REASONABLE ACCOMMODATION OF MIXED MOTIVES CLAIMS UNDER THE ADA: CONSISTENT, CONGRUENT, AND NECESSARY

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 (Title VII) condemns as an unlawful labor practice any employment decision that adversely affects an employee because of the employee's race, color, religion, sex, or national origin.[1] In *Price Waterhouse v. Hopkins*, the Supreme Court decided that employees could bring Title VII claims against employers even when a forbidden motive was not the only motive for the adverse employment decision.[2] These claims have become known as "mixed motives" claims,[3] because the reason for the employer's adverse employment decision implicates both innocent and forbidden motives. Subsequent to *Price Waterhouse*, courts have confronted the question of whether an employee may bring a mixed motives claim under and Americans with Disabilities Act of 1990 (ADA). For almost twenty years, most courts followed *Price Waterhouse* and permitted mixed motives claims under the ADA.[4] However, in 2009, the Supreme Court altered the landscape by deciding, in *Gross v. FBL Financial Services, Inc.*, that an employee could not bring a mixed motives claim under the Age Discrimination in Employment Act (ADEA).[5] Thus, under the ADEA, unless the forbidden factor was the "but-for" cause of the adverse employment decision, employees may not bring claims.[6] Following *Gross*, some circuit courts have shifted from permitting ADA mixed motives claims to denying such claims.[7]

The answer to this question—whether ADA mixed motives claims are permissible after *Gross*—will have vast implications upon the ability of an employee/plaintiff to recover under the ADA.[8] A plaintiff's

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1 42 U.S.C. § 2000e-2(a)(1) (2012) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]").

2 490 U.S. 228 (1989).

3 To be consistent, "mixed motives" claims are often referred to as "motivating factor" claims. Throughout this Note, both terms will be representing the same concept: a claim in which both innocent and forbidden motives are implicated.

4 *See* cases cited *infra* note 61.

5 557 U.S. 167 (2009).

6 *Id.* at 180.

7 *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012) (holding that *Gross* applies to ADA cases, and therefore mixed motives claims were not allowed in ADA cases); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010) (finding that *Gross* applied to ADA cases and upholding jury instructions which disallowed a mixed motives claim).

8 *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 (2010). Sherwyn and Heise set out to determine whether the instructions given to a jury affect the ability of the employee to prevail in anti-discrimination cases. *Id.* After conducting a two-year study with college students hearing different jury instructions and filling out jury forms, Sherwyn and Heise conclude that "[b]urden of proof assignments matter. The

chances of recovering damages significantly increases with a mixed motives instruction as jurors are more likely to find an employer liable.[9] Additionally, a mixed motives instruction allows a plaintiff who fails to establish but-for causation to recover attorneys' fees, if a jury finds that the plaintiff established a mixed motives claim.[10] Because the costs and fees of most employment discrimination cases exceed the potential damages,[11] a plaintiff's ability to secure legal representation depends heavily upon the ability to recover attorney fees.[12] Thus, achieving the ADA's goal of eliminating employment discrimination depends on whether or not mixed motives claims are allowed.

This Note explores the question of whether mixed motives claims are permissible under the ADA by focusing on the ADA's consistent and congruent application in two types of cases. The first type of case is one that involves the ADA's "reasonable accommodation" defense provision.[13] This provision requires an employer to "reasonably accommodate" an employee's disability when such accommodation can be done without undue hardship on the employer.[14] Under the ADA, even when the employer acts with *no* discriminatory intent, it is nonetheless liable if a "reasonable accommodation" of the employee's disability was possible but not adopted.[15] The second type of ADA case is the "classic" case where the question is whether forbidden factors were involved in the employment decision. If the employer's decision involved both forbidden and innocent factors, liability turns solely on the standard of causation that is required—mixed motives or but-for. To achieve the ADA's goal of eliminating employment discrimination, if employers that act with *no* discriminatory intent are held liable, then employers that act *with* discriminatory intent must also be held liable. The only way to hold such employers liable is to permit mixed motives

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so-called motivating factor instruction will result in costs and fees being awarded significantly more often than in pretext cases." *Id.* at 944. The importance of this finding is that an employee that is able to receive a mixed motives jury instruction will have a better chance of recovering damages, and at the very least, have a better chance at recovering attorney's fees. *See id.* at 930–31. The attorneys' fees factor is important because this directly affects the ability of an employee to secure legal assistance. *See id.* at 904.

9 *Id.* at 944.

10 *See id.* at 930–31. See *infra* notes 39–42 and accompanying text for a discussion of the statutory provisions which make this type of recovery permissible.

11 *Id.* at 903 n.17 (noting that in most cases the back pay is small, and legal costs run in the hundreds of thousands of dollars).

12 *See supra* note 8.

13 42 U.S.C. § 12113(a) (2012) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.").

14 *Id.*

15 *Id.*

claims under the ADA. This Note argues that mixed motives claims must be permitted under the ADA because this standard of causation is the only way to ensure that an employer who is liable when it acts *without* discriminatory intent is also liable when it acts *with* discriminatory intent.[16]

Part I will present a background of Title VII, *Price Waterhouse*, and the Civil Rights Act of 1991, which amended portions of Title VII. Part II will present the problem by conducting a survey of pre-*Gross* ADA cases, an analysis of *Gross*, a survey of post-*Gross* ADA cases, and introducing the Americans with Disabilities Act Amendment Act of 2008. Part III will analyze four flawed approaches courts have used to resolve the problem. Part IV will argue that because a consistent and congruent application of the ADA in all types of ADA cases is necessary to achieve the ADA's goal of eliminating discrimination, mixed motives claims must be permitted under the ADA.

I. BACKGROUND

A. *Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employment-related discrimination *because of* an individual's race, color, religion, sex, or national origin.[17] Title VII not only makes it unlawful to discriminate against individuals based on their respective membership in a protected class, but it also provides a private right of action for those individuals adversely affected.[18] To establish a prima facie case of discrimination, a plaintiff must show either direct evidence of the discrimination or a disparate impact upon his employment status resulting from discrimination.[19] Until 1991, Title VII was silent on the availability of mixed motives claims.[20] In 1989, the Supreme Court

16 *Id.*

17 *Id.* § 2000e-2.

18 *See* Russell Specter & Paul Spiegelman, *Employment Discrimination Action Under Federal Civil Rights Acts,* 21 AM. JUR. TRIALS 1, § 4 (2013). The development of Title VII's private right of action remains a mystery. *Id.* As originally drafted, the right of enforcement was given to an administrative tribunal and only on the Senate floor was this idea abandoned for a private right of action as part of what became known as the Dirksen-Mansfield Compromise. *Id.*

19 42 U.S.C. § 2000e-2(k).

20 See *infra* note 37 and accompanying text for a discussion of the Civil Rights Act of 1991; *see also* McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802–04 (1973). The *McDonnell* Court laid the foundation for the burden shifting framework that dictated many of the later Title VII cases, including *Price Waterhouse*. The Court defined what is necessary in a race-based Title VII complaint, but noted that in the future, the specific requirements for establishing a prima facie case can change when the factual situation changes. *Id.* at 802 n.13. In all Title VII cases, after a plaintiff establishes a prima facie case, the burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employer's

addressed the question of whether an employee could bring a claim when both innocent and forbidden motives were implicated.[21]

B. Price Waterhouse v. Hopkins

In *Price Waterhouse v. Hopkins*, the Supreme Court—without a majority opinion—decided that mixed motives claims were permissible in Title VII discrimination cases.[22] This decision ushered in a new era because, for the first time, it expressly recognized that plaintiffs might bring Title VII claims when only a part of the adverse employment action was based upon a forbidden discriminatory factor.[23]

In 1982, Ann Hopkins sued her employer, Price Waterhouse, under Title VII, claiming that her partnership candidacy was denied because she was a woman and did not conform to conventional female stereotypes.[24] In particular, Ms. Hopkins was told that if she were to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," her candidacy might fare better the next time she was considered for partnership.[25] Price Waterhouse countered that the partnership denial was based on legitimate deficiencies in Ms. Hopkins's interpersonal office skills and that management would have denied her candidacy regardless of her being a woman and not conforming to gender stereotypes.[26]

Justice Brennan's plurality opinion stated that the real issue in *Price Waterhouse* was how to balance the employee's rights, as established in Title VII, against an employer's freedom of choice.[27] Justice Brennan stated that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."[28] Justice Brennan concluded that once a Title VII plaintiff proves that gender played a *motivating* part in the employment decision, the defendant may avoid liability only by proving by a preponderance of the evidence that it

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action. While *McDonnell* did not specifically address mixed motives claims, its foundation opened the door to the idea that an employee need not be solely responsible for the burdens involved in Title VII cases.

