Testimony of Helen Norton

Associate Professor, University of Colorado School of Law

on S. 1756, the "Protecting Older Workers Against Discrimination Act"

before the United States Senate Committee on Health, Education, Labor, and Pensions

May 6, 2010

Thank you for the opportunity to join you today. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's employment discrimination enforcement efforts.

The Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*[1] significantly undermines older workers' ability to enforce their rights under the Age Discrimination in Employment Act, and threatens to do the same for workers seeking to enforce their rights to be free from discrimination and retaliation under a wide range of other federal employment laws. S. 1756 would replace the causation rule articulated by the *Gross* Court with the causation standard long in place under Title VII that more effectively furthers Congress' key interest in removing and deterring barriers to equal employment opportunity.

"Causation" in the Context of Federal Antidiscrimination Law

Current federal law prohibits job discrimination "because of" certain specified characteristics, such as race, color, sex, national origin, religion, age, genetic information, and disability.[2] The Age Discrimination in Employment Act (ADEA), for example, provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*."[3] Federal employment laws also frequently include antiretaliation provisions that prohibit an employer from discriminating against an individual "because" that individual reported potentially unlawful behavior, filed a charge of discrimination, or otherwise engaged in activity protected from retaliation under the statute.[4] In short, these causation provisions require proof of a nexus or connection between the defendant's discriminatory behavior and the adverse employment action experienced by the plaintiff.

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

[2] *See* 42 U.S.C. § 2000e-2 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12101 et seq. (Americans with Disabilities Act); 42 U.S.C. § 2000ff-1(a) (Genetic Information Nondiscrimination Act).

[3] 29 U.S.C. § 623(a)(1) (emphasis added).

[4] *See, e.g.*, 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. §623(d) (ADEA).

In many discrimination cases, the competing parties agree that a single factor "caused" an adverse employment decision, but vigorously disagree in identifying that factor. This is the case, for example, when the plaintiff contends that his employer discharged him "because of" his age, while the employer contends instead that it acted "because of" some nondiscriminatory reason like performance. In such cases, the plaintiff bears the ultimate burden of persuading the fact-finder that the decision was made "because of" age.[5]

But employment decisions – like so many decisions made by human beings – are sometimes driven by multiple motives. "Mixed-motive" claims thus raise a challenging causation question: when multiple motives inform an employment decision – some of which are discriminatory and some of which are not -- under what circumstances should we conclude that the employer made such a decision "because of" discrimination in violation of federal law?

The Supreme Court first addressed this question in 1989 in *Price Waterhouse v. Hopkins*,[6] where six Justices interpreted Title VII's statutory language prohibiting job discrimination "because of" race, sex, color, religion and national origin to prohibit adverse employment actions motivated in whole or in part by the plaintiff's protected characteristic. In that case, more specifically, they concluded that a plaintiff successfully proves that an employer discriminated "because of sex" when he or she has proven that sex was a motivating or a substantial factor in the employer's decision.[7] Upon such a showing, they further ruled, the burden of persuasion then shifts to the employer, who may escape liability "only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[8]

Congress then addressed this issue, along with several others, with the enactment of the Civil Rights Act of 1991 and its series of amendments to Title VII. Congress adopted the *Price Waterhouse* Court's burden-shifting framework, agreeing that the burden of proof should shift to the employer when the plaintiff proves that discrimination based on a protected characteristic was a motivating factor in the employer's decision. Congress and the *Price Waterhouse* Court thus both concluded that the defendant employer is in a better position than the plaintiff employee to reconstruct history and prove whether an employer who has been proven to have engaged in discrimination would have taken the same action in a workplace uninfected by bias.

---

[5] *See, e.g.*, Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143 (2000).

[6] 490 U.S. 228 (1989).

[7] *Id.* at 241 (plurality opinion) ("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 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. . . . 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."); *see also id*. at 259-60 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring).

[8] *Id.* at 244-45 (plurality opinion); *see also id.* at 259-60 (White, J., concurring); *id. at* 261 (O'Connor, J., concurring).

