed[-]motive clause defines the conditions under which an “unlawful employment practice” is established. The antiretaliation provision of Title VII appears under the specific heading of “[o]ther unlawful employment practices.” To date, no court has ruled on this issue, but the EEOC has issued a notice concurring with this interpretation.<sup>381</sup>

Thus, applying Larson’s reasoning regarding the structure of Title VII and its amendments, the motivating-factor provision could apply to retaliation claims. As was noted previously, however, most courts have concluded the 1991 Act does not apply to retaliation claims, especially after *Gross*.<sup>382</sup>

*D. Supreme Court Opinions and Other Courts’ Treatment  
of Discrimination Claims and Retaliation Claims  
Support Providing Broad Protection to Victims of Retaliation*

The Court has routinely provided broad protection for retaliation plaintiffs.<sup>383</sup> For example, the Court in *Burlington Northern & Santa Fe Railway v. White* gave a broad definition to what constitutes an “adverse employment action,” and it also held retaliatory acts can be actionable even if they occur outside the workplace.<sup>384</sup> Prior to *Burlington Northern*, the Court issued another pro-plaintiff opinion in *Robinson v. Shell Oil Co.*,<sup>385</sup> where it determined Title VII covered former employees.<sup>386</sup> More recently,

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380. *Id.* (relying on 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 35.04[1]). The court in *De Llano v. North Dakota State University* also relied on Larson for a similar proposition. 951 F. Supp. 168, 170 (D.N.D. 1997).

381. *Heywood*, 902 F. Supp. at 1081 n.1 (quoting 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 35.04[1]).

382. *See supra* Parts V.B and VII.B. Even though Larson’s argument is based on the structure of Title VII and its amendments, he has acknowledged there is a strong possibility the Court’s opinion in *Gross* will be applied to Title VII retaliation claims, making it more difficult for retaliation plaintiffs to prevail. *See* LARSON, *supra* note 85, § 35.04[3] (2013).

383. *See supra* note 6; *see also infra* notes 384–392 and accompanying text.

384. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 60 (2006).

385. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

386. *Id.* at 346.

the Court determined third-party retaliation claims were actionable.<sup>387</sup> Finally, although not in the Title VII context, the Court recently decided oral complaints are protected under the Fair Labor Standards Act’s antiretaliation provision.<sup>388</sup> The Court has therefore recognized that without an effective antiretaliation provision, statutes that protect employees against discrimination and other adverse working conditions are weakened:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. “Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.” *Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.*<sup>389</sup>

In addition to these pro-plaintiff cases and pronouncements from the Court regarding the importance of an effective antiretaliation provision, the Third Circuit in *Woodson* noted the following argument, which demonstrates courts *could* apply the 1991 Act’s motivating-factor provision to retaliation claims:

We are given pause by the fact that we and other courts have generally borrowed from discrimination law in determining the burdens and order of proof in retaliation cases. This understanding could lead us to the opposite result in considering this question. *That is, we could say that Congress knew of the practice of borrowing in retaliation cases, and presumed that courts would continue this practice after the 1991 Act. Considering the question with this assumption in mind, Congress’s failure to reference § 2000e-3 specifically in § 107 would not mean that § 107 does not apply in retaliation cases; rather, it would mean that Congress assumed that it was unnecessary for it to do so because courts would borrow the “motivating[-]factor” language in deciding retaliation claims.*<sup>390</sup>

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387. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011); *see also* *Crawford v. Metro. Gov’t of Nashville*, 555 U.S. 271 (2009) (holding that participating in a company’s internal EEO investigation is protected activity under Title VII’s antiretaliation provision).

388. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).

389. *Burlington N.*, 548 U.S. at 67 (emphasis added) (citations omitted).

390. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 (3d Cir. 1997) (emphasis added).

Therefore, although not concluding that the 1991 Act applies to retaliation claims, the court in *Woodson* acknowledged that this interpretation was, at least, a plausible one.<sup>391</sup>

Despite the fact the Court has provided broad protection for retaliation plaintiffs, and while there is some additional support for applying the motivating-factor provision to retaliation claims, most courts are applying *Gross* to retaliation claims, making it more difficult for these plaintiffs to prevail.<sup>392</sup>

*E. The Equal Employment Opportunity Commission Agrees that Plaintiffs Should Be Able to Pursue Motivating-Factor Retaliation Claims*

The Equal Employment Opportunity Commission (EEOC) has also expressed its opinion that retaliation plaintiffs should be able to pursue motivating-factor claims.<sup>393</sup> The EEOC expressed this opinion both soon after the 1991 Act and soon after *Gross*.<sup>394</sup>