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

22 *Id.* There were four separate opinions issued in this case: a four justice plurality, a one justice concurrence in the judgment, another one justice concurrence in the judgment, and a three justice dissent. More discussion of each opinion will follow, but through the plurality and concurrences, the majority of the court agreed that mixed motives claims are permissible.

23 *Id.* at 287 (Kennedy, J., dissenting) ("Today's creation of a new set of rules for 'mixed-motives' cases is not mandated by the statute itself.").

24 *Id.* at 222–35 (plurality opinion).

25 *Id.* at 235 (internal quotation marks omitted).

26 *Id.* at 236–37. Price Waterhouse relied on the negative feedback regarding her interpersonal skills as justification for its denial of Ms. Hopkins's partnership candidacy. *Id.*

27 *Id.* at 239.

28 *Id.* at 240.

would have made the same decision if it had not taken the plaintiff's gender into account.[29]

Justice O'Connor's concurrence, however, has been deemed "controlling."[30] Justice O'Connor agreed with the plurality that once an employee establishes that a discriminatory motive played a role in the adverse employment decision, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have made the same decision regardless of any discriminatory motive.[31] However, while she believed that "because of" meant "but-for," she also recognized that requiring the plaintiff to prove that *any* one factor was the but-for cause of the decision makers' action would be the same as declaring Title VII ineffective.[32] Accordingly, Justice O'Connor concluded that if a plaintiff has convinced the fact-finder that a forbidden factor played a *substantial* role in the employment decision—where the fact-finder could reasonably conclude with no further evidence that the forbidden factor "caused" the adverse employment decision—then the plaintiff has established a prima facie case for recovery.[33]

At the most basic level, the plurality and concurrence agreed that mixed motives claims were permitted under Title VII.[34] Thus, if an employee can show that a discriminatory motive played a role in the adverse employment decision, he may bring a Title VII claim. But, if the employer can show that the adverse employment decision would have occurred absent the discriminatory factor, the employer will be relieved of all liability. A few years later, Congress responded to *Price Waterhouse* by passing the Civil Rights Act of 1991.[35]

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29 *Id.* at 258.

30 *See, e.g.*, Erickson v. Farmland Indus., Inc., 271 F.3d 718, 724 (8th Cir. 2001) ("According to Justice O'Connor's controlling concurrence in *Price Waterhouse* . . . ."); Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998) ("Under the standard announced by Justice O'Connor's controlling opinion in *Price Waterhouse v. Hopkins* . . . .").

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

32 *Id.* at 262–64. Justice O'Connor discussed how requiring an employee to show what was in the mind of the employer at the time of the employer's actions is an impossible task. *Id.* at 264. To require this type of standard would render Title VII ineffective and ultimately give no strength to the Congressional Act. *Id.* Instead of saying "but-for" in the traditional tort sense, Justice O'Connor believed that by requiring a employee to show the factor was a "substantial" factor in the decision, Congress's intent is furthered while remaining true to the text. *Id.* at 273; *see also* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655–59 (2008) (discussing the negative implications of requiring a but-for standard in employment discrimination cases).

33 *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring in the judgment).

34 In addition to the opinions of Justice Brennan and Justice O'Connor, Justice White also wrote a concurrence. *Id.* at 258 (White, J., concurring in the judgment). Justice White agreed with the Justice Brennan's opinion on all accounts except he believed that the employer, Price Waterhouse, need not show objective evidence that it would have made the same decision absent the discriminatory factor, as he believed Justice Brennan's opinion required. *Id.* at 261.

35 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42

C. *The Civil Rights Act of 1991*

The Civil Rights Act of 1991 was enacted to strengthen and improve federal civil rights laws, to provide for damages in cases of intentional employment discrimination, and to clarify provisions regarding disparate impact actions.[36] One of its central purposes was to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[37]

The Civil Rights Act of 1991's impact upon Title VII mixed motives claims took two different forms. First, Congress amended Title VII's standard of causation for determining employer liability from "because of" to "motivating factor for any employment practice, even though other factors also motivated the practice."[38] In other words, it made Title VII mixed motives claims expressly permissible. The second impact on Title VII represented a departure from the *Price Waterhouse* framework. Instead of relieving an employer of all liability when the employer showed by a preponderance of the evidence that the same decision would have been made absent the discriminatory motive, Title VII now gives courts discretion to award limited damages in certain cases.[39] Specifically, in these cases, a court may grant declaratory relief, injunctive relief, and/or attorneys' fees;[40] but the court may not award compensatory damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.[41] This change permits a court to hold an employer financially liable when it acts with discriminatory *intent*, which is of central importance to this Note's proposal.[42]

U.S.C. § 2000e-2 (2012)).

36 *Id.* §§ 2–3.

37 *Id.* § 3(4).

38 42 U.S.C. § 2000e-2(m) (2012) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

39 42 U.S.C. § 2000e-5(g)(2)(B).

40 *Id.* § 2000e-5(g)(2)(B)(i).

41 *Id.* § 2000e-5(g)(2)(B)(ii).

42 *See infra* Part IV. As will be discussed, Title VII's amendment sheds light on Congress's belief that an employer who acts with clear discriminatory intent, despite having the ability to point to innocent factors, should not be relieved of liability.

II. PROBLEM

A. *Americans with Disabilities Act*

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[43] In its findings and purposes section, Congress stated that physical or mental disabilities did not diminish a person's right to participate in all aspects of society.[44] Nonetheless, persons with disabilities had been isolated and segregated by society,[45] and unlike individuals who had experienced discrimination on the basis of race, color, sex, national origin, religion, or age, disabled individuals often had no legal recourse to redress such discrimination.[46]

The ADA originally adopted Title VII's "because of" substantive standard of causation because at the time Congress passed the ADA in 1990, Title VII had not yet been amended with the "motivating factor" language.[47] Therefore, the "because of" language was consistent with Title VII and other employment discrimination statutes, specifically the ADEA.[48] However, just one year later when Congress amended Title VII to include "motivating factor" as a standard of causation, it did not amend the ADA or ADEA in the same way.[49] Notwithstanding, the legislative history surrounding the Civil Rights Act of 1991 suggests Congress intended that laws modeled after Title VII, including the ADA, should be interpreted consistently with the amended Title VII.[50]

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43 42 U.S.C. § 12101(b)(1).

44 *Id.* § 12101(a)(1).

45 *Id.* § 12101(a)(2).

46 *Id.* § 12101(a)(4).

47 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331 (codified as amended at 42 U.S.C. § 12112(a)) ("No covered entity shall discriminate against a qualified individual with a disability *because of the disability* of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (emphasis added)).

48 *See* 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer . . . to fail or refuse to hire . . . any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." (emphasis added)).

49 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2) (providing "motivating factor" standard for race, color, religion, and national origin claims).

50 H.R. REP. NO. 102-40, pt. 2, at 4 (1991) ("A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act (ADEA) are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act." (footnote omitted) (citations omitted)); *see also* H.R. REP. NO. 101-485, pt. 3, at 48 (1990)

While most courts heeded Congress's suggestion and permitted mixed motives claims under the ADA, some courts did not permit them.[51]

B. *Pre*-Gross *ADA Cases*

In *McNely v. Ocala Star-Banner Corp.*, one of the most cited and impactful early ADA cases, the Eleventh Circuit held that mixed motives claims were permitted under the ADA.[52] In *McNely*, the plaintiff was a night supervisor at a newspaper's camera department, and after a brain injury, he had vision problems in his left eye that required him to have an assistant.[53] Believing that if the plaintiff wore eyeglasses he could fully perform the job, the employer removed the assistant.[54] After the assistant was removed, the plaintiff claimed to have extreme difficulty performing portions of his job.[55] After filing a grievance regarding his working conditions, the plaintiff shut down the printing presses.[56] The plaintiff's employer then reassigned him, citing the plaintiff's refusal to perform his duties as the reason.[57] After an altercation with a supervisor, the plaintiff was suspended and eventually terminated.[58]

Following a jury trial, the district court determined that because the plaintiff had not shown that the *sole* reason he was terminated was discriminatory, he could not recover.[59] On appeal, the Eleventh Circuit reversed, holding that the plain language of the ADA, the legislative history, and Supreme Court decisions interpreting "because of" not to mean "*solely* because of," all led to the conclusion that mixed motives claims were permitted under the ADA.[60] Despite the use of a similar rationale in numerous other ADA cases,[61] the legal landscape of mixed

(discussing that Congress was aware of a bill potentially amending Title VII and explicitly stating that any amendment to Title VII would be fully applicable to the ADA).

