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Lewis v. Humboldt Acquisition Corp.: Inconsistent with Precedent, Inconsistent with Itself, Inconsistent with the Supreme Court

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LEWIS V. HUMBOLDT ACQUISITION CORP.: INCONSISTENT WITH PRECEDENT, INCONSISTENT WITH ITSELF, INCONSISTENT WITH THE SUPREME COURT

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I. INTRODUCTION

In 1990, as a response to what it perceived as prejudicial and antiquated attitudes regarding disabled Americans, Congress passed the Americans with Disabilities Act (ADA).[1] The ADA was intended to remove the societal and institutional barriers which obstructed physically and mentally disabled people from fully participating in society.[2] Unfortunately, current judicial interpretation of the ADA may be hampering the efforts by Congress to eradicate disability-based discrimination.

In 2006, Humboldt Acquisition Group dismissed Susan Lewis from her position as a registered nurse.[3] Lewis claimed that she was discharged, in violation of the ADA, as a result of a medical condition.[4] Humboldt, however, responded that it discharged Lewis because of an outburst in which she yelled, used profanity, and criticized supervisors.[5] When the case subsequently went to trial on Lewis's ADA claims, the court refused to instruct the jury, as Lewis requested, that an ADA violation could be established if the employee's disability was a motivating factor in the employment decision.[6] Rather, the court accepted Humboldt's version of liability in which an ADA claimant had to prove that the employee's disability was the sole cause of the adverse employment decision.[7] After the jury subsequently found in favor of Humboldt,[8] Lewis appealed. The Sixth Circuit Court of Appeals, sitting en banc, agreed to hear the case.[9] The en banc panel did, in fact, depart

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1. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553. (2008).

2. *Id.*

3. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 314 (6th Cir. 2012) (en banc).

4. Lewis v. Humboldt Acquisition Corp., 634 F.3d 879, 880 (6th Cir. 2011) (stating that Lewis suffered from an unspecified medical condition that, among other things, affected her lower extremities. She alleged that the condition made it difficult for her to walk and prevented her from working for one month. When she did return to work, she sometimes needed a wheelchair).

5. *Id.*

6. *Lewis*, 681 F.3d at 314.

7. *Id.*

8. Judgement, Lewis v. Humboldt Acquisition Corp. (W.D. Tenn. Nov. 16, 2009) (No. 07-1054-JDB).

9. Lewis v. Humboldt Acquisition Corp., No. 09-6381, 2011 U.S. App. LEXIS 11941, at *1

from the "sole-cause" standard but ultimately held that a but-for test, not a motivating factor test, was the appropriate standard.

Relying on prior precedent, statutory interpretation, legislative history, and policy considerations, this Casenote will analyze the Sixth Circuit's treatment of the ADA's causation standard, focusing heavily on the propriety of the *Lewis* decision. This Casenote ultimately suggests that the Sixth Circuit failed to properly interpret the ADA and simply substituted one incorrect interpretation of the ADA for another when it adopted the "but for" test. Part II of the Casenote will lay out the framework for the development of the ADA's causation standard. This will involve a progression through the web of the relevant cases and statutes and their corresponding impact on the understanding of the ADA's causation standard. Part III will provide a more detailed explanation of *Lewis*. Part IV will begin by briefly reiterating the differences between the various causation standards that may be applied and will lay out the current trend in ADA cases. Part IV will then discuss the impropriety of the *Lewis* decision and argue that the decision conflicts with recent Sixth Circuit precedent, is internally inconsistent, and is not mandated by the Supreme Court. This Part will also detail *Lewis*'s departure from congressional intent and the decision's policy implications. Part V will conclude by summarizing the arguments presented and discussing possible avenues for change.

II. THE DEVELOPMENT OF THE ADA

A. The Civil Rights Act of 1964

In 1964, Congress passed the Civil Rights Act and with it, Title VII.[10] This landmark legislation promotes equal employment opportunities and prevents discrimination against historically disadvantaged groups.[11] Specifically, Title VII makes it unlawful for an employer to discriminate against an employee "*because of*" the employee's race, color, religion, sex, or national origin.[12] Early on, the Supreme Court established a burden shifting framework in which the employee was first required to establish a prima facie case of discrimination.[13] If this requirement was satisfied, the burden then shifted to the employer to articulate a legitimate, non-discriminatory reason for the employment decision; and

(6th Cir. June 2, 2011) (order granting rehearing en banc).

10. 42 U.S.C. § 2000e (2006).

11. Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solutions (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 965 (2009).

12. 42 U.S.C. § 2000e-2(a)(1) (2006).

13. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

if the employer was successful, the burden shifted back to the employee to show that the proffered reason was simply a pretext.[14] These early cases assumed that the adverse decision was either "because of" a legitimate reason or "because of" an illegitimate reason.[15] This framework, however, was soon found be to ill-suited for employment decisions that were influenced by both legitimate and illegitimate factors because it allowed employers to escape liability by advancing a legitimate, non-discriminatory reason that, while not pretextual, was not actually the primary justification.[16] Thus, the Supreme Court was left to determine how cases in which the motivations were mixed would be handled.[17] The Court's decision in *Price Waterhouse v. Hopkins* helped to somewhat answer this question.

B. Price Waterhouse v. Hopkins

Anna Hopkins was a senior manager in a Price Waterhouse office.[18] In 1982, Hopkins was considered for partnership. Hopkins possessed both attractive and unattractive qualities.[19] While she was viewed as a highly competent project leader who worked long hours and pushed vigorously to meet deadlines, she could also be abrasive, unduly harsh, and impatient with the staff.[20] Instead of granting or denying the partnership, Hopkin's candidacy was held for reconsideration until the following year.[21] However, when the time came, the partners refused to reconsider her for partnership.[22] Hopkins brought suit under Title VII, claiming that the firm had discriminated against her based on sex.[23] While Price Waterhouse did have legitimate reasons for denying Hopkins partnership (i.e. her poor interpersonal skills), it was also clear that Hopkins received poor reviews based on gender stereotypes.[24] The partner reviews included comments such as, "She overcompensates for being a woman;" she should take a "course in charm school;" and she should walk, talk, and dress more femininely.[25]

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14. *Id.* at 802–04.

15. Deborah A. Widiss, *Undermining Congressional Overrides, The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 881 (2012).

16. *Id.* at 882.

17. *Id.*

18. Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989).

19. *Id.* at 234 (detailing both the attractive and unattractive qualities of Ms. Hopkins).

20. *Id.* at 234–35.

21. *Id.* at 231.

22. *Id.* at 231–32.

23. *Id.*

24. *Id.* at 235.

25. *Id.*

Justice Brennan, writing for a plurality,[26] held that gender should be irrelevant to employment decisions and that to construe the words "because of" to mean "but for" was to misunderstand them.[27] Justice Brennan found that a plaintiff in a Title VII case need only to show that gender was a *motivating factor* in the employment decision.[28] However, in an attempt to harmonize this with the employer's need for freedom of choice, the plurality found that the employer had an affirmative defense allowing the employer to avoid liability if it could show that the same decision would have been made even if gender had played no role in the decision.[29] As this was a plurality opinion, there is a question of what opinion controls. Most courts have found that Justice O'Connor concurred on the narrowest grounds and thus her opinion is controlling.[30] Justice O'Connor's concurrence echoes the burden shifting test set out by the plurality, differing mainly in relation to an evidentiary standard that is not applicable to this Casenote.[31]

C. Passage of the Americans with Disabilities Act of 1990

In 1990, with this background in place, Congress passed the Americans with Disabilities Act (ADA).[32] The ADA prohibits discrimination against disabled persons in a variety of areas.[33] Title I, dealing with employment discrimination, mandates that "no covered entity shall discriminate against a qualified individual with a disability '*because of*' the disability of such individual."[34] The ADA did not include its own enforcement provisions; rather, Congress cross-referenced the ADA with Title VII of the Civil Rights Act.[35] This cross-reference established that the powers, remedies, and procedures under

26. *Id.* at 231 (Blackmun, Marshall, and Stevens, JJ., concurring).

