Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation under the ADA

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By Cheryl L. Anderson

Abstract: Causation continues to be one of the most confounding issues in antidiscrimination law. Despite having rejected the position over two decades ago in Price Waterhouse v. Hopkins, the Court in Gross v. FBL Financial Services, Inc., recently asserted that the “ordinary default rule” in disparate treatment claims requires a plaintiff to prove but-for causation when a statute prohibits discrimination “because of” a protected characteristic. Gross threw disparate treatment law into disarray. Title VII has been statutorily modified to require only proof of motivating factor causation before the burden of proof shifts to the employer to show it would have made the same decision without consideration of the improper factor, but after Gross, other statutes not so modified do not permit any such burden shift. But-for causation is required under those statutes even if the plaintiff can prove by a preponderance that the employer’s actions were based at least in part on an improper motive. While Congress may legislatively restore uniformity to causation standards in disparate treatment law, this would not eliminate all the ramifications of Gross’ supposed default rule of causation.

Some of those ramifications impact the ADA. Courts have been struggling with similar causation issues in ADA reasonable accommodation cases. They tend to borrow causation standards from other anti-discrimination statutes, and elements of “but-for” causation are already present in some aspects of ADA analysis. While the Court in US Airways v. Barnett refused to adopt a but-for standard in that accommodation claim, Gross’s surprising re-interpretation of Price-Waterhouse at least hints that Barnett may be vulnerable to a similarly limited read. The accommodation of reassignment to a vacant position may be the most vulnerable to a Gross-like revision of the law. This article examines causation in ADA reasonable accommodation law and argues that but-for causation should not be permitted to creep into accommodation analysis in a way that diverts from the statute’s main consideration, namely whether a plaintiff with a known physical or mental limitation has been denied reasonable accommodation of that limitation by an employer who cannot establish undue hardship.

TABLE OF CONTENTS

I. Introduction ............................................................................................................................................. 2
II. Causation Standards under Price Waterhouse and the Civil Rights Act of 1991 ..................... 11
III. Gross v. FBL Financial’s Impact on Uniformity........................................................ 16
IV. Mixed Motive Claims under the ADA? ................................................................................... 25
    a. The ADA of 1990 Contemplated Mixed-Motive Claims .................................................... 26
    b. Protecting Older Workers against Discrimination Act ...................................................... 34
V. Causation and Reasonable Accommodation......................................................................................... 37
    a. Causation as a Prima Facie Element of Title I Accommodation Claims......................... 38
I. Introduction

At the heart of all anti-discrimination law lies the issue of causation. The plaintiff must prove that an adverse action occurred “because of” a protected characteristic, such as race, sex, age, or disability.\(^1\) After the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, the law seemed fairly established that discrimination claims involving a mixture of legitimate and illegitimate motives generally required something less than prima facie proof of “but-for” causation in order to shift the burden to the employer.\(^2\) The Supreme Court altered this landscape with its decision in *Gross v. FBL Financial Services, Inc.*, concluding that when a statute requires discrimination “because of” a protected characteristic, the “ordinary default rule” is that the plaintiff must indeed show that “but-for” the protected characteristic, the employer would not have taken the adverse action.\(^3\) No burden of proof shifts to the employer.\(^4\)

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\(^3\) *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2351 (2009).

\(^4\) *Id.* at 2352.
The result of *Gross* has been to create disparate standards of causation among related federal anti-discrimination statutes.\(^5\) The Court had previously suggested that statutes such as Title VII of the Civil Rights Act of 1964,\(^6\) the Age Discrimination in Employment Act (ADEA),\(^7\) and the Americans with Disabilities Act (ADA)\(^8\) should be construed in a similar fashion when Congress used similar language in each statute.\(^9\) Each of these statutes had similar causation language in their basic prohibition: discrimination must be “because of” a protected characteristic.\(^10\) Title VII was unaffected by *Gross*, however, because the Civil Rights Act of 1991 amended that statute to make clear that it is governed by the “motivating factor” causation standard, which allows the burden-shifting on something less that proof of strict but-for causation.\(^11\) The ADEA, by contrast, has no further definition of its causation standard and is

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\(^9\) See Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005) (quoting Northcross v. Bd. of Ed. of Memphis City Schs., 412 U.S. 427, 428 (1973) (per curiam)). (reasoning in ADEA case that the Court “begin[s] with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes”); see also Bragdon v. Abbott, 524 U.S. 624, 626 (1998) (finding that “when administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, Congress' intent to incorporate such interpretations as well”).


\(^11\) See Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006) (providing that violation of the Act is established when plaintiff demonstrates prohibited characteristic was a “motivating factor” in adverse decision); *Id.* at §
governed by Gross’ but-for causation standard.\textsuperscript{12} Any other federal civil rights law premised on showing an action taken “because of” a prohibited reason, which would include the ADA, would seemingly also be subject to the “ordinary default rule” of but-for causation.\textsuperscript{13} The parameters of this “but-for” standard are unclear, with some suggesting it will require proof of sole causation.\textsuperscript{14}

In reaction to Gross, sponsors in both houses of Congress introduced a statute entitled the Protection of Older Workers against Discrimination Act (POWADA).\textsuperscript{15} POWADA would have reversed Gross and established a new default rule, namely that unless Congress indicates otherwise, “because of” causation requires only proof that a prohibited factor was a motivating factor in the defendant’s decision.\textsuperscript{16} POWADA explicitly provided that it would extend to any claims for intentional discrimination under any federal statute using the “because of” standard.\textsuperscript{17}

The net effect of POWADA would have been to bring the law back to the state of unity on

\begin{itemize}
\item \textsuperscript{12} See Gross, 129 S.Ct. at 2351.
\item \textsuperscript{13} See Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010) (in ADA case, reading Gross as “suggest[ing] that when another anti-discrimination statute lacks comparable language [to Title VII’s motivating factor provisions], a mixed-motive claim will not be viable under that statute”); see also Katz, supra n. 5, at 859 (noting that “Gross’s reasoning suggests that the Court is likely to apply this . . . . standard to all employment discrimination statutes other than the part of Title VII that was amended by the Civil Rights Act of 1991”).
\item \textsuperscript{15} H.R. 3721, 111th Cong. § 1 (2009); S. 1756, 111th Cong. § 1 (2009).
\item \textsuperscript{16} H.R. 3721, at § 3 (g)(1)(A); S. 1756 at § 3 (g)(1)(A).
\item \textsuperscript{17} H.R. 3721 at § 3 (g)(5)(B); S. 1756 at § 3 (g)(5)(B).
\end{itemize}
mixed-motive claims many assumed had existed prior to *Gross.*\(^{18}\) Despite having a substantial amount of support, POWADA did not make it out of subcommittee, perhaps a victim of the 2010 mid-term election.\(^{19}\)

Commentators have made several arguments why unification of causation standards within discrimination law is important to efficient and even-handed application of the law.\(^{20}\) For the ADA, unity plays an additional role. Courts have been slow to embrace disability as a matter of civil rights, instead taking more of a welfare benefits approach to interpreting the rights granted under the Act.\(^{21}\) The ADA’s protected class was construed extremely narrowly by the Supreme Court in several employment discrimination cases, on the premise that Congress intended to reach only a select group of individuals as having qualifying disabilities.\(^{22}\) Congress passed the ADA Amendments Act of 2008 (ADAAA) to overturn that narrow interpretation.\(^{23}\)


\(^{19}\) In the House of Representatives, POWADA had one sponsor and 45 co-sponsors when it was referred to Committee, and likewise one sponsor and 24 co-sponsors in the Senate. *See* H.R. 3721: Protecting Older Workers Against Discrimination Act: 111th Cong. (2009), http://www.govtrack.us/congress/bill.xpd?bill=h111-3721SH.R. 3721; *see also* S. 1756: Protecting Older Workers Against Discrimination Act, 111th Cong. (2009), http://www.govtrack.us/congress/bill.xpd?bill=h111-3721.

\(^{20}\) See Katz, *supra* n. 5, at 867-68; *see also infra* n. ___ and accompanying text.

\(^{21}\) See Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 193 (2010) (noting that “[m]any cases suggest that courts tend to view the ADA through the framework of welfare benefits rather than the framework of civil rights”).

\(^{22}\) See Toyota Motor Mfg., KY., Inc. v. Williams, 534 U.S. 184 (2002) (asserting that the definition of disability must be “interpreted strictly to create a demanding standard for qualifying as disabled”); Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999) (concluding that corrective measures such as medications must be considered when determining whether an individual’s impairment substantially limits a major life activity).

Congress also amended the basic causation language in Title I of the statute, changing “because of” to “based on” disability, and the legislative history indicates the rationale for this was “to mirror the structure of nondiscrimination protection provision [sic] in Title VII of the Civil Rights Act of 1964.” In general, it enhances the ADA as an effective rights-protecting statute for it to be understood as imposing standards similar to Title VII.

But there may be pitfalls to unifying disability discrimination standards with other antidiscrimination laws. Courts may fail to make important distinctions between the ADA and statutes like Title VII. Specifically, Gross may lay the groundwork for a renewed effort to inject additional causation elements into the ADA’s unique reasonable accommodation mandate. A majority of the Court seemingly rejected doing so in US Airways v. Barnett, refusing to adopt Justice Scalia’s arguments that plaintiffs should have to show but-for their disability, they would not have been denied the requested accommodation. Gross demonstrates, however, that no precedent is necessarily safe, especially if there is a backdoor through which those with countervailing views can slip. A statute like POWADA would not on its face preclude this...

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24 *Id.* at 3557 § 5(a)(1) (codified at 42 U.S.C. § 12112(a) (Supp. III 2009)).
26 See Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 863 (2004) (asserting that “if the ADA is understood as lying outside of our society’s ongoing antidiscrimination project, the Act may be deprived of the moral authority that antidiscrimination laws (while not wholly uncontroversial) tend to enjoy” (footnote omitted)).
27 See *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 398 (2002) (rejecting argument accommodations that amount to preferences are not required under the ADA). Justice Scalia would have dismissed the plaintiff’s claims because he failed to show that he was excluded from the job in question because of a “disability-related obstacle” that would not have been an obstacle “but-for” his disability. *See id.* at 413 (Scalia, J., dissenting).
backdoor reversal from occurring, and there are already cases where causation issues have predominated over reasonable accommodation analysis.28

I have previously written about how causation has been misapplied to require plaintiffs establish a causal relationship between the major life activity they allege to have been substantially limited as part of their proof of a covered disability and the reasonable accommodation they seek.29 The ADA in fact has no such requirement, instead requiring employers to accommodate the “known physical or mental limitations” of the covered plaintiff.30 While this misread of the statute might be mitigated under the ADAAA because plaintiffs no longer have to stretch to find a major life activity they can prove is substantially limited,31 it nonetheless demonstrates the traditional notions of causation some courts insist on inserting into ADA accommodation analysis.

In the post-Gross regime, causation could similarly creep into another aspect of reasonable accommodation analysis—as a requirement that plaintiffs show their disability is a but-for cause of their need for the accommodation. There is case law rejecting ADA Title I employment claims because the plaintiffs could not show they needed the requested

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28 Infra cite
30 See 42 U.S.C. § 12112(b)(5)(A) (2006) (defining “discriminate” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . .”).
31 See Stephen F. Befort, Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability, 4 UTAH L. REV. 993, 1016 (2010) (noting that after ADAAA, “some individuals will be able to establish coverage under the Act without describing the activities in which they are limited so long as they have a serious medical condition that results in a substantial limitation on a major bodily function”).
accommodations in order to do their job.\textsuperscript{32} The but-for test could go a step further and require plaintiffs to show their disability is the but-for reason the accommodation itself is necessary.

Although not directly the issue decided in \textit{Gross}, such a rule may be a fairly simple extension of \textit{Gross}'s understanding of the default rules of causation. At least in the Seventh Circuit, a similar “but-for” standard has already crept into ADA Title II analysis.\textsuperscript{33} That circuit requires Title II plaintiffs establish that their need for accommodation is based on something that is not a characteristic shared with the general public.\textsuperscript{34} The leap from Title II to Title I for applying such a standard may not be too large.\textsuperscript{35}

Why might courts make this leap? As has been extensively discussed in the literature, reasonable accommodation law has an uneasy fit into our understanding of discrimination law.\textsuperscript{36} Reasonable accommodation claims do not require proof of intent to discriminate.\textsuperscript{37} They also do

\textsuperscript{32} See, e.g., Nichols v. Unison Indus., Inc., No. 99-C-50194, 2001 WL 849528, at *8 (N.D. Ill. July 24, 2001) (dismissing ADA claim because plaintiff failed to show that he needed the requested accommodation in order to be able to perform his job).

\textsuperscript{33} Title II prohibits disability discrimination in the services, programs and activities of public entities. See 42 U.S.C. § 12132 (2006).

\textsuperscript{34} See Wisc. Cnty. Servs., Inc., v. City of Milwaukee, 465 F.3d 737, 754 (7th Cir. 2006).

\textsuperscript{35} As discussed in Part IV(C) \textit{infra}, the Seventh Circuit’s Title II analysis mirrors that urged by Justice Scalia in his \textit{Barnett }dissent.

\textsuperscript{36} See, e.g., Crossley, \textit{supra} n. 26, at 867-75 (summarizing the literature asserting distinctions between the ADA and other civil rights statutes based on the accommodation mandate); Michael Ashley Stein, \textit{Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination}, 153 U. PA. L. REV. 579, 631 (2004) (describing the Supreme Court’s ADA rulings as reflecting justices who “subscribe to the notion that disability-based rights differ in kind from more traditional civil rights, are contingent on humanitarian concerns rather than equality, and are thus subject to the availability of competing resources”).

\textsuperscript{37} See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (noting that “any failure to provide reasonable accommodations for a disability is necessarily ‘because of a disability’—the accommodations are only deemed reasonable (and, thus, required) if they are needed because of the disability-and no proof of a particularized discriminatory animus is exigible”).
not require proof of an adverse effect on an entire group of individuals. Court have shown themselves uneasy about interpreting the law in a way that appears to give preference to a particular individual. This unease has been especially apparent in circumstances when an employee with a disability seeks reassignment to a vacant position as a reasonable accommodation and the employer asserts another employee is entitled to or more qualified for that position. Focusing on causation may mitigate that unease, because it seems to distinguish between those whose disadvantage is related to their disability and those who will receive an unfair advantage over others.

In general, the Gross but-for standard eases courts’ concerns about discrimination claims because it requires plaintiffs to carry the burden of proof throughout the process of proving discrimination. That stands in contrast to the statutory provisions setting out the ADA’s reasonable accommodation mandate, which requires plaintiffs establish only that an accommodation is reasonable and then shifts the burden to employers to prove the accommodation poses an undue hardship on the business. It has been suggested that Gross is

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39 See EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000) (finding that, “the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it’s the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant”); see also Huber v. Wal-Mart Stores, 486 F.3d 480, 483 (8th Cir. 2007) (favorably citing the Seventh Circuit’s reasoning in Humiston-Keeling).
41 This is an example of the so-called “windfall doctrine.” See Anderson, supra n. 29, at 327 (describing courts’ concerns about awarding windfalls to undeserving plaintiffs as a basis for denying reasonable accommodations to individuals who proceed under the “regarded as” prong of the definition of disability).
the product of a Court majority hostile to imposing burdens on the employer, perhaps out of fear that doing so will make it too easy for undeserving plaintiffs to prevail. Thus, *Gross* insists that the risk of sorting out whether discrimination was in fact the reason for an action rests firmly with the plaintiff. The Court could apply a similar construct to accommodation claims and do an end run around the undue hardship burden-shift: The plaintiff could be required to show that what she seeks is indeed related to her disability in a way that distinguishes her limitations from the barriers faced by the general public. Otherwise, much as the “motivating factor” standard in a mixed-motive claim is (arguably) overbroad in finding discrimination when legitimate factors predominate, the reasonable accommodation standard would be (arguably) overbroad in providing accommodations to individuals not actually burdened by their disability but by the same burdens everyone else faces. As this article will demonstrate, however, that reasoning misconstrues the reasonable accommodation mandate.