51 *See, e.g.*, Macy v. Hopkins Cnty. Sch. Bd. of Educ., 484 F.3d 357, 363 & n.2 (6th Cir. 2007) (requiring an ADA plaintiff to show adverse employment action was caused solely by reason of the plaintiff's handicap and recognizing that aside from the Tenth Circuit, all the other circuits allowed mixed motives instructions in ADA cases); Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir. 2000) (collecting cases applying Title VII's mixed motives standard to ADA cases and following this approach).

52 99 F.3d 1068 (11th Cir. 1996).

53 *Id.* at 1070.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 1071.

59 *Id.*

60 *Id.* at 1073–76.

61 *See, e.g.*, Head v. Glacier Northwest Inc., 413 F.3d 1053, 1065 (9th Cir. 2005) ("We conclude that a motivating factor standard is the appropriate standard for causation in the ADA context for the reasons discussed below."); Parker v. Columbia Pictures Indus., 204 F.3d

motives claims was foggy at best.[62] The Supreme Court's decision in *Gross* added further confusion.

C. Gross v. FBL Financial Services

In 2009, the Supreme Court heard *Gross v. FBL Financial Services, Inc.* to decide whether a plaintiff could bring a mixed motives claim under the ADEA.[63] Like the ADA, the ADEA was not amended to explicitly include Title VII's motivating factor language.[64] Also like the ADA, prior to *Gross*, most courts had followed *Price Waterhouse*'s lead and permitted mixed motives claims under the ADEA.[65] However, in *Gross*, the Supreme Court decided that mixed motives claims were *not* permitted under the ADEA.[66]

In *Gross*, the employer reassigned Gross to a new department, relieving him of many of his responsibilities—though still paying him the same compensation.[67] Gross viewed the reassignment as a demotion, and filed an ADEA-based claim against his employer.[68] In district court, Gross introduced evidence that the reassignment was based at least partly upon his age while the employer claimed that the reassignment was part of larger corporate restructuring and the new position was better suited for Gross's skills.[69] The district court instructed the jury on

326, 337 (2d Cir. 2000) ("[W]e join those circuits that have held that, in establishing a prima facie case of disability discrimination, a plaintiff need not demonstrate that disability was the sole cause of the adverse employment action. Rather, he must show only that disability played a motivating role in the decision."); Farley v. Nationwide Mut. Ins. Co. 197 F.3d 1322, 1334 (11th Cir. 1999) ("We unambiguously have held that the ADA's 'because of' causation language is defined as 'a factor that *made* a *difference in the outcome*.'").

62 Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 341–42 (2006) (discussing that while some circuits initially incorporated a but-for causation standard into the ADA, by 2006 most courts had concluded that the ADA allows for liability upon proof that the disability was a *motivating cause*).

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

64 29 U.S.C. § 623(a)(1) (2012) ("It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." (emphasis added)).

65 Before *Gross*, district courts routinely applied the *Price Waterhouse* framework to ADEA claims. *See* Erickson v. Farmland Indus., 271 F.3d 718, 724 (8th Cir. 2001) (accepting Justice O'Connor's "substantial factor" and burden shifting framework as applicable to ADEA claims); Febres v. Challenger Caribbean Corp., 214 F.3d 57, 59–60 (1st Cir. 2000); Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 180 (2d Cir. 1992) (determining that because the substantive standards of the ADEA were derived from Title VII, the *Price Waterhouse* framework applies to ADEA claims).

66 *Gross*, 557 U.S. 167.

67 *Id.* at 170.

68 *Id.*

69 *Id.*

a mixed motives theory and the jury returned a verdict for Gross.[70] On appeal, the Eighth Circuit reversed, citing the fact that because Gross did not provide direct evidence of discrimination, a jury instruction containing Title VII's "motivating factor" language was incorrect.[71] On appeal the Supreme Court was asked to determine whether a plaintiff must show *direct* evidence to get a "motivating factor" instruction to the jury.[72] Instead, the Supreme Court answered a different question: whether mixed motives claims were permissible under the ADEA.[73]

Writing for a five-to-four majority, Justice Thomas relied upon statutory and textual interpretations to conclude that under the ADEA, mixed motives claims were never permitted.[74] Justice Thomas began his analysis by stating that the rationale used in Title VII cases, like *Price Waterhouse*, did not apply to ADEA claims because the rules applicable to one statute, Title VII, should not be applied to a different statute, the ADEA, without careful and critical examination.[75] Having limited the reach of *Price Waterhouse*, Justice Thomas then compared the statutory construction of the ADEA to Title VII.[76] Justice Thomas concluded that "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[77] In other words, because Congress neglected to add the motivating factor language to the ADEA, Congress effectively determined that ADEA claims should not be viewed the same as Title VII claims.[78]

After minimizing the reach of *Price Waterhouse* and Title VII, Justice Thomas conducted a strict textual ADEA analysis to determine whether it permitted mixed motives claims.[79] Justice Thomas first looked to the dictionary for guidance and found that "because of" meant "by reason of: on account of."[80] Therefore, the Court concluded that the ordinary meaning of the ADEA's "because of" requirement is that age

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70 *Id.* at 170–71.

71 *Id.* at 171–73.

72 *Id.* at 172. Following Justice O'Connor's controlling plurality in *Price Waterhouse*, the Eighth Circuit held that direct evidence—evidence which "show[s] a specific link between the alleged discriminatory animus and the challenged decision"—is necessary to shift the burden to the employer to convince the fact finder that the same result would have occurred absent the illegitimate factor. *Id.* (alteration in original) (quoting Gross v. FBL Fin. Serv., Inc., 526 F.3d 356, 359 (8th Cir. 2008) (internal quotation marks omitted)). This issue is tangential for this Note, but it is important to recognize that the Supreme Court answered the threshold question of whether mixed motives claims were permissible instead of the issue argued by the parties regarding the necessity of producing direct evidence of discrimination in order to get a mixed motives instruction. *See id.*

73 *Id.*

74 *Id.*

75 *Id.* at 174.

76 *Id.*

77 *Id.* at 174.

78 *Id.* at 175.

79 *Id.* at 175–77.

80 *Id.* at 176 (internal quotation marks omitted).

must be the *reason* that the employer acted.[81] Hence, to establish a discrimination-based claim under the ADEA, a plaintiff must show that the employee's age was the "but-for" cause of the employer's action and mixed motives claims are no longer permitted.[82]

This decision deviates from most post-*Price Waterhouse* anti-discrimination statute cases, where mixed motives claims were permitted.[83] Specifically, in *Price Waterhouse*, Justice O'Connor agreed that "because of" meant "but-for," but decided that because this interpretation would render Title VII ineffective a substantial step standard was appropriate.[84] In *Gross*, Justice Thomas removed any doubt as to whether this substantial step standard applied to the ADEA by removing *Price Waterhouse* and Title VII from impacting the ADEA. More importantly, Justice Thomas did not speak to how *Gross* should apply to other anti-discrimination statutes, including the ADA. This Note argues that *Gross* does not impact ADA cases due to fundamental differences between the ADA and ADEA; however, because some courts have viewed *Gross* as controlling, it is necessary to understand these courts' rationales to fully understand this Note's proposal.

D. *Post*-Gross *ADA Cases*

The permissibility of mixed motives claims under the ADA is anything but clear. Before *Gross*, most courts permitted mixed motives claims.[85] However, some of these same courts have cited *Gross* and changed direction, denying ADA mixed motives claims.[86] To properly understand *Gross*'s role in this problem, it's important to know that until Congress amended the ADA in 2008, both the ADEA and ADA used "because of" as their respective substantive standard of causation.[87]

In one of the first post-*Gross* ADA cases, the Seventh Circuit decided, in *Serwatka v. Rockwell Automation, Inc.*, that mixed motives

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81 *Id.*

82 *Id.* Justice Thomas bridged the gap between finding "because of" to mean "by reason of" and concluding that this requires a "but-for" standard by citing to a Supreme Court case where the Court said that under the ADEA, a claim cannot succeed unless the employer's decision regarding age had a determinative influence on the outcome. *Id.* (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

83 *See supra* notes 62, 65.