27. *Id.* at 240.

28. *Id.* at 244.

29. *Id.* at 244–45.

30. While Justice O'Connor's concurrence is typically thought to be controlling, it is essentially a restatement of Justice Brennan's opinion with a different evidentiary standard; a distinction that is not relevant for the purposes of this Casenote. *See* Widiss, *supra* note 15, at 884; s*ee also* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when no rationale has the assent of five justices, the court is viewed to have taken the position of the narrowest concurrence).

31. *See Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring).

32. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

33. *Id.* (prohibiting discrimination in employment, public services, public accommodations and services operated by private entities, and telecommunications).

34. *Id.* § 102(a). The ADA was amended in 2008 to replace "because of" with "on the basis of." 42 U.S.C. § 12112(a) (2008). This amendment is discussed briefly in section D(4) of this Casenote. However, most courts and scholars do not believe this amendment changes the analysis of the ADA's causation standard, and, therefore, this Casenote focuses on the "because of" language. *See* Widiss, *supra* note 15, at 913.

35. 42 U.S.C. § 12117 (1990).

the ADA would be identical to those set forth in 42 U.S.C. §§ 2000e-4, 20000e-5, 2000e-6, 2000e-8, and 2000e-9.[36]

D. The 1991 Amendment to the Civil Rights Act

The next major development in discrimination jurisprudence came just a year later with the passage of the Civil Rights Act of 1991 (CRA of 1991).[37] Congress stated that the purpose of the act was to respond to recent Supreme Court decisions by amending, and expanding the scope of, relevant civil rights statutes in order to provide adequate protection to victims of discrimination.[38] This goal was accomplished by making it clear that Title VII's prohibition against discrimination "because of" race, color, religion, sex, or national origin was satisfied when one of these impermissible considerations was a "motivating factor" in an adverse employment decision.[39] The relevant language stated:

> [A]n 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.[40]

This language, codified in 42 U.S.C. § 2000e-2(m), represents a partial codification of the *Price Waterhouse* holding by allowing a plaintiff to satisfy its burden simply by showing that a discriminatory consideration played a role in the adverse employment decision.[41]

The CRA of 1991 also amended *Price Waterhouse*'s holding that an employer had an affirmative defense completely barring liability if it could show that the same action would have been taken without the impermissible consideration.[42] After the CRA of 1991, if an employee establishes that an impermissible consideration was a motivating factor in the employer's decision, then the court can grant declatory relief, injunctive relief, and attorneys' fees even if the employer can show that the same decision would have been made without the impermissible consideration.[43] Ultimately, while the amendment does away with the complete affirmative defense from *Price Waterhouse*, the employer still

36. *Id.*

37. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

38. *Id.* § 3 (Purposes).

39. *Id.* § 107(a) (Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex or National Origin in Employment Pracitces).

40. *Id.*

41. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); s*ee also id.* at 261 (O'Connor, J., concurring).

42. Civil Rights Act of 1991 § 107(b).

43. *Id.*

has a partial defense if it can show that the same decision would have been made regardless of the impermissible consideration (the same-decision test).[44] In that case, the court is limited to the remedies above (declatory relief, injunctive relief, and attorneys' fees) and cannot award damages or require admission, reinstatement, hiring, or promotion.[45] This amendment was codified in 42 U.S.C. § 2000e-5, a section cross-referenced by the ADA.[46]

E. Supreme Court Decides Gross v. FBL Financial Services

After the CRA of 1991, courts generally interpreted the term "because of" in anti-discrimination statutes to be consistent with the "motivating factor" test laid out in *Price Waterhouse* and codified as amended in Title VII.[47] However, in 2009, the Supreme Court entered the picture again in *Gross v. FBL Financial Services* and introduced doubt into this area of the law.[48]

In this case, Jack Gross was an employee of FBL Financial Group, Inc. (FBL) for more than thirty years and had risen to the position of claims administration director.[49] In 2003, however, when Gross was 54 years old, he was demoted and his old position was given to a younger co-worker whom Gross had previously supervised.[50] Gross subsequently brought suit under the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful to take adverse action against an employee "because of" the employee's age.[51]

The district court instructed the jury that it was required to return a verdict for Gross if he proved that his age was a "motivating factor" in FBL's decision to demote him.[52] The district court also instructed the jury that it must find for FBL if FBL proved that it would have chosen to demote Gross regardless of his age.[53] The jury returned a verdict for Gross.[54] Subsequently, the Eight Circuit Court of Appeals reversed the district court due to a perceived error regarding the appropriate

44. *Id.*

45. *Id.*

46. 42 U.S.C. § 12117 (1990).

47. *See, e.g.*, Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir. 2000) (citing to and agreeing with several other circuits' adoption of mixed-motive analysis in ADA cases).

48. Gross v. FBL Fin. Servs. Inc., 557 U.S. 167 (2009).

49. *Id.* at 170.

50. *Id.*

51. *Id.*

52. *Id.* at 170–71.

53. *Id.* at 171.

54. *Id.*

evidentiary standard.[55]

Thus, on appeal of the Eight Circuit's decision, the question actually presented to the Supreme Court was whether or not an employee had to present direct evidence of discrimination in order to obtain a motivating-factor, burden shifting instruction under a non-Title VII discrimination case.[56] The Supreme Court, however, did not answer this question and instead held that the burden never shifts to the employer defending a mixed-motive discrimination claim under the ADEA.[57] Writing for the Court, Justice Thomas reasoned that Title VII and the ADEA were materially different with respect to the burden of persuasion and thus ADEA claims are not controlled by Title VII jurisprudence.[58] The Court stated that it should be careful not to apply the rules of "one statute to a different statute without careful and critical examination."[59]

Title VII, the Court said, had been explicitly amended to authorize discrimination claims in which an improper consideration was a "motivating factor" in the adverse employment decision.[60] The text of the ADEA, however, does not state that the plaintiff can establish a claim by simply showing that age was a motivating factor.[61] The Court was influenced by the fact that Congress explicitly amended Title VII to allow for the "motivating factor" test but did not, at the same time, amend the ADEA to include the motivating factor language even though Congress simultaneously amended other parts of the ADEA.[62] The Court also looked to the dictionary definition of "because of" and found that its ordinary meaning meant that Gross had to establish that his age was *the* reason that the employer decided to act or, put another way, that his age was the but-for cause of the adverse decision.[63] Therefore, to be successful under the ADEA, *Gross* held that a plaintiff must show that age was the but-for cause of the challenged employment decision, and even if the employee shows that age was a motivating factor in the decision, the burden does not shift to the employer to show that it would

55. *Id.* at 172 (finding that the jury instructions were flawed because they allowed Gross to shift the burden to FBL upon presentation of a preponderance of any category of evidence showing that age was a motivating factor, rather than direct evidence. The Eight Circuit reasoned that Justice O'Connor's controlling concurrence in *Price Waterhouse* required the plaintiff to present direct evidence that the illegitimate criterion was a substantial factor in the employment decision before the burden could be shifted to the employer and before a mixed motive instruction could be obtained).

56. *Id.* at 173.

