HBA LABOR AND EMPLOYMENT SECTION

CAUSATION ISSUES IN EMPLOYMENT LAW, POST-*NASSAR*

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I. INTRODUCTION

The employment statutes that engender the most litigation have been on the books for decades. But the causation standards that apply to claims brought under those statutes have often changed, been unclear, or been the subject of conflicting court decisions. As such, lawyers and district courts often lack clear guidance as to how to instruct juries regarding what causation standard is applicable in some of the most important employment discrimination causes of action. As one district court recently observed, "[t]his is a problem in urgent need of a solution." *Johnson v. Benton Cnty. Sch. Dist.*, __ F. Supp. 2d __, Civil Action No. 3:11CV11, 2013 WL 765614, at *7 (N.D. Miss. Feb. 25, 2013). This paper explores and explains the current legal landscape concerning the surprisingly confounding concept of causation standards in employment law claims.

Before turning to that landscape, it is worth observing some of the reasons why this topic has significant practical importance to employment law practitioners:

- Plaintiffs' lawyers may be less or more inclined to take a case depending on the applicable standard of causation.
- The causation standard may drive results at the summary judgment stage. *See, e.g*, *Peterson v. Bell Helicopter Textron, Inc.,* 901 F. Supp. 2d 846, 859 (N.D. Tex. 2012) (granting summary judgment against ADEA claim, but denying summary judgment against a Texas state law age discrimination claim based on the exact same evidence, because "the causation element of Peterson's rebuttal arguments to Bell's legitimate, nondiscriminatory reason is less stringent [under the state law claim than the ADEA."]).
- Some other legal doctrines (*e.g*., the "cat's paw" theory) that apply under one causation standard, may not apply under another.
- The causation standard must be correct in the jury instructions or else there may be grounds for an appeal.
- Jurors may base liability decisions on the causation standard given to them in the jury instructions.
- Finally, while "[i]t may be unrealistic to think that jury instructions are very important *to the jury;* their principal importance may lie in placing bounds on what the lawyers can say to the jury in their closing arguments." *Boyd v. Ill. State Police*, 384 F.3d 888, 899 (7th Cir. 2004) (Posner, J.) (concurring) (italics in original).

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II. THE MOTIVATING FACTOR CAUSATION STANDARD

A. <u>The Motivating Factor Causation Standard Applicable To Title VII Discrimination Claims</u>

The U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775 (1989), held that plaintiffs could prove a Title VII violation if they could demonstrate that discrimination was a factor, among other factors, for an adverse employment action and the employer failed to establish that it would have made the same decision absent any discrimination. The court found that the words "because of" in 42 U.S.C. § 2000e-2(a) encompassed claims challenging an employment decision attributable to "mixed motives." While significant, the impact of *Price Waterhouse* was lessened by the fact that most appellate courts adopted Justice O'Connor's concurrence in the decision, where she opined that direct, rather than circumstantial, evidence of discrimination was required in mixed-motive cases. This generally kept the mixed-motive analysis out of the most common vehicle for circumstantially proving a case of discrimination: the *McDonnell Douglas* burden-shifting framework. This is so because claims involving direct evidence are rare, and it is rarer still for one of them to actually go to trial in front of a jury.

In the Civil Rights Act of 1991, Congress codified the *Price Waterhouse* mixed-motive analysis as applied to discrimination claims, with some modifications. 42 U.S.C. § 2000e-2(m) 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." Once the plaintiff has made this showing, an employer cannot escape liability for discrimination in Title VII cases. However, through the use of a limited affirmative defense, if an employer can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor," then it may limit the plaintiff's damages to injunctive relief, declaratory relief, and attorney's fees and costs. *See, e.g., Garcia v. City of Houston*, 201 F.3d 672 (5th Cir. 2000) (affirming an award of $13,603 in attorneys' fees and $4,917 in costs to the plaintiff where the plaintiff proved national origin and race discrimination, but the jury found that the employer would have taken the same action regardless of the plaintiff's national origin or race).

Similar to the post-amendment Title VII, the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") prohibits adverse employment action on the basis of a person's obligation to perform military service where antimilitary animus is a motivating factor in the employer's action. 38 U.S.C. § 4311(a), (c). In *Staub. v. Proctor Hosp.,* __ U.S. __, 131 S. Ct. 1186 (2011), a USERRA case, the court explained that the "motivating factor" causation standard is simply the traditional tort law standard of proximate cause, requiring only "some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those link[s] that are too remote, purely contingent, or indirect." *Id.* at 1192 (internal quotation marks omitted).