84 Price Waterhouse v. Hopkins, 490 U.S. 228, 265–67 (O'Connor, J., concurring in the judgment).

85 *See* cases cited *supra* note 61.

86 *See, e.g.*, Serwatka v. Rockwell Automation, Inc. 591 F.3d 957 (7th Cir. 2010) (holding mixed motives claims impermissible despite years of allowing such claims).

87 *Compare* 29 U.S.C. § 623(a)(1) (2012), *with* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331 (codified as amended 42 U.S.C. § 12112(a)). In 2008, Congress passed the ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, which changed the "because of" language to "on the basis of." *See* discussion *infra* Part II.E.

claims were no longer permitted under the ADA.[88] Instead, the court concluded that the proper standard for ADA claims was the same as the ADEA: but-for causation.[89] In *Serwatka*, the plaintiff filed suit against her former employer, Rockwell, alleging that Rockwell discharged her because it regarded her as being disabled, despite her ability to perform the essential functions of her job.[90] The district court concluded that the jury instruction and subsequent answers represented a mixed motives finding.[91] Therefore, the issue on appeal was whether the jury's mixed motives finding entitled Serwatka to judgment in her favor.[92]

The Seventh Circuit began its analysis by looking at *Price Waterhouse*. It explained the mixed motives origin and stated that after *Price Waterhouse*, courts had applied the mixed motives framework to ADA claims.[93] However, the court stated that because of *Gross*, the only question it needed to resolve was whether mixed motives claims were *still permissible* under the ADA.[94] Though it recognized that *Gross* only addressed the ADEA, the *Serwatka* court nonetheless stated that *Gross* strongly suggested that if an anti-discrimination statute lacks express language permitting mixed motives claims, a mixed motives claim is not viable.[95] The court, like *Gross*, then looked to the ADA's text to determine whether mixed motives claims were permitted under ADA's plain language.[96] The court concluded that mixed motives claims were impermissible under the ADA because *Gross* determined that "because of" required a "but-for" standard of causation.[97]

More recently, in *Lewis v. Humboldt Acquisition Corp.*, an en banc Sixth Circuit addressed the permissibility of mixed motives claims under the ADA.[98] In *Lewis*, Humboldt Acquisition dismissed Susan Lewis from her position as a registered nurse at one of Humboldt's retirement homes.[99] Lewis claimed that she was dismissed because she had a medical condition that made it difficult for her to walk and that occasionally required her to use a wheelchair.[100] Humboldt countered that Lewis was dismissed because of an outburst at work, in which she

88 591 F.3d 957 (7th Cir. 2010). Although the Seventh Circuit's opinion came after Congress amended the ADA in 2008, the court was interpreting the original language. *Id.* at 961 n.1.

89 *Id.* at 962–64.

90 *Id.* at 958.

91 *Id.*

92 *Id.* at 959.

93 *Id.* at 959.

94 *Id.* at 961.

95 *Id.*

96 *Id.* at 961–62.

97 *Id.* at 962.

98 681 F.3d 312 (6th Cir. 2012). Like the court in *Serwatka*, the Sixth Circuit considered the language of the ADA before it was amended in 2008. *See id.* at 313.

99 *Id.* at 314.

100 *Id.*

allegedly yelled, used profanity, and criticized her supervisors.[101] The district court issued a jury instruction that said Lewis could only prevail if her disability was the *sole* reason for Humboldt's decision.[102] On appeal, the Sixth Circuit determined that "solely" was not the correct standard to apply to claims under the ADA.[103] Nonetheless, like the court in *Serwatka*, the *Lewis* court concluded that mixed motives claims were not permitted under the ADA because the ADA did not have express "motivating factor" language.[104] The court cited *Serwatka* as supporting its interpretation of "because of" to mean "but-for," and explicitly stated, "*Gross* resolves this case."[105]

The *Serwatka* and *Lewis* cases are representative of the ADA's treatment by some courts after *Gross*. The Seventh Circuit, which had historically permitted mixed motives claims, followed *Gross* in holding that such claims were no longer permissible under the ADA.[106] The Sixth Circuit, which did not historically permit mixed motives claims, also concluded that *Gross* required the denial of mixed motives claims.[107] With the Americans with Disabilities Act Amendment Act's passage in 2008, Congress added another level of complexity by changing the ADA's substantive standard of causation and thus undermining the rationales of both *Serwatka* and *Lewis*.[108].

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101 *Id.*

102 *Id.*

103 *Id.* at 314–17. The first issue in this appeal was whether the district court's use of the standard of "sole" reason was correct. *Id.* For over seventeen years, the Sixth Circuit had adopted the Rehabilitation Act of 1973's "solely" standard in ADA cases. *Id.* at 314. In *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), the Sixth Circuit applied the Rehabilitation Act's "solely" standard to both the Rehabilitation Act and ADA claims. *Lewis*, 681 F.3d at 314 (discussing *Maddox*). After *Maddox*, the Sixth Circuit continued to apply the "solely" standard in ADA claims. *Id.* The first portion of the *Lewis* majority opinion discusses this history and ultimately concludes that the "solely" standard should never have applied to ADA cases because the Rehabilitation Act and the ADA have distinct standards. *Id.* at 317. Therefore, the *Lewis* majority concluded that the district court's jury instruction was incorrect but still needed to determine what instruction was appropriate. *Id.*

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

105 *Id.* The court went through a very lengthy textual discussion to rebut Lewis's argument that Congress expressly intended mixed motives claims to be permissible under the ADA because the ADA cross-references the motivating factor portion of Title VII. *Id.* at 319. The court's discussion of this argument is addressed *infra* Part IV.

106 *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 959 (7th Cir. 2010).

107 While the Sixth Circuit had not historically permitted mixed motives claims, it only did so because it had pulled inappropriate language from the Rehabilitation Act. *See supra* note 103. For this Note's purposes, what is important is that the *Lewis* court made it clear that it no longer was following its own precedent and based its decision to no longer permit mixed motives claims upon *Gross*. *Lewis*, 681 F.3d at 318.

108 As noted previously, both *Gross* and *Serwatka* interpreted the original ADA language, even though both cases were decided after the ADA Amendment Act of 2008 was passed. *Lewis*, 681 F.3d at 313; *Serwatka*, 591 F.3d at 961 n.1.

E. *Americans with Disabilities Act Amendment Act*

Congress passed the Americans with Disabilities Act Amendment Act of 2008 (ADAAA) to "restore the intent and protections of the Americans with Disabilities Act of 1990."[109] Specifically, one of the ADAAA's purposes was "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection . . . under the ADA."[110]

The ADAAA impacts the discussion in two ways. First, it amended the ADA's substantive standard of causation from "because of" to "on the basis of."[111] While this change seems important, its only impact is making two of the approaches discussed below even more misguided.[112] Second, and more importantly, the ADAAA provides guidance as to where the proper solution to this problem must start: the ADA. Congress's statement that the ADAAA's purpose was to carry out the ADA's original objective of providing a clear and comprehensive national mandate for the elimination of discrimination is critical.[113] This statement is important not because the ADA's purpose was previously unknown, but because it shows that the proper solution to this problem *must* be clear, comprehensive, and *must* seek a national elimination of discrimination. The approaches discussed in the following Part all fail to be clear, comprehensive, or at the very least, consistent with the ADA's objectives.

III. ANALYSIS

At its most basic level, the problem is that employees' and employers' respective rights and obligations are different across the nation because mixed motives claims are sometimes permissible and

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109 ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29, 42 U.S.C.).

110 *Id.* § 2(b)(1) (codified at 42 U.S.C. § 12101(b)(1) (2012)).

111 *Compare* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual *on the basis of* disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (emphasis added)), *with* Americans With Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331 (codified as amended at 42 U.S.C. § 12112(a)) ("No covered entity shall discriminate against a qualified individual with a disability *because of the disability of such individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (emphasis added)).

112 *See infra* Part III.B–C.

113 *See supra* note 109 and accompanying text.

sometimes impermissible under the ADA. To solve the problem, a court's rationale must create a uniform solution to the mixed motives problem because this solution will determine whether a plaintiff can recover damages and, ultimately, it will determine whether the ADA accomplishes its goal of eliminating discrimination.