Expressing concern, however, that the *Price Waterhouse* rule still did not sufficiently deter employers from discrimination, Congress further amended Title VII to make clear that a plaintiff has established a violation once he or she proves that race, sex, color, religion, or national origin was a motivating factor in the employer's decision.[9] Upon such a showing, the burden of proof shifts to the employer not to escape liability but to substantially reduce the plaintiff's relief. An employer that then proves that it would have made the same decision even absent discrimination can limit available remedies to declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs – relieving the employer from exposure for backpay, damages, or reinstatement.[10] This framework ensures both that a plaintiff is no better off than he or she would have been absent any discrimination *and* that federal courts retain the power to enjoin the defendant's proven discrimination through declaratory and injunctive relief, thus encouraging equal employment opportunity in the future.

The 1991 Act's amendments with respect to Title VII causation, however, did not expressly apply to the ADEA. For the approximately twenty years between *Price Waterhouse* and *Gross*, lower courts thus routinely interpreted the ADEA and other employment discrimination statutes that borrowed Title VII's language prohibiting discrimination "because of" a protected characteristic in a manner consistent with the Court's interpretation of that identical language in *Price Waterhouse*. For example, during that time, lower courts uniformly understood *Price Waterhouse* as providing the causation standard for the ADEA's prohibition of job discrimination "because of" age, thus permitting a plaintiff who proves that age was a motivating factor in an employer's decision to establish liability unless the employer could then prove that it would have made the same decision in a workplace free from age discrimination.[11]

---

[9] *See, e.g.,* H.R. REP. NO. 102-40(I), at 47 (1991), *reprinted at* 1991 U.S.C.C.A.N. 549, 585 ("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."); S. REP. NO. 315, 101st Cong., 2nd Sess. 48-49 (1990) (describing Congressional intent to replace the *Price Waterhouse* causation standard with one that better deters discrimination).

[10] *See* 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); 42 U.S.C. § 2000e-5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations under § 2000e-2(m) when the defendant proves that it would have taken the same action in the absence of the impermissible motivating factor).

[11] For examples of lower courts' application of the *Price Waterhouse* causation standard to the ADEA in the years before *Gross*, *see* Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000); Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171 (2nd Cir. 1992); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3rd Cir. 1995); EEOC v. Warfield-Rohr Casket Co., 364 F. 3d 160 (4th Cir. 2004); Rachid v. Jack in the Box, Inc., 376 F. 3d 305 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F. 3d 564 (6th Cir. 2003); Hutson v. McDonnell Douglas Corp., 63 F. 3d 771 (8th Cir. 1995); Lewis v. YMCA, 208 F.3d 1303 (11th Cir. 2000).

The Damaging Consequences of the Supreme Court's Decision in *Gross v. FBL Financial Services, Inc.*

The Supreme Court's 5-4 decision in *Gross v. FBL Financial Services, Inc.*[12] brought a dramatic – and unwelcome – change to this landscape. After receiving instructions consistent with *Price Waterhouse* and nearly 20 years of case law, a jury concluded that Mr. Gross had proved that age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. It thus found that Mr. Gross had established that his employer had violated the ADEA, and awarded him approximately $47,000 in lost compensation. The Supreme Court, however, vacated his award. Departing from twenty years of precedent, it articulated a brand-new causation standard for the ADEA that erects substantial barriers in the path of older workers seeking to enforce their right to be free from discrimination.[13]

The *Gross* Court first characterized Congress' 1991 decision to amend Title VII's causation standard – but not that of the ADEA – as evidence that Congress intended the two statutes to provide different levels of protection.[14] Next, after strongly suggesting that *Price Waterhouse* was wrongly decided,[15] the *Gross* Court limited *Price Waterhouse* in any event as applicable only to Title VII.[16] It then insisted upon a new interpretation of the identical language under the ADEA, holding that the burden of persuasion never shifts to the defendant even after the plaintiff proves that age was a motivating factor in the decision. Under the Court's new rule – a rule rejected both by the *Price Waterhouse* Court[17] and by Congress in the Civil Rights Act

---

[12] 129 S. Ct. 2343 (2009).

[13] For additional discussion of the *Gross* decision and its implications, *see* Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-09 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 263-73 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Leigh A, Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399 (2009).

[14] *See Gross*, 129 S. Ct. at 2349 ("We cannot ignore Congress' 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.").

[15] *See id.* at 2351-52 ("[I]t is far from clear that the Court would have the same approach were it to consider the question today in the first instance.").

[16] *See id.* at 2352 ("Thus, 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.").