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B. Jury Instructions For Title VII Discrimination Cases In Light Of Title VII's Motivating Factor Standard

Even after the 1991 Act amending Title VII, most appellate courts still followed Justice O'Connor's *Price Waterhouse* concurrence and required plaintiffs to produce direct evidence of discrimination in order to proceed under a mixed-motive theory, rather than a pure "pretext" theory. *See, e.g., Mohr v. Dustrol, Inc*., 306 F.3d 636, 640–41 (8th Cir. 2002); *Fernandes v. Costa Bros. Masonry, Inc*., 199 F.3d 572, 580 (1st Cir. 1999). The application of the mixed-motive option thus remained somewhat limited in its scope. This changed with the U.S. Supreme Court's 2003 decision of *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003), where the Court expressly rejected the "direct evidence" requirement in Title VII mixed-motive cases. The Supreme Court held in *Desert Palace* that, in order to qualify for a mixed-motive jury instruction, "a plaintiff need only present sufficient evidence [either direct or circumstantial] for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"

Despite *Desert Palace*, the question of when a mixed-motive jury instruction is appropriate in a Title VII discrimination case has engendered considerable confusion. Since the 1991 amendment, courts have developed instructions charging juries that they must find a defendant liable but award no damages if a plaintiff proves that national origin motivated an adverse action but the defendant demonstrates it would have taken the action anyway. *See* Seventh Cir. Pattern Jury Instruction § 3.01 cmts. B & C. Several circuits now provide a mixed-motive instruction in all Title VII cases, *see* 8th Cir. Model Civil Jury Instructions § 5.01; 9th Cir. Model Civil Jury Instructions § 12.1 & cmt.; 11th Cir. Pattern Jury Instructions (Civil Cases) § 1.21 (stating that plaintiff must prove "[race] [sex or gender] was a substantial or motivating factor" that prompted the adverse employment action), but others provide it only when a case presents an issue of mixed motives, *see Watson v. Se. Penn. Transp. Auth.*, 207 F.3d 207, 217–20 (3d Cir. 2000); *Fields v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, 115 F.3d 116, 121–24 (2d Cir. 1997). The Seventh Circuit's pattern instructions continue to retain a distinction between mixed-motive cases and those where a but-for instruction is appropriate. *See* Seventh Cir. Pattern Jury Instruction § 3.01 & cmt. B (noting that other circuits employ "motivating factor" language in all Title VII cases but assuming continued viability of but-for instructions in "non-mixed motive cases in the Seventh Circuit"); *see also Lewis v. City of Chicago Police Dep't*, 590 F.3d 427, 438 (7th Cir. 2009) ("This Court has yet to decide when it is appropriate to apply a motivating factor instruction."). Adding to the confusion is the fact that the Second and Third Circuit cases adopting the pretext versus mixed-motive approach both pre-dated *Desert Palace*, which, as mentioned above, eliminated the need for direct evidence of discrimination (often the stated distinction between so-called "pretext" and mixed-motive cases) in mixed-motive cases. *Desert Palace*, 539 U.S. at 101–02, 123 S. Ct. 2148.

In *Rapold v. Baxter Intern. Inc.*, 708 F.3d 867 (7th Cir. 2013), the Seventh Circuit addressed the question of when a mixed-motive instruction is appropriate. The court held that, in order to obtain a mixed-motive instruction, the plaintiff need not concede that the employer's given reason for termination is true, in whole or in part. *Id*. at 875. The Fifth Circuit has likewise stated that "[r]equiring the plaintiff to concede at trial the legitimacy of the employer's stated reason for the discharge is contrary to the purpose of the mixed-motive framework." *Smith*