57. *Id.*

58. *Id.*

59. *Id.* at 174.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 176.

have made the same decision regardless of age.[64]

III. THE SIXTH CIRCUIT'S DECISION IN *LEWIS V. HUMBOLDT*

The major question stemming from *Gross* was how this decision would impact the causation standard of other anti-discrimination statutes. An area that seemed particularly uncertain after *Gross* was the ADA. *Lewis* solved the dilemma on how the Sixth Circuit would interpret the ADA's causation standard post-*Gross*. This Part first discusses the facts and background of the *Lewis* decision and then describes the majority and dissenting opinions.

A. The Facts and Background

The facts presented to both the three-judge panel and the en banc court were relatively sparse. Susan Lewis worked as a registered nurse at a retirement home owned by Humboldt Acquisition Corp.[65] In March 2006, Humboldt terminated Lewis's employment. Lewis then sued Humboldt under Title I of the ADA, claiming that she was fired because of her medical condition that made it difficult for her to walk and occasionally required her to use a wheelchair.[66] Humboldt, however, claimed that it fired Lewis based on an outburst at work in which she supposedly yelled, used profanity, and criticized supervisors.[67]

At trial, Lewis asked the court to instruct jury that it must find in her favor if it determined that her disability was a "motivating factor" in Humboldt's decision to terminate her.[68] The district court, however, consistent with circuit precedent, instructed the jury that Lewis could recover only if her disability was the "sole" reason for the adverse employment decision.[69] Based on this instruction, the jury found for Humboldt.[70] On appeal to the Sixth Circuit, a three judge panel upheld the jury instruction.[71] The court acknowledged that this standard was out of step with other circuits but reasoned that, according to a well established rule of the circuit, one three-judge panel could not overrule another three-judge panel without an intervening inconsistent ruling

64. *Id.* at 180.
65. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 314 (6th Cir. 2012).
66. *Id.*
67. *Id.*
68. Lewis v. Humboldt Acquisition Corp., 634 F.3d 879, 880 (6th Cir. 2009).
69. *Id.*
70. *Id.*
71. *Id.* at 881 (originally before Merritt, Clay, and Griffin, JJ).

from the Supreme Court.[72] Because contrary Supreme Court precedent was nonexistent, the only avenue for change would be an overruling by the Sixth Circuit sitting en banc.[73] Subsequently, the Sixth Circuit did, in fact, agree to hear the case en banc.[74]

B. The Majority Opinion

To begin, the en banc panel unanimously agreed that it should overrule circuit precedent holding that an ADA claimant was required to prove that his/her disability was the "sole" reason for the adverse employment decision.[75] This causation standard was established in the mid-1990s when the Sixth Circuit transplanted this "sole" reason test from the Rehabilitation Act to the ADA because the two acts had parallel protections and goals.[76] The court recognized that this interpretation of the ADA's causation standard was out of sync with the other circuits and should be abolished.[77] The panel was guided by the rule from *Gross* that courts must refrain from "applying rules applicable under one statute to a different statute without careful and critical examination."[78] Ultimately, the court held that different words usually convey different meanings and a law establishing liability against employers who discriminate "because of" an employee's disability does not require the employee to show that an adverse employment decision was made "solely" because of that disability discrimination.[79]

While the "sole-cause" standard was unanimously abolished, the court was sharply divided on what causation standard should take its place.[80] After doing away with the "sole-cause" standard, the majority then also rejected applying the "motivating factor" standard. Instead, it

72. *Id.* at 879–81.

73. *Id.* at 881; s*ee also* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1178 (6th Cir. 1996) (prior circuit precedent establishing the "sole-cause" test).

74. Lewis v. Humboldt Acquisition Corp., No. 09-6381, 2011 U.S. App. LEXIS 11941, at *1 (6th Cir. June 2, 2011) (order granting rehearing en banc).

75. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., concurring in part and dissenting in part) (stating that a unanimous Sixth Circuit agrees that the "sole-cause" standard is inappropriate for determining causation under the ADA).

76. *Id.* at 314. For early cases applying the "sole-cause" test to the ADA, see *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995) and *Monette*, 90 F.3d at 1178 (6th Cir. 1996).

77. *Lewis*, 681 F.3d at 315.

78. *Id.* at 316.

79. *Id.* at 315–16.

80. Judges Sutton, Batchelder, Boggs, Gibbons, Rogers, Cook, McKeague, Griffin, and Kethledge agreed that a "but for" standard was appropriate. Judges Clay, Martin, Stranch, Moore, Cole, White, and Donald believed that a "motivating factor" standard was appropriate.

replaced the "sole-cause" standard with a "but for" test.[81]

As is typical of most courts that have analyzed this issue, the majority briefly detailed the history of the ADA and other anti-discrimination statutes.[82] Specifically, the court noted that Congress passed Title VII of the Civil Rights Act of 1964 to make it unlawful to discriminate against an individual because of such individual's race, color, religion, sex, or national origin.[83] The court then stated that *Price Waterhouse* created a burden shifting framework for Title VII claims in which an employee who proved that discrimination was a motivating factor in the employment decision was able to shift the burden to the employer who was required to prove that the same decision would have been made regardless of the impermissible discrimination.[84] Then, two years after the *Price Waterhouse* decision, Congress passed the CRA of 1991 codifying that an unlawful employment practice was established if race, color, religion, sex, or national origin was a motivating factor in an adverse employment decision and allowing limited remedies, consisting of declaratory and injunctive relief and attorney's fees, when the employer can show that the same decision would have been made regardless.[85]

The *Lewis* majority believed that they were only two ways to interpret this history.[86] The first possibility was that *Price Waterhouse* defined the meaning of "because of" for Title VII and all similarly-worded anti-discrimination statutes as incorporating a "motivating factor" standard.[87] The other option, the majority believed, was that by amending only Title VII to allow recovery under a "motivating factor" standard, Congress made this standard available to Title VII claimants but did not extend this framework to other similar statutes.[88]

The majority then stated that the *Gross* Court adopted the second option by deciding that the "motivating factor" standard did not apply to the ADEA.[89] The majority was persuaded by the *Gross* Court's reasoning that rules applicable to one standard should not be casually applied to a different statute.[90] The majority emphasized the *Gross* Court's concern that while Title VII was amended to include a

81. *Lewis*, 681 F.3d at 321.
82. *Id.* at 317.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 318.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

"motivating factor" standard, the ADEA was not similarly amended.[91] Likewise, when Congress amended the ADA through the Civil Rights Acts of 1991, it did not specifically provide for an ADA "motivating factor" standard.[92] This, the majority reasoned, must be presumed to be an intentional omission.[93]

The majority also rejected the argument that the ADA's cross-reference of Title VII alleviates the concern about not specifically incorporating the motivating factor language into the ADA.[94] This majority emphasized the fact that the ADA's cross-reference to Title VII does not include section 2000e-2 of Title VII, which actually enumerates the "motivating factor" standard.[95] The majority further rejected the argument that this issue is cured by the fact that section 2000e-5, which is explicitly cross-referenced by the ADA, establishes a set of limited remedies for claimants who demonstrate that discrimination was a motivating factor in an adverse employment decision.[96] The majority reasoned that the language of section 2000e-5 allows limited remedies only if the claimant can prove that discrimination was a motivating factor under section 2000e-2, which ADA claimants cannot do as 2000e-2 refers to discrimination based on race, color, religion, sex, or national origin; not a disability.[97]

Finally, the majority was not persuaded by the legislative history tending to show that Congress desired the ADA to be analyzed under a "motivating factor" standard.[98] The majority reasoned that the best indicator of legislative intent is the meaning of the actual text enacted, not legislative reports.[99] Further, the *Lewis* majority said it would not be persuaded by legislative history because the *Gross* Court was not persuaded by similar legislative history regarding the ADEA.[100]