In *Lewis*, Judge Donald's opinion, concurring in part and dissenting in part, described four approaches available to solve the ADA's mixed motives confusion.[114] First, courts could follow the *Serwatka* and *Lewis* approach and hold that *Gross* dictates that mixed motives claims are not permissible, absent express language in the ADA.[115] Second, courts could revert to a pre-*Gross* era and simply say that the ADA either permits or denies mixed motives claims depending on that particular court's precedent.[116] Third, courts could follow a plain language approach, where similar to *Gross*, a court could simply find mixed motives claims either permissible or impermissible based on the ADA's language.[117] The fourth option is referred to as the "explicit link" view.[118] This approach argues that because a provision within the ADA expressly connects Title VII's "motivating factor" language to the ADA, mixed motives claims are permissible.[119] Each of these approaches contains flaws that render them unclear, incomprehensive, or in conflict with the ADA's goal of eliminating disability discrimination. In contrast, this Note's proposed interpretation reads the ADA as requiring mixed motives claims because the only way to achieve a clear and comprehensive elimination of disability-based discrimination is to ensure that an employer who acts *with* discriminatory intent is liable.

A. *The* Gross *Approach*

The first approach takes the position that *Serwatka* and *Lewis* were correct in concluding that because *Gross* controls, mixed motives claims are not permitted under the ADA. The reasoning is this: *Gross* held that when a statute does not have express language permitting mixed motives claims, mixed motives claims are not permitted; the ADA does

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114 *Lewis,* 681 F.3d at 335 (Donald, J., concurring in part and dissenting in part). The approaches discussed by Judge Donald are similar to the four approaches discussed in this Note but after the ADAAA was passed, the intricacies and reasoning behind the different approaches are necessarily altered.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 339. This is the approach Judge Donald would have adopted. *Id.* at 341–42. To be consistent with Judge Donald's opinion in *Lewis*, this Note will also refer to this approach as the "explicit link" approach.

119 *Id.* at 339.

not have express mixed motives language; therefore, mixed motives claims are not permitted under the ADA.[120]

This approach has two problems.[121] First, the *Serwatka* and *Lewis* approaches were based upon a reading of the ADA prior to the ADAAA.[122] However, as discussed previously, the ADAAA changed the ADA's substantive standard from "because of" to "on the basis of."[123] In Part III.C, this Note concludes that it is not clear whether "on the basis of" permits or denies mixed motives claims.[124] Because clarity in the law is a necessary part of any solution, a *Gross*-based approach is problematic.

The second problem is more fundamental: Neither the *Serwatka* nor the *Lewis* court performed a careful and critical examination of the ADA and ADEA—which *Gross* requires[125]—before concluding *Gross* extends to ADA cases.[126] If either court had performed such an examination, fundamental differences between the ADA and ADEA would have been clear. One such difference is that an employer's obligations are vastly different under each statute.

As a defense to an employee's charge of discrimination, the ADA permits an employer to show that the alleged discriminatory motive, which led to the adverse employment action, was job-related and consistent with business necessity.[127] If the employer shows that the employment decision was job-related and consistent with business necessity, the employer may avoid all liability.[128] However, if an employee then shows that the job performance could have been

120 For a discussion of *Gross*, see *supra* Part I.C.

121 In addition to the two problems identified by this Note, other commenters have argued that *Gross* was incorrectly decided and therefore should not be followed. *See* Sherwyn & Heise, *supra* note 8, at 923–27.

122 *See supra* notes 87, 108 and accompanying text.

123 *See supra* note 111 and accompanying text.

124 *See infra* text accompanying notes 139–40.

125 *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009) ("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." (internal quotation marks omitted)).

126 Both courts limited their examination to the lack of express mixed motives language within the statute and then concluded that because the ADA and ADEA share the same substantive standard, *Gross* controlled the issue at hand. *See* discussion *supra* Part I.C. This Note argues in the subsequent sections that a true careful and critical examination of the ADA shows substantial differences between the ADA and ADEA, which dictate different treatment of mixed motives claims.

127 42 U.S.C. § 12113(a) (2012) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter."); *see also* Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316–17 (11th Cir. 2009) (discussing the burden shifting framework of "reasonable accommodation" and that to avoid liability an employer must show that no "reasonable accommodation" was possible).

128 42 U.S.C. § 12113(a); *see also Allmond*, 558 F.3d at 1316–17.

accomplished through "reasonable accommodation" of his disability, the employer is nonetheless liable.[129] In other words, the ADA *requires* an employer to accommodate the disabled worker as long as such accommodation is reasonable and without undue hardship on the employer.[130] Therefore, under the ADA, an employer must put the employee in the *same* position as able-bodied employees by treating the disabled employee *differently*.[131]

In contrast, the ADEA requires employers to treat employees the *same*. Instead of requiring a reasonable accommodation of an employee, an employer avoids all liability if the reason for the adverse employment decision was a "reasonable factor other than age."[132] In other words, instead of treating the aging employee *differently*, an ADEA employer avoids liability by treating them the *same*. The ADEA's treatment of employer obligations is vastly different than the ADA's.[133] The fact that the ADA forces employers to treat employees *differently* while the ADEA does not makes the ADA unique. This difference should have stopped the *Serwatka* and *Lewis* courts from extending *Gross* because after careful and critical examination, the ADA and ADEA work in very different ways. As discussed below, the "reasonable accommodation" provision plays a pivotal role in this Note's argument that mixed motives claims are permissible under the ADA.

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129 42 U.S.C. § 12113(a); *see also Allmond*, 558.F.3d at 1316–17.

130 42 U.S.C. § 12112(b)(5)(A) ("As used in subsection (a) of this section, the term 'discriminate against a qualified individual on the basis of disability' includes . . . 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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]").

131 *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996). Karlan and Rutherglen engage in an in-depth analysis of the role that "reasonable accommodation" plays in the ADA's correct application. *Id.* Specifically for this Note's purposes, they discuss *sameness* and *difference* as it relates to an employer's obligations under the ADA. *Id.* at 10. While the authors mostly compare this with Title VII's *sameness* standard, the same analysis applies to the ADEA, because like Title VII, the ADEA does not have a "reasonable accommodation" clause. *See id.* at 9–10.

132 29 U.S.C. § 623(f) ("It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section *where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business*, or where the differentiation is based on *reasonable factors other than age*." (emphasis added)); *see also* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV 859, 905–07 (2012) (discussing that the "reasonable factors other than age" provision is a key textual difference between the ADEA and Title VII and that it should have played a role in the *Gross* Court's analysis); Robert Tananbaum, Note, *Grossly Overbroad: The Unnecessary Conflict over Mixed Motives Claims in Title VII Anti-Retaliation Cases Resulting from* Gross v. FBL Financial Services, 34 CARDOZO L. REV. 1129, 1153–54 (2013) (discussing that it is highly unlikely, if not impossible, for a court to determine that a factor was "legitimate" and also unreasonable and that therefore, if a factor is found to be legitimate, it must also be reasonable).

133 *See supra* note 131.

B. Price Waterhouse/*Title VII Approach*

The next approach takes the position that *Gross* did not explicitly state that its rationale applies outside of the ADEA, and therefore other anti-discrimination statutes are left unaffected.[134] If this is true, then *Gross* does not affect the ADA, and a court facing a mixed motives claim under the ADA should just follow its circuit precedent until the Supreme Court or Congress expressly dictate such deviation.[135]

Again, this approach is problematic because the ADAAA amended the ADA's substantive standard of causation from "because of" to "on the basis of."[136] This is troublesome because most circuit courts that permitted mixed motives claims prior to *Gross* did not specify whether its rationale was based on *Price Waterhouse* or the Title VII language affected by the Civil Rights Act of 1991.[137] If the former is true, then following *Price Waterhouse* is precarious because *Gross* is the most recent Supreme Court decision to address mixed motives and thus removes some of *Price Waterhouse*'s influence. If the latter is true, then a court still must decide whether applying Title VII to ADA claims, even though the ADA does not contain Title VII's mixed motives language, is appropriate. Either way, this approach advocates for the status quo, which is the exact problem that needs to be resolved and thus fails to provide a clear and comprehensive *national* mandate to eliminate discrimination.

C. *Plain Language Approach*

The "plain language" approach states that because the ADAAA makes the ADA's language unique from *Price Waterhouse*, Title VII, and ADEA, a court should apply Congress's intent by taking a *Gross*-like textual approach and determine whether the term "on the basis of" permits mixed motives claims.[138] However, an analysis of the term "on the basis of" does not clarify the issue; it muddles the issue by trying to find a conclusive meaning in an inconclusive term.