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v. Xerox Corp., 602 F.3d 320, 333 (5th Cir. 2010). Rather, according to both the Seventh and Fifth Circuits, "the relevant question [in deciding whether a mixed-motive jury instruction is appropriate] then is not a plaintiff's concession but whether the case overall is one where either the plaintiff or the defendant's evidence lends itself to coexisting dual causes for an adverse employment action." *Rapold*, 708 F.3d at 876; *Smith*, 602 F.3d at 333 ("Put another way, if the district court has before it substantial evidence supporting a conclusion that both a legitimate and an illegitimate (*i.e*., more than one) motive may have played a role in the challenged employment action, the court may give a mixed-motive instruction."). Absent such evidence of coexisting dual causes, however, the Seventh Circuit and Fifth Circuit both hold that a mixed-motive instruction is not appropriate, and instead "but-for" causation applies. *See Rapold*, 708 F.3d at 877 (affirming district court's decision to give a "but-for" causation instruction, rather than a mixed-motive instruction, where evidence of dual causes did not exist); *Smith*, 602 F.3d at 33.

C. How Title VII's Motivating Factor Standard In Discrimination Cases Affects The Summary Judgment Standard

Post-*Desert Palace*, several appellate courts have applied a modified *McDonnell Douglas* approach in discrimination cases under Title VII. As described by the Fifth Circuit, under that approach, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact that either (1) the employer's reason is a pretext; or (2) that the employer's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011) (stating that if the employer sustains its burden, the *prima facie* case dissolves, and the burden shifts back to the plaintiff to establish either: (1) that the employer's proffered reason is not true but is instead a pretext for discrimination; or (2) that the employer's reason, while true, is not the only reason for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

Similarly, the Sixth Circuit has stated that, "to defeat summary judgment on a discrimination claim under a mixed-motive analysis, the plaintiff must "produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) race, color, religion, sex, or national origin was *a* motivating factor for the defendant's adverse employment action." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) (internal quotation marks omitted). According to the Sixth Circuit, "the burden of producing such evidence 'is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim.'" *Id*. at 400 (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252, 106 S. Ct. 2505 (1986)). *See also Griffin v. Finkbeiner*, 689 F.3d 584, 596 (6th Cir. 2012) (circumstantial evidence was enough to raise an issue of fact as to whether race was at least a motivating factor in the employer's termination decision and thus to survive summary judgment under a mixed-motive analysis).

In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), the plaintiff was fired from his position as an assistant coach of the Iona College men's basketball team following a decline in the team's performance. He claimed that the college's decision to terminate him was motivated

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in part by his marriage to an African–American woman (the plaintiff is white). The district court granted summary judgment dismissing the complaint, finding that the plaintiff failed to meet his burden at the third step of the *McDonnell Douglas* analysis to produce evidence establishing that the college's stated reasons for his termination were a pretext for racial discrimination. The Second Circuit reversed, holding that:

> [A] plaintiff who claims that the employer acted with mixed motives is not required to prove that the employer's stated reason was a pretext. A plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.

Holcomb, 521 F.3d at 141–42 (internal quotation marks and citations omitted).

D. How The "Cat's Paw" Doctrine Fits Into The Motivating Factor Standard In Title VII Discrimination Cases

In *Staub v. Proctor Hosp.,* Vincent Staub sued his former employer, Proctor Hospital, under USERRA, 38 U.S.C. § 4301 *et seq*. Staub alleged that his termination was motivated by Proctor's hostility to his obligations as a member of the United States Army Reserve, which required him to devote a certain number of weeks and weekends per year to training. Specifically, he claimed that although the vice president of human resources, who lacked such hostility, made the decision to terminate him, her decision was influenced by Staub's supervisors, who possessed enmity to his military obligations. *Id*. at 1190.

The Seventh Circuit characterized Staub's claim as a "cat's paw case," or one in which Staub sought to hold his employer liable for the animus of a nondecisionmaker. *Staub v. Proctor Hosp.*, 560 F.3d 647, 651 (7th Cir. 2009). Under Seventh Circuit precedent, an employer would be held liable in such a circumstance only if the nondecisionmaker exerted such "singular influence" over the decisionmaker as to make the decision no more than a rubber stamp of the nondecisionmaker's recommendation. *Id*. The decisionmaker would not be considered a pawn of the nondecisionmaker, however, if he or she conducted an independent investigation into the relevant facts before rendering the adverse decision. *Id*. at 656–57.

Applying this test, the Seventh Circuit observed that the vice president of human relations considered Staub's past employment incidents, in addition to the supervisors' opinions, before rendering her ultimate decision. *Id*. at 659. Thus, the court held that a reasonable jury could not have concluded that the decision to terminate Staub was a product of "blind reliance." *Id*. Although the decision was influenced by the supervisors' opinions, it was not "'wholly dependent'" upon them, and thus Proctor was not liable. *Id*. (internal quotation omitted).