In its July 14, 1992 Policy Guidance, which was based in part on its Compliance Manual, the EEOC specifically addressed what effect, if any, the 1991 Act had on retaliation claims.<sup>395</sup> It was clear from this Policy Guidance that the EEOC believed the motivating-factor provision from the 1991 Act applied to retaliation claims.<sup>396</sup> Specifically, that Policy Guidance provides:

Although Section 107 does not specify retaliation as a basis for finding liability whenever it is a motivating factor for an action, neither does it suggest any basis for deviating from the Commission's long-standing rule that it will *find liability* and

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391. Throughout this Article, I have quoted other pieces of legislative history that also demonstrate retaliation plaintiffs should be granted broad, rather than narrow, protection. *See, e.g., supra* Parts V and VII; *see also* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 187 (2009) (Stevens, J., dissenting) (“Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII.”); *id.* at 186 n.6 (“[T]hese other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act,” including the mixed-motives provisions.” (quoting H.R. REP. NO. 102-40, pt. II, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697)).

392. *See supra* Part VII.B.

393. *See* EEOC POLICY GUIDANCE NO. 915.002 § III(B)(2) n.14 (July 14, 1992) [hereinafter POLICY GUIDANCE], *available at* [www.eeoc.gov/policy/docs/disparat.html](http://www.eeoc.gov/policy/docs/disparat.html) (last visited May 13, 2013); *see also* *Hearing, supra* note 315.

394. *See Hearing, supra* note 315.

395. *See* POLICY GUIDANCE, *supra* note 393.

396. *Id.*

pursue injunctive relief *whenever retaliation plays any role in an employment decision*.<sup>397</sup>

Therefore, relatively soon after the 1991 Act, the EEOC stated its position that the motivating-factor provision should apply to retaliation claims as well as to discrimination claims.<sup>398</sup>

More recently, EEOC Chairwoman Jacqueline A. Berrien expressed her support for the proposition that *Gross* should not apply to Title VII retaliation claims.<sup>399</sup> Specifically, while expressing support for the “Protecting Older Workers Against Discrimination Act,” Chairwoman Berrien rejected the Court’s *Gross* requirement that a plaintiff must show but-for causation in an ADEA claim.<sup>400</sup> Although the chairwoman’s comments were made in support of a proposed amendment to the ADEA, there was a critical statement she made that addressed motivating-factor retaliation claims; specifically, she mentioned that the proposed legislation, which would “legislatively overturn” *Gross*, *would also apply to Title VII retaliation claims*.<sup>401</sup> Thus, the chairwoman recognized some courts had been applying *Gross* to claims brought under other statutes (including Title VII’s antiretaliation provision); that the EEOC opposed this practice; and that legislation was needed to end any question regarding this issue.<sup>402</sup>

Therefore, it is clear the EEOC favors a more relaxed standard for retaliation claims. After both the 1991 Act and *Gross*, the EEOC expressed its support for an easier path for retaliation plaintiffs, acknowledging the importance of antiretaliation provisions.<sup>403</sup> While not binding, the EEOC’s position is yet one more reason why courts could adopt a lower standard for retaliation plaintiffs, or why Congress should either amend the 1991 Act and include retaliation in its motivating-factor provision or enact legislation that would overturn *Gross* and no longer require a plaintiff to prove but-for

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397. *Id.* (emphasis added). The EEOC has also stated the following:

Courts have long held that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation. Furthermore, an interpretation of Section 107 that permits proven retaliation to go unpunished undermines the purpose of the antiretaliation provisions of maintaining unfettered access to the statutory remedial mechanism.

EEOC COMPLIANCE MANUAL § 8-II(E)(1) n.45 (May 20, 1998), available at [www.eeoc.gov/policy/docs/retal.html](http://www.eeoc.gov/policy/docs/retal.html) (last visited May 13, 2013). This position from the EEOC came out before the *Gross* opinion.

398. See POLICY GUIDANCE, *supra* note 393. The court in *De Llano* relied on this statement from the EEOC in its opinion. *De Llano v. N.D. State Univ.*, 951 F. Supp. 168 (D.N.D. 1997).

399. See *Hearing*, *supra* note 315, at 10.

400. See *id.* at 7.

401. See *id.* at 11–12.

402. *Id.* at 12.

403. See *id.*

causation in discrimination or retaliation claims brought under statutes with no motivating-factor provisions.