[17] Indeed, the *Price Waterhouse* Court explicitly rejected such a "but-for" standard when interpreting Title VII's parallel prohibition of job discrimination "because of" sex:

> We take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for' causation . . . is to misunderstand them. 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 [in Title VII] in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made.*

Price Waterhouse, 490 U.S. at 240-41 (plurality opinion) (emphasis in original).

of 1991 -- the burden of persuasion always remains on the plaintiff not only to prove that age motivated the decision, but also to prove that age was the "but-for" cause of the decision.[18]

Proving that age was the "but-for" cause of an action requires us to imagine a situation identical to the actual facts, except that we remove the defendant's wrongful behavior – its age discrimination -- and then ask whether the employer would have taken the same adverse action against the plaintiff even if it had behaved correctly. Requiring the plaintiff to bear the burden of reconstructing such a decisionmaking scenario is especially difficult after the fact, as the defendant is in a better position than the plaintiff to show how it would have acted in such a hypothetical situation. As Justice Breyer explained in his *Gross* dissent: "The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer."[19]

Consider an example: An older worker applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he prefers not to hire older workers because he finds them to be less energetic, less creative, and generally less productive. Suppose too that the employer ultimately hires another applicant who was arguably even more qualified than the plaintiff for the position. Under the Court's new rule in *Gross*, even if the plaintiff can prove that the employer relied on inaccurate and stigmatizing age-based stereotypes in its decision to reject her,[20] the employer will escape ADEA liability altogether if the plaintiff cannot also prove that the employer would have made the same decision even absent age discrimination. In this way, the *Gross* rule permits an employer to avoid liability altogether for its proven discrimination – indeed, even when there is "smoking gun" direct evidence of discrimination – when the challenged action, though infected by discrimination, is also supported by nondiscriminatory reasons. By permitting employers to escape liability altogether for such discriminatory conduct, with no incentive to refrain from similar discrimination in the future, the *Gross* rule thus undermines Congress' efforts to stop and deter workplace discrimination through the enactment of federal antidiscrimination law.

---

[18] *Gross*, 129 S. Ct. at 2352 ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. 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.").

[19] *Id.* at 2359 (Breyer, J., dissenting); *see also id.* (explaining that *Price Waterhouse* permitted the employer an affirmative defense to liability, "not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation.") (emphasis in original).

[20] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

Not only does *Gross* significantly narrow the scope of protections available to older workers under the ADEA,[21] it threatens workers' rights to be free from discrimination and retaliation in a wide range of other contexts as well. Although *Gross* binds lower courts only with respect to the ADEA, the Court clearly signaled its unwillingness to interpret other statutes in a manner consistent with the *Price Waterhouse* Court's interpretation of identical language, thus destabilizing courts' longstanding expectation that Congress incorporated the same language in different employment laws because it intended consistent interpretation of those laws.[22] For this reason, lower courts have already begun to apply the Court's new standard in *Gross* to claims under other laws, requiring the plaintiff not only to prove that discrimination or retaliation motivated the decision, but also to bear the burden of proving that such discrimination was the "but-for" cause of the decision. These include cases alleging job discrimination because of disability in violation of the Americans with Disabilities Act,[23] job discrimination because of

---

[21] *See, e.g.*, Martino v. MCI Communications Services, Inc., 574 F.3d 447, 455 (7th Cir. 2009) ("And if there were any doubt that Martino cannot survive summary judgment, it evaporates completely in the wake of the Supreme Court's decision in *Gross.* The Court held that in the ADEA context, it's not enough to show that age was *a* motivating factor. The plaintiff must prove that, but for his age, the adverse action would not have occurred. Martino cannot handle that. At best, he has done no more than show that his age *possibly* solidified the decision to include him in the RIF. But a reasonable jury could only conclude that he would have been fired anyway; age was not a but-for cause.") (citations omitted; emphasis in original); Geiger v. Tower Automotive, 579 F.3d 614, 621 (6th Cir. 2009) ("*Gross* overrules our ADEA precedent to the extent that cases applied Title VII's burden-shifting framework if the plaintiff produced direct evidence of age discrimination."); Fuller v. Seagate Technology, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009) ("[T]his Court interprets *Gross* as elevating the quantum of causation required under the ADEA. After *Gross*, it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant's decision to terminate him. Instead, Plaintiff must present evidence establishing that age discrimination was the 'but for" cause of Plaintiff's termination.'").

