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POWADA: A GROSS OVERREACTION

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Iowa's two senators, Chuck Grassley and Tom Harkin, have sponsored legislation that seeks to overhaul federal employment practice statutes—and to revamp them in a decidedly plaintiff-friendly manner. In mid-March 2012, Harkin, Grassley, and Patrick Leahy introduced Senate File 2189, dubbed the Protecting Older Workers Against Discrimination Act ("POWADA"). In short, POWADA reflects a sweeping proposal to benefit plaintiffs and the plaintiff's bar—with a concomitant effort to burden employers. POWADA seeks to change the default civil litigation rule by setting a standard that shifts the burden of persuasion to the employer. This article will review the status of the law surrounding the burden of proof in employment cases, describe POWADA's text, and support the conclusion that the legislation is nothing more than a gift to the plaintiff's employment bar.

Harkin and Grassley's bill is an attack on the Supreme Court's analysis in *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009). The Senators contend in part that in *Gross*, the Supreme Court "departed from . . . well-established precedents." The bill's "findings and purposes" section outlines at length the basis for Harkin and Grassley's belief that the *Gross* decision was a departure from precedent—and as discussed, these "findings" are plainly erroneous. The press release surrounding the introduction of the legislation suggests that neither POWADA's authors nor their staff have analyzed the state of the law. Ironically, although Senator Grassley has no apparent reservations in attacking the Supreme Court because he deems the *Gross* decision not sufficiently plaintiff-friendly, Grassley recently criticized statements by the President as an "attack" on the Supreme Court. Jason Clayworth, *Branstad sides with Grassley's 'stupid' comment*, Des Moines Register 1B (Apr. 10, 2012). Grassley and Harkin have taken on legislation that has an extraordinary purpose—to benefit plaintiffs and the plaintiff's bar.

Background

Several federal statutes regulating employment practices authorize a but-for causation standard, including Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA"). *See e.g*. 42 U.S.C. § 2000e-2(a) (Title VII—prohibits discriminatory employment practices based on race, color, religion, sex, or national origin);[1] 42 U.S.C. § 2000e-3(a) (Title VII—prohibiting retaliation);[2] 29 U.S.C. § 623(a)(1) (ADEA—prohibiting discriminatory employment practices based

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WHAT'S INSIDE

1. Title VII makes it unlawful for an employer to take an adverse employment action against an individual "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added).

2. Title VII's anti-retaliation provision prohibits taking an adverse employment action against an individual "*because* he has opposed any practice made an unlawful employment practice . . . or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

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on age);[3] 29 U.S.C. § 623(d) (ADEA—prohibiting retaliation);[4] 42 U.S.C. § 12112(a) (ADA—prohibiting discriminatory employment practices based on disability);[5] 42 U.S.C. § 12203(a) (ADA—prohibiting retaliation).[6] The Supreme Court has interpreted statutory text containing a "because of" standard to require an employee to prove that consideration of an unlawful factor was outcome determinative in the adverse action at issue. *See e.g. Gross*, 129 S. Ct. at 2351; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). That interpretation is consistent with the conventional practice in civil litigation: when the "statutory text is silent on the allocation of the burden of persuasion," the "ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims." *Gross*, 129 S. Ct. at 2351 (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)).

At times, Congress has made deliberate policy choices to set a lesser standard. In 1991, for example, Congress amended Title VII to create an alternative basis for imposing liability, stating:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Pub. L. No. 102-166, § 107. The 1991 Act established by express statutory text the rules of production and persuasion governing cases arising under Title VII. *See* 42 U.S.C. § 2000e-2(m). The 1991 Act went on to state that for purposes of Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion." Pub. L. No. 102-166, § 104; *see also* 42 U.S.C. § 2000e-2 (m). Additionally, the 1991 Act made the "same decision" defense an affirmative one, at least as to remedy. Pub. L. No. 102-166, § 107. An employer found liable under 42 U.S.C. § 2000e-2(m) may limit remedies, but may not avoid liability, if it "demonstrates" it would have made the same decision absent the impermissible factor. 42 U.S.C. § 2000e-5(g)(2)(B)(i)–(ii).

Similarly, Congress made a deliberate policy choice to use the less demanding "motivating factor" language in another federal statute: the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Like the 1991 Act's Title VII amendments, a plaintiff may prevail under USERRA by proving that military service was a "motivating factor" in an employer's adverse employment action. 38 U.S.C. § 4311(c)(1). The employer then may avoid liability by proving that it would have taken the same action absent the protected conduct. *Id*. In contrast to the anti-retaliation provisions under Title VII, the ADEA, and the ADA, USERRA's anti-retaliation provision specifies that the plaintiff has the burden to prove protected conduct was a motivating factor in the challenged employment decision, then the burden shifts to the employer to prove the same decision defense. 38 U.S.C. § 4311(c)(2).