The Supreme Court reversed. It rejected the "singular influence" test and stated that the correct test of employer liability was one of proximate cause. 131 S. Ct. at 1194. The Court further found unpersuasive Proctor's argument that a decisionmaker's "independent investigation (and rejection) of the employee's allegations of discriminatory animus" relieves an employer of fault. *Id*. at 1193. It declined to adopt a "hard-and-fast rule" that a decisionmaker's independent

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investigation would be sufficient to negate the effect of a nondecisionmaker's discrimination. *Id*. The Court explained:

> [I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action ... then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.... The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.

Id. at 1193.

The Supreme Court described USERRA as a statute "very similar to Title VII." 131 S. Ct. at 1191. USERRA provides that "[a]n employer shall be considered to have engaged in [prohibited] actions ... if the person's membership ... in the services ... is a motivating factor in the employer's action." 38 U.S.C. § 4311(c). Likewise, Title VII prohibits employment discrimination "because of ... race," among other grounds, and provides that the complaining party establishes an unlawful employment practice when it demonstrates that race "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e–2(a), (m). Thus, under *Staub*, proximate cause necessary to establish a Title VII claim requires only some direct relation between the injury asserted and injurious conduct alleged, and excludes only those links that are too remote, purely contingent, or indirect. *See McKenna v. City of Philadelphia*, 649 F.3d 171, 178 (3d Cir. 2011) (applying *Staub* in Title VII context), *cert. denied* (2012); *see also Crowe v. ADT Sec. Servs., Inc*., 649 F.3d 1189, 1194–95 (10th Cir. 2011) (same); *Davis v. Omni–Care, Inc*., 482 Fed. Appx 102, 2012 WL 1959367, at *7 n. 8 (6th Cir. June 1, 2012) (same).

In *McKenna*, a Title VII case, a police officer was ultimately terminated by a Police Board of Inquiry, and there was evidence suggesting his superior, who referred the matter to the board, was acting with a retaliatory animus. *Id*. at 176–80. Accordingly, the Third Circuit U.S. Court of Appeals affirmed the jury's verdict for the plaintiff. *Id*.

In *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339 (6th Cir. 2012), a supervisor who had made several disparaging comments about African–Americans recommended that the African–American plaintiff be terminated for horseplay in his work site. *Id*. at 343–44. Based on the supervisor's recommendation, company officials issued the plaintiff a final written warning that had the effect of making him ineligible for a promotion. *Id*. at 344–45. The Court, finding dispositive the reasoning of *Staub*, held that in order to impute a supervisor's racial animus to the ultimate decisionmaker under *Staub*, a plaintiff must show that (1) the supervisor "perform[ed] an act motivated by [discriminatory] animus that [was] *intended* ... to cause an adverse employment action," and (2) the supervisor's "discriminatory action is a proximate cause of the ultimate employment action." *Id*. at 351 (emphasis and ellipsis in original) (quoting *Staub*, 131 S. Ct. at 1194 (emphasis in original)). Applying that standard, the Sixth Circuit U.S. Court of Appeals reversed a summary judgment that had been entered for the employer.

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In *Haire v. Bd. of Supervisors of Louisiana State University Agricultural and Mechanical College*, __F.3d __, 2013 WL 2211656 (5th Cir. May 21, 2013), the Fifth Circuit reversed a summary judgment that had been entered for the employer in a sex discrimination case, based partially on the "cat's paw" doctrine. Haire was a female major at the Louisiana State University ("LSU") police department. She sued after she was not promoted to the chief position by the university's Chancellor. Haire had competed for the vacant police chief position against a male officer, Rabalais, who had allegedly made a number of derogatory comments about women. The Chancellor ultimately selected Rabalais for the position over Haire. Prior to Rabalais' appointment, LSU's public safety director had ordered Haire to disclose information about a former LSU Dean who was a high-profile figure on campus. Haire complied but was later told the disclosure was against department policy and she was subject to discipline she claimed cost her the promotion. The Fifth Circuit held Haire presented a factual dispute precluding summary judgment as to pretext. The court observed that while the Chancellor selected the chief, a fact issue existed as to whether he took into account Rabalais' comments, investigation, and discipline of Haire for the disclosure incident, thereby essentially allowing Rabalais, an alleged sexist who had allegedly made sexist remarks about women, to substantially influence the decision. Accordingly, the court reversed and remanded.