Some lower courts have relied on *Gross* to narrow the protections available for older workers even more dramatically. For example, some have misinterpreted the Court's requirement that the plaintiff prove that age was the but-for cause of the adverse employment action to mean that the plaintiff must prove that age was the sole reason for the adverse action. *See, e.g.*, Culver v. Birmingham Bd. Of Education, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009) ("*Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact he is over 40 years old was the *only* or the *but for* reason for the alleged adverse employment action. The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was *any* other proscribed motive involved.") (emphasis in original); Wardlaw v City of Philadelphia, 2009 WL 2461890 at *7 (E.D. Pa. 2009) ("The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the only reason for discrimination. Even if Wardlaw's assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination and retaliation she alleges to have experienced. . . . Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, Wardlaw is foreclosed from prevailing on a claim for age-related discrimination."); *see also* Bell v. Raytheon, Co., 2009 WL 2365454 at *5 (N.D. Tex. 2009) ("[T]he court will not shift the burden to the defendant to articulate a legitimate nondiscriminatory reason unless the plaintiffs show that age was the but-for cause of any adverse employment actions.").

[22] *See Gross*, 129 S. Ct. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'") (citation omitted).

[23] Serwatka v. Rockwell Automation, Inc. 591 F.3d 957, 961 (7th Cir. 2010) ("Although the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination lacks comparable language, a mixed-motive claim will not be viable under that statute.").

Note that the ADA, properly construed, authorizes mixed motive claims consistent with the standards identified in the Civil Rights Act of 1991. The ADA's enforcement provisions specifically incorporate the powers,

protected speech under 42 U.S.C. § 1983,[24] interference with pension rights in violation of ERISA,[25] and job discrimination based on an employee's jury service in violation of the Jury Systems Improvement Act.[26] Other courts have speculated about the application of the *Gross* standard to still other federal laws providing important employment protections, such as 42 U.S.C. § 1981 and the Family and Medical Leave Act.[27]

S. 1756 Would Replace the *Gross* Standard with a Uniform Standard that Furthers Congress' Interest in Preventing and Deterring Job Discrimination and Retaliation

S. 1756 – the "Protecting Older Workers Against Discrimination Act" – would apply the standard adopted by Congress with respect to Title VII in the Civil Right Act of 1991 to make clear that a plaintiff establishes an unlawful employment practice under the ADEA (and any other federal employment antidiscrimination or antiretaliation statute) by proving that age (or

---

remedies and procedures of Title VII, including the Title VII provision authorizing certain remedies where the plaintiff has proven mixed motive discrimination. 42 U.S.C. §12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment."). Thus, Congress clearly envisioned that relief would be available for mixed motive discrimination under the ADA, just as it is available under Title VII. In addition, in amendments to the ADA in 2008, Congress changed the Act's employment provisions to bar discrimination "on the basis of disability" rather than "because of" disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a) (codified at 42 U.S.C. § 12112(a)). This change to the ADA's causation language was intended to align the ADA even more clearly with Title VII. *See, e.g.*, Senate Statement of Managers for Pub. L. No. 110-325; H. REP. NO. 110-730 (I), at 6 (2008). Despite these indications of congressional intent in both the original ADA, and the ADA Amendments Act, the Seventh Circuit, as noted above, relied on *Gross* to conclude that the original ADA does not permit such claims because the ADA's employment title does not directly mirror Title VII's explicit scheme concerning mixed motive claims. The court noted, however, that it was not deciding whether the ADA Amendments Act of 2008 necessitated a different result, since the amendments did not control the case before it. *Serwatka*, 591 F.3d at 962 n.1.

[24] *E.g.*, Fairley v. Andrews, 578 F. 3d 518, 525-26 (7th Cir. 2009) (applying *Gross* to public employees' claims under 42 U.S.C. § 1983 and characterizing *Gross* as holding that, "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law.").

[25] Nauman v. Abbott Laboratories, CA 04-7199 (N.D. Ill. April 22, 2010) (observing that, in light of *Gross*, "plaintiffs have apparently withdrawn their theory that defendants could be found liable for ERISA violations if plaintiffs proved an intent to interfere with benefits partially motivated defendants' implementation of the spin and attendant policies. The court agrees with defendants that the *Gross* line of cases stands for the proposition that, unless a statute such as Title VII of the Civil Rights Act specifically provides for liability in a 'mixed motive' case, the prohibited motivation must be the motivating factor, rather than simply a motivating factor.") (citation omitted).

