# CHASING CAUSATION: THE FOURTH CIRCUIT'S AMERICANS WITH DISABILITIES ACT DECISION AND PROPER CAUSATION STANDARDS*

## INTRODUCTION

Since the enactment of the Americans with Disabilities Act of 1990 (the "ADA") twenty years ago,[1] the question of what causation standard is required for discrimination claims has created disagreement among lower courts. Some courts require that a "motivating factor" standard must be met, meaning a plaintiff need demonstrate only that prohibited discrimination *contributed* to the employer's decision.[2] Other courts employ a "but-for" causation standard, which necessitates a showing that but for a plaintiff's disability she would not have been fired.[3] Recently, the Fourth Circuit Court of Appeals became the first circuit to analyze which standard must be adopted under the Americans with Disabilities Act Amendments Act of 2008,[4] which prohibits discrimination "on the basis of" disability.[5]

In *Gentry v. East West Partners Management Co.*,[6] the Fourth Circuit held that the ADA mandated application of the more stringent "but-for" causation standard,[7] meaning a plaintiff must prove that but for her disability, the employer would not have taken



1. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

2. Johnathan R. Mook, *Fourth Circuit Adopts "But-For" Causation for ADAAA Claims*, 16-5 Bender's Lab. & Emp. Bull. (MB) 03 (May 1, 2016) (explaining that under a 'motivating factor' standard, "to establish liability, a plaintiff need demonstrate only that prohibited discrimination contributed to the employer's decision.").

3. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 266 (5th ed. 1984) (defining but-for causation as: "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.").

4. Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (2012)).

5. 42 U.S.C. § 12112(a) (2012). In this Recent Development, "the ADA" refers to both the original 1990 Act and the 2008 Amendments, as they are applied as one body of law.

6. 816 F.3d 228 (4th Cir. 2016).

7. *See infra* Part II.

adverse employment action against her.[8] The court reasoned that Supreme Court precedent, prior decisions by other circuit courts, and the legislative history of the ADA all support the conclusion that the "on the basis of" language suggests a "but-for" causation requirement.[9]

This Recent Development argues that the "but-for" causation standard used by the Fourth Circuit is the incorrect standard and, instead, proposes using the "motivating factor" standard. The argument focuses on the Fourth Circuit's reasoning for its decision in *Gentry* by examining the text of the ADA, the legislative history of the ADA, and relevant decisions of the Supreme Court and other circuits.

Analysis proceeds in four parts. Part I briefly discusses the history of the ADA causation standards with a specific focus on how the standards have developed and changed over the last twenty years. Part II provides the factual background for the Fourth Circuit's adoption of a "but-for" causation standard. Part III analyzes and then explains why the "but-for" causation standard is not the proper standard a plaintiff must meet to assert a claim of discrimination by looking to the text and history of the ADA and relevant decisions of the Supreme Court and other circuits. Part IV examines the policy outcome when using the "but-for" causation standard and the negative impacts it has on implementing the purpose of the ADA.

## I. THE DEVELOPMENT OF CAUSATION STANDARDS AND THE ADA

The ADA was enacted in 1990 "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability."[10] Especially in a context as "critical" as employment, individuals with disabilities were seen as pervasively disadvantaged through "outright intentional exclusion[;] the discriminatory effects of . . . communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser . . . benefits, jobs, or other opportunities."[11] The ADA was therefore created with the intent to both remedy this discrimination,

8. *Gentry*, 816 F.3d at 235.

9. *Id.* at 235–36.

10. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

11. *Id.* §2(a)(3), (5).

and to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[12]

Originally, to set forth a viable claim under section 102(a) of the 1990 ADA, a disabled job applicant or employee had to show that an adverse employment action was taken against her "because of the disability of such individual."[13] This language mirrored the language in Title VII of the Civil Rights Act of 1964 ("Title VII"), which stated that it was an "unlawful employment practice" for an employer to discriminate against any individual "*because of* such individual's race, color, religion, sex or national origin."[14]

Interpretations of the "because of" language in Title VII helped establish the original standard applied in ADA cases. In the seminal case *Price Waterhouse v. Hopkins*,[15] the United States Supreme Court dictated the causation standard associated with the "because of" language in Title VII.[16] Despite the Court's inability to form a majority, six justices agreed that in a status-based discrimination case under Title VII, a plaintiff could prevail if he could show that one of the prohibited traits was a "motivating" or "substantial" factor in the employer's decision.[17] Because the decision involved language identical to that of the ADA, lower courts began applying the motivating factor causation standard to discrimination claims brought under the ADA after its enactment one year later.[18]

Two years after *Price Waterhouse* was decided, Congress passed the Civil Rights Act of 1991, amending Title VII to codify the new causation framework dictated by the Supreme Court.[19] The new provision stated that an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a *motivating factor* for any employment practice."[20]

12. *Id.* § 2(a)(8).