C. The Dissenting Opinions

In total, seven of the 16 judges, while agreeing with the majority's decision to discontinue the application of the "sole-cause" standard, argued that the appropriate causation standard was a "motivating factor"

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 319.
95. *Id.*
96. *Id.* 319–20.
97. *Id.* at 320.
98. *Id.*
99. *Id.* at 321.
100. *Id.*

test.[101]

1. Judge Clay: Concurring in Part and Dissenting in Part

Judge Clay, joined by Judge Martin, began his opinion by concurring in the majority's judgment that the "sole-cause" standard should no longer be applied.[102] This, however, is where the agreement ended. Judge Clay argued that because the ADA, unlike the ADEA, is explicitly tied to Title VII, the court's decision in this case was not controlled by the *Gross* decision; rather, careful examination of the ADA makes clear that a claimant only needs to prove that discrimination was a motivating factor in the adverse decision.[103] In support, Judge Clay argued that because the ADA explicitly cross-references the "powers, remedies, and procedures" of Title VII, the remedies provided by Title VII, including any changing interpretations or amendments thereto, apply with equal force to the ADA.[104]

Judge Clay also argued that a "but for" standard—requiring the plaintiff to prove that the adverse decision would not have been made absent any discrimination—barely lessens the burden imposed by the "sole-cause" standard.[105] He also expressed concern that it will be too difficult for plaintiffs to identify the exact state of mind of the employer and too easy for the employer to avoid liability by simply offering a myriad of non-discriminatory reasons for the decision.[106] According to Judge Clay, this is not compatible with the goal of ameliorating disability-based discrimination.[107]

2. Judge Stranch: Concurring in Part and Dissenting in Part

Judge Stranch, joined by Judges Moore, Cole, and White, weighed in next.[108] Joining with her fellow justices, Judge Stranch concurred in the majority's opinion that the "sole-cause" standard should be abandoned.[109] The concurrence however ended there, and Judge Stranch dissented from the majority's view that a "but for" standard

101. Judge Sutton delivered the opinion of the court, in which Batchelder, C.J., Boggs, Gibbons, Rogers, Cook, McKeague, Griffin, and Kethledge, JJ., joined. Clay, Martin, Stranch, More, Cole, White, and Donald, JJ., concurred in part and dissented in part. *Id.* at 312.

102. *Id.* at 322 (Clay, J., concurring in part and dissenting in part).

103. *Id.* at 324.

104. *Id.* at 322.

105. *Id.* at 323.

106. *Id.*

107. *Id.* at 324.

108. *Id.* at 325 (Stranch, J., concurring in part and dissenting in part).

109. *Id.*

should be applied to the ADA.[110]

Judge Stranch began by discussing the importance of the ADA's timing.[111] At the time the ADA was enacted, *Price Waterhouse* had just interpreted the phrase "because of" to include a "motivating factor" standard.[112] With this context, Congress assumed that "because of" in the ADA would be understood consistent with its contemporary meaning.[113] Further, Judge Stranch argued that the cross-reference not only determined the ADA's causation standard at that time, but permanently linked the two statutes and ensured they would evolve in tandem.[114]

Judge Stranch then took issue with the majority's use of *Gross* in guiding its decision.[115] With *Gross* itself teaching that statutory interpretation should be an individualized inquiry, applying *Gross*—a case analyzing the ADEA—to this ADA claim was improper.[116] Judge Stranch pointed out that the ADEA, while also prohibiting adverse employment decisions "because of" discrimination, was adopted in 1967, well outside the context of *Price Waterhouse*'s interpretation that "because of" includes a "motivating factor" standard.[117] Further, the ADEA never cross-referenced Title VII as the ADA does.[118] According to Judge Stranch, these differences make the *Gross* decision inapplicable to an ADA case.[119]

Additionally, Judge Stranch took issue with the majority's statement that it would not be persuaded by legislative history because the *Gross* Court was not persuaded by the legislative history.[120] The history of the ADEA, Judge Stranch argued, is not the history of the ADA.[121] Judge Stranch then cited a House Report for the ADA that explained "if the powers, remedies and procedures changed in Title VII . . . , they will change identically under the ADA for persons with disabilities."[122] The same report stated that "the purpose of the ADA [is] to provide civil rights protections for persons with disabilities that are parallel to those

110. *Id.* at 325–26.
111. *Id.* at 326.
112. *Id.* at 326–27.
113. *Id.* at 329.
114. *Id.* at 326.
115. *Id.* at 327.
116. *Id.*
117. *Id.* at 329.
118. *Id.*
119. *Id.* at 327.
120. *Id.* at 331.
121. *Id.*
122. *Id.* (citing H.R. REP. NO. 101-485 (III), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471).

available to minorities and women."[123] Accordingly, to be faithful to the fundamental purpose of statutory construction, namely giving effect to the original meaning of the words Congress chose, Judge Stranch believed that the court was required to adopt a "motivating factor" standard.[124]

3. Judge Donald: Concurring in Part and Dissenting in Part

The final opinion was Judge Donald's partial concurrence and partial dissent. Like her colleagues, Judge Donald welcomed the abandonment of the "sole-cause" standard.[125] Again, the dissent was based on an inability to accept the majority's definition of "because of."[126]

Rather than simply stating her view alone, Judge Donald laid out four possible views of the proper ADA causation standard, only two of which are relevant for this Casenote.[127] One of the views was the majority's position that "because of" means "but for."[128] Under this view, no burden shifting is allowed and the burden is the plaintiff's alone to show that the adverse employment decision would not have been made absent any discrimination.[129] Judge Donald could not accept this view.[130]

The other relevant view discussed by Judge Donald, and the one she ultimately agreed with, was that the express linkage between the ADA and Title VII shows that a "motivating factor" standard is appropriate for the ADA.[131] Judge Donald rejected the argument that the "motivating factor" standard is inapplicable to the ADA simply because Title VII's "motivating factor" test appears in section 2000e-2(m), a section that is not cross-referenced in the ADA.[132] Judge Donald pointed out that section 2000e-2 is expressly referenced twice in section 2000e-5 of Title VII, a section that is explicitly referenced in the

123. *Id.* (Stranch, J., concurring in part and dissenting in part) (citing H.R REP. NO. 101-485 (III), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471).

124. *Id.* (Stranch, J., concurring in part and dissenting in part).

125. *Id.* (Donald, J., concurring in part and dissenting in part).

126. *Id.* at 332.

127. *Id.* at 335. The four views included: (1) *Price Waterhouse* burden shifting applies to the ADA but was nullified as to Title VII by the CRA of 1991; (2) motivating factor is the causation standard for the ADA, based solely on the plain meaning of "because of;" (3) neither *Price Waterhouse* or Title VII apply to the ADA, and because the ADA lacks explicit mixed-motive language, "because of" in the ADA, means but-for; and (4) motivating factor is the causation standard for the ADA due to the ADA's explicit link to Title VII. *Id.* Only views three and four are discussed in this footnote.

128. *Id.* at 338.

129. *Id.*

130. *Id.* at 339.

131. *Id.*

132. *Id.* at 340.