If there is a renewed legislative move toward causation unification, the less obvious consequence of *Gross* for reasonable accommodation claims should be addressed. This article will examine how but-for causation may creep into reasonable accommodation analysis and why that would be wrong. Part I sets out what “because of” causation meant prior to the Court’s decision in *Gross*, and the extent to which courts adopted uniform causation standards across various federal anti-discrimination statutes. Part II addresses *Gross*’ impact on that uniformity. One result of *Gross* was to create disunity in disparate treatment law between Title VII and other antidiscrimination statutes, but another result was that we now have a default rule the Court has indicated it will apply to causation unless explicitly told otherwise by Congress. This different locus of unity may have consequences beyond the disparate treatment context. Part III then

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43 *See* Katz, *supra* n. 5, at 878-80.
briefly examines the legislative history of the Act, which contains direct evidence Congress contemplated liability under the ADA without requiring plaintiffs to prove but-for causation when it eliminated the Rehabilitation Act’s requirement that discrimination be “solely” because of disability. This section also examines how proposed legislation like the Protecting Older Workers against Discrimination Act would restore the uniformity in disparate treatment law undone by *Gross*, including its application to ADA mixed motive claims, but would not go far enough to address all the tentacles put out by that decision.

Part IV demonstrates the consequences of those tentacles reaching reasonable accommodation law. This part first shows how causation analysis in ADA Title I reasonable accommodation cases diverts courts away from proper consideration of the essential functions of a job and the reasonableness of a requested accommodation. This part next examines Justice Scalia’s dissent in *Barnett*, which advocates for applying the but-for standard to accommodation claims. It then turns to ADA Title II cases applying what they call a “necessity- causality standard,” which is in essence a but-for requirement similar to Justice Scalia’s. A similar causation requirement might creep into Title I analysis. Finally, Part V examines one particular issue that may be ripe for erroneous application of a but-for standard: reassignment to a vacant position.

II. **Causation Standards under *Price Waterhouse* and the Civil Rights Act of 1991**

As has been demonstrated by a number of commentators, intent to discriminate is proven under Title VII and related anti-discrimination laws not by a showing of hostile animus toward a protected characteristic, but by proving a causal link between an adverse action taken against the
plaintiff and the protected characteristic. This link establishes that the action was “because of” the protected characteristic. Congress used similar “because of” language across several federal anti-discrimination laws, including Title VII, the ADEA, and the ADA. The Supreme Court has generally found that this similarity indicates Congress’ intent these statutes be construed in a similar fashion. Thus, courts not infrequently look to decisions under one statute to assist it in determining similar issues under another statute. This has been referred to by Professor Jamie Durin Prenkert as “second order uniformity,” or uniformity “in the aggregate” across several statutes. It stands in contrast to first order uniformity, which would be uniformity of interpretation of the disaggregated parts of a particular statute like Title VII.

As Professor Martin Katz demonstrates, the Supreme Court generally followed second order uniformity when interpreting federal anti-discrimination laws at least until the passage of

44 See, e.g., Rebecca Hanner White & Linda Hamilton Krieger, Whose Motive Matters: Discrimination in Multi-Factor Employment Decision Making, 61 L.A. L. REV. 495, 503 (2001) (noting that “the Supreme Court’s disparate treatment decisions, properly construed, would view the motive or intent inquiry not as a search for hostile animus or for adverse effects, but as a search for causation”); Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 294 (noting that "in a case of intentional discrimination, the plaintiff must prove that the defendant treated a member of a protected group . . . differently because of his or her race[,] no additional proof of animus or motive is necessary"); see also Pers. Adm’r v. Feeney, 442 U.S. 256, 279 (1979) (reasoning that decisionmaker must have “selected or reaffirmed a particular course of action at least in part ‘because of,’ and note merely ‘in spite of’ its adverse effects upon an identifiable group”).
45 See Joseph A. Seiner, After Iqbal, 45 WAKE FOREST L. REV. 179, 215 (2010) (stating that in a Title VII claim, “[t]he assertion of discriminatory intent . . . provides the causal link between the employer’s prohibited actions and the characteristics protected by the statute”).
46 See supra n. 9.
47 See id.
48 Jamie Darin Prenkert, The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas’s Longevity and the Mixed-Motive Mess, 45 AM. BUS. L.J. 511, 542 (2008). The term “second order uniformity” was coined by Professor Prenkert to describe uniformity of “disparate treatment law in the aggregate.” Prenkert, supra n. 48, at 518. “First order uniformity” refers to “the disaggregated, constituent . . . parts [of a statute] such as Title VII.” Id.
49 See id. Professor Prenkert suggests, for example, that all disparate treatment claims under Title VII might be unified under the mixed-motive approach. Id. at 518-19.
the Civil Rights Act (CRA) of 1991 and the Court’s subsequent decision in *Gross v. FBL Financial Services, Inc.* 51 In regard to mixed-motive causation, this unity was built largely on two cases, *Mt. Healthy City School District Board of Education v. Doyle,* 52 a First Amendment case, and *Price Waterhouse v. Hopkins,* 53 a Title VII case that looked to *Mt Healthy.*

In *Mt. Healthy,* the Court unanimously determined that a teacher who contacted a local radio station and made comments critical of the school administration met his standard of prima facie causation under the First Amendment by alleging his public comments were a “substantial factor” in the decision not to rehire him. 54 The Court indicated that the school should then have been required to prove it would have made the same decision not to rehire even if it hadn’t considered the radio station incident. 55 Subsequently, in *Price Waterhouse v. Hopkins,* a majority of the Court agreed that mixed-motive claims were similarly viable under Title VII but split on the degree of causation required to prove such claims. 56 The Court analogized to *Mt. Healthy,* suggesting both cases raised “contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits.” 57

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51 See Katz, *supra* n. 5, at 871-73.
54 *Mt. Healthy,* 429 US. at 287.
55 *Id.*
56 *Compare* 490 U.S. at 250 (plaintiff who shows “an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive”) *with id.* at 265-66 (asserting that “[w]here an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial factor* in an adverse employment decision . . . ,” the employer can then be required to prove it would have made the same decision regardless).
57 *Id.* at 248; see also *id.* at 258 (White, J., concurring in judgment) (stating his view that “to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy . . . .*”). The *Price Waterhouse* dissent apparently would have distinguished *Mt
Although the Court in *Price Waterhouse* fractured over what was required to prove an adverse action was “because of” a protected characteristic, a majority of the Court nonetheless agreed it did not require plaintiffs to prove but-for causation in order to meet their prima facie case. Justice Brennan’s plurality opinion noted that Title VII required proof an action was taken “because of” a protected characteristic, not that the actions were taken “solely” because of that characteristic. He thus rejected the assertion the statutory language required proof of “but-for” causation from the plaintiff. Neither Justice O’Connor nor Justice White’s concurring opinions took issue with this narrow point. Instead, the justices debated whether the burden shift was triggered when the plaintiff showed the protected characteristic was a “motivating factor” in the employer’s decision (the plurality’s standard) or when plaintiff presented “direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision” (Justice O’Connor’s standard).

Because of that debate, *Price Waterhouse* left causation in a state of disarray, and subsequently, the lower courts split regarding what was required to support the mixed-motive burden shift. Several circuits adopted O’Connor’s direct evidence approach in Title VII Healthy because it was a First Amendment case, without further explanation. See id. at 289-90. (Kennedy, J., dissenting).

58 *Price Waterhouse*, 490 U.S. at 241. Justice Brennan noted for the plurality that Congress in fact rejected an amendment to Title VII that would have added “solely” to the “because of” standard. Id. at 241. n. 7.

59 Id. at 240.

60 Justice O’Connor “disagreed with the plurality’s dictum that the words “because of” do not mean “but-for” causation” but found the plurality’s approach consistent with hers because “[t]he question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.” Id. at 262-63 (O’Connor, J., concurring in judgment).

61 Id. at 250.

62 Id. at 277 (O’Connor, J., concurring in judgment).

63 See Steven M. Tindall, *Do As She Does, Not As She Says: The Shortcomings of Justice O’Connor’s Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP.
claims and applied it “as if it actually required a plaintiff to present direct evidence in the sense of ‘evidence, which if believed, proves the existence of a fact in issue without inference or presumption.” Some courts extended mixed-motive burden shifting to ADEA claims under either the motivating factor or direct evidence approach, although others refused to recognize mixed-motive claims for the separate reason that the ADEA has a “reasonable factors other than age” defense not available under Title VII.

In the 1991 CRA, Congress resolved one part of the causation issue: it adopted the motivating factor standard in Title VII claims. The 1991 CRA did not, however, address what level of evidence was required to prove that standard, specifically whether direct evidence was

\& LAB. L. 332, 354-355 (1996) (finding that “courts of appeal fall into one of three categories: courts which apply or attempt to apply the traditional definition of direct evidence, those which apply O'Connor's non-standard definition, and those which apply neither, allowing the plaintiff to present any evidence of discrimination to help carry its burden. Each of these three categories requires the plaintiff to meet a different standard of proof. . .”).

Id. at 356 (finding that the First, Fifth, Sixth, and Tenth Circuit Courts of Appeals took the literal direct evidence approach).

See, e.g., E.E.O.C. v. Warfield-Rohr Casket Co., Inc., 364 F.3d 160, 163 (4th Cir. 2004) (finding that one way to establish an ADEA claim was through a “mixed motive” framework of proof, requiring that an employee’s age motive an employer’s adverse decision); Mooney v. Aramco Services Co., 54 F.3d 1207, 1216 (5th Cir. 1995) (noting that “a plaintiff can prove age discrimination in two ways[:] by direct evidence or by an indirect or inferential method of proof”).

See, e.g., Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) (reasoning that the “reasonable factors other than age” defense creates “[a] critical asymmetry in the texts of the ADEA and Title VII [that] counsels convincingly against recognizing a disparate impact cause of action under the former statute”). The First Circuit’s position was subsequently rejected by the Supreme Court. Smith v. City of Jackson, Miss., 544 U.S. 228, 228, (2005) (recognizing disparate impact claims under the ADEA); see also Smith v. Allstate Ins. Co., 195 F. App’x 389, 397, n. 6 (6th Cir. 2006) (recognizing that “the Supreme Court determined last term that the ADEA allows for disparate impact claims, although ‘the scope of disparate-impact liability under ADEA is narrower than under Title VII’ because the ADEA contains a ‘reasonable factors other than age’ defense . . .”).

See 42 U.S.C. § 2000e-2(m) (2006) (providing that violation of the Act is established when plaintiff demonstrates prohibited characteristic was a “motivating factor” in adverse decision).
required or whether circumstantial proof would suffice.\textsuperscript{68} The Court would later resolve this in \textit{Desert Palace, Inc., v. Costa}, holding that direct evidence was not required.\textsuperscript{69} More significant to second order uniformity, the provisions regarding mixed motive in the CRA amended only Title VII. Thus, while courts almost universally recognized mixed-motive claims under the ADEA and applied Justice O’Connor’s direct evidence standard, they also concluded that \textit{Price Waterhouse}’s affirmative defense to liability applied.\textsuperscript{70} The relationship between the 1991 CRA and ADEA claims remained unclear until the Supreme Court granted certiorari in \textit{Gross v. FBL Financial Services}.

\textbf{III. \textit{Gross v. FBL Financial’s} Impact on Uniformity}

The Court granted certiorari in \textit{Gross} on the question of “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction under the [ADEA].”\textsuperscript{71} As Justice Stevens pointed out in his dissent, however, the Court went beyond


\textsuperscript{69} 539 US 90, 92 (2003). Because \textit{Desert Palace} was a Title VII claim, as was \textit{Price Waterhouse}, it remained unclear whether the Court’s holding in \textit{Desert Palace} applied to other antidiscrimination statutes. See, e.g., Sandra F. Sperino, \textit{Recreating Diversity in Employment Law By Debunking the Myth of the McDonnell Douglas Monolith}, 44 HOUS L. REV. 349, 374-375 (2007).

\textsuperscript{70} See, e.g., Baqir v. Principi, 434 F.3d 733, 745 n. 13 (4th Cir. 2006) (noting that “[b]y way of the Civil Rights Act of 1991, Congress eliminated an employer's ability to avoid liability in certain Title VII cases upon proof that it would have taken the same adverse employment action absent a discriminatory motive[, but b]ecause Congress did not similarly amend the ADEA, . . . ADEA mixed-motive cases remain subject to the \textit{Price Waterhouse} analysis”); Harper, \textit{supra} n. 14, at 102 (noting the lower court’s “almost unanimous” embrace of mixed-motive claims applying the direct evidence evidentiary standard).

\textsuperscript{71} 129 S.Ct. at 2346.
this question to determine that mixed-motive burden shifting was not appropriate under the ADEA.\textsuperscript{72}

Although it did not explicitly overrule \textit{Price Waterhouse}, the majority in \textit{Gross} adopted the same “but-for” causation standard argued by the dissent and rejected by the plurality in that case.\textsuperscript{73} Under this but-for standard, there is no burden-shift to the employer regardless of whether the plaintiff showed the protected characteristic was either a motivating or a substantial factor in the adverse employment decision.\textsuperscript{74} The plaintiff retains the burden throughout to prove that but-for consideration of the protected characteristic, the adverse action would not have occurred.\textsuperscript{75} To be clear, \textit{Price Waterhouse’s} formulation ultimately also results in finding but-for causation for liability.\textsuperscript{76} If the jury finds the protected characteristic motivated the employer at least in part and rejects the employer’s argument it would have made the same decision absent consideration of that characteristic, the jury will have found that but-for the improper consideration, the adverse action would not have occurred.\textsuperscript{77} Under the \textit{Gross} formulation, as pointed out by Justice Breyer in his dissent, the difference is who has bears the risk of persuasion.

\textsuperscript{72} Id. at 2353 (Stevens, J., dissenting).
\textsuperscript{73} See 129 S.Ct. at 2353 (Stevens, J., dissenting) (noting that the majority’s but-for standard was advanced in \textit{Price Waterhouse} but rejected).
\textsuperscript{74} See id. at 2352.
\textsuperscript{75} Id.
\textsuperscript{76} William R. Corbett, \textit{Babbling about Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?}, 12 U. Pa. J. Bus. L. 683, 722-23 (2010) (describing “mixed-motive analysis [as] initially employ[ing] a motivating factor standard of causation and then but-for causation when it shifts the burden to the employer on the same-decision defense”). Title VII was subsequently amended to allow for some recovery even after the employer meets its burden of proof. See 42 U.S.C. \S 2000e-5(g)(2)(B) (2006) (permitting an award of declaratory and injunctive relief as well as attorneys fees, but not damages or reinstatement, upon plaintiff proving a violation of \S 2000e-2(m)).
\textsuperscript{77} See \textit{Katz supra} n. 5, at 863 (noting that \textit{Price Waterhouse’s “same decision formulation is a but-for test; it requires the defendant to prove a lack of but-for causation”})
regarding what would have happened in the hypothetical situation that excludes the improper consideration.  