III. THE BUT-FOR CAUSATION STANDARD

A. ADEA

1. In General

The ADEA prohibits employers from discharging an employee who is at least 40 years of age because of that employee's age. 29 U.S.C. §§ 623(a)(1), 631(a). The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id*. § 623(a)(1). In *Gross v. FBL Financial Services, Inc*., 557 U.S. 167, 176, 129 S. Ct. 2343, 2350 (2009), the Supreme Court held that the language "because of" in the ADEA statute means that a plaintiff must prove that discrimination was the "but-for" cause of the adverse employment action. *See id*. ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."); *see also id*. (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome") (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L.Ed.2d 338 (1993)); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it."). The *Gross* decision has created uncertainty and opened up a reexamination of causation standards in other statutes that is currently working its way through the courts. *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Texas L. Rev. 859, 909–17 (2012) (discussing application of *Gross* to non-ADEA federal statutes).

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Gross dictates that the "motivating factor" standard applicable to Title VII discrimination claims does not apply to ADEA claims. This is so because "a 'but-for' cause requires a closer link than mere proximate causation; it requires that the proscribed animus have a determinative influence on the employer's adverse decision." *Sims v. MVM, Inc.*, 704 F.3d 1327, 1336-37 (11th Cir. 2013); *see also Simmons v. Sykes Enters. Inc.*, 647 F.3d 943, 947 (10th Cir. 2011) ("In other words, we must determine whether age was a 'but-for' cause, *id*., or "the factor that made a difference") (quoting *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1277 (10th Cir. 2010)); *Lindsey v. Walgreen Co.*, 615 F.3d 873, 876 (7th Cir. 2010) ("[E]ven if Jenkins were a cat's paw, Lindsey could not prevail because the evidence established at most that her age was a motivating factor in Walgreens' decision to fire her. To establish liability under the ADEA, however, Lindsey had to show that her age was the determinative factor."); *Bennett v. Kaiser Permanente*, Civil Action No. 10–CV–2505 AW, 2013 WL 1149920, at *4 (D. Md. Mar. 20, 2013) ("For age to be the but-for cause of the employer's adverse decision, it must play a role in the process and have a "determinative influence on the outcome.'") (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701 (1993)).

2. Does The "Cat's Paw" Doctrine Apply To Cases That Require Proof Of "But For" Causation?

Based on *Gross*, some courts have held that that *Staub's* "proximate causation" standard does not permit the application of the "cat's paw" doctrine in cases under the ADEA. *See, e.g., Sims*, 704 F.3d at 1336 ("Because the ADEA requires a "but-for" link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a "motivating factor" in the adverse employment decision, we hold that *Staub's* "proximate causation" standard does not apply to cat's paw cases involving age discrimination."); *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949–50 (10th Cir. 2011) (same); *Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aero. Workers*, 435 Fed. Appx. 545, 549 (7th Cir. 2011) (same). *See also Holliday v. Commonwealth Brands, Inc.*, 483 Fed. Appx. 917, 922 n. 2 (5th Cir. 2012) (expressing doubt about the theory's application to ADEA claims).

3. "But For" Causation Does Not Mean "Sole Cause"

Although "but for" causation is a higher standard than proximate cause, it is not the same thing as "sole cause." It has long been the law that there is a difference between "but for" causation and "sole" causation. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n. 10, 96 S. Ct. 2574 (1976) (distinguishing sole causation from but for causation); *see also McNely v. Ocala Star–Banner Corp*., 99 F.3d 1068, 1076 (11th Cir. 1996) (same). *Gross* refers only to "but for" causation. *Gross*, 129 S. Ct. at 2350. As set forth above, "but for" causation requires proof that illegal animus was a determinative factor, but does not require proof that it be the sole factor. *See supra*.