ADA.[133] Further, the ADA cross-references section 2000e-5(g)(2)(B) of Title VII, which provides remedies for plaintiffs who can establish a claim under 2000e-2(m), but limits those remedies if the employer is able to show that the same decision would have been made regardless of the discriminatory consideration.[134] Judge Donald argued that by explicitly linking section 2000e-5 of Title VII to the ADA, Congress declared that ADA plaintiffs are entitled to all the remedies described therein (i.e. liability under a "motivating factor" standard).[135]

IV. DISCUSSION

This discussion will analyze both the impact and correctness of the *Lewis* decision, ultimately coming to the conclusion that the case was wrongly decided. Part A will discuss the impact of the decision; Part B will argue that the majority's decision in *Lewis* was inconsistent with circuit precedent; Part C details the internal inconsistencies in *Lewis*; and, finally, Part D discusses while the *Lewis* majority's decision was not mandated by Supreme Court precedent.

A. What is at Stake

Before discussing the *Lewis* case in detail, it is useful to clearly define each relevant causation standard and briefly lay out the current state of the law.

1. The Causation Standards: What Do They Mean

At this point, three causation standards have been discussed: the "sole-cause" test, the "but for" test, and the "motivating factor" test. The "sole-cause" test imputes the lowest standard of care on employers and requires the claimant to prove that the adverse employment decision was made exclusively based on the impermissible consideration and for no other reason. This test is no longer followed by any circuit.[136] The "but for" test, the test adopted by the *Lewis* majority, requires the claimant to prove that the impermissible consideration was *the* determinative factor in the adverse employment decision and, if other legitimate reasons contributed to the decision, that the same decision would not have been made absent the discriminatory consideration.[137]

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 315.
137. Serwatka v. Rockwell Automation, Inc., 591 F.3d. 957, 961–62 (7th Cir. 2010).

Finally, the "motivating factor" standard allows the claimant to establish a prima facie claim simply by showing that the impermissible consideration influenced the adverse decision, even if other factors also influenced the decision.[138] A key distinction between the "but for" standard and the "motivating factor" standard is that the "motivating factor" standard allows the claimant, after establishing that an impermissible consideration motivated the adverse decision, to shift the burden to the employer to prove that the same decision would have been made regardless.[139] Then, even if the employer is successful in doing so, the plaintiff is still entitled to limited remedies simply because the employer negatively considered the impermissible factor (i.e. the discriminatory factor).[140]

By way of example, consider an employer who terminates an employee for being disabled, rude, and often late. Under the "sole-cause" test no liability could be established because the disability was not the sole reason for the adverse decision—the rudeness and tardiness also played a part. Under the "but for" test, liability could be established only if the employee could prove that the rudeness and tardiness alone were not enough for the employer to make the same decision or, put another way, that had it not been for the disability, the employee would not have been terminated. Under the "motivating factor" standard, the employee could establish liability simply by showing the disability played a role in the decision.

2. The Current State of the Law

Prior to the *Gross* decision, most circuits applied the "motivating factor" standard in reviewing ADA claims.[141] However, after the Supreme Court decided *Gross*, the trend among circuits has been to apply the "but for" test. Currently, the Sixth Circuit in *Lewis* and the Seventh Circuit in *Serwatka v. Rockwell Automation, Inc.* have explicitly adopted the "but for" test for the ADA.[142] At this point, the only other federal appeals court that has explicitly adopted the "but for" test as the ADA's causation standard is the First Circuit.[143] However,

138. 42 U.S.C. § 2000e-2(m) (2006).

139. 42 U.S.C. § 2000e-5(g)(2)(B) (2009).

140. *Id.*

141. *See* Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008); Head v. Glacier Nw., Inc., 413 F.3d 1053, 1065 (9th Cir. 2005); Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000); Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995).

142. *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 314 (6th Cir. 2012); s*ee also Serwatka*, 591 F.3d. at 962 (7th Cir. 2010).

143. Palmquist v. Shinseki, 689 F.3d 66 (1st Cir. 2012).

some circuits that have not yet had a chance to finally decide the issue have indicated that the "motivating factor" test may no longer apply to the ADA after *Gross*.[144]

The matter, however, is far from being settled. The Fifth Circuit in *Smith v. Xerox Corp*. seems to have indicated an unwillingness to blindly apply the reasoning in *Gross* to other anti-discrimination statutes.[145] The *Smith* court was faced with determining whether the "motivating factor" standard from Title VII's discrimination provision should apply to Title VII's retaliation provision which does not contain, and was never amended to include, motivating factor language.[146] The Fifth Circuit held that a simplified application of *Gross* to Title VII retaliation claims would be contrary to *Gross*'s admonition against intermingling the interpretations of two statutory schemes, and concluded that the motivating factor framework was controlling.[147] This decision may indicate an unwillingness of the Fifth Circuit to apply *Gross* to the ADA.[148] In addition, there are district courts still applying the "motivating factor" standard to the ADA.[149]

The importance of analyzing this area of the law is only enhanced by the current uncertainty. While the law seems to be trending in favor of a "but for" standard, the answer is not definitive. Through careful examination, we can understand why *Lewis*, and any case concurring in its reasoning, was wrongly decided and hopefully help reverse the current trend.

B. Lewis *is Inconsistent with Sixth Circuit Precedent*

The first issue with the majority's decision in *Lewis* is the inconsistency with circuit precedent. After the *Gross* decision, the Sixth Circuit initially showed an ability to critically analyze other anti-discrimination statutes as opposed to blindly applying the reasoning of the *Gross* Court. In *Hunter v. Valley Local Sch.*, the plaintiff alleged that she was placed on involuntary leave in violation of the Family

144. *See* Bolmer v. Oliveria, 594 F.3d 134, 148 (2d Cir. 2010) (finding it "questionable" whether ADA discrimination claims can proceed on mixed-motive theory after *Gross*); *see also* Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1002 (8th Cir. 2012) (declining to decide the issue until it is explicitly briefed by the parties).

145. Smith v. Xerox Corp., 602 F.3d 320, 330 (5th Cir. 2010).

146. *Lewis*, 681 F.3d at 328 (Stranch, J., concurring in part and dissenting in part).

147. *Smith*, 602 F.3d at 328–29.

148. Allison P. Sues, *Gross'ed Out: The Seventh Circuit's Over Extension of Gross v. FBL Financial Services into the ADA Context*, 5 SEVENTH CIRCUIT REV. 356, 364 (2010).

149. Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324, 343 (S.D.N.Y. 2010); *see also* George v. Roush & Yates Racing Engines, LLC., No. 5:11CV00025, 2012 U.S. Dist. LEXIS 115495, at *6–7 (W.D.N.C. Aug. 16, 2012). *But see* Warshaw v. Concentra Health Servs., 719 F. Supp. 2d 484, 503 (E.D. Pa. 2010) (applying a "but for" standard).

Medical Leave Act (FMLA).[150] The Sixth Circuit stated that it relies on Title VII precedent to analyze FMLA claims, but noted that *Gross* reminded the court that Title VII does not automatically control the construction of other employment discrimination statutes.[151] Ultimately, after careful analysis of the FMLA, the Sixth Circuit found that the "motivating factor" standard, even after *Gross*, continued to apply to the FMLA.[152] Scholars on the subject cited this case as an indication that the Sixth Circuit would not liberally apply *Gross* to other anti-discrimination statutes and specifically would not follow the Seventh Circuit's application of *Gross* in the context of the ADA.[153] The *Lewis* majority then abruptly decided that the "motivating factor" standard would be available only under Title VII and not under any other civil rights statutes (and therefore not available to the ADA).[154] In making this decision, the Sixth Circuit contradicted itself when, even after *Gross*, it had already applied the "motivating factor" standard to a civil rights statute, the FMLA.[155]

C. The Inconsistencies in Lewis

The *Lewis* decision was also internally inconsistent. The majority began its opinion by purporting to be true to the mandate laid down in *Gross*: that courts must refrain from applying rules applicable under one statute to a different statute without careful and critical examination.[156] With this caveat, the majority decided that a careful and critical examination revealed that it should not continue to apply the "sole-cause" test, a test previously imported from the Rehabilitation Act, to the ADA.[157] However, the majority then reversed course and shunned the careful and critical examination requirement when it failed to critically examine the ADA and, instead, applied *Gross* in a blanket fashion by assuming that the Supreme Court's analysis of the ADEA completely transferred to the ADA.[158] Rather than carefully analyzing the history, context, or purpose of the ADA, the majority hung its decision on the fact that Title VII was amended by the CRA of 1991 to

150. Hunter v. Valley View Local Sch., 579 F.3d 688, 689 (6th Cir. 2009).

151. *Id.* at 691.