[26] Williams v. District of Columbia, 646 F. Supp. 2d. 103, 109 (D.D.C. 2009) ("Thus, under *Gross*, Dr. Jackson must prove by a preponderance of the evidence that she was 'excessed' [involuntarily transferred to a less desirable position] 'by reason of' her jury service-that is, that jury service was the 'but-for' cause of the decision to excess her. The Court has no doubt that Dr. Jackson's jury service was *a* motivating factor behind Ms. Warley's acceptance of the loss of a guidance counselor, who otherwise is of particular assistance to a principal in dealing with behavior and other student problems. What is lacking is any evidence that her jury service was 'the "but-for" cause,' of the decision . . . .") (emphasis in original).

[27] *See, e.g.*, Brown v. J. Kaz, Inc., 581 F.3d 175, 187 (3rd Cir. 2009) (Jordan, J., concurring) ("[I]t seems quite possible that, given the broad language chosen by the Supreme Court in *Gross*, a critical re-examination of our [section 1981] precedent may be in order."); Crouch v. J.C. Penney Corp., Inc., 337 Fed. Appx. 399, 402 n.1 (in the context of an FMLA case, noting that "[t]he Supreme Court's recent opinion in *Gross* raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework") (citation omitted).

other protected characteristic) was a motivating factor for an employment decision.[28] The burden of proof then shifts to the employer to establish that it still would have taken the same action absent its discrimination. If the employer satisfies that burden, it will be liable only for declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs, [29] and a court may not order the hiring, reinstatement, or promotion of the individual, nor the payment of backpay to the individual.[30]

As Congress recognized in enacting the Civil Rights Act of 1991, this approach -- which shifts the burden of proof to the employer to limit remedies rather than to defeat liability entirely -- best achieves antidiscrimination laws' key purposes of preventing and deterring future discrimination by ensuring that employers proven to have engaged in discrimination cannot completely escape liability for their actions.[31] Indeed, this approach enables federal courts to retain judicial power to order correction of the wrongful conduct in the form of declaratory and certain injunctive relief. Once the plaintiff proves that the employer engaged in discrimination and thus violated federal law, the employer may still substantially limit the available remedies, however, by showing that it would have made the same decision in a discrimination-free environment.

Return to our earlier example of an older worker who is rejected for a job opportunity because of invidious age discrimination but who nonetheless would not have been hired for other nondiscriminatory reasons as well. S. 1756 would provide a tool for remedying such proven discrimination by empowering the federal court to enjoin the employer from engaging in such discrimination in the future, thus serving the important deterrent functions of antidiscrimination law, while leaving employers free to make decisions based on ability or any other nondiscriminatory factor.

In enacting the Civil Rights Act of 1991, Congress wisely clarified the causation rule to be applied to Title VII and its prohibition of discrimination because of race, color, gender, religion, and national origin. S. 1756 would apply the same causation standard – proven workable under Title VII after nearly two decades in operation -- to other federal laws that that prohibit job discrimination because of age and other protected characteristics. Moreover, ensuring that the standard for proving unlawful disparate treatment under the ADEA (and other

---

[28] S. 1756, § 3 ("[A] plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that . . . an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice.").

[29] The availability of limited attorney's fees and costs encourages individuals to act as private attorneys general in the public interest to vindicate Congress' commitment to equal employment opportunity. *See* City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in §1988 over and above the value of a civil rights remedy to a particular plaintiff. . . .") (citations omitted).

[30] *Id.*

[31] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (identifying Title VII's "primary purpose" as "prophylactic" in removing barriers that have operated in the past to limit equal employment opportunity).

antidiscrimination and antiretaliation laws) tracks that available under Title VII – as S. 1756 would do – also offers great practical value by establishing a principle of uniformity. Such a consistent approach to causation, moreover, is especially helpful in cases involving claims under multiple statutes – such as an older African-American plaintiff who brings claims under both Title VII and the ADEA – by ensuring that the jury will receive the same "motivating factor" instruction for all claims.