*F. Strong Antiretaliation Provisions Strengthen Antidiscrimination Statutes, Courts Have Consistently Analyzed Discrimination Claims and Retaliation Claims Similarly, and Victims of Retaliation Should Be Granted Protection that Is No Less Effective Than the Protection Granted to Victims of Discrimination*<sup>404</sup>

Currently, Title VII plaintiffs are entitled to prevail in their *discrimination* claims when they can demonstrate a protected trait played a motivating factor in the adverse employment action.<sup>405</sup> Admittedly, Congress did not explicitly include retaliation in the 1991 Act's motivating-factor provision, but as the heading to this Part of the Article suggests, there are more reasons why, despite this omission, courts should not treat retaliation claims differently than how they treat discrimination claims. First, without a strong antiretaliation provision, the substantive prohibition against discrimination is significantly weakened.<sup>406</sup> The Court in *Burlington Northern* noted the importance of a strong antiretaliation provision when it noted the following:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.*<sup>407</sup>

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404. The Supreme Court has suggested it disagrees with the substance of the last part of this heading, stating the following:

The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their . . . status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

*Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (citations omitted); *see also* John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2018 n.53 (1995) (suggesting there are valid reasons retaliation plaintiffs deserve less protection than discrimination plaintiffs).

405. 42 U.S.C. § 2000e-2(m) (2006).

406. *Burlington N.*, 548 U.S. at 67.

407. *Id.* (emphasis added) (citations omitted).

Similarly, the court in *De Llano* emphasized the importance of employees’ willingness and ability to engage in protected activity without the fear of retaliation:

This court is of the view that it would be illogical and contrary to congressional intent to apply different standards of proof and accompanying relief provisions to retaliation claims as opposed to discrimination claims. *As this court has previously noted, “[t]he Eighth Circuit Court has given employees filing discrimination claims broad protection from retaliation.”*<sup>408</sup>

Without a strong antiretaliation provision, antidiscrimination statutes are significantly weakened. As a result, courts should be more willing to allow retaliation plaintiffs to utilize either *Price Waterhouse* or the 1991 Act to vindicate their rights.

Second, because courts consistently analyzed retaliation claims the same way they analyzed discrimination claims, there was no reason for Congress to mention retaliation in the 1991 Act’s motivating-factor provision; Congress simply assumed courts would continue to analyze these claims similarly. The plaintiff in *Woodson* made this argument, but the court ultimately rejected it:

We are given pause by the fact that we and other courts have generally borrowed from discrimination law in determining the burdens and order of proof in retaliation cases. This understanding could lead us to the opposite result in considering this question. *That is, we could say that Congress knew of the practice of borrowing in retaliation cases, and presumed that courts would continue this practice after the 1991 Act. Considering the question with this assumption in mind, Congress’s failure to reference § 2000e-3 specifically in § 107 would not mean that § 107 does not apply in retaliation cases; rather, it would mean that Congress assumed that it was unnecessary for it to do so because courts would borrow the “motivating[-]factor” language in deciding retaliation claims.*<sup>409</sup>

The plaintiff in *Tanca* also unsuccessfully attempted to utilize this argument:

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408. *De Llano v. N.D. State Univ.*, 951 F. Supp. 168, 170 (D.N.D. 1997) (emphasis added) (citation omitted).

409. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 (3d Cir. 1997) (emphasis added); *see also supra* Part VIII.D.

First, [the plaintiff] argues that, because we “must presume that Congress knows of prior judicial or executive branch interpretations of a statute when it . . . amends a statute,” we must presume that Congress knew of the judicial practice of borrowing the order and allocations of burdens of proof developed under Title VII and applying them to retaliation cases and other employment discrimination cases. Therefore, the argument goes, Congress’[s] failure to amend all other employment discrimination statutes at the same time that it amended section 2000e-2 can mean that Congress presumed that the courts would continue to borrow and apply Title VII concepts, including the newly minted mixed[-]motive damages provision.<sup>410</sup>

The *Tanca* court rejected this argument because the plaintiff in *Tanca* was arguing that a separate provision of the same statute was at issue, and that this was not a situation where a court was borrowing language from one statute and applying it to another.<sup>411</sup> Thus, despite the fact courts often borrow discrimination case law when analyzing retaliation claims, some courts decided this was not sufficient to justify applying the 1991 Act’s motivating-factor provision to anything other than Title VII discrimination claims.