152. *Id.*

153. Sues, *supra* note 148, at 364.

154. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318 (6th Cir. 2012).

155. S*ee* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726–28 (2003) (finding that the FMLA is a valid exercise of Congress's power to enforce the 14th Amendment equal protection clause as it prevents gender based discrimination in the workplace).

156. *Lewis*, 681 F.3d at 316.

157. *Id.* at 317.

158. *Id.* at 329 (Stranch, J., concurring in part and dissenting in part).

include motivating factor language while the ADA, like the ADEA, was not which it assumed was an indication that Congress did not intend the "motivating factor" standard to apply to the ADA.[159] It did not, however, do a careful analysis of the context in which the ADA was adopted and its relationship to Title VII, which would have shown that the ADA did not need to be amended to accomplish this goal.[160]

Furthermore, the majority failed to do a careful analysis of the numerous differences between the ADEA and the ADA before it applied ADEA reasoning to the ADA. Instead the majority said, "[E]very salient argument in favor of importing the 'motivating factor' burden shifting test from Title VII into the 'because of' test of the ADA was made in *Gross*."[161] Using the reasoning of *Gross*—an ADEA case—to preordain the outcome of an ADA case expressly violates the requirement that a careful and critical examination of the statute in question is needed before mapping the causation standard of one statute onto the causation standard of another statute.[162] The majority also discussed the impact of the legislative history on the ADA's causation standard, but ultimately found it unpersuasive because it, "did not alter the outcome in *Gross* with respect to the ADEA, [and thus] it is difficult to see why it would make a difference [in the ADA]."[163] This is a blatant example of the majority blindly applying the Court's reasoning in *Gross* and failing to examine the ADA on its own terms.

Additionally, the majority was inconsistent in its discussion of policy implications. When discussing why the "sole-cause" test should be discarded, the majority noted that Congress may find this standard inconsistent with "a statute designed to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[164] After acknowledging this purpose, the majority then applied a "but for" test. This test is also inconsistent with a desire to eliminate disability discrimination as it places a heavy burden on the plaintiff and allows discrimination to play a role in employment decision so long as it is not the but-for cause.[165] The policy implications of the majority's decision are more fully discussed in Part (D)(5).

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159. *Id.*

160. *Id.* (explaining the importance of considering the timing of the *Price Waterhouse* case, the Civil Rights Act of 1991, and the ADA).

161. *Id.* at 321.

162. *Id.* at 316 (the majority citing the requirement that courts must refrain from applying rules applicable under one statute to a different statute without careful and critical examination).

163. *Id.* at 321.

164. *Id.* at 316 (citing 42 U.S.C. § 12101(b)(1) (2006)).

165. *Id.* at 323 (Clay, J., concurring in part and dissenting in part).

D. The Lewis *Decision Was Not Mandated by* Gross

For the numerous reasons discussed below, the *Lewis* decision was not mandated by Supreme Court precedent. Part 1 will discuss a foundational error which infected the *Lewis* majority's interpretation of Supreme Court precedent; Part 2 will discuss the impact of the ADA's cross-references to Title VII; Part 3 will discuss the significance of the timing of the ADA's enactment; Part 4 will argue that the *Lewis* decision is contrary to clear legislative intent; and Part 5 will make a policy-based argument.

1. The Foundational Error of *Lewis*

The majority built its decision on an unsound foundation when it argued that *Price Waterhouse* and the subsequent legal history, including the CRA of 1991, could only be interpreted two ways: 1) the CRA of 1991 codified *Price Waterhouse* and "because of" always means a "motivating factor" standard applies, or 2) a "motivating factor" standard applies to Title VII only and to no other civil rights statutes.[166] With this false dichotomy in place, the majority, drawing from *Gross*, found that the second theory was correct and that Congress intended to provide a "motivating factor" standard to Title VII claimants, but not to claimants under other civil rights statutes.[167] With this framework infecting the majority's entire analysis, the erroneous outcome that a "motivating factor" standard does not apply to the ADA (a civil rights statute) is a foregone conclusion.[168] So why is this dichotomy wrong? The first view is too simplistic. Congress did not simply codify *Price Waterhouse* through the CRA of 1991; rather, it departed from *Price Waterhouse* in a key way by allowing liability to be established based simply on proof that an impermissible consideration was a motivating factor even when the employer was able to prove the same decision would have been made absent the impermissible consideration.[169] But the second view, the idea that the CRA of 1991 was meant to completely nullify the applicability of the *Price Waterhouse* burden shifting, is also wrong.[170] Again, instead of doing a careful analysis of the ADA as required by the Supreme Court, the majority in *Lewis* supported it position by arguing that it was mandated

166. *Id.* at 318.

167. *Id.* at 327 (Stranch, J., concurring in part and dissenting in part).

168. *Id.*

169. *Id.* at 334 (Donald, J., concurring in part and dissenting in part).

170. *Id.*

by *Gross*, a case involving a totally different statute.[171] The conclusion that a "motivating factor" framework no longer applies to other civil rights statutes is especially odd when the Sixth Circuit itself, post *Gross*, has held that a "motivating factor" standard applies in the context of the FMLA, itself a civil rights statute.[172] The fact that the CRA of 1991 was not meant to nullify the applicability of a "motivating factor" standard to other anti-discrimination states, and the ADA in particular, is rooted in the text of the ADA, the context in which the ADA was adopted, and the statute's legislative history.

2. The ADA's Cross-reference to Title VII

A major tenet of the majority's position was that, through the CRA of 1991, Congress amended Title VII to include motivating factor language but at the same time neglected to add this language to the ADA.[173] According to the majority, this omission was intentional and should be considered a signal that the "motivating factor" standard does not apply to the ADA.[174] This reasoning is largely drawn from analogous reasoning by the *Gross* Court which made a similar argument regarding the ADEA.[175] However, the majority failed to recognize a major problem with simply copying the reasoning of the *Gross* Court: the ADA, unlike the ADEA, is directly linked to Title VII via cross-references.[176] Here, the ADA's incorporation of Title VII's causation standard through express cross-references makes explicit amendment to the ADA unnecessary.[177] Through the ADA's cross-references, Title VII's remedies apply to the ADA with equal force and validity.[178] The ADA does not include its own enforcement provisions but rather incorporates those of Title VII through the following language in section 12117(a):

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the [EEOC], to the Attorney General, or to any person alleging discrimination on the basis of disability.[179]

171. *Id.* at 318.

172. Hunter v. Valley View Local Sch., 579 F.3d 688, 691 (6th Cir. 2009).

173. *Lewis*, 681 F.3d at 318.

174. *Id.*

175. *Id.* (citing Gross v. FBL Financial Servs. Inc., 557 U.S. 167, 174 (2009)).

176. *Id.* at 324 (Clay, J., concurring in part, dissenting in part).

177. *Id.* at 322.

178. *Id.*

179. 42 U.S.C. § 12117(a) (2006).

