Case No. 09–6381

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN LEWIS
Plaintiff–Appellant

v.

HUMBOLDT ACQUISITION CORP., d/b/a
HUMBOLDT MANOR NURSING CENTER
Defendant–Appellee

On Appeal from the United States District Court
for the Western District of Tennessee, No. 07–cv–1054

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING DEFENDANT–APPELLEE'S BRIEF AND SEEKING AFFIRMATION OF THE PANEL DECISION

E. Todd Presnell
Kara E. Shea
MILLER & MARTIN PLLC
150 Fourth Avenue North, Ste. 1200
Nashville, Tennessee 37219
Phone: 615-744-8447
Fax: 615-256-8197
tpresnell@millermartin.com

Counsel for Amicus Curiae, DRI –
The Voice of the Defense Bar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

DRI–The Voice of the Defense Bar ("DRI") is an international organization comprised of more than 22,000 attorneys involved in the defense of businesses and individuals in civil litigation. DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a leading voice in the ongoing effort to promote fairness, efficiency, and consistency in the civil justice system. DRI participates as *amicus curiae* in cases, such as this one, raising issues of importance to its members, their clients, and the judicial system as a whole.

DRI has significant interests in the issues presented in this case. A substantial reduction in the causation standard of the Americans with Disabilities Act, as proposed by the Plaintiff, will affect how DRI's constituents evaluate and determine adverse employment actions. Imposition of a motivating factor standard will also impact employers as civil litigation defendants, affecting the number of discrimination suits filed and the financial burden of defending these suits. DRI has filed a Petition for Leave to File a Brief as *Amicus Curiae* for authority to file this brief.

---

[1] No party's counsel authored this brief in whole or in part, and no party's counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

ARGUMENT

The Americans with Disabilities Act ("ADA") prohibits employers from taking an adverse employment action against an individual "because of" (or, as amended, "on the basis of") the individual's disability. 42 U.S.C. § 12112. This case requires the court to determine a disability-discrimination plaintiff's burden in showing an adverse employment action was taken "because of" a disability. The issue before the court is the proper causation standard under the ADA.

Plaintiff asks the court to impose a motivating factor causation standard, borrowed from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* ("Title VII"), on the ADA. But the United States Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009), serves—at a minimum—as a reminder that "Title VII decisions do not automatically control the construction of other employment discrimination statutes." *Hunter v. Valley View Local Sch.*, 579 F.3d 688, 691 (6th Cir. 2009). Rather, the ADA *itself* must dictate the motivating factor standard in disability-discrimination claims if it is to be used. *See id.*

The arguments that the ADA does not authorize adoption of a motivating factor standard are simple and compelling. First, Congressional intent, as evinced by the statutory text, must control. Title VII contains a provision expressly mandating a motivating factor causation standard; the ADA does not. Second, in

Gross, the Supreme Court unambiguously holds that courts should not do exactly what Plaintiff is asking the court to do in this case—that is, impose Title VII's motivating factor standard on other kinds of disparate treatment claims absent clear congressional intent to do so.

The Defendant argues that the Sixth Circuit should continue to apply the "sole cause" standard, as it has on many previous occasions, based on clear and unambiguous language *within the ADA* requiring incorporation of standards consistent with those of the identically-purposed Rehabilitation Act of 1973, § 504(a), 29 U.S.C. § 794(a) (2006). *See* 42 U.S.C. § 12117(b). The *amicus curiae* fully joins in this argument, and with all arguments presented by Defendant. However, to avoid repetition of matters exhaustively and persuasively covered in the principal briefs, this *amicus* brief illuminates the pitfalls of the motivating factor causation standard versus the comparative advantages of a standard which incorporates logical, longstanding principles of "but-for" causation. The brief emphasizes that the interests of employees *and employers* must be balanced and considered when determining the most appropriate causation framework for ADA disparate treatment claims, and that, absent clear congressional intent, balancing these considerations is the role of Congress, not the courts.