Third, despite the fact that several courts rejected the following argument, at least one court observed retaliation victims should be afforded protection similar to that afforded to discrimination victims.<sup>412</sup> Specifically, the court in *Heywood* noted the following:

Thus, it is clear that Congress intended to invalidate the holding in *Price Waterhouse* by the enactment of § 2000e-2(m). It is not as clear, however, that the amendment was intended to affect the standards for determining whether *retaliatory* discharge has occurred. Retaliatory discharge is comprised in § 2000e-3(a), rather than § 2000e-2, and the specific language of the amendment, and of the House report, do not include retaliation. *However, it is certainly reasonable to assume that the [c]ongressional policy articulated in the amendment and in the House report, reaches retaliation as well as the enumerated considerations.*<sup>413</sup>

Despite this court’s belief that it was at least “reasonable to assume” retaliation plaintiffs should receive the same protection as discrimination

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410. *Tanca v. Nordberg*, 98 F.3d 680, 683 (1st Cir. 1996) (citations omitted).

411. *Id.*

412. *Heywood v. Samaritan Health Sys.*, 902 F. Supp. 1076, 1081 (D. Ariz. 1995).

413. *Id.* (emphasis added).

plaintiffs, most courts do not agree, especially after *Gross*.<sup>414</sup> Unless courts change their minds regarding the 1991 Act and *Gross*, or unless Congress amends the 1991 Act’s motivating-factor provision (or enacts separate legislation that overturns *Gross* and applies to other antidiscrimination statutes and their accompanying antiretaliation provisions), retaliation plaintiffs will face a very high burden when trying to establish liability.

*G. Motivating-Factor Plaintiffs’ Remedies Are Limited;  
Therefore, Allowing These Claims Will Not  
Severely Impact Employers’ Bottom Lines*

Although the 1991 Act allowed plaintiffs to prove a Title VII violation even if a defendant could prove it would have made the same decision regardless of the protected trait, Congress did limit the relief available to these plaintiffs.<sup>415</sup> Specifically, if a defendant is able to demonstrate it would have made the same decision regardless of the protected trait, one limitation is that the plaintiff is not entitled to compensatory or punitive damages.<sup>416</sup> Thus, even if a plaintiff wins a motivating-factor retaliation claim, the defendant is not going to experience as significant a financial consequence as it would have had it been subject to the relief Congress made available to “non-motivating-factor” plaintiffs.<sup>417</sup> While the employer could be responsible for attorney’s fees and some other forms of relief, this amount would be much less than if employers were also responsible for the relief Congress provided for in the 1991 Act and in Title VII.<sup>418</sup> This limitation on available remedies is another reason to have a lower burden on motivating-factor plaintiffs—they can still vindicate their rights, and defendants will not experience such a severe financial loss if they can demonstrate they would have made the same decision regardless of the retaliatory motive.<sup>419</sup>

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414. *Id.*; see also *supra* Part VII.B.

415. 42 U.S.C. § 2000e-5(g) (2006).

416. *Id.*

417. *Id.* If the Court adopts the *Price Waterhouse* approach rather than the 1991 Act approach, the plaintiff would not be entitled to *any* type of relief if the employer can prove it would have made the same decision absent the retaliatory motive.

418. *Id.*; see also, 42 U.S.C. § 1981a (2006) (establishing damage caps for victorious Title VII plaintiffs). Admittedly, the plaintiff’s attorney’s fees could amount to a substantial figure.

419. Since the writing of this Article, the Court heard oral arguments in *Nassar*. Two additional pro-plaintiff points that were raised in that argument were that there are no anti-discrimination statutes that have different causation standards for retaliation claims and substantive discrimination claims, see *supra*, Part VIII.F, and that the term “discrimination” includes retaliation. Oral Argument, *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. 978 (2013) (No. 12-484), available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_484](http://www.oyez.org/cases/2010-2019/2012/2012_12_484) (last visited May 13, 2013).

## IX. CONCLUSION

Although an antidiscrimination statute's effectiveness is limited when there is not a strong antiretaliation provision to accompany it, since the 1991 Act and *Gross*, courts have been making it more difficult for Title VII retaliation plaintiffs to succeed with their claims. By applying *Gross*'s but-for standard, courts have significantly weakened Title VII's antiretaliation provision. While courts certainly have a basis for creating a high standard in light of the 1991 Act's motivating-factor provision's language and the Court's decision in *Gross*, courts could also justify adopting standards that are more plaintiff-friendly. If, however, courts continue to apply the rigorous standard adopted in *Gross*, Congress should either (1) take the simple step of amending the motivating-factor provision of the 1991 Act and explicitly adding retaliation claims or (2) enact legislation to overturn *Gross* and prevent its application to other antidiscrimination statutes and their antiretaliation provisions. This will provide greater protection for employees, and it will allow more employees to come forward if their employers are engaging in discriminatory or retaliatory practices.