Of the provisions referenced above, only 2000e-5 is truly an enforcement provision.[180] The relevant part of this provision, 2000e-5(g)(2)(B), holds:

> (B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title;[181]

And finally, 2000e-2(m) holds that:

> Except as otherwise provided in this title, 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.[182]

After considering the relevant provisions above, the majority made two arguments. First, the majority argued that the "motivating factor" standard from Title VII does not apply to the ADA because it is actually embodied in 2000e-2(m), a provision that the ADA does not explicitly cross-reference.[183] The majority next argued that the motivating factor framework laid out in 2000e-5(g)(2)(B), a provision that is cross-referenced in the ADA, does not actually apply to ADA claimants because it starts by stating, "On a claim in which an individual proves a violation under section 2000e-2(m)."[184] Thus, the majority argued, this does not apply to ADA claimants because 2000e-2(m) is a provision that applies to Title VII claimants and discrimination based on race, color, religion, sex, or national origin, not a disability.[185]

The majority's argument that the "motivating factor" standard does not apply to the ADA because section 2000e-2(m) of Title VII is not directly cross-referenced in the ADA is dishonest. Clearly 2000e-2(m) would not be directly referenced in the ADA's enforcement provision as it, in fact, is not an enforcement provision at all (it simply defines illegal

180. *Lewis*, 681 F.3d at 339 (Donald, J., concurring in part and dissenting in part) (explaining that 2000e-4 discusses the powers of Equal Employment Opportunity Commission, 2000e-6 discusses the procedures for civil actions brought by the Attorney General, 2000e-8 discusses investigations, and 2000e-9 discusses hearings and investigations).

181. 42 U.S.C. § 2000e-5(g)(2) (2009).

182. 42 U.S.C. § 2000e-2(m) (2006).

183. *Lewis*, 681 F.3d at 320.

184. *Id.* at 320–21.

185. *Id.* at 320.

conduct) and reference to it as an enforcement provision would be nonsensical.[186] And while 2000e-2(m) is not referenced specifically in the ADA, it is referenced (twice) in the 2000e-5, a section that is directly cross-referenced in the ADA.[187]

Next, the majority's argument that 2000e-5's motivating factor language is inapplicable to ADA claimants because it first requires a violation of 2000e-2(m), which refers only to race, color, religion, sex, and national origin, is facially absurd. 2000e-2(m) refers only to these forms of discrimination because these are the forms of discrimination addressed in the statute in which it is found. If 2000e-2(m) had been expressly incorporated in the ADA, would it still be available to an ADA claimant only if the claimant could also prove racial or gender discrimination in addition to disability based discrimination? Of course not. Additionally, if the majority was really willing to follow this extremely literal logic, then it should have been prepared to find the entire ADA unenforceable. Section 12117 of the ADA says, "The powers . . . set forth in . . . 2000e-5 [of Title VII] . . . shall be the powers . . . of the Commission."[188] Then 2000e-5 says, "The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in [2000e-2 or 2000e-3] of this title."[189] By the majority's logic, because 2000e-2 and 2000e-3 are not expressly incorporated into the ADA and refer only to discrimination based on race, color, religion, sex and national origin, then the Commission has no power at all in relation to the ADA. Of course, the majority would likely not extend their logic to reach this absurd result, but it shows the error in the majority's overly literal reasoning.

Failure to allow liability under the "motivating factor" standard in section 2000e-5(g)(2)(B) of Title VII would be to cross-reference remedies for a claim which could not be established.[190] It is more than reasonable to assume that by referencing these provisions in the ADA, Congress intended to make these remedies available to ADA claimants.[191] Ultimately, Congress's failure to specifically amend the ADA to include motivating factor language is of no consequence. The ADA itself did not need to be amended as the ADA's cross-references to Title VII ensured that any amendments to Title VII's causation standard,

186. *See* 42 U.S.C. § 2000e-2(m) (2006).

187. 42 U.S.C. § 2000e-5(g)(2)(B) (2009).

188. 42 U.S.C. § 12117(a) (2006).

189. 42 U.S.C. § 2000e-5(a) (2009).

190. *Lewis*, 681 F.3d at 320 (holding that no ADA plaintiffs will prevail under 2000e-2(m) and thus remedies under 2000e-5(g)(2)(B) cannot be achieved).

191. *Id.* at 340 (Donald, J., concurring in part and dissenting in part).

including the amendments in the CRA of 1991, would also apply to the ADA.[192]

3. The Timing of the ADA, *Price Waterhouse* and the CRA of 1991

The timing of the ADA's enactment is crucial to the understanding of its meaning. When the *Price Waterhouse* decision was handed down in 1989, the Supreme Court decided that "because of" in the context of Title VII included a burden shifting framework in which, if the employee showed that an impermissible consideration was a motivating factor in an adverse decision, the employer was required to show the same decision would have been made absent this impermissible consideration.[193] The ADA was then adopted just one year later at a time when Congress was fully aware of the contemporary interpretation of "because of."[194] The logical conclusion is that when Congress used the term "because of" in the ADA, it expected it to be interpreted in conformity with the term's understanding at that time.[195] As "because of" at the time of the ADA's enactment was understood to incorporate a motivating factor/ burden shifting framework, the same standard would apply to the ADA.[196] And, as discussed above, the ADA's cross-reference to Title VII ensured that the amendments made to the *Price Waterhouse* definition of "because of" would also apply to the ADA.[197]

The context of the ADA's enactment stands in sharp contrast to that of the ADEA. The ADEA was adopted in 1967, well before *Price Waterhouse's* definition of "because of." This is a major difference between the ADEA and the ADA and is yet another reason that the majority's reliance on *Gross*, without a careful examination of the ADA on its own, is misguided.[198] While it may have been reasonable for the *Gross* Court to believe that failure to amend the ADEA, which does not cross-reference Title VII and was not adopted when "because of" was understood to include a "motivating factor" standard, meant that Congress did not intend for a "motivating factor" standard to apply to the ADEA, the same cannot be said for the ADA. At the time the CRA

192. *Id.*

193. Price Waterhouse v. Hopkins, 490 U.S. 228, 261 (1989) (O'Connor, J., concurring).

194. *Lewis*, 681 F. 3d at 326 (Stranch, J., concurring in part and dissenting in part).

195. N. Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them.").

196. *Lewis*, 681 F. 3d at 326 (Stranch, J., concurring in part and dissenting in part).

197. *Id.* at 322 (Clay, J., concurring in part and dissenting in part).

198. *Id.* at 329 (Stranch, J., concurring in part and dissenting in part) (ignoring that context and declaring blanket applicability of Gross, the majority assumes that the Supreme Court's ADEA statutory analysis simply transfers to the ADA).

of 1991 was adopted, "because of" in the ADA was seen as consistent with *Price Waterhouse* and contained an express cross-reference to Title VII.[199] The fact that the ADA was not amended does not indicate that Congress intended ADA claims to be treated differently from Title VII claims; rather it meant just the opposite—that Congress was indicating its willingness to continue the existing system of treating ADA claims consistently with Title VII claims. Had this not been the case, Congress would have amended the ADA to make this change clear.