This has led some courts to interpret *Gross* as requiring plaintiffs to show sole causation—the plaintiff bears the burden throughout to eliminate any other non-discriminatory reason that explains the employer’s actions.  

The Tenth Circuit, by contrast, has interpreted *Gross* as not requiring plaintiffs to prove sole causation.  

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78 See *Gross*, 129 S.Ct. at 2359 (Breyer, J., dissenting) (noting that cases involving multiple motives requires the parties to “engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different”). Justice Breyer also points out that the employer is in much better position to address this question, in that the employer knows what it was thinking at the time. *Id.* Moreover, the hypothetical inquiry is a negative one, requiring the plaintiff to prove that something that didn’t actually happen wouldn’t have happened. This makes it all the more difficult. See Martin Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655-56 (2008) (outlining how “but-for” causation requires proof of a negative and the difficulties inherent in that exercise).  

79 See *Love v. TVA Bd. of Dirs.*, 06-754, 2009 WL 2254922, at *10 (M.D. Tenn. July 28, 2009) (asserting that under *Gross*, “[p]laintiff must prove that his age was the reason for his nonselection”); *Wardlaw v. City of Phila. Sts. Dep’t*, Nos. 05-3387, 07-160, 2009 WL 2461890, at *4 (E.D. Pa. Aug. 11, 2009) (rejecting plaintiff’s ADEA claim because her evidence failed to establish age was “the sole cause” of the alleged discrimination and retaliation against her), aff’d 378 Fed.Appx. 222, 226 (3d Cir. 2010) (upholding without further explanation the reasoning of the district court); see also *Foreman*, supra n. 14 Error! Bookmark not defined., at 692 (discussing the post-*Gross* district court decisions). The Eleventh Circuit may have signaled it would apply a sole causation standard. The Court recently described *Gross*’ reasoning as follows: “Because an ADEA plaintiff must establish “but for” causality, no “same decision” affirmative defense can exist: the employer either acted “because of” the plaintiff's age or it did not.” *Mora v. Jackson Mem’l Found.*, Inc., 597 F.3d 1201, 1204 (11th Cir. 2010) (citing *Gross*, 129 S.Ct. at 2352). The issue did was not ultimately determinative, and the court did not elaborate on whether it intended to set out a sole causation standard. See *id.* *Gross* left significant questions exactly what other proof models are to be applied to non-Title VII cases. See David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 938 (2010) (noting that some defendants have argued the *McDonnell Douglas* pretext model no longer applies to ADEA claims).  

80 See *Jones v Okla. City Pub. Sch.*., 617 F.3d 1273, 1277-78 (10th Cir. 2010) (rejecting employer’s argument that if there is any other reason for the adverse action, plaintiff cannot prevail). Similar conclusions have been reached in the academic literature:
Whether Gross requires proof of sole causation or something less, the burden it imposes on plaintiffs is nonetheless an extremely difficult one to meet. Even in light of persuasive evidence they considered a prohibited characteristic, employers need only produce some other, legitimate consideration that they allege was part of a mixture of reasons for the employment decision.\footnote{Gross, 129 S.Ct. at 2352 (reasoning that “[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision”).} The ADEA plaintiff then has to show that regardless of any legitimate considerations, the improper consideration was itself necessary to the employer’s decision—that without it, the same decision would not have been made.\footnote{See Foreman, supra n. 14 Error! Bookmark not defined., at 692 (indicating that “showing the employer improperly considered age in the employment decision is no longer a sufficient basis to establish liability”).} It should not be difficult for an employer to attach a legitimate rationale to one motivated by bias, which suggests that ADEA plaintiffs’ chance of sorting out this mixture in their favor is quite limited.\footnote{See id. at 693 (suggesting that Gross “send[s] employers a message that age may be a factor in employment decisions, so long as it is not the determining factor”).}

It was quickly apparent that Gross’ rationale would not be limited to the ADEA. A primary thrust of Gross was that Congress could have, but did not, amend the other anti-discrimination statutes when it added the “motivating factor” and burden shifting provisions to

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In that regard, the but-for requirement does not mean that an employee must establish that an illegitimate reason was the sole reason for the adverse action, despite the dissent in Gross protesting otherwise. In his Price Waterhouse dissent, Justice Kennedy acknowledged that a protected category did not need to be the “sole cause” but rather “merely a necessary element of the set of factors that cause the decision, i.e., a but-for cause.” This language likely means that an employee would need to establish that a discriminatory motive was such a strong motivating reason for the adverse action that, without consideration of it, any other legitimate reasons the employer had would not have resulted in that adverse action.”

Title VII, although it did amend other aspects of the ADEA.\textsuperscript{84} The majority rejected its prior approach of construing Title VII and the ADEA in similar fashion because of Congress’ explicit actions in amending Title VII but not the ADEA.\textsuperscript{85} A similar argument could be, and soon was, made that Congress amended certain aspects of the ADA in the 1991 Act as well, but did not incorporate the motivating factor language. In \textit{Serwatka v. Rockwell Automation, Inc.},\textsuperscript{86} the Seventh Circuit reversed a verdict in favor of an ADA plaintiff on a mixed-motive claim, finding that she had failed to show but-for causation.\textsuperscript{87} The court reasoned that the ADA, like the ADEA, lacked language comparable to Title VII’s mixed motive provisions, and that “\textit{Gross} ma[de] clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute,” the plaintiff had the burden to prove discrimination under the “but-for” standard.\textsuperscript{88} The Seventh Circuit’s approach suggests courts will treat \textit{Gross} as establishing a uniform rule for any anti-discrimination statute that prohibits actions “because of” a particular characteristic.\textsuperscript{89}

\textsuperscript{84} \textit{Gross}, 129 S.Ct. at 2349. Congress modified the ADEA’s notice of limitations period provisions. \textit{See} Civil Rights Act of 1991, Pub. L. 102-166, § 115, 105 Stat. 1071, 1079 (Nov. 21, 1991). It also extended antidiscrimination protections to employees of the Senate and specifically enumerated the ADEA among the statutes under which they were now covered. \textit{See id.} § 302(2), 105 Stat. at 1088.

\textsuperscript{85} \textit{See id.} \textit{Gross} emphasized the opposite of unification, namely that “[w]hen conducting statutory interpretation, [the Court] ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’” \textit{Id.} (citing Fed. Express Corp. v. Holowecki, 128 U.S. 1147, 1153 (2008)).

\textsuperscript{86} 591 F.3d 957 (7th Cir. 2010).

\textsuperscript{87} \textit{Id.} at 963. The jury found that the plaintiff in \textit{Serwatka} was terminated due to the employer’s perception she was limited in her ability to walk or stand, but also found that the employer would have discharged her even if it did not believe her to have been substantially limited in that regard. \textit{Id.} at 958.

\textsuperscript{88} \textit{Id.} at 962.

\textsuperscript{89} The Seventh Circuit itself has gone further to hold that \textit{Gross} makes mixed-motive claims improper in any case where the statute at issue lacks motivating factor language. \textit{See} Serafinn v. Local 722, Int’l Bd. of Teamsters, 597 F.3d 908, 915 (7th Cir. 2010) (denying a mixed-motive instruction to a plaintiff in claim under the Labor Management Reporting and Disclosure Act, 29
The Seventh Circuit’s approach may be justified under Gross, because the majority’s conclusion in Gross rested on an asserted plain language interpretation of the term “because of.” According to the Gross majority, “the ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act.” The majority asserts “[i]t follows, then, that under [the ADEA], the plaintiff retains the burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action.” The majority justified this as the “ordinary default rule” when a statute is “silent on the allocation of the burden of persuasion.”

What the majority fails to explain, however, is how Price Waterhouse could have reached the conclusion it did if there was indeed an “ordinary default rule.” By the majority’s theory,

U.S.C. §§ 401-531 because that statute did not contain language comparable to Title VII); Fairley v. Andrews, 578 F.3d 518, 525-26 (7th Cir. 2009) (interpreting Gross to hold that “unless a statute . . . provides otherwise, demonstrating but-for causation is part of plaintiff’s burden in all suits under federal law”). Not all courts agree and have distinguished Gross as applying to ADEA claims. See Smith v. Xerox Corp., 602 F.3d 320, 328-29 (5th Cir. 2010) (rejecting “simplified application” of Gross to Title VII retaliation claim and finding Price Waterhouse continues to govern such claims); Hunter v. Valley View Local Sch., 579 F.3d 688, 691-92 (6th Cir. 2009) (distinguishing Gross in Family and Medical Leave Act (FMLA) claim because it had previously found Department of Labor regulation reasonable that provided “employers cannot use the taking of FMLA leave as a negative factor in employment decisions”). The Fifth Circuit most clearly indicated it was reluctant to overrule its prior decisions allowing mixed motive retaliation claims, at least under Title VII, without the Supreme Court having explicitly overruled Price Waterhouse in Gross. See Smith, 602 F.3d at 329 (reasoning that it was not the court’s “place, as an inferior court, to renounce Price Waterhouse as no longer relevant to mixed-motive retaliation cases [under Title VII]”).

90 Gross, 129 S.Ct. at 2350. 91 Id. at 2351. 92 Id. (quoting Schafer v. Weast, 546 U.S. 49, 56 (2005)). 93 Rather than addressing Price Waterhouse head-on, the Gross majority instead suggests that the current Court might not reach the same decision, especially in light of what the majority claims is difficulty applying the mixed-motive approach. Id. at 2351-52. The authority cited by the Gross majority, however, does not support the assertion of difficulty. See Catherine T. Struve, Shifting Burdens: Discrimination through the Lens of Jury Instructions, 51 B.C. L. Rev. 279, 293 (2010) (noting that “the authorities the Gross Court cited in support of [its] assertion provide no evidence on the question”); Harper, supra n. 14, at 108-09 (noting the only majority opinion
the Court should have rejected any burden-shift in *Price Waterhouse* and insisted that “but-for” causation by default meant the plaintiff bore the burden to persuade that sex alone played the determinative role in her firing. But the *Price Waterhouse* Court did not reject burden-shifting; it instead adopted an approach that was consistent with its other cases interpreting “because of” causation.94 If there was a “default rule,” one from which Congress might be supposed to have been legislating, it rested causation on something less than *Gross’* formulation of but-for proof.

There have been strong critiques of the Court’s decision in *Gross* and its weak basis for rejecting what Professor Katz refers to as the “presumption of uniformity” that had previously governed.95 Several arguments have been made that at least within a particular proof model, such as disparate treatment, there should be a symmetry of standards across overlapping anti-discrimination laws, absent substantial justification.96 Among those arguments are efficiency, even-handedness, and common sense understanding.

As a practical matter, having the same standards apply across multiple anti-discrimination statutes makes it more efficient to litigate and resolve such claims.97 Parties do not have to spend time sorting out differing summary judgment standards, and jury instructions would be

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94 See supra n. 52-57 and accompanying text.
95 See Katz, supra n. 5, at 868. Several other articles criticize the Court’s reasoning in *Gross*, among them Harper, supra n. 14 Error! Bookmark not defined.: Foreman, supra n. 14; Corbett, supra n. 76; Sherwyn & Heise, supra n. 79; Noonan, supra n. 80; Stuve, supra n. 93; Sean Graham, *Gross v. FBL Financial Services, Inc.: Supreme Court Requires Plaintiffs to Prove Age is a “But-For” Cause in Disparate-Treatment Claims under the Age Discrimination in Employment Act (ADEA) (Recent Cases)*, 30 BERKELEY J. EMP. & LAB. L. 571 (2009); Leigh A. Van Ostrand, Note, 78 FORHAM L. REV. 399, 451 (2009). But see Jaqueline Go, Comment, *Another Move away from Title VII: Why Gross Got It Right*, 51 SANTA CLARA L. REV. 1025, 1027 (2011) (arguing that *Gross* is consistent with congressional intent and “effectively corresponds to practical employer compliance”).
96 See, e.g., Corbett, supra n. 76, at 690-91.
97 Katz, supra n. 5, at 867.
less confusing. Litigants as well as well as the public are also more likely to be supportive of anti-discrimination laws if those laws are perceived as treating similarly-situated individuals in a similar fashion. Asymmetry by contrast fosters cynicism. Further, there is common sense, as reflected in the general assumption of uniformity in statutory interpretation. If Congress uses the same terminology across different but broadly related statutes, the most sensible conclusion is that it had the same standard in mind. Gross recognizes this but distorts it, suggesting that what Congress had in mind was some theretofore unknown default rule requiring but-for causation.

The Gross majority can argue it didn’t reject uniformity per se. Its default rule of construction is premised on uniformity. Congress is the party that undermined uniformity by amending only Title VII when it should have known the default rule would otherwise apply. Thus, the Court approached the issue with an assumption of uniformity among anti-discrimination laws, just one with the locus in a different position. Professor Katz has suggested that Gross more likely stems from the current Court’s hostility to burden-shifting, which is

98 See id. at 867-68 (reasoning that “a unified standard would permit the judge and jury to apply a single standard to all of the claims—as opposed to having to apply different standards to different claims”); see also Corbett, supra n. 93, at 691 (noting that “[t]he difficulty of analyzing cases should be of even greater concern with the availability of jury trials in most disparate treatment cases”).
99 Corbett, supra n. 93, at 691-92.
100 Id. at 691. This is certainly demonstrated by the public debate regarding affirmative action and to a degree by the “windfall” concerns raised regarding reasonable accommodations under the ADA.
101 Katz, supra n. 5, at 867.
102 Id. at 667.
103 This rationalization would necessarily have to ignore the Court’s prior precedent in which it looked to a pre-CRA Title VII decision to determine a post-CRA claim was available under the ADEA. See Smith v. City of Jackson, 544 U.S. 228, 229 (2005) (concluding that ADEA disparate impact claims were governed by its pre-CRA Title VII decision, Ward’s Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). The Gross majority does not acknowledge this case, although as the dissent points out, it “is precisely on point.” See Gross v. FBL Fin. Servs., Inc., 129 S.Ct. at 2356 (Stevens, J., dissenting).
probably the most reasonable interpretation of the outcome.\textsuperscript{104} For example, the Court previously demonstrated this hostility in its disparate impact decisions by making the plaintiff’s prima facie case more onerous, and lessening the employer’s defense burden to one of production rather than proof.\textsuperscript{105} In the context of disability law, the Court’s decision in \textit{US Airways v. Barnett}\textsuperscript{106} can be seen as an attempt to side-step burden-shifting.\textsuperscript{107} In that case, the Court imposed on plaintiffs a burden to show “extraordinary circumstances” make an accommodation deviating from a seniority system reasonable, with the only burden on employers being to produce evidence of such a system.\textsuperscript{108} This burden allocation arguably contradicts the statutory scheme that would require employers to prove the accommodation posed an undue hardship on that system.\textsuperscript{109}

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\textsuperscript{104} Katz, supra n. 5, at 878.  
\textsuperscript{105} Ward’s Cove; see also Katz, supra n. 5, at 879 (characterizing the Court’s post-Price Waterhouse cases as “accepting the possibility of unification in cases that did not involve . . . expanding burden-shifting”).  
\textsuperscript{106} 535U.S. 391 (2002).  
\textsuperscript{108} Barnett, 535 U.S. at 404.  
\textsuperscript{109} See 42 U.S.C. § 12112(b)(5)(A) (2006) (discrimination includes not making reasonable accommodation unless covered entity can demonstrate that accommodation would pose an undue hardship on the operation of the business); see also Samuel A. Marcosson, Of Square Pegs and Round Holes: The Supreme Court’s Ongoing “Title VII-ization” of The Americans with Disabilities Act, 8 J. GENDER RACE & JUST. 384-385 (2004) (arguing that the Court “rendered the hardship inquiry irrelevant, creating out of thin air a general rule that any accommodation request that would violate existing seniority systems ‘ordinarily’ is not reasonable, without reference to any hardship it may or may not create for the employer”); Monica G. Renna, Casenote, An Accommodation is Ordinarily Presumed to be Unreasonable if it Violates an Employer’s Bona Fide Seniority System Unless the Employee Can Show Special Circumstances That Make it Reasonable: U.S. Airways, Inc. v. Barnett, 68 J. AIR L. & COM. 655, 661 (2003) (noting that, “the Supreme Court’s holding[in Barnett] creates the very burden of proof dilemma to which Barnett is referring. The Court unduly raises the bar for the employee to establish a prima facie case of an RA, when the burden should really be on the employer to prove the hardship”).
Regardless, there is an underlying premise at work here that is problematic when applied in other contexts. While there may be disagreement about the content of the standards themselves, there is a general desire for uniformity. When the issue is whether an age discrimination plaintiff should be able to proceed under the same disparate treatment proof models as a Title VII plaintiff, it makes sense to support that desire. The disarray that currently exists within disparate treatment law serves no substantial purpose. A problem arises, however, when this desire for uniformity is taken to other contexts, where there are in fact substantial reasons to apply distinct standards.