13. *Id.* § 102(a).

14. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (1964)) (emphasis added).

15. 490 U.S. 228 (1989).

16. *Id.* at 239–40.

17. *See id*. at 241.

18. *See* McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1077 (11th Cir. 1996) ("We hold that the 'because of' component of the ADA liability standard imposes no more restrictive standard than the ordinary, everyday meaning of the words would be understood to imply. In everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome.").

19. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2 (2012).

20. *Id.* (emphasis added).

This statutory change, however, actually led to more interpretational confusion in lower courts regarding causation standards. In *Gross v. FBL Financial Services, Inc.*,[21] the Supreme Court held that Title VII's "motivating factor" standard, which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice,"[22] could not be carried over to claims brought under the Age Discrimination in Employment Act (the "ADEA"),[23] which prohibits employers from "discriminat[ing] against any individual . . . because of such individual's age."[24]

Unsurprisingly, this decision led to conflict among lower courts as they struggled to determine what this meant for claims brought under the ADA, which also mirrored the "because of" language of the ADEA.[25] Based on *Gross*, a number of circuit courts held that the motivating factor standard would no longer apply to ADA claims.[26] Instead, in order to state a viable claim of disability discrimination, a plaintiff would have to apply the more stringent "but-for" causation standard.[27]

However, even before *Gross*, the ADA causation standard was in a constant state of flux due to changes to the ADA. In 2008, Congress amended the ADA.[28] The most notable change to the

21. 557 U.S. 167 (2009).

22. 42 U.S.C. § 2000e-2(m) (2012).

23. The ADEA referenced in *Gross v. FBL Financial Services, Inc.* is the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012). *See Gross*, 557 U.S. at 169. This Act deems it 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." 29 U.S.C. § 623(a)(1). The "because of" language in the ADEA is the same language used in the ADA, causing some courts to hold that the treatment of one act must mirror the treatment of the other. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331–32.

24. *Gross*, 557 U.S. at 176 (quoting 29 U.S.C. § 623(a)(1)).

25. Americans with Disabilities Act of 1990 § 102(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . .").

26. *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 314 (6th Cir. 2012) ("[W]e see no reason to insert the one addendum ('solely') or the other ('a motivating factor') into the ADA."); Serwatka v. Rockwell Automation, Inc., 591 F. 3d 957, 957 (7th Cir. 2010) ("The ADA did not authorize mixed-motive disability discrimination claim.").

27. *Lewis*, 681 F.3d at 312; *Serwatka*, 591 F. 3d at 957.

28. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (2012)). Congress amended the ADA in response to a number of Supreme Court cases that were narrowly defining what constituted a disability

ADA, for purposes of this Recent Development, was the change in the language in § 102. While the original 1990 text employed the same "because of" language found in Title VII, the 2008 amendment modified the text to prevent discrimination "on the basis of" the disability.[29] Thus, this pivotal change in language resulted in the need for a new analysis of what causation standard the ADA requires.

Eight years later, with its decision in *Gentry*, the Fourth Circuit became the first circuit court to address what the appropriate causation standard should be given the new language of the ADA,[30] and it held that the "but-for" causation standard applied to ADA claims.[31]

## II. *GENTRY V. EAST WEST PARTNERS MANAGEMENT CO.*

The Fourth Circuit had the opportunity to evaluate the ADA causation standard issue when considering Judith Gentry's challenge to a district court's jury instructions under the ADA.[32] Gentry sued her employers Maggie Valley and East West for disability discrimination under the ADA, among other violations.[33] She claimed she was terminated because of an ankle injury she had sustained while on the job.[34] The Western District of North Carolina instructed the jury that Gentry must be able to demonstrate that her disability was the but-for cause of her termination in order to establish a claim of discrimination under the ADA.[35] Accordingly, the jury found for Maggie Valley and East West on the disability discrimination claims

under the act. *See generally* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (holding that terms "substantially" and "major" in the definition of disability under the ADA must be "interpreted strictly to create a demanding standard for qualifying as disabled"); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that the coverage under the third prong of the definition of disability needs to be narrowly construed). Congress intended the amendments to force courts 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 to be available under the ADA." ADA Amendments Act of 2008 § 2(b)(1).

29. ADA Amendments Act of 2008 § 5(a).

30. Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 236 (4th Cir. 2016).

31. *Id.* at 235.

32. *Id.* at 233.