4. The Legislative History of the ADA

A tenet of statutory construction is that courts are obliged to interpret a law consistent with clear legislative intent.[200] The *Lewis* majority shirked this obligation by ignoring a mass of legislative history indicating that Congress intended the ADA to be interpreted consistent with Title VII and thus be governed by a "motivating factor" standard.[201] A 1990 House Report on the ADA noted, "Because of the cross-reference to Title VII [in the ADA], any amendments to Title VII . . . would be fully applicable to the ADA."[202] This is direct evidence that the amendments made to Title VII via the CRA of 1991, which provided for a "motivating factor" standard, were intended to apply to the ADA. The majority countered this piece of legislative history simply by saying that it disagreed with the idea that the ADA is cross-referenced to Title VII in a way that requires the Title VII causation standard to be applied to the ADA.[203] What the majority failed to realize was that it was not its prerogative to interpret a statute in a way that is clearly at odds with legislative intent. This same report further emphasized the congressional intent to make the remedies and protections available to Title VII claimants also available to ADA claimants when it said:

> An amendment was offered . . . that would have removed the cross-reference to Title VII and would have substituted the actual words of the cross-referenced sections. This amendment was an attempt to freeze the current Title VII remedies in the ADA. This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women. *By retaining the cross-reference to Title VII, the Committee's intent is that the remedies of Title VII, currently and as*

199. *Id.*
200. *Id.* at 331.
201. *Id.*
202. H.R. REP. NO. 101-485(III), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471.
203. *Lewis*, 681 F.3d at 320.

amended in the future, will be applicable to persons with disabilities.[204]

If further evidence of congressional intent was needed, the 1990 House Report also states, "[I]f the powers, remedies and procedures change in Title VII, they will change identically under the ADA for persons with disabilities."[205] Clearly, Congress intended for the ADA to have remedies that were identical to those enumerated in Title VII. The *Lewis* majority limited the remedies available to an ADA claimant, as compared to a Title VII claimant, by eschewing the "motivating factor" standard and requiring but-for causation.[206]

It is also worth noting that while the majority's heavy focus on the words "because of" is understandable, Congress likely did not intend for these words to carry an extreme amount of weight.[207] It must be remembered that the ADA was adopted in the wake of *Price Waterhouse*, a plurality decision that clearly established a motivating-factor/burden-shifting framework but failed to come to an exact consensus on what "because of" meant.[208] The fact that Congress nevertheless retained this language is an indication that it is not the definition of the term but the associated procedures that matter.[209] Furthermore, had Congress intended the words "because of" to carry such great weight and establish but-for causation, why would they have amended the ADA in 2008 to replace the term "because of" with "on the basis of"?[210] The purpose of the amendment was not to help clarify "because of" (this was pre-*Gross* when there was a consensus among the circuits on the meaning); rather, the amendment was made for a totally unrelated purpose and replacing "because of" with "on the basis of" seems to have been simply an innocuous word choice.[211] Had "because of" been intended to carry so much weight and to be used as the determinative causation standard, it is unlikely that Congress would have haphazardly discarded the phrase in the 2008 amendment.

5. Policy Considerations

Beyond the legal arguments for adopting a "motivating factor"

204. H.R. REP. NO. 101-485 (III) at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471 (emphasis added).

205. *Id.*

206. *Lewis*, 681 F.3d at 331 (Stranch, J., concurring in part and dissenting in part).

207. *Id.* at 315 (stating that no matter the common history and shared goals of the two laws, they do not share the same text. Different words usually convey different meanings).

208. *Id.* at 333 (Donald, J., concurring in part and dissenting in part).

209. *Id.*

210. ADA Amendments Act of 2008. Pub. L. No. 110-325, § 5, 122 Stat. 3553, 3557 (2008).

211. *See* ADA Amendments Act of 2008 § (2)(a)–(b) (listing the findings and purposes associated with amending the ADA, none of which relating to the clarification of the causation standard).

standard, there are also strong policy reasons to adopt this standard. When taking into the account the stated purpose of the ADA, the elimination of disability based discrimination, it becomes clear that a "motivating factor" standard is much more compatible with the goals of the ADA than a "but for" test.[212] A "but for" test does not advocate for a complete elimination of disability discrimination; rather, it affirmatively allows some amount of discrimination so long as the employer has other legitimate reasons for making the adverse employment decision. Instead of conveying that discrimination in any amount is unacceptable, a "but for" test sends the message to employers that a little disability based discrimination is acceptable, so long as they have additional "good" reasons to fire the disabled employee.[213] Allowing any discrimination is at odds with the ADA's stated purpose: "to provide a clear and comprehensive national mandate for the elimination of discrimination" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" by reinstating a broad scope of protection.[214] Clearly, a "but for" standard is out of touch with the goals of the ADA and the intent of Congress.

Beyond the undesirable message conveyed by a "but for" test, this standard is also practically burdensome for ADA claimants. The "but for" standard requires that the plaintiff prove that without his/her disability, other negative but non-discriminatory factors would not have been enough for the employer to make the same adverse decision.[215] This requires that the employee discover objective evidence of the employer's state of mind and be able to show the employer's internal motivations.[216] In other words, the employee is burdened with the unreasonable task of identifying the precise causal role play by the legitimate and illegitimate motivations. In practice, an employee will rarely be able to discover such objective evidence or prove what role different motivations played in the employer's decision, leaving the employer free to offer a parade of pretextual justifications for the decision.[217] The "motivating factor" standard set out in Title VII more appropriately shifts the burden to the employer, who has better access to the information used in making the decision, to show that the same

212. *Lewis*, 681 F.3d at 324.

213. H.R. REP. NO. 102-40(I), at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585 (amending *Price Waterhouse* because [the but-for aspects of its holding] sent a message that a little overt, sexism or racism is okay, as long as it was not the only basis for the employer's action).

214. 42 U.S.C. § 12101(b)(1)–(2) (2009).

215. *Lewis*, 681 F.3d at 323.

216. *Id.*

217. *Id.*

decision would have been made absent the impermissible consideration.[218] And even if this is shown, it conveys that any disability based discrimination, no matter how small, is impressible by imposing limited liability any time discriminatory motivations play a role in an adverse employment decision.[219]

V. CONCLUSION

For all of the reasons outlined above, the *Lewis* majority applied the incorrect causation standard to the ADA. The unfortunate reality is that other circuits have already followed this decision, which itself followed the Seventh Circuit.[220] Continuing this current trend can only work to the detriment of ADA claimants and disabled persons in general. Fortunately, the ADA's causation standard is far from being finally decided, and there is still hope that the situation can be remedied. With the circuits trending toward a "but for" causation standard, the Supreme Court may not grant certiorari on the issue, and thus, going forward, reliance on the Supreme Court to correct this error may not be advisable.[221] There is currently legislation pending in Congress which responds to *Gross* by amending both the ADEA and the ADA to include a "motivating factor" standard.[222] Unfortunately, this legislation has previously stalled in Congress and it is not considered likely to be enacted.[223] One possible solution to this issue may be found in the 2008 amendments to the ADA. Although most courts have considered the change inconsequential for purposes of the causation standard, the fact that "because of" in the ADA has been amended to read "on the basis of" could be a way for future courts to distinguish *Lewis* which interpreted the pre-amendment version of the ADA.

Ultimately, the *Lewis* decision is at odds with prior precedent, is internally inconsistent, is not mandated by the Supreme Court, is contrary to congressional intent, and runs counter to persuasive policy considerations. Accordingly, in order to mitigate the damage caused by this decision, it should be invalidated by congressional legislation and its reasoning should not be followed by other courts in the future.

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218. 42 U.S.C. § 2000e-5(g)(2)(B) (2009).

219. *Id.*

220. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d. 957, 962 (7th Cir. 2010); *see also* Palmquist v. Shinseki, 689 F.3d 66 (1st Cir. 2012).

221. 23-510 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE—CIVIL § 510.21 (3d ed. 2010) (describing how the existence of a conflict among circuits has historically been one of the most frequent reasons to grant certiorari).

222. *See* Protecting Older Works Against Discrimination Act, S. 2189, 112th Cong. (2012).

223. *See* S. 1756, 111th Cong. (2009).