In practice, under these federal "motivating factor" statutes, a plaintiff merely has to prove membership in a protected class, an adverse employment action, and the protected group status was a "motivating factor" in the adverse employment decision. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100–02 (2003). The plaintiff does not have to establish but-for causation. The "same decision" defense is a corollary to the motivating factor standard, whereby an employer demonstrates another neutral motivating factor drove a decision and would have led to the same outcome. The same decision affirmative defense places the burden of persuasion on the defendant in most race and sex discrimination cases.

For an employer, prevailing on the "same decision" defense can be a pyrrhic victory. Even if an employer prevails on the defense, the consequence is denying the plaintiff compensatory damages. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i)–(ii). Attorney's fees are still available to plaintiff's lawyers. As most experienced employment defense litigators know, plaintiff's attorney's fees are often the largest element of damage in many employment cases—especially failure-to-promote or equal-pay claims. Thus, a plaintiff's lawyer who fails to obtain monetary relief for the plaintiff may still "cash in" under the "mixed-motives" theory. It is not entirely clear, however, whether the relative lack of success in such a case should impact a plaintiff's lawyer's monetary recovery. Among the federal courts that have decided whether a fee claim should be denied or reduced after an employer establishes the "same decision" defense, most agree that the award of attorney's fees is a matter left to the discretion of the district court. *See Sheppard vs. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1335 (4th Cir. 1996). *See also Garcia vs. City of Houston*, 201 F.3d 672, 677–78 (5th Cir. 2000).

In contrast to Title VII (as amended in 1991) and USERRA, the ADEA, the ADA, and the retaliation prohibitions in Title VII, the ADEA, and the ADA, do not authorize shifting the burden of per-

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3. The ADEA makes it unlawful to take an adverse employment action "*because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

4. The ADEA's anti-retaliation provision prohibits taking an adverse employment action against an individual "*because* such individual, member or applicant for membership has opposed any practice made unlawful by this section, or *because* such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d) (emphasis added).

5. The ADA prohibits discrimination in employment "against a qualified individual *on the basis of* disability." 42 U.S.C. § 12112(a) (emphasis added).

6. The ADA's anti-retaliation provision prohibits taking an adverse employment action against an individual "*because* such individual has opposed any act or practice made unlawful . . . or *because* such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added).

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suasion on causation to the employer. Although some circuit splits exist, generally, under these statutes, a plaintiff bears the burden of proving that protected class status must have "actually played a role in [the employer's decisionmaking] process and had a *determinative influence* on the outcome." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 143 (2000) (emphasis added); *see also Hazen Paper Co*., 507 U.S. at 610 (the employee must prove that age actually motivated the employer's decision). The Eighth Circuit Court of Appeals has repeatedly held that retaliation claims are subject to the "determinative—not merely motivating-factor" standard. *Van Horn v. Best Buy, Stores, L.P.*, 526 F.3d 1144, 1148 (8th Cir. 2008); *see also Alvarez v. Des Moines Bolt Supply, Inc*., 626 F.3d 410, 416 (8th Cir. 2010).

In 2009, the Supreme Court recognized in the *Gross* decision that "Title VII is materially different with respect to the relevant burden of persuasion." 129 S. Ct. at 2348. *Gross* held that because the ADEA's statutory language does not authorize mixed-motive liability, a mixed-motive theory is not available to a plaintiff. The Supreme Court clarified that to establish a disparate-treatment claim under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id* at 2350. Moreover, "ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims." *Id*. at 2351. Consequently, a mixed-motive jury instruction "*is never proper* in an ADEA case." *Id*. at 2346 (emphasis added). The Supreme Court based the *Gross* decision on the ADEA's statutory text and the typical understanding of but-for causation in civil litigation. *Id*. at 2350 ("[t]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."). The Supreme Court also referenced several authorities recounting the typical understanding of but-for causation. *Id*.

Response to *Gross*: POWADA

POWADA would amend several federal statutes regulating employment rights, including discrimination and retaliation under the ADEA, the ADA, the Rehabilitation Act of 1973, and Title VII's retaliation provisions, by inserting the mixed-motives proof concept dreamed up by the plaintiff's bar in the 70s and 80s and codified in the Civil Rights Act of 1991 with regard to Title VII cases. If enacted, the POWADA legislation would essentially convert most age discrimination, and disability discrimination, and retaliation cases into "mixed-motives" cases.