33. *Id.* at 232–33. The other violations Gentry alleged were sex discrimination under Title VII and North Carolina common law and retaliation for pursuing a workers' compensation claim in violation of North Carolina law. *Id.*

34. *Id.* at 232.

35. *Id.* at 233.

because it did not find that but for Gentry's disability she would not have been fired.[36]

On appeal, Gentry argued that the district court had improperly instructed the jury on the causation standard for disability discrimination claims under the ADA.[37] She argued the jury should have adopted the "motivating factor" causation standard of Title VII instead of the "but-for" standard used.[38] Under the "motivating factor" standard, an unlawful employment action is established when the complainant demonstrates that her disability was a "motivating factor for any employment practice, even though other factors also motivated the practice."[39] However, the Fourth Circuit affirmed the district court's jury instructions, finding that a "but-for" causation standard is the proper standard for a plaintiff to establish a viable claim of discrimination under the ADA.[40]

The Fourth Circuit came to this conclusion despite the language change in the 2008 amendments to the ADA, asserting that the new "on the basis of" language was essentially identical to the removed "because of" language.[41] Although the Fourth Circuit was the first circuit to decide the causation standard under the new ADA language, it closely followed several previous Supreme Court and other circuit court decisions, reasoning that such precedents "dictate[] the outcome."[42]

The Fourth Circuit also focused on the text and legislative history of the ADA, stating that such language "calls for a 'but-for' causation standard" and the legislative history "does not suggest that 'on the basis of' was intended to mean something other than 'but-for' causation."[43] Although the Fourth Circuit acknowledged that this causation standard set a higher bar for plaintiffs, it nonetheless found that the legislative history of the ADA "suggests the language was changed to decrease the emphasis on whether a person is disabled, not to lower the causation standard."[44]

36. *Id.* at 231.
37. *Id.* at 233.
38. *Id.* at 235.
39. 42 U.S.C. § 2000e-2(m) (2012).
40. *Gentry*, 816 F.3d at 234.
41. *Id.* at 235–36.
42. *Id.* at 234.
43. *Id.* at 235–36.
44. *Id.* at 236.

## III. ANALYSIS OF THE "BUT-FOR" CAUSATION STANDARD

The Fourth Circuit's rationale for adopting the "but-for" causation standard focused on three main conclusions: (1) the ADA's "on the basis of" disability language calls for using a "but-for" causation standard; (2) the legislative history surrounding the enactment of the ADA and its 2008 amendment leads to the conclusion that the change in language to "on the basis of disability" was not intended to establish a "motivating factor" causation standard; and (3) looking to the text of the ADA, there is no text that "provide[s] that a violation occurs when an employer acts with mixed motives."[45] Through this analysis, the Fourth Circuit became the first circuit court to decide that "on the basis of" disability entails a "but-for" causation standard.

### *A. "On the Basis of" Disability Textual Analysis*

While other circuits have interpreted the Supreme Court's decision in *Gross* as signifying that a "but-for" causation standard must be applied to ADA discrimination claims, with its decision in *Gentry*, the Fourth Circuit became the first—and only—circuit to make such a holding when interpreting the ADA's "on the basis of" language.[46]

Congress's 2008 amendments to the ADA included a change in the language used in section 102 providing the "General Rule" for discrimination.[47] Prior to 2008, the ADA stated: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . ."[48] The 2008 amendments to the ADA changed this language to read that one shall not "discriminate against a qualified individual on the basis of disability."[49]

Because the amendment to the text of the statute was the impetus for *Gentry*, the textual difference was the Fourth Circuit's first consideration. Specifically, the Fourth Circuit held that there was "no meaningful textual difference" between "because of" and "on the

45. *Id.* at 235–36.

46. *See* Mook, *supra* note 2; *see also* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 314 (6th Cir. 2012); Serwatka v. Rockwell Automation, Inc., 591 F. 3d 957, 959 (7th Cir. 2010).

47. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553, 3557 (codified as amended at 42 U.S.C. § 12112 (2012)).

48. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331.

49. ADA Amendments Act of 2008 § 5(a).

basis of."[50] The court looked to the New Oxford American and Merriam-Webster's dictionary definitions of "basis"[51] and determined that a "basis" is merely the "justification for or reasoning behind something."[52] Therefore, the Fourth Circuit claimed the "on the basis of" language exactly mirrored the previous "because of" language.[53]

However, when looking at the full definition of "basis" provided by Merriam-Webster online, it is defined as "the bottom of something considered as its foundation" or "the principal component of something."[54] This definition neither leads to the automatic assumption that "because of" and "on the basis of" have the same definition, nor the determination that it indicates a sole cause analysis. The use of the words "foundation" and "component" indicate that when something is a "basis," it is one part of a whole—not a "sole"[55] cause. Therefore, this definition seems to lean towards an interpretation that a disability must only be a contributing cause, as opposed to a but-for cause.[56]

With this analysis, the Fourth Circuit determined that Congress's 2008 amendment resulted in no meaningful difference in the statutory terms of the ADA.[57] Yet it seems incredibly unlikely that Congress would have changed this language for no purpose. As noted in the Sixth Circuit's ADA causation analysis, "[d]ifferent words usually convey different meanings . . . ."[58] Given the importance of, and weight given to, the language used in a statute when determining what causation standard to apply in the previous court decisions cited

50. *Gentry*, 816 F.3d at 236.