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

135 For examples of pre-*Gross* circuit precedent, see cases cited *supra* note 61. In addition, see *supra* note 103 for a discussion regarding the reason the Sixth Circuit had previously not permitted mixed motives claims.

136 *See supra* note 111 and accompanying text.

137 *See* cases cited *supra* note 61. These cases came to the conclusion that mixed motives claims were permitted under the ADA, but they never clarified if the basis for this holding was in *Price Waterhouse* or Title VII. What makes the issue even more complicated is that the ADA was passed after *Price Waterhouse* but prior to the Civil Rights Act of 1991, and the drafters of the Civil Rights Act of 1991 made it clear they were aware of the ADA. *See supra* note 50.

138 *See supra* note 79.

According to The New Oxford American Dictionary, the word "basis" means "the underlying support or foundation for an idea, argument, or process."[139] On the one hand, it can be argued that mixed motives claims are impermissible because the employer's discriminatory motive must be the "foundation" for the action. In other words, it must be the "but-for" reason for the action. On the other hand, it can be argued that the same term simply requires the discriminatory factor to be the "underlying support" for the action, not the "but-for" reason, thus permitting mixed motives claims. Trying to find clear and comprehensive meaning in these terms is fleeting at best because the "plain language" approach raises as many questions as it answers.

However, this approach does two things correctly. First, it focuses upon the *text* of the ADA. Second, it acknowledges that the ADAAA's purpose must play a role. However, while this Note's proposal agrees that a focus on the ADA's text and ADAAA's purpose is necessary, the appropriate approach must include more than an interpretation of these four words.[140]

D. *Explicit-Link Approach*

The "explicit-link" approach argues that because the ADA *is* explicitly connected to Title VII's motivating factor language, mixed motives claims are permitted under the ADA.[141] The ADA's enforcement section does not contain its own enforcement provisions.[142] Instead, the ADA sets forth that the "powers, remedies, and procedures" set forth in Title VII shall be the "powers, remedies, and procedures" to parties under the ADA.[143] Therefore, the

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139 THE NEW OXFORD AMERICAN DICTIONARY 136 (2001) (defining "basis" to mean "the underlying support or foundation for an idea, argument, or process"); BLACK'S LAW DICTIONARY 171 (9th ed. 2009); *see also* WEBSTER'S NEW WORLD DICTIONARY 115 (3d Coll. Ed. 1988) (defining "basis" to mean "the base, foundation, or chief supporting factor of anything").

140 This Note argues that the ADA alone provides the answer to whether mixed motives claims are permissible, but one must look at the *entire* statute, not just the substantive standard of causation. *See* Part IV.C.

141 Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012). This approach is discussed at length within the *Lewis* decision in both the majority opinion and Judge Donald's opinion.

142 42 U.S.C. § 12117(a) (2012) ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.").

143 *Id.*

enforcement provisions of Title VII apply to the ADA and mixed motives claims are permitted.

The rationale begins with the fact that ADA § 12117(a) refers to Title VII, § 2000e-5.[144] Section 2000e-5(g)(2)(b) states that if a party has proven a violation under Title VII, § 2000e-2(m), a plaintiff's relief is limited.[145] Section 2000e-2(m) contains the *express motivating factor* language added by the Civil Rights Act of 1991.[146] Therefore, the approach argues that Congress *did* expressly incorporate mixed motives claims into the ADA and thus mixed motives claims are permissible under the ADA. However, the approach is more complicated than the above suggests. The majority and dissent of *Lewis* extensively discuss the merits of the approach and come to different conclusions regarding its validity.

The majority in *Lewis* argued that the "explicit-link" approach is invalid.[147] The court began by stating that § 12117(a) predates Title VII's 1991 amendments, so the cross-reference could not have been inserted for the purpose of incorporating § 2000e-2(m), as it did not exist at the time of the ADA's drafting.[148] Second, § 12117(a) clearly states that the enforcement mechanisms only apply to remedies for discrimination in violation of any provision of *this chapter*, not *this title*.[149] In other words, "[a] disability claimant may not use the 'powers, remedies, and procedures' of Title VII without establishing a violation of the ADA," and the ADA does not contain mixed motives language.[150] Finally, and most importantly, § 12117(a) does not reference § 2000e-2(m).[151] Instead, the only reference to § 2000e-2(m) is through § 2000e-5. Therefore, no ADA plaintiffs will prevail under § 2000e-2(m), because that provision applies only to Title VII plaintiffs, not to ADA plaintiffs.[152]

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144 *Id.*

145 42 U.S.C. § 2000e-5(g)(2)(B) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).").

146 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

147 Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 319 (6th Cir. 2012).

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

A dissent, written by Judge Bernice B. Donald, concluded that the "explicit link" approach is valid because it is necessary to a full and correct application of the ADA.[153] Judge Donald makes a distinction that the majority did not discuss: Section 2000e-5—specifically subsection 2000e-5(g)(2)(B)—is the *only* ADA section that refers to remedies.[154] Because § 2000e-5 contains § 2000e-5(g)(2)(B), which references § 2000e-2(m), to read out the reference to § 2000e-2(m), as the majority does, would render the ADA's only remedy section meaningless.[155] This would effectively remove *all* remedy sections from the ADA.[156] Judge Donald concludes that under the most basic rules of statutory construction, such a reading is impermissible and therefore mixed motives claims must be permitted under the ADA.[157] Despite Judge Donald's attempt to clarify the issue, the "explicit link" approach fails to resolve the problem because it has legally sound arguments for permitting *and* not permitting mixed motives claims. Therefore, the likely result of this approach would be the status quo: Some courts would, and others would not, permit mixed motives claims.

As the foregoing section details, each approach fails to provide a clear and comprehensive answer to the question of whether a mixed motives claim is permissible under the ADA. As a result, both employees and employers will continue to not understand their respective rights and obligations under the ADA, and the ADA's goal of eliminating discrimination will not be reached. Despite the confusion and failed approaches above, this Note argues that a solution exists under the current ADA.

IV. PROPOSAL

There are two types of cases that arise under the ADA. In the first type—what I will call the "classic" case—the parties' arguments focus on whether the employer is liable for taking an employee's disability into account when it made its employment decision.[158] The second type of case is the "reasonable accommodation" case, where the parties are not arguing over which standard of causation should apply, but whether the employer should have "reasonably accommodated" the employee's

153 *Id.* at 339 (Donald, J., concurring in part and dissenting in part).

154 *Id.*

155 *Id.* at 341.

156 *Id.*

157 *Id.*

158 *See, e.g.*, *id.* at 314 (majority opinion). The parties were fighting over whether or not the employer took the employee's disability into account when the employment action was taken. *Id.*

disability.[159] To achieve the ADA's goal of eliminating discrimination, employers acting *with* discriminatory intent must be liable in both types of ADA cases. The only way to achieve this goal is to permit mixed motives claims. To understand this Note's argument, an overview of the two types of discrimination in ADA cases is necessary.

In each type of ADA case, there are two potential types of discrimination: discriminatory *effect* and discriminatory *intent*. Discriminatory *effect* is simply whether the employment decision results in discrimination. This can be an employee losing his job, being demoted, or any other action that the employee files suit over. Establishing discriminatory *effect* is necessary in all ADA cases because otherwise the plaintiff has not been harmed. Discriminatory *intent* is whether or not the employer's purpose in acting was based upon or involved discriminatory factors. This could be in the form of internal management communications describing the plaintiff's disability and the need to take a particular action because of such disability. Unlike discriminatory *effect*, a plaintiff does not need to show discriminatory *intent* in a "reasonable accommodation" case, only in the "classic" case.

Because an employer can be held liable when it acted with *no* discriminatory intent in a "reasonable accommodation" case, it would be illogical to conclude that the ADA then permits an employer to avoid all liability when it acted *with* discriminatory intent in a "classic" case. The only way to ensure that an employer acting *with* discriminatory intent is held liable is to permit mixed motives claims. If the goal of the ADA is to eliminate discrimination,[160] and the ADA clearly holds employers liable when they act with *no* discriminatory intent, then the ADA must hold an employer liable when it acted *with* discriminatory intent. Working through each type of case will illustrate that the only way to achieve this outcome is to permit mixed motives claims.

A. *The Reasonable Accommodation of Mixed Motives Claims*

In a typical "reasonable accommodation" case, the employer will be held liable under the ADA if reasonable accommodation of the disability without undue hardship was possible and not implemented.[161] This is true even if the employer acted with no discriminatory intent.[162] In these cases, the court will implement a dynamic cost-based analysis of the "reasonable accommodation" and "undue hardship."[163] After which,

159 *See supra* notes 127–31 and accompanying text.