I. THE MOTIVATING FACTOR STANDARD FAILS TO PROPERLY ENSURE THAT EMPLOYERS WILL INCUR ADA LIABILITY ONLY WHEN DISCRIMINATION CAUSES THE ADVERSE ACTION

The freedom of employers to manage their businesses as they see fit is an important principle underlying the American economic system. This principle is reflected in the well-established at-will employment doctrine. *See, e.g.*, *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972) (noting the "common law rule" that "employment is terminable by either party at will"). Indeed, in an era of ever-increasing governmental regulation of the workplace, it bears emphasizing that the ADA, Title VII, and other anti-discrimination statutes are *exceptions* to the at-will employment doctrine.

Eliminating workplace discrimination is an inarguably worthy goal. But this goal must be balanced with other important goals, including ensuring that businesses are not hamstrung in their decision-making processes because of litigation fears or unnecessarily burdened with the costs of defending or settling frivolous lawsuits based on insufficient evidence of discrimination. All of these important considerations, and the interests of both employers and employees, should inform any discussion of the appropriate burden of proof in any disparate treatment claim.

A. The Motivating Factor Standard Represents a Fundamental Deviation from Traditional Causation Principles

The Court must look to the ADA's plain language to determine the ADA's ordinary meaning. *See, e.g.*, *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850 (2009). The phrase "because of" has been consistently defined as "by reason of" or "on account of," indicating a direct cause and effect relationship, or but-for causation. *See, e.g.*, *American Heritage College Dictionary* 121 (3d ed. 2000) (defining "because of" as "by reason of" or "on account of"); *The American Heritage Dictionary of the English Language* 163 (3d ed. 1992) (same); *Webster's Ninth New Collegiate Dictionary* 139 (1988) (same); *The Compact Edition of the Oxford English Dictionary* 746 (1971) (same); *Webster's New International Dictionary of the English Language* 242 (2d ed. 1947) (same). These definitions align with everyday usage of the phrase. When one speaks of an action occurring "because of" another action, a direct cause and effect relationship is presumed. Stated differently, the phrase "because of" means that the action is determinative of the outcome of the situation. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome."). Thus, the plain language of the

ADA dictates that the causation standard applied to ADA claims must incorporate, at minimum, the concept of outcome-determinative, or "but for" causation.[2]

The Plaintiff seems to suggest that interpreting the "because of" phrase as requiring an application of but-for causation principles would render the ADA an outlier in the anti-discrimination-law spectrum. But this argument is decidedly inaccurate. Anti-discrimination statutes are analogous to liability burdens in the common-law tort arena. *See Price Waterhouse*, 490 U.S. at 263–64 (O'Connor, J., concurring). And the but-for causation has long served as the preferred causation standard in tort law. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984) (defining but-for causation as: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."). Even with the emergence of other causation standards, the but-for standard has retained its favored status. *See* John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679 (2003). Indeed, the most recent *Restatement of Torts* abandons the confusing and misused substantial factor

[2] The "sole cause" standard set forth in the Rehabilitation Act and applied by this Court in *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) and many other ADA cases, inarguably incorporates principles of "but for" causation.

test and now states, "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." Restatement (Third) of Torts § 26 (2010); *see* Rue, *supra* at 2682 & n. 29.

Upholding the *Monette* causation standard is consistent with well-established causation principles. Moreover, the logic of applying a principle incorporating an outcome-determinative causation standard in the employment setting is readily apparent. If a supervisor's discriminatory motive did not result in the employee being terminated, how has the statute in question been violated? Conversely, if an employer is held liable when factors other than discrimination caused the adverse action, how has the purpose of the statute been served?

In *Gross*, the Supreme Court spoke favorably of principles of but-for causation, recognizing that statutes prohibiting discrimination should be read as incorporating a requirement that the discriminatory conduct or motive be outcome-determinative, absent express statutory language to the contrary. 129 S. Ct. at 2350 (noting that the "the ADEA's phrase "because of" means "by reason of" which in turn "requires at least a showing of 'but for' causation" (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008))).