IV. Mixed Motive Claims under the ADA?

Should the ADA be subject to Gross’s default rule, or should it allow mixed motive burden shifting? There is good evidence that Congress considered the ADA to be similar to Title VII, which allows for mixed-motive claims with a burden shift to the employer on evidence less than proof of but-for causation.\textsuperscript{110} Although the Civil Rights Act (CRA) of 1991 muddied the waters somewhat, lower courts assumed mixed motive claims were available under the ADA and generally applied Title VII standards to those claims.\textsuperscript{111} When Congress amended the ADA in

\textsuperscript{110} See infra Part III(A).
\textsuperscript{111} See, e.g., Head v. Glacier Nw., Inc., 413 F.3d 1053, 1065 n. 63 (9th Cir. 2005) (noting cases that similarly adopt mixed motive standards under the ADA); Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 25, 25 n.2 (1st Cir. 2002) (assuming 1991 CRA standards apply and that plaintiff with direct evidence of discriminatory intent need only prove such intent was a motivating factor in employer’s adverse action). Much like the Title VII cases, the ADA cases reflect courts with differing opinions regarding the level of proof needed in order to get a mixed motive instruction. \textit{Compare} Yates v. Rexton, Inc., 267 F.3d 793, 799 (8th Cir. 2001) (concluding that plaintiff who lacked direct evidence of discrimination must proceed under \textit{McDonnell Douglas} pretext standard) \textit{with} Head, 413 F.3d at 1065 (finding the “motivating factor” standard most consistent with the plain language of the statute and purposes of the ADA”). The Sixth Circuit stood alone in requiring ADA plaintiffs prove sole causation. \textit{See} Jones v. Potter, 488 F.3d 397, 403 (6th Cir. 2007) (acknowledging that Sixth Circuit is in minority in applying a “solely by reason of” standard of proof in ADA claims).
2008, it addressed the causation language in the statute, but not in a way that corrected what the lower courts had been doing.\textsuperscript{112} Consistent with the language and purpose of the ADA, courts were justified in taking a unified approach to causation.\textsuperscript{113}

The fact courts tended to take this unified approach prior to \textit{Gross}, however, means they failed to give much consideration to whether the ADA poses unique causation considerations. The ADA’s distinct treatment of causation includes not making reasonable accommodations,\textsuperscript{114} and that should counsel against applying an “ordinary default rule” to causation issues raised under the statute. As the Seventh Circuit’s recent \textit{Serwatka} decision indicates, however, arguments distinguishing ADA causation are not likely to prevail absent explicit statutory direction to do so.\textsuperscript{115} Proposed legislation overruling \textit{Gross}, such as the Protecting Older Workers Against Discrimination Act,\textsuperscript{116} would make Congress’s intent clear to allow burden-shifting mixed-motive claims under the ADA, but that would resolve only disparate treatment discrimination claims. Given the breadth of the majority’s rationale in \textit{Gross}, it might be expected the justices will approach other causation issues from a similar mindset.

\textit{a. The ADA of 1990 Contemplated Mixed-Motive Claims}

The legislative history of the ADA contains substantial evidence that Congress did not contemplate plaintiffs would be required to prove “but-for” causation as envisioned by the \textit{Gross}
majority. The ADA largely incorporates the standards developed under section 504 of the Rehabilitation Act of 1974, with one specific important difference. Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”\(^{117}\) This requirement of “sole” causation was not incorporated into any relevant portion of the ADA.\(^{118}\) Title II of the ADA, which prohibits discrimination by public entities, most closely tracks the language of section 504, except Congress deliberately deleted the term “solely:” “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity, or be subjected to discrimination by any such entity.”\(^{119}\) The Committee explained that it recognize[d] that the phrasing of [the ADA’s substantive prohibition] differs from section 504 by virtue of the fact that the phrase ‘solely by reason of his or her handicap’ has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504. . . . A literal reliance on the phrase ‘solely by reason of his or her handicap’ leads to absurd results . . . .\(^{120}\)

The Committee then gave an example that illustrated how a decision may be based on more than one factor:

\(^{118}\) See 42. U.S.C. § 12112(a) (Supp. III 2009) (prohibiting “discriminat[ion] against a qualified individual based on a disability”); id. § 12132 (2006) (providing that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity, or be subjected to discrimination by any such entity”).
\(^{119}\) Id. § 12132.
\(^{120}\) H.R. Rep. No. 101-485, pt. 2, at 85 (1990), reprinted in, 1990 U.S.C.C.A.N. 303, 368-69. The legislative committee report indicates that the burden of proof in ADA cases was to be the same as set out in the 1989 Rehabilitation Act regulations. Those regulations deleted the “solely” requirement: “[n]o qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.” 34 C.F.R. 104.4(a) (2010).
Assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he is black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.\(^\text{121}\)

The Committee concluded more broadly that “the existence of non-disability related factors in the rejection decision does not immunize employers. The entire selection procedure must be reviewed to determine if the disability was improperly considered.”\(^\text{122}\)

In other words, Congress had Title VII-like mixed-motive situations in mind when it articulated the ADA’s causation language. Of course, this doesn’t necessarily mean that Congress had in mind burden-shifting.\(^\text{123}\) Support for that proposition comes from the Committee’s citation of Pushkin v. Regents of University of Colorado,\(^\text{124}\) a Tenth Circuit case articulating a detailed proof model that shifts a burden of persuasion to the defendant:

1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person apart from his handicap, and that he was rejected under circumstances which gave rise to the inference that his rejected was based solely on his handicap;

2) Once the plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program’s requirements in spite of his handicap, or that his rejection from the program was for reasons other than his handicap;

\(^{121}\) Id.
\(^{122}\) Id. at 86.
\(^{123}\) See Struve, supra n. 93, at 325 (noting that the comparison between the ADA and the Rehabilitation Act on the issue of sole causation does not “establish whether the plaintiff bears the burden of proving but-for causation”).
\(^{124}\) 658 F.2d 1372 (10th Cir. 1981).
3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants’ reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.\(^{125}\)

The italicized language indicates Congress not only contemplated mixed-motive situations under the ADA, the case it cited explicitly placed the burden of proof on the defendant to prove it was motivated by reasons other than disability.

Interestingly enough, the burden-shifting approach referred to in the ADA’s legislative history came from a case decided under the Rehabilitation Act, which contains the “solely” requirement.\(^{126}\) Then existing Rehabilitation Act regulations explicitly eliminated the “solely” requirement, and the ADA legislative committee report favorably referenced those regulations as establishing the proper burden of proof.\(^{127}\) Altogether, this presents a persuasive case that Congress rejected the but-for regime envisioned by *Gross*.

Further, the ADA was enacted in 1990.\(^{128}\) Unlike the ADEA, which had been enacted prior to the Supreme Court applying mixed-motive burden-shifting to Title VII,\(^{129}\) the ADA was enacted after *Price Waterhouse*, i.e., at a time when the Court had interpreted “because of” not to require plaintiffs to disprove the significance of all other possible reasons for the employer’s

\(^{125}\) *Pushkin*, 658 F.2d at 1387 (emphasis added). *Pushkin* involved plaintiff with multiple sclerosis who applied to a psychiatry residency program and was rejected. *Id.* at 1376. Pushkin argued he was rejected because of a negative reaction to his multiple sclerosis, and the school argued it was because he scored low in interviews. *See id.* at 1387. The court concluded that it was not possible to separate the interview scores from the reaction to the plaintiff’s disability, and that the plaintiff had established his prima facie case that he was rejected from the program “under circumstances which support a finding that his rejection was based solely on his handicap.” *Id.* at 1386-1387.


\(^{127}\) *See supra* n. 120.


actions. If Congress had disagreed with this interpretation of “because of,” it seems unlikely it would have used the same language in the ADA without qualifying it in some fashion.  

The 1991 CRA does muddy the waters to a degree. The 1991 CRA amended only Title VII in regard to mixed motive standards, a fact that was heavily relied upon by the Gross majority.  

The Gross majority does not at any point acknowledge that a majority of justices in Price Waterhouse, without more specific statutory language, found the term “because of” allowed for a shift in the burden of proof. The Gross majority instead rests on the failure of Congress to add explicit endorsement of mixed-motive to the ADEA at the same time it amended Title VII. Moreover, as noted above, Congress did amend some portions of the ADEA, but not to include mixed-motive claims.

Applying Gross simplistically, it could be argued Congress amended some portions of the ADA when it passed the 1991 Act and, therefore, its failure explicitly to endorse mixed-motive claims evidences its intent not to allow such claims. The Seventh Circuit in Serwatka indeed follows this line of interpretation. The court acknowledged that Title I’s remedial section, 42 U.S.C. § 12117(a), provides that the same “powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9” of Title VII are available to ADA claimants, and that § 2000e-5(g)(2)(B) was in fact amended by the CRA of 1991 to provide for

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130 When Congress amended the ADA in 2008 to modify the language from “because of” to “based on,” it again had an opportunity to establish a different causation standard but did not. Instead, it asserted its desire to make the ADA structurally similar to Title VII. See infra n. 140-143 and accompanying text.

131 Gross, 129 S. Ct. at 2349. That part of the majority’s opinion mentions Price Waterhouse briefly, to set-up its discussion of the CRA. The majority subsequently notes Price Waterhouse again only to make the questionable argument that the proof model that case endorsed was confusing to apply. See Struve, supra n. 93, at 293-296 (finding no evidence to support assertion mixed-motive model causes undue confusion for juries).

132 See supra n. 84.
remedies in mixed-motive cases. Rather than finding this implicitly to endorse mixed-motive claims, the Seventh Circuit instead focused on the fact that the liability portions of the ADA had not been amended. The court analyzed the statutory language as a simple failure to be explicit, the lesson drawn from Gross.

There are several strong critiques of Gross’s take on the 1991 CRA, which are beyond the scope of this article. Even if there were ambiguity in the 1991 Act, however, Congress’ subsequent actions, or inaction, when amending the ADA in 2008 add strength to the argument it endorsed mixed-motive burden-shifting in disability discrimination claims. By that time, all the federal circuit courts to have considered the issue except one had recognized mixed-motive burden-shifting as appropriate under the ADA. Yet, while the ADA Amendments Act of 2008

133 Serwatka, 591 F.3d at 962 (quoting 42 U.S.C § 12117(a) (2006)).
134 See id.
135 Among those critiques, Congress amended Title VII not so much to authorize mixed-motive claims but to settle uncertainty about the standard of causation caused by the fracturing of the Court in Price Waterhouse. 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, 403-04 (2010), at http://www.kentlaw.edu/7cr/v5-2/sues.pdf (suggesting “it is reasonable to conclude that Congress meant only to clarify that the statutory language, ‘because of,’ does indeed support a mixed-motive causation scheme [and] did not vitiate the continued applicability of Price Waterhouse’s instructive value”). Because Price Waterhouse was a Title VII claim, it is not surprising Congress amended that statute to correct the situation created by that decision. Given the state of the law generally recognized mixed-motive burden shifting, there was no need to fix, or change, other anti-discrimination statutes. If Congress intended to undo the unity that existed in regard to the availability of mixed-motive burden shifting, more than a backhanded approach could be expected. As Sues points out, this interpretation also assumes that Congress engaged in a nonsensical act. See id. at 382. Because the 1991 Act amends 42 U.S.C. § 2000e-5 to provide a limited remedy in mixed-motive cases even if the employer proves it would have made the same decision anyway, and § 12117(a) of the ADA cross-references § 2000e-5, to read the 1991 Act as intending mixed-motive burden-shifting only under Title VII creates an absurdity—a remedy is offered under the ADA for a claim that cannot be pursued. See id.
136 See, e.g., Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) (finding that Congress’ elimination in the ADA of “solely” from “because of” is “forceful” evidence it recognized mixed-motive causation). The lone standout was the Sixth Circuit. See McLeod v. Parsons Corp., 73 F..App’x. 846, 858 (6th Cir. 2003) (rejecting plaintiff’s argument that prior
(ADAAA) extensively modified the ADA in order to undo several judicial decisions construing the statute inappropriately, it did not similarly single out those decisions. Following the familiar canon of statutory construction, evaluation of Congress’s actions in amending the ADAAA “must take into account [the] contemporary legal context.” That context strongly endorsed applying the same mixed-motive proof model as established under Title VII.

Moreover, although Congress did not explicitly address mixed-motive issues in the ADAAA, it did address the very “because of” language at issue in *Gross*. In the original ADA, discrimination included adverse actions taken against an individual “with a disability because of the disability of such individual.” The ADAAA strikes that language and substitutes in its place “based on disability.” While the Supreme Court has asserted those two terms are substantively interchangeable, Congress’s expressed reason for the change is significant. As explained in the Managers’ Report accompanying the ADAAA, the change was made in order to

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Sixth Circuit decisions requiring proof of sole causation were no longer good law); see also Anderson, *supra* n. 29, at 342-43 (discussing the Sixth Circuit’s analysis). Congress singled out two Supreme Court cases with which it disagreed and rejected an EEOC regulation it found too stringent. § 2(b)(3)-(4), (6).


By analogy to Title VII, courts also found plaintiffs met their prima facie case by presenting sufficient evidence their disability was a motivating factor in the employer’s decision. See, e.g., *Parker*, 204 F.3d at 337 (finding plaintiff had presented prima facie proof his disability was a motivating factor in his employer’s decision); *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005) (concluding that the “motivating factor” standard is the most consistent with the plain language and purposes of the ADA). Pattern jury instructions at the time similarly incorporated the mixed-motive, motivating factor language. See *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1152 n. 5 (11th Cir. 2005) (quoting Eleventh Circuit Pattern Jury Instruction 1.5.2 which stated the final element in the plaintiff’s prima facie case as: “[t]he Plaintiff’s disability was a substantial or motivating factor that prompted the Defendant to take that action”).


more closely conform the structure of the ADA to that of Title VII. Given that Congress made the very causation language at issue more Title VII-like, it would be anomalous to conclude it did not expect courts to apply Title VII disparate treatment standards to ADA claims, absent some specific statutory provision directing otherwise.