B. <u>Title VII Retaliation Claims</u>

In *Nassar v. Univ. of Texas Southwestern Med. Ctr.*, __ S. Ct. __, No. 12–484, 2013 WL 3155234 (June 24, 2013), the Supreme Court addressed the proper causation standard applicable to retaliation claims. The Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened "motivating factor" causation test

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stated in 42 U.S.C. § 2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

In reaching this conclusion, the Court relied heavily upon the fact that, by its own terms, 42 U.S.C. § 2000e-2(m) applies to discrimination claims, but not retaliation claims – indeed, the section contains no express reference to retaliation. The Court bolstered its decision by reasoning that applying a lower standard could contribute to frivolous retaliation claims. In addition, the Court declined to defer to the EEOC's view that the "motivating factor" standard applies to retaliation claims, holding that the EEOC's guidance manual's explanations for its view lack the persuasive force that is a necessary precondition to judicial deference.

The Court's ruling resolved a circuit split and overturned the Fifth Circuit U.S. Court of Appeal's decision in *Nassar*, which had held that the trial court had not erred in giving a "mixed motive" jury instruction in the case. The Fifth Circuit had declined to grant en banc review of the panel's decision. Four judges dissented from the court's decision not to rehear the case en banc, arguing that the panel's application of the motivating factor standard to retaliation cases was "an erroneous interpretation of [Title VII] and controlling caselaw" and should be overruled en banc. *See Nassar v. University of Texas Southwestern Med. Ctr.*, 688 F.3d 211, 213-14 (5th Cir. 2012) (Smith, J., dissenting from denial of rehearing en banc).

C. <u>ADA</u>

Before *Gross* was decided in 2009, courts held that the motivating factor standard of causation applied in ADA cases. *See, e.g., Pinkerton v. Spellings*, 529 F.3d 513, 518 & n. 30 (5th Cir. 2008). Post-*Gross*, that has changed. In *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010), the Seventh Circuit held that *Gross's* "but for" causation standard applied in ADA cases, writing that:

> There is no provision in the governing version of the ADA akin to Title VII's mixed-motive provision.... Like the ADEA, the ADA renders employers liable for employment decisions made "because of" a person's disability, and *Gross* construes "because of" to require a showing of but-for causation. Thus, in the absence of a cross-reference to Title VII's mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed-motives will not suffice.

Serwatka, 591 F.3d at 962.

In *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012), the *en banc* Sixth Circuit explicitly agreed with *Serwatka's* analysis, writing that:

> [W]hat standard should trial courts use in instructing juries in ADA cases? *Gross* points the way. The ADEA and the ADA bar discrimination "because of" an employee's age or disability, meaning that they prohibit discrimination that is a

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> "'but-for' cause of the employer's adverse decision." 557 U.S. at 176, 129 S. Ct. 2343, 174 L.Ed.2d 119. The same standard applies to both laws.

Lewis, 681 F.3d at 321.

Similarly, in *Palmquist v. Shinseki*, 689 F.3d 66, 74 (1st Cir. 2012), a Rehabilitation Act case, the First Circuit held that "*Gross* is the beacon by which we must steer, and textual similarity ... compels us to reach the same conclusion here."

Complicating matters slightly, the ADA Amendments Act of 2008 slightly altered the causation language in the statute. 42 U.S.C. § 12112(a) now prohibits an employer from discharging "a qualified individual on the basis of disability," rather than forbidding discrimination "because of" disability. However, the Seventh Circuit has continued to apply its holding in *Serwatka* to post-ADA Amendments Act cases. In *Fleishman v. Continental Cas. Co.*, 698 F.3d 598 (7th Cir. 2012), for example, the Seventh Circuit noted that:

> The ADEA makes it unlawful for an employer to "discharge any individual ... because of such individual's age." 29 U.S.C. § 623(a)(1); *see also* 29 U.S.C. § 631(a) (limiting protections to individuals over forty). Similarly, the ADA prohibits an employer from discharging "a qualified individual on the basis of disability." 42 U.S.C. § 12112(a).

Fleishman, 698 F.3d at 603.

The Seventh Circuit thus deemed the two standards to be "similar," and it found the plaintiff's arguments in favor of a mixed-motive instruction to be unsupported by the revised language.

Likewise, in the recent district court case of *Johnson v. Benton Cnty. Sch. Dist.*, __ F. Supp. 2d __, Civil Action No. 3:11CV11, 2013 WL 765614, at *5–6 (N.D. Miss. Feb. 25, 2013), the court relied on *Gross*, *Serwatka, Palmquist*, and *Fleishman,* to conclude that "but for" causation applies to ADA claims, notwithstanding contrary Fifth Circuit authority predating *Gross*.