51. *Id.* at 236 (citing *Basis*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010); *On the basis of*, MERRIAM-WEBSTER'S ADVANCED LEARNER'S ENGLISH DICTIONARY (2008) (defining "on the basis of" as "according to[,] based on")).

52. *Gentry*, 816 F.3d at 236.

53. *Id.* at 235–36.

54. *Definition of Basis*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/basis [https://perma.cc/39Z8-7CNE].

55. *Definition of Sole*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sole [http://perma.cc/KB7S-2GRZ] ("belonging exclusively or otherwise limited to one usually specified individual, unit, or group").

56. *See* Corey Stein, Comment, *Mixed-Motive Jury Instructions Under the ADA and ADAAA: Are they Still Applicable in the Wake of* Gross v. FBL Financial Services, Inc. *and* University of Texas Southwestern Medical Center v. Nassar*?*, 44 SETON HALL L. REV. 1223, 1251 (2014) ("[T]he plain language of the phrase 'on the basis of' is significantly broader than the phrase 'because of' . . . .").

57. *See Gentry*, 816 F.3d at 235–36 ("We see no 'meaningful textual difference' between this language and the terms 'because of' . . . .").

58. Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 315 (6th Cir. 2012).

by the Fourth Circuit,[59] the Fourth Circuit's brief, two-sentence analysis of this point appears deficient.[60]

To strengthen its argument, the Fourth Circuit emphasized that the amendments to the ADA occurred prior to the decision in *Gross,* which held that the "because of" language in the ADEA required a "but-for" causation standard.[61] Since *Gross* had not yet been decided, the court reasoned, Congress's 2008 amendment to the ADA cannot be said to have been an effort to avoid a "but-for" causation standard.[62] The relevance of this argument, however, seems questionable given that the ADEA has a "because of" standard, which the Fourth Circuit interpreted as having the same exact meaning as the "on the basis of" language. And more importantly, this chronology does not preclude an argument that the change in language was meant to prevent an application of a "but-for" causation standard, as Congress could have had other reasons other than the decision in *Gross* for enacting such change.

### *B. Legislative History of the 1991 ADA*

Aside from a brief mention of the legislative history behind the 2008 ADA amendments, the Fourth Circuit's analysis in *Gentry* largely ignored the legislative history of the original 1991 ADA.[63] The Fourth Circuit likely overlooked this analysis due to its quick determination that "on the basis of" exactly mirrored "because of" language and, therefore, a "but-for" causation standard was applicable.[64]

In fact, the legislative history that the Fourth Circuit cited explains why the "on the basis of" language implies a causation standard less than "but-for" causation. In its analysis, the Fourth Circuit briefly looked to the legislative history of Congress' enactment of the amended language to the ADA.[65] In that history, Congress explicitly stated that such amendments were undertaken to

59. This seems particularly true given the amount of weight and how closely the Fourth Circuit followed the Supreme Court decision in *Gross*, which is a decision that was almost entirely based on the analysis of the ADEA's "because of" language. *See* Gross v. FBL Fin. Servs, Inc., 557 U.S. 167, 175–78 (2009); Price Waterhouse v. Hopkins, 480 U.S. 228, 240–42 (1989); *Lewis*, 681 F.3d at 312.

60. *See Gentry*, 816 F.3d at 235–36; *see also* Stein, *supra* note 56, at 1251.

61. *Gentry*, 816 F.3d at 236.