Beyond the specific language, the ADAAA itself suggests something about the Court’s recent interpretive approach toward discrimination statutes. The ADA only had to be amended at all because the Court went considerably off-track in construing the statute. In those opinions, however, the Court’s conclusions are supported by repeated assertions about congressional intent ostensibly drawn from the language of the Act. Similarly, the majority in *Gross* justifies its interpretation of “because of” causation as based on the ordinary meaning of the term, despite legislative indications that it was not Congress’ ordinary understanding. In both regards, the Court’s interpretation reflects its view of what should be required more than what Congress actually enacted, wrapped in the guise of “ordinary” meaning. This has implications for issues outside the disparate treatment context.

One positive potential outcome of *Gross* may be that Congress is more comprehensive when enacting or amending statutes in the future, to forestall the Court’s “default” rule. Along

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143 154 CONG. REC.. S8843 (daily ed. Sept. 16, 2008). This change was part of Congress’s move to undo the narrowness brought about by the Supreme Court’s interpretation of the Act. See *Sues*, supra n. 135, at 407-08. Congress was clarifying that the statute applied to cases involving uncorrected vision standards. See *id.*

144 The Seventh Circuit left open the possibility that the change in language supported a different conclusion regarding the viability of mixed-motive ADA claims. *Serwatka*, 591 F.3d at 962 n. 1.

145 See *Sutton* v. United Air Lines, Inc., 527 U.S. 471, 487 (1999) (finding, for example, that “[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings”); see also *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 197 (2002) (reiterating *Sutton*’s assertion of congressional findings as indicating the definition of disability must be “interpreted strictly to create a demanding standard”).

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those lines, a recent attempt to undo Gross is discussed in the next section. While comprehensively addressing disparate treatment claims, that bill would not have been as comprehensive as it needed to be to address all but-for causation issues.

b. Protecting Older Workers against Discrimination Act

Shortly after Gross was decided, the Protecting Older Workers against Discrimination Act (POWADA) was proposed in both houses of Congress.146 POWADA would have amended the ADEA to incorporate the same motivating factor and burden-shifting standards that are currently found in Title VII.147 POWADA would also have permitted plaintiffs the choice to prove but-for causation, specifically that “the practice complained of would not have occurred in the absence of an impermissible factor.”148 Plaintiffs would be permitted to rely on “[e]very method for proving either such violation, including the evidentiary framework set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).”149 The Act further clarified that plaintiffs “may rely on any type or form of admissible circumstantial or direct evidence and need only produce evidence sufficient for a reasonable trier of fact to conclude that a violation” has occurred.150

A striking component of this Act was that it not only would have amended the ADEA, but every federal law prohibiting discrimination or retaliation, including constitutional claims. A new subsection (g)(5) provided that

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146 H.R. 3721, 111th Cong. (2009); S. 1756, 111th Cong. (2009). The language of the two versions is identical. To be concise, only the House version will be cited from this point forward.
147 H.R. 3721, § 3 (adding new subsection (g) to § 4 (29 U.S.C. § 623)).
148 Id. (new 4(g)(1)(B)).
149 Id. (new 4(g)(4))
150 Id. (new 4(g)(3)).
This subsection shall apply to any claim that the practice complained of was motivated by a reason that is impermissible, with regard to that practice, under--

(A) this Act, including [the ADEA’s prohibition on retaliation];
(B) any Federal law forbidding employment discrimination;
(C) any law forbidding discrimination of the type described in [the ADEA’s prohibition on retaliation] or forbidding other retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law); or
(D) any provision of the Constitution that protects against discrimination or retaliation.\(^\text{151}\)

POWADA was, therefore, an attempt to anticipate the causation tentacles put out by \textit{Gross}. It reached any discrimination statute that utilized a “because of” standard regarding which there could be a question about mixed-motive causation. POWADA thus seemingly would have achieved causation unification in disparate treatment claims.\(^\text{152}\)

POWADA would almost certainly have effectively addressed \textit{Gross}’ impact on disparate treatment claims. But POWADA went no further than this. It would not have explicitly overruled the overarching assertion in \textit{Gross} that the ordinary standard of causation requires the plaintiff to meet a but-for test. The statute attempted to comprehensively identify all potential statutes to which Congress intends the special causation rule to apply instead of simply broadly announcing that “but-for” causation is not required in any circumstance unless the statute specifically calls for it. In a sense, POWADA would have confirmed \textit{Gross}’ thesis—that any

\(^{151}\textit{Id.} \text{ (new 4(g)(5)).}\)

\(^{152}\)Indeed, the Act’s purpose section explicitly states this intent:

The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991.

\textit{Id.} § 2(b).
change from that default must come from explicit statutory language. Left in place is the proposition that ordinary causation standards require plaintiffs to show the precise causal role played by a protected characteristic.

Moreover, POWADA spoke only to claims that a practice “was motivated by a reason that was impermissible.”\(^\text{153}\) Causation issues that arise outside of disparate treatment would, therefore, have had to account with Gross’ default rule. For example, in the reasonable accommodation context, the issue is not whether the employer acted upon improper motivation when deciding whether to grant the employee’s request, but whether the employee has a need for accommodation and the feasibility of such accommodation.\(^\text{154}\) There can be an element of causation in the latter analysis, in regard to whether the employee in fact needs the accommodation because of a disability.\(^\text{155}\) Nothing in POWADA directs the Court what, if any, causation analysis is appropriate in that context. Presumably, causation that does not rest on motivation would have remained vulnerable to some kind of but-for analysis. POWADA would not, therefore, have been sufficient to eliminate all of Gross’ problematic implications.

\(^\text{153}\) Id. § 3 (new 4(g)(5)).

\(^\text{154}\) See Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) (articulating the test for reasonable accommodation as requiring plaintiff to show “that the proposed accommodation would enable her to perform the essential functions of her job,” and “that, at least on the face of things, it is feasible for the employer under the circumstances”); see also 42 U.S.C. § 12111 (10)(B)(i)-(iv) (2006) (factors to be considered in determining whether a reasonable accommodation poses an undue hardship); see also 45 C.F.R. § 605.12 (c)(i)-(iii) (2010) (same).

\(^\text{155}\) The ADA specifically provides that the employer has an obligation to reasonably accommodate the “known physical or mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A). As discussed in Part IV infra, some courts have read the standard to require plaintiffs show the need for the accommodation because of their disability.
V. Causation and Reasonable Accommodation

Problems with causation already impact reasonable accommodation claims. The duty of reasonable accommodation is a subcategory of the general substantive prohibition on discrimination “based on” (previously “because of”) an individual’s disability.\(^{156}\) Currently, the role of causation in the reasonable accommodation prima facie case is confusing. Some courts articulate the prima facie case in reasonable accommodation claims as having a causation element, some do not.\(^{157}\) Some cases suggest that it is not necessary to consider causation in accommodation cases because the employer concedes it.\(^{158}\)

Justice Scalia in his dissent in *US Airways v. Barnett* would require accommodation claims meet a “but-for” standard.\(^{159}\) He believes the ADA “eliminates workplace barriers only if a disability prevents an employee from overcoming them—those barriers that would not be barriers but for the employee's disability.”\(^{160}\) The Seventh Circuit adopted a similar standard for claims arising under ADA Title II.\(^{161}\) That circuit requires claimants seeking accommodation in public services meet what it call the “necessity-causality” standard.\(^{162}\) Plaintiffs must show that the barrier to obtaining the benefits sought is one not shared with the public generally.\(^{163}\) In

\(^{156}\) Subsection (a) of the ADA’s general prohibition provides that “[n]o covered entity shall discriminate against a qualified individual based on disability . . . .” 42 U.S.C. 12112(a) (Supp. III 2009). Subsection (b) entitled “Construction” then provides that “[a]s used in subsection (a) of this section, the term discriminate includes . . . (5)(A) not making reasonable accommodation . . . .” *Id.* § 12112(b).

\(^{157}\) See Part IV(A) infra.

\(^{158}\) See Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032-33 (7th Cir. 1999) (noting that in plaintiff’s prima facie case, proving that a disability caused an adverse employment action is “frequently left unstated because employers will concede that the disability was the reason for the job action but will argue the ‘otherwise qualified’ or ‘reasonable accommodation’ issues”).


\(^{160}\) *Id.*

\(^{161}\) See Wisc. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.4d 737, 752 (7th Cir. 2006).

\(^{162}\) See *id.* at 754.

\(^{163}\) *Id.*
other words, plaintiffs must show that “but-for [their] disability, [they] would have been denied access to the services or benefits desired.” 164

In each of these three areas, requiring proof of but-for causation undermines the purpose of accommodation law. The core value noted at the opening of this article—that causation lies at the heart of all anti-discrimination law—works against reasonable accommodation because it confuses the issues. 165

a. Causation as a Prima Facie Element of Title I Accommodation Claims

Whether and when causation is an element of prima facie proof in an ADA claim depends on the court and the nature of the claim. When a disability discrimination claim is postured as a disparate treatment claim, courts typically set forth prima facie elements similar to Title VII claims, which require the plaintiff show the adverse action was caused by the protected characteristic. 166 When courts spell out the plaintiff’s prima facie case in ADA reasonable accommodation claims, they may also include a requirement that the plaintiff show a causal link

164 Id.
165 [[note to me--this is deleted from the text: Efforts to understand reasonable accommodation as similar to other statutory anti-discrimination protections and the tendency toward unification of causation standards may work together to create that confusion.]]
166 See, e.g., Bones v. Honeywell Int’l, 366 F.3d 869, 878 (10th Cir. 2004) (articulating plaintiff’s prima facie as requiring her to “establish that: (1) she is a disabled person within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job, with or without accommodation; and (3) the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability) (citation omitted); Buchsbaum v. Univ. Physicians Plan, 55 F. App’x 40, 45 (3d Cir. 2002) (noting that plaintiff’s disparate treatment claim under ADA may proceed under either pretext approach established by McDonnell Douglas or mixed-motive approach established by Price Waterhouse). Cf. Humphrey v. Mem’l Hosp. Ass’n, 239 F.3d 1128, 1139 (9th Cir. 2001) (noting that “[u]nlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability”).
between his disability and the alleged adverse employment action. Some courts say this element can be met by showing reasonable accommodation was requested and denied. The Seventh Circuit explained that causation is always required as part of the plaintiff’s prima facie case, but that it will often go unstated because employers concede disability was the reason for their decision. Instead, employers argue the plaintiff was not otherwise qualified for the position or that the accommodation sought was not reasonable.

What if the employer does not concede that disability was the reason for adverse action? For example, in Foster v. Arthur Andersen, LLP, the employer argued that it fired the plaintiff not because she requested an accommodation of her carpal tunnel syndrome, but because she violated company policy regarding notifying the company about being late for work. Arguably the plaintiff’s reason for being late was related to her disability, in that she was at her doctor’s office, and she framed her case as raising denial of a reasonable accommodation. The court, however, framed the case more like a disparate treatment claim. It emphasized that even in failure to accommodate claims, the plaintiff has to show that her disability motivated the employer’s decision to terminate. The court dismissed the claim because it found the only

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167 See, e.g., Turner v. Hershey Chocolate USA, 440 F.3d 604, 611 (3d Cir. 2006) (articulating prima facie case in reasonable accommodation claim to require plaintiff show she “has suffered an adverse employment action because of [her] disability”).
168 See Turner, 440 F.3d at 611 n.4 (suggesting that once plaintiff shows failure to accommodate, she has also shown adverse action because of disability); see also McKane v. UBS Fin. Servs., Inc., 363 F. App’x 679, 681 (11th Cir. 2010) (articulating the prima facie standard to require plaintiff show “he was discriminated against by way of the defendant’s failure to provide a reasonable accommodation”).
169 See Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032-33 (7th Cir. 1999).
170 See id.
171 Id. at 1033.
172 Id. at 1032.
173 Id. at 1033 (noting analogy to Title VII, 42 U.S.C. § 2000e-2(a)(1), which contains similar “because of” language).
174 See id.
evidence of such intent was the timing between the plaintiff’s request and her dismissal, which standing alone in that circuit was legally insufficient to prove causation. Cases like Foster would now apparently also be subject to Gross’ default rule requiring the plaintiff to disprove all other proffered reasons for her dismissal, with no burden shift to the employer other than a burden to produce admissible reasons.

What if but-for causation is required? A district court case arising out of the Sixth Circuit illustrates the problems causation issues can present when the relationship between the failure to accommodate and the reason for the employer’s discharge decision is not clear. In Whitfield v. Tennessee, the employer asserted that it discharged the plaintiff because of deficiencies in her performance, although it is not entirely clear from the facts whether these performance deficiencies related to her disability, whether they involved essential functions of her job, or whether she would have avoided those deficiencies if she had received the accommodations she requested. Indeed, the court found the plaintiff had raised a jury question regarding whether

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175 See id. at 1034 (citing Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chicago, 104 F.3d 1004, 1014 (7th Cir. 1997)); see also Bones v. Honeywell Int’l, 366 F.3d 869, 878 (10th Cir. 2004) (finding plaintiff failed to prove her dismissal was based on her need for an accommodation when employer knew of her physical restrictions for over ten months before her termination).
176 The Supreme Court has indicated that when the plaintiff bears the burden of proving discrimination, the defendant’s evidence need only “rais[e] a genuine issue of fact as to whether it discriminated against the plaintiff.” Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).
179 The facts in Whitfield regarding the plaintiff’s job duties and her needed accommodations are fairly complicated, which in itself suggests summary judgment was not appropriate. Essentially, the plaintiff alleged that her deficiencies in the tasks assigned to her as an administrative assistant were related to the failure of her employer to give her proper equipment and training in light of her vision and mobility impairments. See Whitfield, 2009 WL 3839753 at *1-4. Other courts have been careful to note that “with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.” See
she was qualified to do the job, either with or without reasonable accommodation. The court, however, characterized her claim as proceeding under indirect proof of discrimination, which in that circuit required her to show prima facie evidence that she “was discriminated against solely because of the disability.” The court concluded that she had “not produced sufficient other evidence to show Defendants’ reason for terminating her employment had no basis in fact, that it did not actually motivate the Defendants’ challenged conduct, or that it was insufficient to warrant the challenged conduct.” In other words, that her disability was the sole reason she was fired.

Because the court found Whitfield raised a jury question regarding her ability to do the job with or without reasonable accommodation, the jury should have been asked to resolve whether her performance deficiencies were disability-related. Instead, the but-for standard

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_Humphrey_ 239 F.3d at 1139-40 (citing Hartzog v. Wasatch Academy, 129 F.3d 1076, 1086 (10th Cir. 1997)) (finding evidence sufficient to create issue of fact whether plaintiff’s attendance problems were caused by her OCD).


_Id._ at *9. Even after _Desert Palace_, the Sixth Circuit continued to require ADA plaintiffs who lack sufficient direct evidence prove that the adverse employment action was based solely on their disability. _See_ Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 454 (6th Cir. 2004) (reaffirming that plaintiffs in that circuit must “show that [their] disability was the sole reason for” the employment action). Whether _Gross_ indeed establishes a sole causation standard, plaintiffs in the Sixth Circuit are already subject to that rule in at least some disparate treatment cases.

_Whitfield_, 2009 WL 3839753 at *11.