Following *Gross*, the Seventh Circuit, which provided one of the opinions on which many Circuits later relied to incorporate the Title VII causation standard into other discrimination claims, recognized that Title VII's mixed-motive

framework should not be incorporated into the ADA or other statutes lacking comparable language. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (Posner, J.), *abrogating Foster v. Arthur Andersen, LLP*, 168 F.3d 1029 (7th Cir. 1999). The Seventh Circuit held that a "plaintiff complaining of discriminatory discharge under the ADA must show that [her] employer would not have fired [her] but for [her] actual or perceived disability." *Id.* at 962; *see also Farley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) ("*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."). These persuasive decisions, explained in more detail in the Defendant's principal brief, weaken the Plaintiff's argument for an expansive interpretation of the ADA and buttress the position that the causation standard applicable to ADA claims should incorporate accepted and well-reasoned principles of but-for causation.

The scope and purpose of the ADA—including some marked differences between the ADA and Title VII—provide further grounds for refusing to import the Title VII causation standard into the ADA. Under Title VII, it is virtually never acceptable for an employer to take a protected factor into account in making an employment decision; rather, all people are expected to be treated the same in the workplace, regardless of their race, color, national origin, sex, or religion. The ADA, to the contrary, does not require employers to ignore an employee's

disability, and often affirmatively requires the employer to consider the individual's disability when evaluating his or her qualifications for a job, where a reasonable accommodation is needed, and in providing that reasonable accommodation to disabled employees. *See* 42 U.S.C. § 12112. The motivating factor standard could easily confuse the appropriate consideration of a disability with its discriminatory consideration.

Plaintiff asks the court to deviate from the well-established and inherently logical but-for causation standard in favor of Title VII's motivating factor liability standard. By way of background, Section 107(a) of the Civil Rights Act of 1991 added a provision to Title VII which deemed unlawful any employment practice motivated by a person's race, color, religion, sex, or national origin, "even though other factors also motivated the practice." A Title VII violation may be found even if the adverse employment action would have occurred absent the discriminatory motive. In other words, discrimination does not need to be an outcome-determinative factor to prove Title VII liability.

The 1991 amendment to Title VII partially codified the Supreme Court's plurality holding in *Price Waterhouse*, which shifted the liability-avoidance burden to the employer to show that discrimination was not a but-for cause of the adverse

employment action. *See Price Waterhouse*, 490 U.S. at 243–45.[3] However, the statutory amendment went further than *Price Waterhouse*; under the amended Title VII, an employer now may avoid certain types of damages, *but not liability*, by proving that it would have taken the same action against the employee absent the discriminatory factor. Consequently, whereas *Price Waterhouse* applied a but-for causation standard with burden-shifting, the 1991 amendment took the further drastic step of abolishing the but-for causation requirement in Title VII discrimination claims.

This departure from traditional causation principles clearly evinces Congress's intent to punish wrongful conduct (or even wrongful thoughts) by an employer, rather than to address the actual impact of discrimination on employees.[4] Courts should not impose a similar approach in contexts where Congressional intent is either absent or lacks clarity.

B. The Motivating Factor Standard May Result in a Windfall For Employees

In many instances, application of a motivating factor standard will result in a "windfall" to an employee. *See* Martin J. Katz, *The Fundamental Incoherence of*

---

[3] Under *Price Waterhouse*, an employer could avoid liability by showing it would have taken the same action against the employee absent the discriminatory factor. *Id.* at 244–45.

[4] In his dissent in *Price Waterhouse*, Justice Kennedy noted that the fundamental problem with substituting a plaintiff's but-for causal burden with a motivating factor standard was that it "represent[ed] a decision to impose liability without causation." *Id.* at 282.

Title VII: Making Sense of Causation in Disparate Treatment Law, 94 Geo. L.J. 489, 512 (2006). That is, an employee is placed in a better position than he would have been in absent the employer's actions. The unfairness of such a result is exacerbated by the fact that, commonly, in a "mixed motive" case, outcome-determinative factors include the employee's own wrongful conduct.