62. *See id.*

63. *See id.*

64. *See id.*

65. *Id.*

> ensure[] that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a "person with a disability."[66]

From this passage alone, the Fourth Circuit concluded that the only overarching goal of amending the ADA was to "decrease the emphasis" courts had previously placed on whether someone has a disability.[67] Therefore, this change in language should not be interpreted as an attempt to "lower the causation standard."[68]

However, this short passage overlooks other key provisions in the ADA's text and legislative history. First, another provision in the amended ADA states that one of the purposes of the amendments was to "reinstat[e] a *broad scope of protection* to be available under the ADA."[69] Yet, the Fourth Circuit's determination that the ADA calls for a "but-for" causation standard appears to go against this explicitly stated purpose.[70] Because a "but-for" causation standard is more difficult to establish than a motivating factor standard, this test imposes a significantly greater burden on plaintiffs alleging discrimination based on their disabilities who will feel the burden of the "but-for" causation standard. As a result, fewer plaintiffs will be able to effectively establish their claims, and many victims of discrimination may choose not to file suit in the first place. The scope of the ADA will not have been broadened, but instead narrowed, as fewer people claiming discrimination based on their disability will be protected by the courts.

Additionally, the House Report associated with this change in language states that

> the bill amends Section 102 of the ADA to mirror the structure of nondiscrimination protection in Title VII of the Civil Rights Act of 1964, changing the language of Section 102(a) from prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual" to

66. 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (statement of Senate Managers) (providing the purpose and summary of the legislation, in addition to explanations of the bill, how the law applies to the legislative branch, and a regulatory impact statement).

67. *Gentry*, 816 F.3d at 236.

68. *Id.*

69. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (emphasis added).

70. *Id.* § 2(a)(4). For full analysis of why a "but-for" causation standard does not provide for a "broad scope" of protection, see *infr*a Part IV.

> prohibiting discrimination against a qualified individual "on the basis of disability."[71]

This language indicates that the intent of Congress was to broaden the scope of ADA protection. Not only would a "but-for" causation standard make it increasingly difficult for ADA claims to be brought[72] in contrast to Congress's intent of broadening the scope of protection through its amendments to the ADA,[73] but determining that "on the basis of" is the equivalent to "because of" statutory language conflicts with the House Report. The change in language was meant to "mirror the structure of nondiscrimination protection" under Title VII, which employs the motivating factor" standard.[74] By holding that "on the basis of" requires but-for causation, the Fourth Circuit directly contravened Congress's clear intent to apply the motivating factor causation standard to the ADA. This oversight indicates that the Fourth Circuit should have more thoroughly analyzed the legislative history,[75] particularly given the arguably ambiguous language of the amendments to the ADA and the importance of the precise statutory language to the court's analysis.[76]

Additionally, the context in which the ADA was enacted is also indicative of this same congressional intent. The ADA was enacted merely one year after the 1989 *Price Waterhouse* decision established that the "because of" language in Title VII required a motivating factor causation standard.[77] Consequently, when choosing the wording of the ADA, Congress was aware that the Supreme Court had interpreted the "because of" language to establish a motivating factor causation standard with respect to Title VII. Thus, Congress's decision to use identical language to that of Title VII further bolsters the likelihood the ADA was enacted to establish the same motivating factor standard analyzed in *Price Waterhouse*.[78]

71. H.R. REP. NO. 110-730, pt. 1, at 16 (2008).

72. *See infra* Part IV.

73. Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 236 (4th Cir. 2016).

74. H.R. REP. NO. 110-730, pt. 1, at 16 (2008).

75. United States v. Pub. Utils. Comm'n of Cal., 345 U.S. 295, 315 (1953) ("Where the language and purpose of the questioned statute . . . [is] ambiguous, the judiciary may properly use the legislative history to reach a conclusion.").

76. *See supra* Section III.A (explaining how the "on the basis of" language could have been construed to mean something other than "but-for" causation which the Fourth Circuit did not consider).

77. *Price Waterhouse* was decided in 1989 and the ADA was originally enacted in 1990. *See supra* Part I.

78. *Id.*

This conclusion is further evidenced by the amendments made to Title VII in 1991. Congress amended Title VII to explicitly state that a motivating factor standard should be used, statutorily linking the ADA and Title VII.[79] A 1990 House Report about the amendments to Title VII and the ADA stated:

> [a] bill is currently pending in the Judiciary and Education and Labor Committees, H.R. 4000, which would amend the powers, remedies and procedures of title VII of the Civil Rights Act of 1964. Because of the cross-reference to title VII in Section 107, any amendments to title VII that may be made in H.R. 4000 or in any other bill would be fully applicable to the ADA.[80]

This of course suggests that Congress knew these amendments were being made to Title VII and fully intended, through the statutory link between the two statutes, that the "motivating factor" causation standard apply to the ADA.[81] Since Congress intended for the motivating factor standard to apply to the ADA when it was first enacted, this strongly suggests that a motivating factor standard is what Congress had always intended for the ADA.

In sum, the Fourth Circuit only undertook an analysis of *one part* of the legislative history relating to the ADA, not fully examining Congress' intent behind the amendments and ignoring any other relevant legislative history. Had it fully examined such history, the court could have uncovered the House Reports, the legislative history surrounding the implementation of the ADA in 1990, the amendments to Title VII in 1991, and the legislative history of the 2008 amendments to the ADA noted above.