_See, e.g.,_ Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998) (finding jury question whether employee’s absenteeism was legitimate basis for her termination where employee’s request for an absence was related to her disability). _Cf._ Kelly Cahill Timmons, _Accommodating Misconduct under The Americans with Disabilities Act_, 57 FLA. L. REV. 187, 241 (2005) (asserting that in the context of a plaintiff discharged for violating work-related rules that such individual “should be able to . . . establis[h] a prima facie case of disability discrimination . . . by demonstrating that he or she was discharged because of conduct causally connected to the disability. Such an approach would provide more protection to plaintiffs, many of whom will have disabilities that manifest themselves through conduct”).
confused the issue. The Sixth Circuit in *Whitfield* transformed what should have been a case about qualification and reasonableness of accommodation into a case about causation.

Application of *Gross* will likely reinforce this outcome. Even in accommodation cases, if the employer argues it had a legitimate reason for discharge, plaintiffs risk dismissal unless they demonstrate “but-for” their disability, the adverse action would not have occurred.185

By contrast, other cases have recognized that juries should determine if a work deficiency is disability-related. In *Gambini v. Total Renal Care, Inc.*, the Ninth Circuit concluded that a jury should have determined whether an employee’s outburst at a meeting, for which she was terminated, arose out of her bi-polar disorder. Even in this context, however, there is still a causation question. The court in *Gambini* framed the issue as requiring the plaintiff to demonstrate “a causal link between the disability-produced conduct and the termination.” Because *Gambini* did not require sole causation, but rather applied a “substantial factor” test, the plaintiff’s task was not as onerous. The court concluded that “a decision motivated even in part by the disability is tainted and entitled a jury to find that an employer violated anti-

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184 Whereas the Sixth Circuit would likely have seen itself as bound by POWADA finally to apply the motivating factor standard.
185 Cases under the Rehabilitation Act similarly demonstrate the dominating role of causation issues. *See* Ragsdale v. Holder, 668 F. Supp. 2d 7, 25-26, (D.D.C. 2009) (finding Rehabilitation Act plaintiff failed to present sufficient evidence to raise inference that she was denied her requested leave on the basis of disability).
186 *See, e.g.*, Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093 (9th Cir. 2007) (finding lower court erred by refusing to give instruction that conduct arising from a disability is part of the disability and cannot be a separate basis for termination); Humphrey, 239 F.3d at 1139-40 (stating similar rule).
187 *Gambini*, 486 F.3d at 1093. The Sixth Circuit has rejected this approach, holding instead that “an employer may legitimately fire an employee for conduct . . . that occurs as result of a disability, if that conduct disqualifies the employee from his or her job.” Macy v. Hopkins Cnty. Sch. Bd. of Educ., 484 F.3d 357, 366 (6th Cir. 2007).
188 *Gambini*, 486 F.3d at 1093.
189 *See id.* at 1094.
discrimination laws.”190 After Gross, the Ninth Circuit may retreat from that interpretation and require ADA disparate treatment plaintiffs to show the causal link under the heightened but-for standard.

Even when courts distinguish between causation issues in disparate treatment and reasonable accommodation claims, they may still look for causation in reasonable accommodation claims. For example, in Nichols v. Unison Industries,191 the federal district court characterized disparate treatment and “failure to accommodate” as “two distinct categories of disability discrimination claims. . . .”192 The employer in that case argued that the plaintiff’s failure to accommodate claim was “based solely on the theory that the company discharged him because he requested heat breaks [during his shift] as an accommodation,” which would apparently be considered a form of disparate treatment.193 The court disagreed with the defendant’s assertion, finding the plaintiff had sufficiently alleged that his claim was based on the denial of the heat breaks, which would be a failure to accommodate claim.194 When the court proceeded to evaluate that failure to accommodate claim, however, it found a causation problem.

The court noted that an employer is required to grant an accommodation request only “when the accommodation makes it possible for the disabled individual to: (1) perform the essential functions of the job in question; (2) pursue therapy or treatment for that disability; or (3) enjoy the privileges and benefits of employment equal to those enjoyed by non-disabled employees.”195 In that case, the court concluded that the plaintiff lacked prima facie evidence to

190 Id.
192 Id. at *6.
193 See id.
194 See id.
195 Id. at *7.
meet any of these three reasons.\textsuperscript{196} Most significantly, the court found the plaintiff was able to continue to perform his job despite having been denied the requested heat breaks.\textsuperscript{197} Without explicitly stating so, the court apparently concluded that the accommodation was not reasonable because there was no evidence of causation—the denial of the accommodation did not cause plaintiff to have difficulty performing his job.\textsuperscript{198}

While \textit{Nichols} did not involve an issue of sole causation, it does contain a “but-for” element. The court seems to be suggesting that part of the plaintiff’s prima facie case must include a showing that but-for being denied accommodation, the plaintiff would have been able to perform the job. Here, plaintiff failed to show how denial of the heat breaks impacted his ability to do the job.\textsuperscript{199} Without evidence that the denial posed a work-related barrier because of his disability, his claim failed.\textsuperscript{200}

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\textsuperscript{196} See \textit{id.} at *8. The plaintiff’s disparate treatment claim also failed because he failed to present sufficient evidence his discharge was caused by his disability. \textit{Id.} at *8. The company argued it was based on statements the plaintiff made to other co-workers that created a hostile working environment. \textit{Id.} at * 2. The plaintiff relied on the temporal relationship between his formal request for reasonable accommodation and his discharge, but the court found that evidence insufficient because the company actually knew of his accommodation request long before the decision to discharge him was made. \textit{Id} at *8.
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Nichols} interpretation of the prima facie test means that employees would not be protected from discrimination when the failure to accommodate makes it much harder, although not impossible, to perform work tasks. \textit{Nichols} was decided prior to \textit{Barnett} and its endorsement of lower courts’ definition of “reasonable” as “ordinarily or in the run of cases.” See \textit{Barnett}, 535 U.S. at 401-02 (citations omitted). As that prima facie test is configured, there is no requirement that employees also prove that they were unable to do the job without the accommodation. See \textit{id.; see also} notes 278-281 \textit{infra} and accompanying text.
\textsuperscript{199} See \textit{id.}
\textsuperscript{200} The Eleventh Circuit has taken this consideration one step further and required a plaintiff to show the refused accommodation would have “completely obviated” the difficulty his impairment caused him the in the workplace. See McKane v. UBS Fin. Servs., Inc., 363 F. App’x. at 682 (11th Cir. 2010).
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As this section illustrates, causation issues are present in courts’ analysis regardless of whether the claim is one for disparate treatment, to which *Gross* more directly applies, or denial of reasonable accommodation. Even in accommodation cases, plaintiffs have been required to show prima facie evidence that the adverse employment action would not have occurred but-for the plaintiff’s need or request for accommodation. Employers have been able to take the focus away from whether the accommodation was reasonable or what are the essential functions of a position by asserting they had a legitimate, non-discriminatory reason for discharging the plaintiff, even when that reason seems to have some connection to the plaintiff’s disability. Although disparate treatment and reasonable accommodation are identified as separate theories, these causation cases suggest the distinction between the two can easily be blurred.


The necessity analysis in a case like *Nichols* has similarities to that articulated by Justice Scalia in his dissenting opinion in *US Airways v. Barnett*. In that case, Justice Scalia, joined by two other justices, argued that “because of disability” under the ADA required plaintiffs to show the sought accommodation had a but-for relationship with the plaintiff’s disability—that but-for the plaintiff’s disability, the plaintiff would not need the accommodation. While a majority of the Court rejected Scalia’s arguments in the context of *Barnett*, those arguments may find greater success in a post-*Gross* regime.

The main issue in *Barnett* was whether an employee was entitled to reassignment to a position despite the employer’s assertion that assignment would violate its non-contractual

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seniority system. In reaching its decision, the majority interpreted the ADA to allow an individual with a disability to seek reassignment to a vacant position as a reasonable accommodation even if the barrier to that reassignment was a workplace rule that all employees, not just those with disabilities. In other words, employers may be required to modify otherwise neutral workplace rules. The workplace barrier in question was a seniority rule, which the employer asserted did not allow the plaintiff to retain a position to which he had been temporarily transferred after an injury. Justice Scalia dissented, joined by Justice Thomas, and argued that the statutory structure of the ADA did not permit accommodation claims in this circumstance.

Scalia asserted that the majority ignored the fact the ADA did not simply prohibit discrimination against a qualified individual, it specifically prohibited discrimination “because of the disability of such individual” and required accommodation “to the known physical or mental limitations of an otherwise qualified individual with a disability.” He interpreted this to require employers to remove workplace barriers “only if a disability prevents an employee from overcoming them—those barriers that would not be barriers but-for the employee’s disability.” The seniority barrier at issue did not pose a special burden for individuals with disabilities as opposed to every other less senior employee and, therefore, it was not the but-for cause of the plaintiff’s failure to be permanently reassigned.

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202 See id. at 394.
203 Id. at 397-98.
204 See id. at 394-95.
205 Id. at 412 (Scalia, J., dissenting).
206 Id. at 412-13 (Scalia, J., dissenting) (quoting 42 U.S.C. §§ 12112(a), 12112(b)(5)(A)).
207 Id. at 413 (Scalia, J., dissenting) (emphasis in original).
208 Id. at 413-14 (Scalia, J., dissenting).
The *Barnett* majority focused on arguments regarding whether granting reassignment worked as an unlawful preference. It reasoned that nothing in the ADA indicated Congress intended to exempt workplace rules simply because they can be characterized as neutral. To the contrary, Congress expected that individuals with disabilities might have to be treated differently on an individualized basis in order to obtain equal opportunity. The Court reasoned that “[t]he Act requires preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy.” While it did not address the substance of Scalia’s but-for argument directly, the majority viewed his argument as tapping into the preference argument and explicitly rejected it on that ground.

While the Court could have been clearer, its rejection of Justice Scalia’s position was correct. Under Scalia’s vision of accommodation causation, rules or policies that “bear no more heavily upon a disabled employee than upon others” do not have to be accommodated. This rule would appear to swallow many otherwise reasonable accommodations. For example, would a rule such as requiring an 8:00 a.m. starting time need to be accommodated for an individual who has difficulty rising in the morning due to medication taken at night or who has transportation

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209 Id. at 397-98.
210 Id. at 398.
211 Id. at 397
212 Id. The Court further elaborated its understanding of the statutory relationship by noting that “preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.” See id. at 398 (reasoning that “[t]he simple fact that an accommodation would provide a ‘preference’—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not ‘reasonable.’ As a result, [the Court] rejects the position taken by US Airways and Justice Scalia to the contrary”). Professor Mark Weber has noted that many courts have missed this part of the majority’s opinion. See Mark C. Weber, *Unreasonable Accommodation and Undue Hardship*, 62 Fla. L. Rev. 1119, 1172 (2010) (noting that it is “surprising . . . that so many courts have failed to realize that the majority of the Supreme Court rejected [the argument] that the ADA does not require ‘preferences’ for employees with disabilities or departures from neutral rules”).
limitations due to a mobility impairment? Individuals without disabilities have their own difficulties with early work times,\textsuperscript{214} and the start time rules is an obstacle regardless of, not but-for, the employee’s disability.\textsuperscript{215} Yet, the reason this particular individual requires accommodation at all is because of the individual’s disability-related limitations.

In Mr. Barnett’s case, Justice Scalia would have found a failure to prove but-for causation because Barnett did not show he was in any different position because of his disability than any other person who lacked seniority to get the job.\textsuperscript{216} But because of his disability, he was the position of having much more limited options.\textsuperscript{217} The ADA requires reasonable accommodations to the employee’s known physical or mental limitations, and failure to make such accommodations is discrimination because of disability.\textsuperscript{218} It is simply irrelevant whether other, non-disabled individuals might also face obstacles to getting the job.

The starting point of Justice Scalia’s analysis cannot be denied; as noted above, the accommodation mandate is a specific application of the substantive prohibition on discrimination “because of” (now “based on”) disability. While the Barnett majority rejected Justice Scalia’s attempt to inject but-for causation into accommodation claims, it did so by framing the argument as involving preferences.\textsuperscript{219} The strength of the Barnett majority is not clear post-Gross.

\textsuperscript{214} Such as child care, commuting, etc.
\textsuperscript{215} Justice Scalia does suggest that a modified work schedule might be a reasonable accommodation, but he frames this in reference to an employee needing breaks from “work for protracted periods.” Barnett, 535 U.S. at 415 (Scalia, J., dissenting).
\textsuperscript{216} Id. at 413-14 (Scalia, J., dissenting).
\textsuperscript{217} See Carlos A. Ball, Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act, 55 ALA. L. REV. 951, 962 (2004) (noting that “[d]isabled employees, once they are bumped from their jobs by more senior employees, have fewer options than their able-bodied counterparts”).
\textsuperscript{219} See Barnett, 535 U.S. at 398.
Another case presenting a different context, much as Gross differed from Price Waterhouse while still raising the same core issue, may result in Scalia’s but-for approach prevailing.

c. “Necessity-Causality” under Title II

Although the Barnett Court refused to adopt Justice Scalia’s but-for standard in a Title I claim, some courts have applied similar reasoning in Title II claims. These cases demonstrate how but-for analysis can creep into accommodation analysis. The potential for the standard “if not restrained [to] take on a life of its own” is substantial.

The Title II cases come out of the Seventh Circuit. Title II applies to the benefits, programs, and activities of public entities. The regulations implementing Title II define discrimination to include not “mak[ing] reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” In Wisconsin Community Services, Inc., v. City of Milwaukee, the Seventh Circuit en banc concluded the term “necessary” added a “but-for” causation element to Title II accommodation claims.