S. 1756 Also Clarifies Federal Antidiscrimination Law in Other Important Ways

S. 1756 also addresses an important question left unanswered by the Supreme Court's opinion in *Gross.* The *Gross* Court actually granted certiorari to decide an issue that had divided lower courts: whether a plaintiff must present direct evidence of age discrimination to obtain a mixed-motive instruction under the ADEA or whether instead circumstantial evidence could suffice.[32] The Court's ultimate decision in *Gross*, however, failed to address this question and instead decided a very different matter that significantly undercut protections for older workers without the benefit of briefing by the parties or any development by the lower courts.[33]

S. 1756 provides valuable clarification of the law by finally answering the question that the *Gross* Court failed to address, making clear that plaintiffs seeking to prove discrimination in violation of the ADEA (or other federal antidiscrimination or antiretaliation law) "may rely on any type or form of admissible circumstantial or direct evidence" to prove their claims.[34] This standard tracks that under Title VII, as confirmed by a unanimous Supreme Court in *Desert Palace, Inc. v. Costa*.[35] As the Court observed in that case, circumstantial evidence is of great utility in discrimination cases and elsewhere: "The reason for treating circumstantial evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'"[36] Indeed, as a practical matter, direct evidence is quite rare in discrimination cases, as employers who engage in discrimination rarely confess their bias and instead work hard to hide it. By codifying the traditional legal rule permitting plaintiffs to rely on any available probative evidence --

[32] *Gross*, 129 S. Ct. at 2348. Indeed, the Supreme Court has granted certiorari on two different occasions on this question whether heightened evidentiary requirements should be applied to mixed-motive cases: in *Desert Palace* (with respect to Title VII) and in *Gross* (with respect to the ADEA)). Lower courts' division on this issue has been driven largely by the questions created by Justice O'Connor's concurring opinion in *Price Waterhouse* that suggested the importance of direct evidence to a plaintiff's ability to bring a mixed-motive claim under antidiscrimination law. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

[33] *See Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting) ("[T]he Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.").

[34] S. 1756, § 3.

[35] 539 U.S. 90 (2003).

[36] *Id.* at 99-100 (citation omitted); *see also id.* (noting also that "we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.").

circumstantial as well as direct -- to establish discrimination, S. 1756 again not only ensures uniformity in the standards to be applied to federal antidiscrimination laws, but provides the standard that most effectively advances the purposes of such laws.

Finally, S. 1756 addresses an additional ambiguity created by the *Gross* Court's suggestion that the application of *McDonnell Douglas*[37] evidentiary framework outside the context of Title VII remains an open question.[38] By making clear that the Supreme Court's familiar *McDonnell Douglas* framework remains available for disparate treatment claims under the ADEA and other federal laws that prohibit job discrimination and retaliation,[39] S. 1756 would eliminate any confusion in the lower courts on this issue.[40]

In sum, S. 1756 rejects the *Gross* Court's significant narrowing of workers' rights under the ADEA, along with the decision's potential to do the same for a wide range of other federal employment laws. S. 1756 would thus replace the causation rule articulated by the *Gross* Court with the causation standard long in place under Title VII that more effectively furthers Congress' key interest in removing and deterring barriers to equal employment opportunity.

.

[37] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that the plaintiff's demonstration of a prima facie case under Title VII shifts the burden of production to the defendant to articulate a legitimate nondiscriminatory reason for its action, although the burden of persuasion remains on the plaintiff to prove that discrimination was the real reason).

[38] *Gross*, 129 S. Ct. at 2349 n.2 ("[T]he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* utilized in Title VII cases is appropriate in the ADEA context.") (citation omitted).

[39] S. 1756, § 3.

[40] *See, e.g.*, Geiger v. Tower Automotive, 579 F.3d 614, 622 (6th Cir. 2009) ("The Supreme Court [in *Gross*] expressly declined to decide whether the *McDonnell Douglas* test applies to the ADEA."); Bell v. Raytheon, Co., 2009 WL 2365454 at *4 (N.D. Tex. 2009) ("Recently, however, the United States Supreme Court issued a decision that questions whether the *McDonnell Douglas* approach should be applied in ADEA cases."); Holowecki v. Federal Express Corp., 644 F. Supp. 2d 338, 352 (S.D.N.Y. 2009) (observing that "whether *Gross*, by implication, also eliminates the *McDonnell Douglas b*urden-shifting framework in ADEA cases was left open by the Court").