While these congressional materials do not definitely establish a particular causation standard for ADA cases, they at least tend to lean away from the use of a "but-for" causation standard. Therefore, the brevity and lack of depth to the Fourth Circuit's analysis of the legislative history of the ADA does not allow for a complete and proper analysis of what causation standard should be used under the new ADA. The assumption that the new language did not require any additional analysis prevented the Fourth Circuit from fully exploring what "on the basis of" means and how legislative history should inform what causation standard should be applied. However, even

79. *See Gentry*, 816 F.3d at 234.

80. *See* H.R. REP. NO. 101-485, pt. 3 at 48 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 471; *see also infra* Section III.C.

81. H.R. REP. NO. 101-485, pt. 3 at 48 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 471.

accepting the Fourth Circuit's conclusion that Congress merely intended the "on the basis of" language to mirror "because of" language, the court still should not have applied a "but-for" causation standard for other reasons.

### *C. Precedent and the Lack of Motivating Factor Language*

Another major influence that led the Fourth Circuit to require a "but-for" causation standard was the lack of "motivating factor" language in the 2008 ADA amendments.[82] This conclusion was largely based upon *Gross*, in which the Supreme Court held that the ADEA's "because of" language did not explicitly provide that a plaintiff may establish discrimination by showing that age was simply a "motivating factor," as the statute included "because of" language.[83] The *Gross* Court also noted that Congress did not add a "motivating factor" provision to the ADEA when it amended Title VII, leading the Court to conclude that "when Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[84]

In support of its heavy reliance on *Gross*, the Fourth Circuit noted that the Sixth and Seventh Circuits had previously applied *Gross* to ADA claims and found that the "motivating factor" standard of Title VII could not be applied to such claims.[85] According to the Sixth Circuit, "[s]hared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters," and thus, because the text of the ADA makes no mention of a "motivating factor," the causation standard from Title VII could not be read into the statute.[86] Similarly, the Seventh Circuit held that "given the lack of a provision in the ADA recognizing mixed-motive claims, such [mixed motive finding] claims do not entitle a plaintiff to relief for disability discrimination."[87] However, like the Fourth Circuit in *Gentry*, neither of these courts considered the fact that the ADA includes a cross-reference to the substantive provisions of Title VII—that the ADEA does not—and merely adopted their ADA analysis from a case analyzing the ADEA.

82. *See Gentry*, 816 F.3d at 234 ("We conclude that Title VII's 'motivation factor' language cannot be read into Title I of the ADA.").

83. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

84. *Id.* at 174.

85. *Gentry*, 816 F.3d at 234.

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

87. Serwatka v. Rockwell Automation, Inc., 591 F. 3d 957, 964 (7th Cir. 2010).

The Fourth Circuit used the criteria espoused in *Gross* to determine whether the amended ADA required a "but-for" causation standard.[88] The court held that the "motivating factor" causation standard could not be applied because the provisions of the amended ADA did not explicitly provide that a plaintiff could establish discrimination by showing that disability was a "motivating factor."[89] Similarly, the Court noted that Congress "contemporaneously amended" provisions of the ADA at the time the motivating factor standard was added to Title VII but failed to make any such amendments to the ADA.[90] This analysis, taken from *Gross*, ignores important differences between the ADEA and the ADA—an issue the Supreme Court itself warned against in *Gross*.[91] Whereas the ADEA was enacted without any cross-reference to the substantive provisions of Title VII, the ADA has such a cross-reference.[92] These factors therefore merit a different approach for ADA cases and ADEA cases when analyzing the absence of "motivating factor" language.

The original ADA's cross-reference to Title VII is significant to this analysis, as it works to incorporate substantive portions of Title VII into the amendments to the ADA. This incorporation provides an important explanation for the lack of "motivating factor" language in the statute and the lack of amendment of the ADA in 1991. The ADA's "enforcement" provision incorporates Title VII, stating: "The powers, remedies, and procedures set forth in Sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides . . . to any person alleging discrimination on the basis of disability . . . ."[93] The Fourth Circuit argued that this merely incorporates Title VII's "enforcement provisions" and not the "unlawful employment practices" in § 200e-2—the portion of Title VII establishing the "motivating factor" causation standard.[94] But even though § 2000e-2(m) is not directly incorporated into the ADA, it is incorporated through § 2000e-5(g)(2)(B), which states, "[o]n a claim in which an individual proves a

88. *See Gentry*, 816 F.3d at 234.