For example, assume that a disabled employee engaged in insubordinate conduct, including use of a profanity towards a coworker, and was terminated. Assume further than her employer was partly motivated by discriminatory animus in terminating the employee, but would have terminated the employee regardless, due to the employee's inappropriate conduct. Under a motivating factor standard, the employee may prevail in such a case, and the employer could be ordered to reinstate the employee or pay compensatory damages, notwithstanding the fact that the employee's own misconduct was the reason she was terminated. The insubordinate employee is therefore placed in a better position than she would have been otherwise, and reaps a windfall not available to non-disabled employees who engage in similar misconduct.

As any human resources professional can attest, the example set forth above is not anomalous. Employers attempting in good faith to comply with the ADA are already wary of terminating a disabled employee, even when the employee has committed a very serious violation of workplace policy, due to the possibility that

the employee will claim he was subjected to discrimination. Application of a motivating factor standard significantly increases this phenomenon, potentially paralyzing an employer faced with disciplining a disabled employee. In that situation, a well-informed employer will understand that it could be held liable for discrimination regardless of the employee's inappropriate conduct. The employer is faced with the choice of retaining an employee who has violated its rules, or chancing the cost and uncertainties of litigation under a framework that permits an employee to establish a claim without showing a causal connection between his protected status and the injury suffered.

Of course, employers sometimes act with discriminatory motives and, in those instances, should receive remedial measures. This may be the case even if the employee has violated a policy, placing multiple motives in play. For instance, if an employer selectively enforces its policies, and punishes disabled employees more harshly for violations than non-disabled employees, then disability truly is an outcome-determinative factor and a finding of liability may be warranted, regardless of the employee's misconduct. The bottom line is that the goal of protecting employees from workplace discrimination should be pursued in a fashion that does not unduly interfere with employers' ability to run their businesses or unfairly reward employees who violate workplace policies. A but-for-based causation standard appropriately accounts for the complicated realities of

workplace decision-making, balances the interests of the employer and employee, and properly limits employer liability to situations where the discriminatory motive actually has a negative impact on the employee.

C. Imposing a Motivating Factor Standard on ADA Claims will Significantly Increase Employers' Litigation Costs

Applying Title VII's motivating factor approach to ADA cases would fundamentally alter the manner in which such cases are litigated. Employers would face the difficulties associated with proving a negative—that they *did not* discriminate—in order to avoid damages. This phenomenon would force employers to consider paying settlement monies even in meritless claims. As commentators have observed:

> Employment decisions . . . are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor—a much lighter burden than demonstrating that the forbidden ground of decision was a *determining* factor. . . . Summary judgment will be less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF51 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis in original).

Applying the minimal burden of a motivating factor causation standard in disability-discrimination cases significantly increases plaintiffs' chances of avoiding summary dispositions and correspondingly increases discovery, expert

initiatives, and other pretrial activities. These additional pretrial activities directly result in increased litigation costs to employers that would, in appropriate cases, be avoided by application of an outcome-determinative causation standard.[5]

The increased litigation costs to employers resulting from this Court's imposition of a motivating factor standard would arrive at a time when ADA litigation costs are otherwise rising due to the 2008 ADA amendments (ADAAA). The Equal Employment Opportunity Commission (EEOC) predicted an increased number of charges and lawsuits based on the expanded definition of "disability," resulting in "additional legal fees and litigation costs associated with bringing and defending these claims." Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,995 (March 25, 2011) (codified at 29 C.F.R. 1630). The EEOC reported that disability charges increased from 19,453 in 2008 to 21,451 in 2009. *See* U.S. Equal Employment Opportunity Comm'n, Americans with Disabilities Act of 1990 (ADA) Charges FY 1997 – FY 2010, http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (last visited Aug. 9, 2011). This trend

[5] Increased ADA litigation will also harm employees and undermine the purposes of the ADA by diverting attention and resources away from development of proactive corporate anti-discrimination measures. *See* Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997) ("Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency.").

appears to be continuing, with the record-breaking number of 25,165 charges filed in Fiscal Year 2010. *See id.* The EEOC partially attributes the surge to the "expanded statutory authorities that EEOC has been given with the…ADAAA." U.S. Equal Employment Opportunity Comm'n, *Fiscal Year 2010 Performance and Accountability Report* (2010), at 19.