160 42 U.S.C. § 12101(b)(1) (2012); *see also supra* note 43 and accompanying text.

161 42 U.S.C. § 12112(b)(5)(A).

162 *See id.*

163 Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148 (2010) (discussing the interplay between reasonable accommodations and undue hardship

the jury will decide whether the employer should have implemented the reasonable accommodation, and if so, the employer will be held liable.[164] Notably, in these cases the focus of the court and jury is not on whether the employer acted with or without discriminatory intent, but whether the discriminatory effect could have been avoided through "reasonable accommodation." The fact that the employer may have acted with *no* discriminatory intent but nonetheless be liable is critical to understanding why mixed motives claims must be permitted under the ADA. A case illustrating the "reasonable accommodation" approach will make it clear that discriminatory *intent* is not necessary for employer liability.

The only Supreme Court case dealing directly with the ADA's "reasonable accommodation" provision is the 2002 case of *U.S. Airways, Inc. v. Barnett*.[165] The relevant facts are as follows: After the plaintiff, Barnett, injured his back working in U.S. Airways' cargo department, he was transferred to a less physically demanding mailroom position.[166] However, his new position became open to seniority-based employee bidding under U.S. Airways' seniority system where more senior employees could bid on certain positions and receive them based on the bid.[167] Employees senior to Barnett planned to bid on the mailroom job, U.S. Airways refused to accommodate his request to remain in the mailroom, and Barnett lost his job.[168] The parties' respective positions were this: Barnett wanted to be treated *differently* than other employees by having the seniority-based bidding system inapplicable to him; U.S. Airways wanted to treat Barnett the *same* as other employees.[169] The Court determined that the ADA requires differential treatment for disabled workers, but only when such "reasonable accommodation" is not an undue hardship upon the employer.[170] This standard is consistent with the ADA's text and with scholars who have argued that this *difference* requirement upon employees is what makes the ADA

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and suggesting that to properly implement Congress's intent, a court must force employers to reasonably accommodate limitations). For this Note's purpose, Weber speaks to the fact that not only are "reasonable accommodation" cases fundamentally different, but they require a court to focus on the ADA's text to properly achieve the goal of eliminating discrimination. This Note suggests that because the "reasonable accommodation" clause requires a court to award damages regardless of discriminatory intent, by applying a but-for causation standard, the court would be taking the teeth out of the ADA by letting employers who admitted to acting with discriminatory intent completely avoid liability.

164 *Id.* at 1178.

165 535 U.S. 391 (2002).

166 *Id.* at 394.

167 *Id.*

168 *Id.* Barnett lost his job because he was physically unable to move to a position outside the mailroom.

169 *See id.* at 394–96; *see also supra* note 131.

170 *U.S. Airways*, 535 U.S. at 402.

unique.[171] This standard lays the groundwork for why mixed motives claims must be permitted because it makes clear that the ADA will hold an employer liable even if it acted with *no* discriminatory intent. A closer look at *U.S. Airways* makes this clear.

In *U.S. Airways*, the plaintiff claimed to have been fired because U.S. Airways would not "reasonably accommodate" his request. What is key to understand is this: U.S. Airways did not act with, nor did Barnett claim that it acted with, any discriminatory intent. Instead, U.S. Airways simply said that it treated Barnett in the exact same way as it treated every other employee when it subjected Barnett to the seniority system. Yet—and this is crucial—the Court made it clear that if Barnett was able to show that accommodating his request to bypass U.S. Airways' seniority system was reasonable and could have been done without undue hardship, Barnett would have recovered.[172] Thus, an employer acting with *no* discriminatory intent can be held liable under the ADA. If the Supreme Court concludes that this result is correct, then Congress's goal must have been to force employers to treat disabled employees *differently* in order to eliminate discrimination in the workplace.[173] To create a clear, comprehensive, and national mandate of eliminating discrimination, employer liability must be consistent in the "classic" ADA case. As will be shown in the following section, a "but-for" standard is incompatible with congressional purpose because it relieves an employer of *all* liability even when the employer acts *with* discriminatory intent.

B. *The But-For Failure*

The parties' arguments in a "classic" ADA case focus on the degree to which the employer took discriminatory factors into account when it made the employment decision, not on whether the disability could have been accommodated. In these cases, if a "but for" standard is used, an employer who admits to using forbidden discriminatory factors in its employment decision will not be liable if a jury thinks that the same decision would have been made absent the forbidden factor.[174] Therefore, it is possible for an employer to act with discriminatory *intent* yet avoid liability. Such a result directly contradicts the "reasonable accommodation" standard of holding employers liable

171 *See* Karlan & Rutherglen, *supra* note 131.

172 *U.S. Airways*, 535 U.S. at 402.

173 Weber, *supra* note 163, at 1178. Professor Weber concludes that to not shy away from requiring preferential treatment when an accommodation does not entail undue hardship is doing no more than what Congress commands. *Id.*; *see also supra* note 170.

174 *See* Katz, *supra* note 32, at 658 (discussing the burden shifting framework that applies in a but-for case).

when they acted with *no* discriminatory intent, and directly contradicts the ADA's goal of eliminating discrimination.[175] A hypothetical illustration will demonstrate why this position is untenable.

A slight modification of the facts of *U.S. Airways* will highlight why but-for causation cannot be the correct standard under the ADA. First, assume that instead of pointing to the seniority-based bidding system to justify its actions, U.S. Airways claimed that Barnett did not get along with other employees and delivered mail late. Then in response, assume Barnett documented that his late mail delivery was due to his disability and U.S. Airways *knew* this. Under a but-for causation standard, the jury's task would be determining whether the adverse employment action would have occurred absent the forbidden disability factor of late mail delivery. In other words, if the jury concluded that Barnett's interpersonal skills deficiency was a sufficient reason for the adverse employment decision, U.S. Airways would avoid all liability despite having documented evidence that Barnett's disability played a role. Thus, in this hypothetical, even though U.S. Airways acted *with* documented discriminatory intent, it avoids all liability. This result is troubling for a couple of reasons.

First, this standard would allow U.S. Airways, which has an informational and resource advantage over its employee, to have disproportionate power in the litigation process. U.S. Airways would know that if it focused solely on innocent factors that cannot be "reasonably accommodated," such as interpersonal skills, it could avoid all liability if a jury determines that the innocent factors were independently sufficient for the employment action. Thus, the ADA's ability to police employment discrimination is diminished because even when an employer acts with discriminatory *intent* and the employee can document such discriminatory *intent*, the employer will not be liable if it properly leverages is superior position by providing the jury with enough innocent evidence to convince the jury that the same result would have occurred absent the forbidden factor. Thus, an employer would not be held accountable when it clearly committed the wrong of taking the disability into account.[176]

More importantly, the but-for result would be in direct conflict with the "reasonable accommodation" provision result. As discussed above, the "reasonable accommodation" provision holds an employer liable even if it acted with *no* discriminatory intent, regardless of the standard of causation.[177] However, under the "but-for" standard, an

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175 *Id.* (discussing the fact that the point of anti-discrimination statutes is to impose sanctions upon wrongdoers and that to permit an employer to avoid liability when it commits a wrong would harm the plaintiff and society).

176 *See id.*

177 *See supra* Part IV.A.

employer may avoid liability when it acts *with* discriminatory intent in the "classic" case. Because both the Supreme Court and scholars have affirmed the fact that the "reasonable accommodation" result reflects Congress's intent in drafting the ADA, it would be illogical for Congress to intend employers to be held liable when they act with *no* discriminatory intent but avoid liability if they acted *with* discriminatory intent. The only way to hold employers liable when they act *with* discriminatory intent is to permit mixed motives claims.

C. *The Mixed Motives Necessity*

The foregoing sections illustrate how "but-for" causation is in conflict with the ADA's "reasonable accommodation" provision and as a result, in conflict with ADA's goal of eliminating employment discrimination. Because the "reasonable accommodation" provision is a core part of the ADA's framework, to achieve the ADA's goal, the mixed motives standard of causation is necessary in "classic" cases. The mixed motives standard achieves what the "but-for" standard does not: It is compatible with the "reasonable accommodation" clause while it furthers the ADA's goal of creating a clear and comprehensive national mandate for the elimination of disability-based discrimination.