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222 28 C.F.R. § 35.130(b)(7) (2010).
223 Wisc. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 752 (7th Cir. 2006) (en banc). A prior Seventh Circuit panel hearing the case had determined that Title II did not contain an accommodation requirement apart from disparate impact situations, which meant plaintiffs had to show the zoning board’s actions bore more heavily on individuals with disabilities than on the general populace. See Wisc. Cmty. Servs., Inc. v. City of Milwaukee, 413 F.3d 642, 645-46 (7th Cir. 2005). While the en banc court reversed the disparate impact requirement, it retained the underlying rationale that Title II plaintiffs had to show how denying the accommodation
As the en banc court explained it, a modification would be ‘‘necessary’’ only when it allows the disabled to obtain benefits that they ordinarily could not have by reason of their disabilities, and not because of some quality they share with the public generally.”\textsuperscript{224} The court called this “necessity-causality,” which could be “satisfied only when the plaintiff shows that, but-for his disability, he would have been able to access the services or benefits desired.”\textsuperscript{225}

In the case, the plaintiff sought a special use permit to open a mental health clinic.\textsuperscript{226} The permit had been denied twice by the zoning board, first largely because of negative sentiment from the neighborhood toward mental health clinics,\textsuperscript{227} and second in part because the zoning board found insufficient evidence that the location was necessary to the patients’ treatment, and also in part because it considered modifying the zoning plan to accommodate a non-profit organization that would not generate taxes or additional business unreasonable.\textsuperscript{228} In regard to the necessity issue, the lower court had articulated a standard that asked whether the accommodation “enhanced[d] affirmatively [the plaintiff’s] disabled patients’ quality of life by ameliorating the effects of disability.”\textsuperscript{229} The lower court suggested this standard made more

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\item \textsuperscript{224} Wisc. Cnty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 745 (7th Cir. 2006) (en banc).
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. at 740.
\item \textsuperscript{227} See \textit{id.} at 742-43 (noting several zoning board members attributed their vote to “overwhelming’ opposition from neighborhood residents”).
\item \textsuperscript{228} See \textit{id.} at 744-45. The zoning board also concluded that granting the request would fundamentally alter the city’s zoning plan because [e]very time a social service agency [or similar treatment facilities] wanted to locate their business in a zoning district requiring a special use to do so, the City or this Board would have to automatically consider giving them an accommodation under the ADA regardless of the special use criteria in the City’s ordinance.
\item \textsuperscript{229} Wisc. Cnty. Servs., Inc., 465 F.3d at 745 (internal quotation marks and citations omitted).
\end{itemize}
sense than one that compared access by those with and without disabilities, since the general public does not require mental health services.230

The Seventh Circuit believed, however, that the issue had been decided by the Supreme Court in Alexander v. Choate.231 This was despite the fact Choate was a disparate impact case involving state allocation of Medicaid benefits which raised a distinct set of principles.232 In Choate, the Supreme Court rejected a class action claim under the Rehabilitation Act that alleged Tennessee’s reduction of Medicaid coverage for inpatient medical care to 14 days disproportionately affected individuals with disabilities.233 The Court’s standard asked whether the plaintiffs had “meaningful access” to Medicaid services.234 The Court concluded there was no evidence the program as defined had a “particular exclusionary effect” on the plaintiffs because of their disability.235 They were able to access and benefit meaningfully from the fourteen days of coverage.236

230 Id.
231 Id. at 747–48 (citing Alexander v. Choate, 469 U.S. 287 (1985)).
232 See Alexander v. Choate, 469 U.S. 287, 287 (1985) (describing plaintiffs’ claim as alleging the state’s reduction in medical benefits “would have a disproportionate effect on the handicapped and hence was discriminatory”).
233 Id. at 309. In an earlier part of the opinion, the Court unanimously concluded that at least some disparate impact claims would be cognizable under § 504. Id. at 299.
234 Id. at 301.
235 Id. at 302. The plaintiffs in Choate tried to argue the issue was broader, namely whether they had meaningful access to adequate health care. See id. at 302-03. They asserted that individuals with disabilities had greater need for health care services than individuals without disabilities and fourteen days did not provide them with meaningful benefit. See id. The Court rejected this broader view of the issue, suggesting nothing in the law required the State to provide an alternative benefit, just to provide equal access to the benefit that was provided. Id. at 305. The Court was not convinced individuals with disabilities would be unable to benefit from fourteen days worth of benefits. See id. at 302 n. 22.
236 Id.
According to the Seventh Circuit, *Choate* created a generalized but-for standard in public service cases that requires comparison to the general public.\(^{237}\) The Seventh Circuit read *Choate* as articulating a “meaningful access” standard that would apply to accommodation claims similar to the way it applied to the Medicaid benefit claim in *Choate*: “The Rehabilitation Act’s promise of ‘meaningful access’ to state benefits, according to the Court, means that ‘reasonable accommodations in the grantee’s program or benefit may have to be made.”\(^{238}\) The Seventh Circuit then read *Choate* to find the plaintiffs did not lack meaningful access because the benefits program did not distinguish based on any criteria individuals with disabilities would be less likely to meet.

While it is correct that *Choate* found no lack of meaningful access because it found no particular exclusionary effect, the context of the Court’s conclusion has to be considered. *Choate* was not presented as a typical accommodation claim, where a specific modification is sought by a particular individual in a particular case. Instead, the plaintiffs in *Choate* sought to enjoin a state from rewriting its Medicaid program.\(^{239}\) The Court begins its discussion of meaningful access by stating it is deciding “which disparate impacts § 504 might make actionable.”\(^{240}\) Although the Court mentions an obligation to make reasonable modifications, it does so only to illustrate that a neutral benefit plan cannot be constructed so as to deny meaningful access to its benefits.\(^{241}\) The Court then concludes that this neutral plan did not

\(^{237}\) *Wisc. Cnty. Servs., Inc.*, 465 F.3d at 748.

\(^{238}\) *Wisc. Cnty. Servs., Inc.*, 465 F.3d at 747 (quoting *Choate*, 469 U.S. at 301).

\(^{239}\) *See Choate*, 469 U.S. at 290 (describing “major . . . thrust of [Choate’s] attack” as “directed at the use of any annual limitation on the number of inpatient days covered”).

\(^{240}\) *Id.* at 299.

\(^{241}\) *See id.* at 301 (reasoning that “[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made”).
create a disparate impact because both individuals with disabilities and those without would receive value from 14 days of in-patient coverage. The Seventh Circuit extrapolates this reasoning and applies it to reasonable accommodation claims, creating an additional element plaintiffs must establish.

The leap the Seventh Circuit took from Choate to an individualized reasonable accommodation claim was substantial. While what the Choate plaintiffs wanted could be characterized as a reasonable modification of the benefits program, the case was not analyzed on the individualized basis that reasonable accommodation cases are. The Choate plaintiffs sought to require Tennessee to change its Medicaid program by eliminating durational limitations on coverage. The facts in the Seventh Circuit case illustrate the difference between that sort of disparate impact claim and an individualized reasonable modification claim. The plaintiff in Wisconsin Community Services sought a modification of zoning ordinances to allow it to build a mental health clinic; it did not seek to strike the city’s special use permit requirement. The issue should have been whether the variance sought by the plaintiff was reasonable, not whether the zoning ordinance impacted individuals with disabilities in fashion similar to others in the

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242 Id. at 302.
243 The better view is illustrated by one of the cases Wisconsin Community Services cites. See Wisc. Cmty. Servs., Inc., 465 F.3d at 748 (citing Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003)). In Henrietta D., the Second Circuit rejected the City of New York’s argument that the plaintiffs needed first to establish a disparate impact before their reasonable accommodation claim could be considered. Henrietta D. v. Bloomberg, 331 F.3d 261, 273 (2d Cir. 2003). That court noted the Department of Justice’s regulations, which prohibit not only failing to provide services and benefits that are not equal or as effective as those afforded others, but also preventing individuals with disabilities from enjoying those services and benefits “regardless of whether other individuals are granted access.” Id. at 274 (citing 28 C.F.R. §§ 35.130(b)(1)(i)-(iii)). The court concluded its own precedent also did “not invite comparisons to the results obtained by individuals without disabilities.” Id.
244 See Choate, 469 U.S. at 714-15.
245 See Wisc. Cmty. Servs., Inc., 465 F.3d at 754 (noting that “WCS submits that the City must waive application of its normal special-use criteria for WCS because it has shown the permit will ameliorate overcrowding, a condition that particularly affects its disabled clients”).
community.\textsuperscript{246} The circuit court found the plaintiffs failed to show but-for causation because the court credited the testimony from city aldermen that their main concern was loss of tax revenue from a non-profit organization.\textsuperscript{247} The court concluded this concern did not distinguish the mental health clinic from any other non-profit organization.\textsuperscript{248} In other words, the accommodation was not necessary because of the disability of the clinic’s patients but because the clinic was not-for-profit.

\textit{Wisconsin Community Services} thus illustrates the barrier an additional causation element can pose to accommodation claims. It also illustrates doctrinal creep—in that case, from disparate impact issues regarding provision of federally assisted state benefit programs to Title II reasonable modification claims.\textsuperscript{249} The consequences of this creep is to allow courts to engage in

\textsuperscript{246} See 28 C.F.R. § 35.130(b)(7) (2010). Section 35.130(b)(7) provides that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” \textit{Id.}

\textsuperscript{247} See \textit{Wisc. Cmty. Servs., Inc.}, 465 F.3d at 754 (reasoning that the plaintiff’s “inability to meet the City’s special use criteria appears due not to its client’s disabilities but to its plan to open a non-profit health clinic in a location where the City desired a commercial, taxpaying tenant instead”).

\textsuperscript{248} See \textit{id.}

\textsuperscript{249} A similar illustration can be found in a Minnesota Supreme Court case, albeit with a different factual conclusion. See \textit{Hinneberg v. Big Stone Cnty. Hous. & Redevelop. Auth.}, 760 N.W.2d 777 (Minn. 2005). In \textit{Hinneberg}, the plaintiff sought to use a Section 8 voucher outside of the Housing Authority’s jurisdiction. \textit{Id.} at 221. She asserted her medical condition made this necessary because she could not find suitable housing within the county. \textit{Id.} The housing authority’s residency policy, however, required that she have physical residence in the county and reside there at least twelve months before the voucher would be portable. \textit{Id.} at 223. The plaintiff sued the housing authority under Title II as well as the Fair Housing Act, alleging it failed to reasonably modify its policy. \textit{Id.} at 221. The lower court applied Choate’s “meaningful access” standard to deny the plaintiff’s claims. \textit{Id.} at 227. The plaintiff argued that because her claim was not a disparate impact claim, the meaningful access standard did not apply. \textit{Id.} The Minnesota Supreme Court disagreed, reading Choate as “treat[ing] ‘meaningful access’ and ‘reasonable accommodations’ as . . . equivalent as applied.” \textit{Id.} The court then concluded that “the holding in \textit{Alexander} on meaningful access is fully applicable to reasonable accommodations claims made under the ADA and FHAA.” \textit{Id.} The court next defined the
universalist reasoning that disregards the particular nature of the limitations experienced by individuals with disabilities. Two contrasting cases involving plaintiffs with transportation limitations illustrate the difference it makes.250

In Sudduth v. Donnelly, the plaintiff was a witness in a criminal matter attempting to get to the courthouse from out of town.251 Because of visual limitations, plaintiff alleged he couldn’t drive or fly, so he had to take the train.252 The train arrived late, and despite the fact the plaintiff contacted the State’s Attorney’s Office prior to leaving on his trip, as well as the courthouse when it became clear he’d be late, the case was dismissed without him being able to testify against the defendant.253 The court rejected the claim he was denied reasonable accommodation, employing Wisconsin Community Service’s but-for analysis to conclude he “was not denied access to the court because of his disability when everyone in the general population faces the risk of late arrival due to travel complications.”254 The court reasoned that he did not arrive on time for the hearing “because his train was late, not because he suffered from diabetes.”255 The court thus transformed a question that should have been about the reasonableness of delaying the benefit in question, which it concluded was portability of housing vouchers. Id. The court concluded the plaintiff was not given meaningful access to this benefit, because individuals without disabilities could move to the county and establish residency, and obtain a portable voucher, but individuals such as the plaintiff could not due to their disability. Id. at 228. Although the court framed the question as one of equal access, its reasoning is ultimately similar to that of the Seventh Circuit in that it compares the plaintiff to individuals without disabilities as if the case were a disparate impact claim.

250 Compare Sudduth v. Donnelly, No. 08 C 4227, 2009 WL 918090, *7 (N. D. Ill. April 1, 2009) (finding no right to reasonable modification in Title II case because plaintiff’s transportation problems were similar to that experienced by general public) with Colwell v. Rite Aid Corp., 602 F.3d 495, 505 (3d Cir. 2010) (finding shift change accommodation needed because of transportation difficulties reasonable in Title I case).

251 Sudduth, 2009 WL 918090 at *1.

252 See id.

253 See id.

254 Id. at *7.

255 Id.
hearing to accommodate the plaintiff’s vision-related transportation limitations into one seeking proof of a disparate impact.

By contrast, in *Colwell v. Rite Aid Corp.*, the Third Circuit found a plaintiff had stated a claim for violation of ADA Title I when she alleged her employer refused to accommodate her night driving limitations by granting her a change to the day shift. The employer argued that her driving difficulties “amounted to a commuting problem unrelated to the workplace.” The court disagreed, focusing instead on the reasonableness of the requested change. The court reasoned that a shift change to accommodate “an employee’s disability-related difficulties in getting to work [would be] reasonable . . . when the requested accommodation is a change to a workplace condition that is entirely within an employer’s control and would allow the employee to get to work and perform her job.” The court properly kept the focus on the policies and practices of the employer and whether the requested accommodation (which clearly related to the employee’s known disability-related limitations) was a reasonable modification of those policies and practices, rather than asking for proof of but-for causation.

So far, it appears that only ADA Title II cases have explicitly applied this necessity-causality standard. Title II differs from Title I in that there is no direct mention of reasonable accommodation in Title II. Instead, the requirement is found in the regulations implementing

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256 *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010).
257 *Id.* at 504.
258 *See id.* at 505.
259 *Id.*
260 Title II’s substantive prohibition provides simply that, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (a) (2006).
Those regulations in turn are derived from the ones adopted under § 504 of the Rehabilitation Act. Both the original Rehabilitation Act regulations and ADA Title II regulations define reasonable accommodation as a modification “necessary to avoid discrimination on the basis of disability.” Similar language does not appear in the ADA Title I. Nonetheless, in a post-\textit{Gross} “but-for” regime, there is a serious question whether this same reasoning will eventually be reflected in Title I analysis.

Justice Scalia’s reasoning in his \textit{Barnett} dissent suggests that the absence of such language will not bar applying the same “necessity” approach to Title I. Both Scalia and the Seventh Circuit essentially employ the same reasoning—that disability plaintiffs have to establish the non-universal character of their limitations and need for accommodation. It adds

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  \item[261] 28 C.F.R. § 35.130(b)(7) (2010); \textit{see supra} n. 246.
  \item[262] 34 C.F.R. § 104.12 (2010). This provision has not been substantively amended since first promulgated in 1980. \textit{See} Reasonable Accommodation, 45 Fed. Reg. 30, 940 (May 9, 1980).
  \item[263] \textit{See} 28 C.F.R. § 35.130(b)(7) (2010); 34 C.F.R. § 104.4 (1981).
  \item[264] \textit{See} 42 U.S.C. § 12112(b)(5)(A) (2006) (prohibiting “not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”); \textit{id.} § 12112(b)(5)(B) (prohibiting “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant”).
  \item[265] I am using “universal” here a bit differently than others have used it. In other contexts, scholars have discussed the “minority model” and the “universal model” of coverage under the ADA. \textit{See generally}, Kevin M. Barry, \textit{Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights}, 31 BERKELEY J. EMP. \& LAB. L. 302 (2010); Under the universal model, the ADA’s civil rights protections would not be dependent on establishing “disability” class status but are seen to apply to all who are denied opportunity because of an impairment. \textit{See id.} at 217-8 (citing Samuel R. Bagenstos, \textit{Subordination, Stigma, and Disability}, 86 V.A. L. REV. 397, 475 (2000)). Similar arguments have been made to expand the protections in other areas of antidiscrimination law, such as sexual harassment law. \textit{See generally} Jessica A. Clarke, \textit{Beyond Equality? Against the Universal Turn in Workplace Protections}, 86 IND. L.J. 1219, 1220-23 (2011) (summarizing the trend toward universalism in workplace bullying and work-life accommodations). Professor Clarke cautions that the general trend toward universalism in antidiscrimination law may “create new problems of inequality, by requiring all workers to assimilate to biased norms masquerading as neutral rules, and by diluting protections for those who need them most[.]” \textit{Id.} at 1223. While I think there are strong benefits
up to something that may have major impact on Title I accommodation claims. As discussed in the next section, it effectively has the potential to derail an entire category of accommodation.

VI. But-For Causation and Reassignment to a Vacant Position

*Barnett* raised issues about the duty to reassign employees with disabilities to vacant positions.266 *Barnett*, however, was presented in a narrow context: reassignment when a seniority system would otherwise make the employee ineligible for the open position.267 *Barnett* did not provide courts with much guidance on how to determine if reassignment is reasonable in other contexts, such as when the employer has other candidates for the open slot that it believes are more qualified.268 Justice Scalia argued but-for standards should to apply to reassignment claims.269 This would presumably prevent reassignment when there are more qualified candidates, because the employee could not show that but-for his disability, he would have been reassigned to the vacant position.270 Justice Scalia’s argument in this regard is not necessarily

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267 See id. at 395-96.