89. *Id.*

90. *Id.*

91. *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.' ").

92. 42 U.S.C. § 12117(a) (2012); *see also* 29 U.S.C. § 621–634 (containing no cross-references to the substantive provisions of Title VII).

93. 42 U.S.C. § 12117(a).

94. *See Gentry*, 816 F.3d at 235.

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 . . . ."[95]

The Fourth Circuit acknowledged the connection to §§ 2000e-2(m) through 2000e-5(g)(2)(B) but argued that § 2000e-5(g)(2)(B) merely incorporates the remedies available under § 2000e-2(m), holding that to invoke a claim under the ADA "an ADA plaintiff must allege a violation of the ADA itself."[96] While the Fourth Circuit makes a valid contention, the mixed motive causation standard used in Title VII is a stronger argument. For one, if § 2000e-2(m) does not apply to the ADA, then the link has provided a remedy with no way to establish liability.[97] Arguably, § 2000e-5(g)(2)(B) only provides remedies for liability established under § 2000e-2(m).[98] This link Congress created must have been purposeful. If the remedies can only be applied to violations of § 2000e-2(m), the logical conclusion is that § 2000e-2(m) must also be incorporated into the ADA for the remedies to apply. This would also explain why Congress did not explicitly include motivating factor language in the ADA if it intended it to be incorporated through this connection with Title VII.

As for the argument that Congress had a clear opportunity to amend the language of the ADA at the time it amended the language in Title VII to include "motivating factor," the House Report implies that Congress considered this but determined that it was unnecessary because any changes made to Title VII would also apply to the ADA.[99] Therefore, the fact that the ADA was not contemporaneously amended with Title VII does not carry as much weight in the case of the ADA as it may have had in the ADEA analysis in *Gross*. Although there are questions as to what exactly Congress intended, when cross-referencing the ADA with the enforcement provision of Title VII, it seems that this cross-reference was meant to connect the ADA and Title VII in some way—a reference that does not exist in the ADEA. Based on these facts, in its analysis of the ADA, the Fourth Circuit too quickly used the

95. 42 U.S.C. § 2000e-5(g)(2)(B)/

96. *Gentry*, 816 F.3d at 235.

97. *See* Stein, *supra* note 56, at 1241 ("If § 2000e-2(m) was not intended to apply to the ADA, then there would have been no need to link the ADA to the remedy established under § 2000e-5(g)(2)(B) with no means of obtaining the remedy provided therein.").

98. The statute itself, 42 U.S.C. § 2000e-5(g)(2)(B), states that "[o]n a claim in which an individual proves a violation under section 2000e-2(m) . . . [,]" which would lead one to believe that the statute only applies to § 2000e-2(m) violations, not violations of the ADA.

99. H.R. REP. NO. 101-485, pt. 3 at 48 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 471.

standards the *Gross* Court used in its analysis of the ADEA, given that the two statutes are inherently different.

## IV. HANDLING THE EFFECTS OF A "BUT-FOR" CAUSATION STANDARD

Due to attempts by advocacy groups, communities, and the independent living movement to eliminate social barriers for individuals with disabilities, Congress enacted the ADA in 1990 as the nation's first civil rights law highlighting the needs of people with disabilities by explicitly prohibiting discrimination based on disability in public accommodations, telecommunications, public services, and employment.[100] The ADA was guided by the overarching goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[101] These guiding principles were carried into the ADA's amendment in 2008.[102] Aside from the argument that a "but-for" causation standard is not the appropriate standard based on the text of the statute and its legislative history, the requirement of a "but-for" causation standard to establish a claim of disability discrimination would directly contravene the purpose behind the implementation of the ADA.

The "but-for" causation standard requires more than just showing that an employer fired an employee because that employee has a disability.[103] While a plaintiff may prove that she was fired due to her disability, her proven claim is not synonymous with a finding that she was discriminated against because of her disability, unless she can prove that she would not have had adverse employment action taken against her had she not been disabled.[104] Not only does this requirement not comport with the very purposes laid out in the ADA,[105] it seemingly contravenes the policy behind its 2008

100. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 328, 328–29 (codified as amended at 42 U.S.C. § 12101 (2012)).

101. *Id.* § 2(a)(8).

102. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 (2012)) (stating that the purpose of the amendment was to "reinstat[e] a broad scope of protection to be available under the ADA").

103. *See* KEETON ET AL., *supra* note 3, at 266 (defining "but-for" causation as follows: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.").

104. *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 323–24 (6th Cir. 2012) (Clay, J., concurring in part and dissenting in part) (explaining in detail the difficulty for a plaintiff trying to establish but-for causation for the adverse employment action taken against them).