Not every court to consider the issue has found that *Gross* applies to ADA claims. In *Hamilton v. Oklahoma City Univ.*, CIV–10–1254–D, 2012 WL 5949122 (W.D. Okla. Nov. 28, 2012), the district court refused to follow *Serwatka* and apply but-for language to the ADA, stating "[a]lthough OCU's comparison of the similarity between the ADA and ADEA statutory language is somewhat persuasive, given the absence of direct authority from this Circuit and the scant authority from other courts, the Court declines to adopt the "but for" standard in this case." *Id*. at *6.

D. FMLA

The Tenth Circuit observed that, as a result of *Gross*, "there is a substantial question whether a mixed motive analysis would apply in a retaliation claim under the FMLA." *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1004 (10th Cir. 2011). In *Hunter v. Valley View Local*

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Schools, 579 F.3d 688 (6th Cir. 2009) the Sixth Circuit held that specific language in FMLA regulations supports the continued applicability of the mixed-motive option post-*Gross*. Specifically, the Sixth Circuit in *Hunter* wrote as follows:

> Congress delegated authority to the Secretary of the Department of Labor to prescribe regulations to implement the FMLA. *See* 29 U.S.C. § 2654. Among those regulations is the following: ...
>
>> By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. 29 C.F.R. § 825.220(c) (emphasis added). Thus, the implementing regulations explicitly forbid an employer from considering an employee's use of FMLA leave when making an employment decision. The phrase "a negative factor" envisions that the challenged employment decision might also rest on other, permissible factors.

Hunter, 579 F.3d at 692.

The Sixth Circuit in *Hunter* thus found that, since FMLA regulations forbid using the taking of FMLA leave as "a negative factor in employment actions," this provides a sufficient legal basis to continue to apply the mixed-motive option in FMLA cases, *Gross* notwithstanding. That is, the Sixth Circuit wrote that:

> In light of our reading of the FMLA through the lens provided by *Gross*, we continue to find *Price Waterhouse's* burden-shifting framework applicable to FMLA retaliation claims. Accordingly, if [plaintiff] has presented evidence to establish that Valley View discriminated against her because of her FMLA leave, then the burden shifts to Valley View "to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive."

Id.

In *Johnson v. Benton Cnty. Sch. Dist.*, __ F. Supp. 2d __, Civil Action No. 3:11CV11, 2013 WL 765614, at *6 (Feb. 25, 2013), the district court agreed with, and followed *Hunter*, stating, "[t]his court agrees with the Sixth Circuit's analysis, since the FMLA's prohibition against the taking of FMLA leave being used as a "a negative factor" in employment decisions does seem consistent with allowing plaintiffs to prove their case under a mixed-motive option." At the same time, the district court acknowledged the uncertainty in this area of the law, and explicitly sought guidance from the Fifth Circuit, stating, "[u]ltimately, this court is less concerned with what approach the Fifth Circuit adopts in this context than with the urgent need for some clarification of the governing law." *Id*.

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IV. THE CONTRIBUTING FACTOR CAUSATION STANDARD

Section 806 of the Sarbanes–Oxley Act ("SOX") of 2002 is probably the most important employment law related statute that incorporates the "contributing factor" standard. SOX protects employees from retaliation when they engage in the following activities:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

29 C.F.R. § 1980.104(b)(1) sets out the *prima facie* elements of a SOX whistleblower claim:

> (i) the employee engaged in a protected activity or conduct; (ii) the [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) the employee suffered an unfavorable personnel action; and (iv) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

Id.; *see also Bechtel v. Administrative Review Bd., United States Dep't of Labor*, 710 F.3d 443, 447 (2d Cir. 2013) (same); *Harp v. Charter Comm., Inc.,* 558 F.3d 722, 723 (7th Cir. 2009) (same); *Gale v. U.S. Dept. of Labor*, 384 Fed. Appx. 926, 929 (11th Cir. 2010) (same); *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same); *Mozingo v. South Financial Group, Inc.*, 520 F. Supp. 2d 733, 740 (D.S.C. 2007) (same).

SOX does not follow the familiar Title VII *McDonnell Douglas* burden-shifting framework. Rather, in a SOX retaliation case:

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> [A]n employee bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee's *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity.