268 The Court granted certiorari in 2008 in an Eighth Circuit case raising a more general issue about employee eligibility for reassignment as a reasonable accommodation, but the case was later dismissed when the parties settled. See Huber v. Wal-Mart Stores, Inc., 552 U.S. 1136 (2008) (dismissing writ of certiorari).

269 Id. at 413 (Scalia, J., dissenting).

270 Justice Scalia’s reasoning in reassignment cases might be signaled by this passage in *Barnett*:

> In particular cases, seniority rules may have a harsher effect upon the disabled employee than upon his co-workers. If the disabled employee is physically capable of performing only one task in the workplace, seniority rules may be, for him, the difference between employment and unemployment. But that does not make the seniority system a disability-
tethered to the preferences argument the Barnett majority rejected. After Gross, he may find the four votes he needs to insert but-for analysis into accommodation law. It would, however, be an incorrect interpretation of the ADA.

The ADA provides that reassignment may be a reasonable accommodation and that failure to accommodate violates the prohibition on discrimination. While the statutory language does not directly incorporate the “because of” language that Gross emphasized, it also does not clearly articulate a contrary standard. Also, as noted above, the ADA’s reasonable accommodation provisions are a subset of the broader prohibition on discrimination “based on” disability. Because of this, at least some lower courts have taken a standard disparate treatment approach to reassignment cases, finding no discrimination for failure to reassign when the employer asserts it gave the vacant position to a more qualified individual.

related obstacle, any more than harsher impact upon the more needy disabled employee renders [a] salary system a disability-related obstacle.

Id. Employer policies to select the most qualified individual for an open position may have harsher effect on individuals with disabilities, this reasoning would say, but that is not a disability-related obstacle simply because it means the employee with a disability will become unemployed. Justice Scalia refers to accommodations as merely “making up” for a disability if the but-for relationship is not shown, which may be the basis for the majority’s view he was making a preference argument. See id. That view may also stem from Justice Scalia’s citation of cases such as one from the Seventh Circuit that follows a preference-based line of reasoning. See id. (citing Humiston-Keeling, Inc., 227 F.3d 1024, 1028-29 (7th Cir. 2000)); see also infra note 275 and accompanying text discussing Humiston-Keeling.

See supra n. 156 and accompanying text.

See Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483-84 (8th Cir. 2007) (employer not required to reassign employee to vacant position when it has a policy to prefer the most qualified candidate); Humiston-Keeling, Inc., 227 F.3d 1024, 1027 (7th Cir. 2000) (employee with a disability is only entitled to be considered for position); see also Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir.1995) (reading the ADA as not “requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in
So far, those courts rejecting the right to reassignment have primarily framed their analysis in the language of preferences, such as the following from the Seventh Circuit’s opinion in *EEOC v. Humiston-Keeling, Inc.*:

The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.275

hiring or reassignment over those who are not disabled”). Other circuits have held that the individual with a disability is entitled to be reassigned to the vacant position if she is qualified for the position, notwithstanding the employer’s claim it chose a more qualified applicant. See Smith v. Midland Brake, Inc., 180 F.3d 1154, 1169 (10th Cir. 1999) (holding employee with a disability is entitled to be reassigned); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1305 (D.C. Cir. 1998) (declining to adopt rule that right to reassignment is nothing more than a right to submit an application along with other candidates); Alston v. Washington Metropolitan Area Transit Auth., 571 F. Supp. 2d 77, 83 (D.D.C. 2008) (reasoning that “[t]o find that the affirmative duty [to reassign] is excused by an employer’s policy of hiring the most qualified candidate would be to hold that the employer’s obligation to a disabled employee is limited to considering him along with every other applicant for the vacant position.”); Thornton v. Providence Health Sys., No. 05-40, 2005 WL 3303944, at *5 (D. Or. Dec. 5, 2005) (concluding that requiring employee to “compete” for a vacant position as would any member of the public who did not have a disability” would be “an inadequate accommodation under the ADA”). The Federal District Court for the District of Pennsylvania recently appears to have adopted a unique position, requiring the plaintiff to meet Barnett’s “special circumstances” test to justify departing from the employer’s asserted “neutral” rule of preferring the most qualified applicant. See Haynes v. AT & T Mobility, LLC, 1:09-CV-450, 2011 WL 532218, at *4-5 (M.D. Pa. Feb. 8, 2011) (concluding that because the plaintiff sought “reassignment over another candidate who [wa]s more qualified for the job, when the most qualified candidate would normally be entitled to the job under the employer’s established hiring practices,” the accommodation was not reasonable in the run of cases and the plaintiff could “only avoid summary judgment by showing special circumstances which establish that, in the circumstances of his case, the accommodation he requested is reasonable”).

275 227 F.3d 1024, 1028 (7th Cir. 2000); see also Huber, 486 F.3d at 483 (quoting Humiston-Keeling).
Humiston-Keeling was decided prior to Barnett, and as such, its objection to the reassignment accommodation on preference grounds is suspect. This has not, however, kept other courts such as the Eighth Circuit from citing Humiston-Keeling’s reasoning favorably.

In Barnett, the Court appears to adopt the “run of cases” standard of reasonableness. Under this rule, the plaintiff need only establish that an accommodation would be reasonable “in the run of cases” as part of her prima facie case. The burden would then shift to the employer to show that this otherwise reasonable accommodation poses an undue hardship. Because the ADA expressly refers to reassignment as a form of reasonable accommodation, there is a good argument that its reasonableness in the run of cases should be presumed, and that the onus should be on the employer to establish a specific reason it would pose an undue hardship under the circumstances of the particular case. To read reassignment in the statute as only giving employees the right to be considered for a vacant position would make that language redundant.

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276 Barnett specifically rejected the argument that accommodations are inappropriate when they can be construed as a form of preference for the individual with a disability. U.S. Airways v. Barnett, 535 U.S. 391, 398 (2002). The Eighth Circuit in Huber failed to acknowledge that aspect of the opinion. To the contrary, it cited Barnett as favorable to its finding, finding it to be consistent with that court’s prior ruling that “an employer is not required to make accommodations that would subvert other, more qualified applicants for the job.” See Huber, 486 F.3d at 483-84 (quoting Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083, 1089 (8th Cir. 2000) (per curiam)).

277 See Huber, 486 F.3d at 483.

278 Barnett, 535 U.S. at 401-02 (favorably citing rule in lower courts as interpreting “reasonable” to mean “ordinarily or in the run of cases” (citations omitted)).

279 The “run of cases” standard originated in Rehabilitation Act cases. See Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001) (citing Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir.1993)).

280 See id. at 259 (concluding that “[i]f plaintiff succeeds in carrying [the prima facie] burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details”).


61
with other aspects of the statute that bar discrimination in job application procedures, rendering
the reasonable accommodation language superfluous.\textsuperscript{282} Moreover, the statute speaks of
“reassignment,” not “consideration of reassignment.”\textsuperscript{283} The statute mandates affirmative acts
by the employer.\textsuperscript{284} It must take more than an employer asserting it prefers another candidate to
defeat the individual with a disability’s right to the accommodation.\textsuperscript{285}

Embedded in the Seventh Circuit’s reasoning is the issue of causation. The court
categorized the employer’s policy of “giving the job to the best applicant” as a “decision on the
merits,” and “legitimate and non-discriminatory.”\textsuperscript{286} In other words, the court was applying
basic Title VII law regarding what is (and is not) discrimination “because of” a protected
characteristic.\textsuperscript{287} The court’s reasoning can be readily translated to “the plaintiff did not lose out
on the job because of his disability, but because there was someone more qualified than he for
that job; thus, his disability did not cause the failure to accommodate with a reassignment.” Its

\begin{itemize}
\item \textsuperscript{282} Nicholas A. Dorsey, Note, Mandatory Reassignment under the ADA: The Circuit Split and
the Need for a Socio-Political Understanding of Disability, 94 CORNELL L. REV. 443, 461 (2009).
\item \textsuperscript{283} Id.
\item \textsuperscript{284} Id.
\item \textsuperscript{285} The EEOC’s interpretive guidance characterizes reassignment to a vacant position as the
accommodation of last resort, available when the employee can no longer perform the essential
functions of the job she currently holds. 29 C.F.R. app. § 1630.2(o) (2010). Crafting further
barriers to the individual’s right to be reassigned virtually insures that the individual will lose her
position. \textit{Cf.} Carlos Ball, Preferential Treatment and Reasonable Accommodation under the
Americans with Disabilities Act, 55 ALA. L. REV. 951, 962 (noting that individuals with
disabilities have fewer options to shift between positions and will almost surely end up losing
employment whereas individuals without disabilities will be able to continue to work and
accumulate seniority that will assist them in future job transfers).
\item \textsuperscript{286} Humiston-Keeling, 227 F.3d at 1028.
\item \textsuperscript{287} See, e.g., McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) (describing
employer’s burden in a disparate treatment claim as “to articulate some legitimate,
nondiscriminatory reason for the employee's rejection”).
\end{itemize}
reference to preferences is arguably dicta to the Seventh Circuit’s underlying theory; that language could be eliminated and the same conclusion reached.\textsuperscript{288}

This may be how \textit{Gross}’ interpretative approach influences the outcome in a reassignment case. While it is unlikely that a majority of the Court would explicitly overrule \textit{Barnett}’s conclusion that the ADA does not bar accommodations merely because they can be characterized as preferences, this doesn’t preclude reading the statutory language to require causation. Being denied the reassignment was not but-for the plaintiff’s disability; it was based on lesser qualification.\textsuperscript{289} This reasoning is \textit{Gross} in action—causation standards applied consistently across different types of anti-discrimination claims, absent explicit congressional direction to apply a different standard.

Of course, the problem with this is that it misconstrues the nature of discrimination involving reasonable accommodations. Not making reasonable accommodation is a self-executing form of causation—it is, in itself, discrimination based on disability.\textsuperscript{290} At least some courts show they understand this, when they note why employers often do not contest causation.\textsuperscript{291} If reassignment is reasonable in the run of cases, which its inclusion in the statute suggests it is, then the only “causation” element at work is the plaintiff’s showing that she can no longer perform the essential functions of the job in question but is otherwise qualified for and

\textsuperscript{288} This is in essence what the Eighth Circuit did in \textit{Huber}. That court framed the issue instead as whether the employer had to “subvert” or “turn away” someone with greater entitlement to the position. \textit{See Huber}, 480 F.3d at 484.

\textsuperscript{289} This ties to the non-essentialism required in the necessity-causality cases, because being less qualified than the preferred candidate is something shared with others who are not disabled.

\textsuperscript{290} \textit{See Higgins v. New Balance Athletic Shoe, Inc.}, 194 F.3d 252, 264 (1st Cir. 1999) (noting that “any failure to provide reasonable accommodations for a disability is necessarily ‘because of a disability’”).

\textsuperscript{291} \textit{See Foster v. Arthur Andersen, LLP}, 168 F.3d 1029, 1032-33 (7th Cir. 1999); \textit{see also supra} n. 169 and accompanying text.
can perform the tasks associated with the equivalent vacant position.\textsuperscript{292} There is not a second level of causation which requires plaintiffs to show (again) that the accommodation was denied based on disability.

Moreover, that a policy can be characterized as “legitimate and non-discriminatory” is not a defense to the obligation to make an otherwise reasonable accommodation. The proper statutory defense is that the accommodation poses an undue hardship.\textsuperscript{293} “Undue hardship” is defined to mean “significant difficulty or expense.”\textsuperscript{294} If construed broadly, some of the statutory interpretive factors arguably allow consideration of employers’ need to select a more qualified individual.\textsuperscript{295} But that argument would be raised in the context of an affirmative defense, which is not to be construed broadly.\textsuperscript{296}

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\textsuperscript{292} This argument presumes there are no other arguments about the reassignment being unreasonable, such as the need to change the position from full to part-time or the vacant position being a promotion.


\textsuperscript{294} 42 U.S.C. § 12111(10)(A).

\textsuperscript{295} For example, one factor directs the court to look at “the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.” \textit{Id.} § 12111(10)(B)(ii). In certain cases, where there are few employees or the nature of the job is especially sensitive, an employer might possibly be able to persuasively argue it would be a significant difficulty not to be able to prefer a more highly qualified individual. Similarly, another factor looks at “the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity . . . .” \textit{Id.} § 12111(10)(B)(iv).

\textsuperscript{296} See 42 U.S.C. § 12112(b)(5)(A) (2006) (requiring reasonable accommodations “unless [a] covered entity can demonstrate that the accommodation would pose an undue hardship . . . ”); 29 C.F.R. app. § 1630.15(d) (noting that “employer cannot simply assert that a needed accommodation will cause it undue hardship,” but must “present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship”); Rodal v. Anesthesia Group of Onondaga, P.C., 369 F.3d 113, 121-122 (2d Cir. 2004) (asserting that “[u]ndue hardship” is an employer's affirmative defense, proof of which requires a detailed showing that the proposed accommodation would “requir[e] significant difficulty or expense” in light of specific enumerated statutory factors”) (quoting Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 221 (2d Cir. 2001)); \textit{see also} Weber, supra n. 213, at 1131 (reasoning that [t]he text and
Therein lies the connection to *Gross* and the need for a comprehensive legislative rejection of all forms of but-for causation—if the result in *Gross* came from a Court that is hostile to burden shifting, a Court using causation standards as a means to prevent it, then it may turn the same technique on reasonable accommodation claims. If there is a legislative response that overturns *Gross* because it misconstrues Congress’ intent regarding causation, that response must be broad enough to prevent but-for causation from undermining reasonable accommodation standards as well.  

VII. Conclusion

The purpose of this article has not been to suggest that unified standards in discrimination law are undesirable. As noted above, there is no justification for the differing standards of causation in disparate treatment law that *Gross* has introduced. Rather, the purpose is to show that because *Gross* isn’t really anti-unification, the Court’s “default rule” has consequences beyond disparate treatment law. Once but-for causation creeps into reasonable accommodation law, it creates its own special havoc. The legislative history of the ADA, as reflected in the structure of the statute itself, demonstrates that Congress did not intend for accommodation decisions to be caught up in the web that causation standards weave. If courts permit this to happen, they will make the same fundamental mistake they made with their interpretation of the original ADA—they will create unduly difficult barriers to the full participation of individuals

\[\text{structure of the [ADA] suggest a substantial obligation to provide accommodation up to the limit of hardship demonstrated by the employer\}].\]

\[297\] The final irony here is, of course, that *Gross* itself cautions against doctrinal creep. *See Gross*, 129 S.Ct. at 2345 (asserting that “[w]hen conducting statutory interpretation, we ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination’”) (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

65
with disabilities in the workplace (and quite possibly beyond that to the other aspects of social and economic interaction protected by other parts of the statute).

A statute like POWADA would be well-intentioned to overturn the Court’s misstep in *Gross*. It would not, however, eradicate but-for standards as applied to plaintiffs’ prima facie burden of proof. Any legislative response to *Gross* needs to be sufficiently comprehensive to preclude but-for analysis in reasonable accommodation claims. The ADA Amendments Act reached only the courts’ misinterpretation of the definition of disability; Congress should now turn its attention to the reasonable accommodation provisions and forestall a similar decade or more of inappropriately narrow application.