105. *See supra* text accompanying notes 65–68.

amendments. Congress was disillusioned with how narrowly the ADA had been applied in Supreme Court cases and sought to fix the issues and broaden the scope of protection the ADA would provide through the 2008 amendments.[106]

By applying a "but-for" causation standard, the Fourth Circuit has made plaintiffs' claims of employment discrimination based on disability more difficult to establish. Therefore, the accountability of employers in making employment decisions is diminished.[107] As long as an employer is able to establish another reason for the termination of the employee, the fact that discrimination based on an employee's disability has occurred becomes a non-issue. Additionally, a plaintiff is put in a position where she is expected to find "objective evidence of her employer's state of mind or internal burdens" to prove "but-for" causation.[108] More often than not, it will be close to impossible to find this evidence, thereby leaving plaintiffs to attempt to make a "conjectural inquiry of the employer's thoughts and purposes."[109] The employer is then in the position to merely reject that the disability was the but-for cause of any adverse employment actions and offer any other "subjective" reason for those actions.[110] The Supreme Court itself has acknowledged this issue and seemed to believe that it would be contrary to our common sense that "Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decisions [a plaintiff] challenges."[111] Requiring the "but-for" causation standard puts the employer in a stronger position than the employee, making it significantly more difficult to establish a claim of discrimination based on disability in the workplace. These difficulties will make it harder

106. ADA Amendments Act of 2008 § 2(a)(4). For a discussion on why Congress made amendments to the ADA, see *supra* note 28 and accompanying text.

107. *See* Brian Joggerst, Comment, *Reasonable Accommodation of Mixed Motives Claims Under the ADA: Consistent, Congruent, and Necessary*, 35 CARDOZO L. REV. 1587, 1612 (2014) (arguing that 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).

108. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 323 (6th Cir. 2012) (Clay, J., concurring in part and dissenting in part).

109. *Id*.

110. *Id*.

111. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989); *see also* Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 191 (2009) (Breyer, J., dissenting) ("[T]o apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.").

for a plaintiff to make a claim of discrimination based on disability and may even result in fewer claims being brought.[112]

The difficulties a plaintiff faces when forced to meet a "but-for" causation standard would be avoided under a "motivating factor" standard. The plaintiff would still have to establish the discrimination but would merely have to show that it was a motivating factor, even if other factors also led to the adverse employment action.[113] Therefore, a defending employer would not escape liability by merely claiming an alternative reason for the firing while in court when a motivation of the termination was the plaintiff's disability. Given the strong policy implications behind the enactment of the ADA, which were strengthened with its 2008 amendments, the "but-for" causation standard hinders the goals of the ADA. As a result, the Fourth Circuit has placed a higher burden on those discriminated against because of their disability than Congress had intended.

## CONCLUSION

Although the Fourth Circuit held that a "but-for" causation standard was the appropriate standard required to establish a claim of discrimination under the ADA, it is most likely not the causation standard Congress intended to require for ADA claims. The Fourth Circuit too quickly dismissed the idea that claims brought under the amended ADA should be evaluated using a "motivating factor" standard. Merely brushing aside the change in language that the amendments implemented, the Fourth Circuit only briefly considered the legislative history and adhered to holdings in previous court cases, which linked "because of" language to but-for causation. Whether the amended language in the ADAAA was meant to mirror "because of" language or not, the Fourth Circuit's analysis is lacking. Its decision to hold plaintiffs to a "but-for" causation standard does not comport with the policy behind the implementation of the ADA. Requiring a "but-for" causation standard as the Fourth Circuit does will make plaintiffs' claims of discrimination based on disability more difficult to bring, contravening Congress' intentions of enacting the ADA and the amendments to it in 2008. A "motivating factor" standard would provide the protection that Congress intended and persons with

112. Mook, *supra* note 2 ("The *Gentry* decision, therefore, represents a significant victory for employers in fending off ADA claims. Had the Fourth Circuit adopted Title VII's 'motivating factor' analysis for the ADAAA's causation standard, a plaintiff would have to show only that his or her disability was one of the considerations that the employer took into account when taking an adverse job action.").

113. *See supra* Part I.

disabilities deserve. For these reason, it may be necessary for Congress to pass another amendment to the ADA clearly laying out to the lower courts that a "motivating factor" standard is required in ADA discrimination claims.

ADRIANNA G. SARRIMANOLIS**

** I am thankful to Professor Victor Flatt for his thoughtful comments in the beginning stages of writing this piece, and Shanda Lewis for helping me find a meaningful topic. I would like to thank the editors of the *North Carolina Law Review* for their comments and guidance throughout the editing of this piece. I would also like to thank my family for their constant support and encouragement throughout this process.