Unlike a "but-for" standard, if an employer acts *with* discriminatory intent under a mixed motives standard, it is liable.[178] This result is congruent with the "reasonable accommodation" case outcome because the employer is liable for causing a discriminatory effect *and* acting *with* discriminatory *intent*. The only difference between the two situations is how the liability attaches to the employer. In the "reasonable accommodation" situation, the liability attaches through the discriminatory *effect* of not accommodating the employee's disability. In the "classic case," liability attaches to the employer's discriminatory *intent*, even if the discriminatory *effect* is justified by other, innocent factors. If the ADA's goal is to eliminate discrimination through a clear and comprehensive national mandate, then employers that act with discriminatory intent must be held liable. A look back to the *U.S. Airways* hypothetical will make it clear that only a mixed motives standard can achieve the ADA's goal.

Assume first that Barnett has documented that his late mail delivery is caused by his disability and that U.S. Airways knew this. The

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178 *See* Katz, *supra* note 32, at 658. Professor Katz agrees that compensatory damages are likely inappropriate under a solely mixed motives finding because the plaintiff may receive a windfall. However, he also concludes that no liability at all would benefit the wrongdoer. As such, Professor Katz concludes that the Civil Rights Act of 1991, awarding limited damages, is the most preferable outcome in strictly mixed motives finding cases.

employer does not deny such evidence, but points to Barnett's interpersonal skills as the innocent factor for its employment decision. If mixed motives claims were permitted, then the jury would be told that if it believed that Barnett's documented disability played a role, even if not a "but-for" role, it should award non-compensatory damages to the employee.[179] Thus, Barnett and his attorneys are able to receive limited damages and U.S. Airways is held "partially" liable for taking a forbidden factor into account in its employment decision.[180] This result is consistent with "reasonable accommodation" cases because an employer is liable when it acts with and without discriminatory intent.

In addition to being consistent with the "reasonable accommodation" clause, mixed motives claims are desirable because holding employers liable for discriminatory *intent* furthers the ADA's goal of a clear and comprehensive national mandate to eliminate discrimination.[181] The mixed motives standard is clear because an employee and employer will know that liability may attach if the employer acts *with* discriminatory intent. It is comprehensive because it applies the same standard to every ADA case. It achieves the ADA's goal of eliminating discrimination because it holds employers who act with discriminatory *intent* and commit the wrong of taking an employee's disability into account.

D. *"Reasonable Accommodation" Concerns*

It is necessary to address one obvious counter argument to the proposal discussed above: If the Supreme Court said anything in *Gross* to the contrary, it is that the Court's approach in *Gross* should be followed in future anti-discrimination cases, not the above proposal.[182] However, even if a court follows the systematic *Gross* approach, it should still find that mixed motives claims are permissible.

The first step the *Gross* Court took was to limit the reach of both *Price Waterhouse* and Title VII from affecting ADEA claims by stating that the rules applicable to one statute should not be applied to another

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179 *See* Sherwyn & Heise, *supra* note 8, at 929–32 (discussing the various jury instructions and the corresponding damages a plaintiff is entitled to under each).

180 *Id.* It cannot be understated how important it is for a plaintiff to at least recover costs and fees in these cases. *See supra* note 8. If plaintiff is in an all or nothing situation, legal assistance will become very difficult to come by because attorneys know that a "but-for" standard will be difficult to win under and not worth the extensive time and resources necessary to win such a case.

181 *See* 42 U.S.C. § 12101(b)(1) (2012).

182 Despite arguments that *Gross* was both illogical and incorrect, it was still decided less than five years ago by the Supreme Court, and as such, reflects the High Court's method for anti-discrimination statutes. *See* Sherwyn & Heise, *supra* note 8, at 923–27.

statute without "careful and critical examination."[183] After a "careful and critical examination," the ADA and the ADEA are significantly different in their substantive standards, defenses, and practical implications of such defenses.[184] Thus, ADEA cases should not impact ADA cases. However, when the ADA is compared to Title VII, the statutes' similarities are evident, and as a result mixed motives claims should be treated the same way under the ADA as they are under Title VII.

First, the fundamental purpose of both statutes is the same: to eliminate discrimination.[185] In addition, both statutes use the "reasonable accommodation" provision to achieve this goal. As discussed throughout this Note, the ADA uses the "reasonable accommodation" framework within its defenses.[186] Title VII also requires an employer to "reasonably accommodate" an employee's religious observance, practice, and belief's.[187] As discussed earlier in this Note, this "sameness" and "difference" portion of the ADA, and Title VII's religion provisions, make these statutes different from the ADEA.[188] The fact that the "reasonable accommod[ation]" language is in both Title VII and the ADA speaks to the fact that both statutes use similar tools to eliminate their respective forms of discrimination.

Second, Congress incorporated many of the procedures and definitions of Title VII into the ADA.[189] Congress's explicit incorporation of Title VII suggests that Congress intended the ADA to be treated the same as Title VII. Additionally, it reiterates the fact that the fundamental purpose of both the ADA and Title VII are the same: to stop discrimination against those individuals that are perfectly capable of fully participating in society.[190]

Third, when the ADAAA replaced "because of" with "on the basis of," it moved the ADA closer to Title VII. When Congress passed the ADAAA it clearly stated that to align "the Americans with Disabilities

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183 *See* Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 174 (2009).

184 *See supra* Part III.A.

185 *Compare* 42 U.S.C. § 2000e-2 (Title VII), *with id.* § 12101(b)(1) (ADA).

186 42 U.S.C. § 12113(a) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.").

187 *Id.* § 2000e(j) ("For the purposes of this subchapter . . . [t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." (emphasis added)).

188 *See* discussion *supra* Part IV.A.

189 *See* H.R. REP. No. 101-485, pt. 1, at 454 (1990); *see also supra* notes 43–46 and accompanying text.

190 *Compare* 42 U.S.C. § 12101(b)(1) (ADA), *with id.* § 2000e-2 (Title VII).

Act with Title VII of the Civil Rights Act of 1964, The [ADAAA] amends . . . the ADA to provide that no covered entity shall discriminate against a qualified individual 'on the basis of disability.'"[191] As discussed earlier in this Note, prior to *Gross*, courts rarely elaborated on *why* they permitted mixed motives claims under the ADA beyond stating that the *Price Waterhouse*/Title VII framework applied to such claims.[192] In other words, for almost twenty years courts used the *Price Waterhouse*/Title VII framework to justify permitting mixed motives claims under the ADA. Because Congress did not condone such practice through the ADAAA, the practice of treating the ADA the same as Title VII should continue.

For the aforementioned reasons, under a *Gross*-based approach, a court would find that the ADA was designed to reflect Title VII. The respective texts of the statutes, the Title VII-based procedures and definitions within the ADA, and court precedent create a substantial connection between the ADA and Title VII. Because the *Gross* court only reached its textual analysis of "because of" after eliminating the reach of Title VII through "careful and critical examination," a *Gross*-based ADA analysis should stop after a "careful and critical examination" and conclude that Title VII's standard of permitting mixed motives claims can and should be applied to the ADA. While the "reasonable accommodation" approach is logically and practically preferable, even a court applying a misguided *Gross* approach should conclude that mixed motives claims are permissible under the ADA.

CONCLUSION

It is all but impossible for an employee to show that the "sole" or "but-for" cause of an adverse employment action was discriminatory. Therefore, a plaintiff's ability to recover damages and secure legal assistance in bringing an ADA claim will depend on the permissibility of mixed motives claims. Ultimately, whether or not such claims are allowed will determine whether the ADA's purpose—to eliminate discrimination against disabled Americans—is achieved. This Note argues that the only way to achieve the ADA's goal is to permit mixed motives claims because it is the only standard that creates consistency in all ADA cases.

Before *Gross*, courts were inconsistent in determining whether mixed motives claims were permissible under the ADA. After *Gross*, the struggle has become more difficult, and courts have held that mixed motives claims are not permitted under the ADA. However, the only

191 *See* 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (statement of Managers to S. 3406).
192 *See supra* note 137 and accompanying text.

way to achieve Congress's goal of providing a clear and comprehensive national mandate for the elimination of discrimination is to permit mixed motives claims. In ADA "reasonable accommodation" cases, employers are liable even if they act with *no* discriminatory intent. To ensure a consistent national mandate of eliminating discrimination, employers that act *with* discriminatory intent must be liable under the ADA. The only way to achieve this goal is to permit mixed motives claims under the ADA. Thus, the "reasonable accommodation" approach will achieve what courts have struggled to do for the last twenty years: Create a clear and comprehensive national approach for the elimination of discrimination.