These increased litigation costs would be in addition to employers' existing financial burdens associated with ADA compliance. While the ADA provides important protections for employees, its requirements are more financially burdensome to employers than the requirements of Title VII due to the implementation costs of reasonable accommodations. Employers often must restructure jobs, hold positions for individuals on extended leave, modify work schedules, acquire or modify new equipment, change policies, or provide readers or interpreters for disabled individuals, to name some accommodations. *See* U.S. Equal Employment Opportunity Comm'n, *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), www.eeoc.gov/policy/docs/accommodation.html. Such accommodations place a financial burden on the employer it would not have to undertake for another, non-disabled employee. *See id.* Congress has determined that these costs are worth the benefit of protecting against discrimination. But if the ADA is to impose even greater financial burdens on the legitimate business

interests of employers by drastically reducing the burden of proof for plaintiffs presenting disparate treatment claims, it is for Congress, and not the courts, to make this change.

II. IT IS THE LEGISLATURE'S ROLE—NOT THE COURT'S—TO BALANCE THE INTERESTS OF ERADICATING DISCRIMINATION AND THE ADVERSE CONSEQUENCES ASSOCIATED WITH INCREASING EMPLOYERS' LITIGATION COSTS

Congress's 1991 Title VII amendment inserting a motivating factor causation standard represents a deliberate, policy-driven decision to deviate from traditional causation principles. It is quite clear that Congress manifested no intention to similarly tip the scales in favor of employees with respect to a diminished burden of proof for disability-discrimination claims. The fact that Congress has amended the ADA, and in fact amended it quite expansively to broaden the scope of individuals covered under the ADA,[6] without substituting a motivating factor standard, is extremely persuasive that the motivating factor standard was excluded purposefully. As noted by the Supreme Court in *Gross*, "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross*, 129 S. Ct. at 2349 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991)); *see also Univ. of Pa. v. EEOC*, 493 U.S 182, 189 (1990) ("We are especially reluctant to recognize a privilege in an area where

[6] *See* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. . . . The balancing of conflicting interest of this type is particularly a legislative function." (citations omitted)). The *Gross* opinion relies on the fact that "Congress neglected to add [a "motivating factor"] provision to the ADEA when it amended Title VII to add [one], even though it contemporaneously amended the ADEA in several ways." *Gross*, 129 S. Ct. at 2349. Congress similarly did not initially include, or later amend to include, a motivating factor standard in the ADA, despite the recent expansive ADAAA amendments.

It is a legislative function, and not that of the courts, to balance the conflicting interests of employees and employers. *See Univ. of Pa.*, 493 U.S. at 189. Inserting a motivating factor standard into the ADA not only lessens the burden of proof for the plaintiff and in turn increases the burden on employers, but it assumes the legislative power of balancing these interests while disregarding legislative intent.

CONCLUSION

For the foregoing reasons, the decision below should be upheld.

Respectfully submitted,

s/ E. Todd Presnell
E. Todd Presnell
Kara E. Shea
MILLER & MARTIN PLLC
150 Fourth Avenue, North, Ste. 1200
Nashville, Tennessee 37219
Phone: 615-744-8447
Fax: 615-256-8197
tpresnell@millermartin.com

Counsel for Amicus Curiae, DRI – The Voice of the Defense Bar

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served through the Court's electronic filing system by electronic notification to the following counsel of record:

Michael L. Weinman, Esq.
114 S. Liberty Street
P.O. Box 266
Jackson, TN 38302

Eric Schnapper, Esp.
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195

James K. Simms, IV
J. Cole Dowsley, Jr.
511 Union Street, Suite 1500
Nashville, TN 37219

This 10th day of August, 2011.

s/ E. Todd Presnell
E. Todd Presnell

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the attached brief is in a proportionally-spaced typeface of 14-point size and is 4,499 words long.

This 10th day of August, 2011.

s/ E. Todd Presnell
E. Todd Presnell