Welch v. Chao, 536 F.3d 269, 275 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009) ; *see also* 18 U.S.C. § 1514A(b) ("An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code."); 49 U.S.C. § 42121(b)(ii) ("[N]o investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."); *see also Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352–53 (4th Cir. 2008) (setting out SOX affirmative defense standard).

"The words 'a contributing factor' mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Pardy v. Gray*, No. 07 Civ. 6324(LAP) 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008) (Preska, J.) (citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)); *Allen v. Administrative Review Board*, 514 F.3d 468, 476 n.3 (5th Cir. 2008) (stating in a SOX case that "[a] contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."). The Tenth Circuit U.S. Court of Appeals referred to the "contributing factor" standard as being "broad and forgiving." *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, __ F.3d __, 2013 WL 2398691, at *9 (10th Cir. June 4, 2013). In *Lockheed*, the court stated that the "contributing factor" standard was intended to overrule existing case law that required whistleblowers to prove that their protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in an unfavorable personnel action in order to prevail. *Id*.

"A plaintiff need not prove that her protected activity was the primary motivating factor in her termination, or that the employer's articulated reason was pretext in order to prevail." *Barker v. UBS AG*, 888 F. Supp. 2d 291, 300 (D. Conn. 2012) (citation omitted). Thus, in SOX retaliation cases, so long as the plaintiff produces more than mere temporal proximity, courts tend to find sufficient evidence to survive summary judgment under the "contributing factor" standard. *See, e.g., Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 1003-04 (9th Cir. 2009) (close timing between protected activity and decision to terminate, combined with evidence of plaintiffs' good job performance that belied employer's performance-based reason for termination, created an issue of fact on this element in a SOX case); *Leshinsky v. Telvent GIT, S.A.*, NO. 10 CIV. 4511 JPO, 2013 WL 1811877, at *6 (S.D.N.Y. May 1, 2013) (evidence that plaintiff was marginalized after he engaged in SOX-protected activity until his termination five months later was sufficient to survive summary judgment); *Lockheed Martin Corp.*, 2013 WL 2398691, at *10 (sufficient evidence that protected activity was a contributing factor between the claimant's complaint and constructive discharge, despite passage of twenty months between the date the plaintiff filed her ethics complaint and the date she resigned); *Barker*, 888 F. Supp. 2d at 300-01 (sufficient causal connection existed despite five month gap between reporting and

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termination, where in between plaintiff was overlooked for assignments and given unfavorable reviews).

On the other hand, in a SOX case, "temporal proximity alone is usually insufficient to constitute evidence that would prove that an employer retaliated against an employee for engaging in alleged protected activity." *Riddle v. First Tennessee Bank, Nat. Ass'n*, 497 Fed. Appx. 588, 596 (6th Cir. 2012). And, if the decision to terminate was clearly made before the plaintiff engaged in any SOX-protected activity, then summary judgment for the employer is proper on this element. *See, e.g., Boyd v. Accuray, Inc.*, 873 F. Supp. 2d 1156, 1170 (N.D. Cal. 2012) (no proof protected activity was a contributing factor in termination decision, where undisputed evidence showed the decision to terminate was made nine days before the plaintiff engaged in any allegedly SOX-protected activity). Likewise, if none of the decisionmakers knew of the plaintiff's allegedly protected activity, then this element cannot be satisfied, unless the "cat's paw" doctrine (explained above) applies. *Compare Boyd*, 873 F. Supp. 2d at 1170 (dismissing SOX claim where the plaintiff failed to show that anyone with supervisory authority over Plaintiff "knew or suspected, actually or constructively, that the [Plaintiff] engaged in the protected activity.") *with Lockheed Martin Corp.*, 2013 WL 2398691, at *10-11 (applying "cat's paw" doctrine in affirming decision in SOX claimant's favor).

V. CONCLUSION

Title VII has been the law for nearly a half century, and yet the proper standard of causation remains a hot topic worthy of Supreme Court review. The same can be said about the ADEA. The recent Supreme Court decisions in *Gross* and *Nassar* have brought more clarity to this area than had previously been the case. However, many significant questions regarding causation in employment law cases remain, and litigants and courts will have to wrestle with them for years to come. We hope that as you confront those questions, and engage in your daily law practice, this paper and presentation are helpful to you.

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