POWADA explicitly rejects the Supreme Court's ruling in *Gross*. The proposed legislation seeks to shift the burden of proof to the employer in all age discrimination cases, requiring a defendant in an age case to bear the burden of proving that it did not take the plaintiff's age into account in taking an employment action. In his press release, Senator Harkin noted that the legislation was intended to overturn *Gross* and to "restore the law to what it was for decades…." Harkin's release ignores the fact that prior to *Gross* there was no clarity concerning the burden of proof in an age discrimination case except for the fact that most courts presented with the problem concluded that the plaintiff, not the defendant, should bear the burden of proof.

The authors of POWADA claim that *Gross* has somehow had a chilling effect on age discrimination claims. They also allege that *Gross* has resulted in some sort of unfairness in the litigation process. There is absolutely no statistical or empirical evidence to support either of these claims.

Moreover, the bill's "findings and purposes" rely on demonstrably inaccurate statements. For example, the bill includes a statement that "Congress intended that courts would interpret Federal statutes, such as the ADEA, that are similar in their text or purpose to title VII of the Civil Rights Act of 1964, in the ways that were consistent with the ways in which courts had interpreted similar provisions in that title VII." S. 2189, 112th Cong. § 2(a)(3) (2012). As discussed, the statutory text in the ADEA and the relevant provision of Title VII are not similar. The ADEA's statutory text reflects a congressional purpose to authorize a different standard for Title VII and the ADEA. In *Gross*, the Supreme Court directly addressed this point, explaining that unlike Title VII, the ADEA's text "does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross*, 129 S. Ct. at 2349. The Supreme Court observed that in 1991, when Congress amended Title VII to add the "motivating-factor" standard, Congress neglected to add such a provision to the ADEA, even though it contemporaneously amended the ADEA in several ways. *Id*. (citing Civil Rights Act of 1991, § 115, 105 Stat. 1079; *Id*., § 302, at 1088). Consequently, the Supreme Court concluded that "[w]e cannot ignore Congress's decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." 129 S. Ct. at 2349.

POWADA rejects these clear textual differences as a basis for the Supreme Court's decision in *Gross*. Incredibly, POWADA is critical of the Supreme Court for interpreting Congress's "failure to amend any statute other than title VII" as evidence that Congress did not intend to allow mixed-motives claims under other statutes. S. 2189 § 2(a)(4)(A). Senators Harkin and Grassley appear to suggest that the Supreme Court should have encroached on Congress's legislative function. Although POWADA as a whole contends that the Supreme Court's decision in *Gross* departed from congressional intent, in fact, the *Gross* decision reflects a careful effort to avoid encroaching on the separation of powers by rewriting a statute to give it a meaning that Congress did not capture in the statutory text.

This is the second attempt by Harkin to overturn *Gross*. An earlier

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version of POWADA was introduced in both the House and Senate. S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009). The 2012 version has been described by some civil rights advocates as being more palatable than the earlier version because it does not contain a retroactivity provision. *See* Ilyse Schuman, *Bill Would Change Burden of Proof, Causation Standards in ADEA, ADA Cases*, Washington DC Employment Law Update (Mar. 19, 2012), http://www.dcemploymentlawupdate.com/2012/03/articles/discrimination-in-the-workplac/bill-would-change-burden-of-proof-causation-standards-in-adea-ada-cases/. This is simply wrong. The final provision of the bill makes it applicable to all claims "pending" on or after the enactment of the legislation. This language is inherently ambiguous, but, because the *Gross* litigation is still active, if the bill is enacted, Gross's lawyers will presumably claim that the POWADA amendment applies. Moreover, what Grassley and Harkin and others ignore is the fact that no jury has ever held that Jack Gross was treated differently "because of" his age as is required by the plain language of the ADEA.

Application of the *Gross* decision by lower courts

Courts have applied the *Gross* decision since its announcement. It has not only been applied to age discrimination cases, but also to claims brought under the ADA and the Family and Medical Leave Act. *See Serwatka v. Rockwell Automation, Inc*., 591 F.3d 957, 959 (7th Cir. 2010) (applying *Gross* to disability discrimination claims). But see *Zimmerman v. AHS Tulsa Regl Med. Ctr., LLC*., 2011 WL 6122629 at *7 (N.D. Okla. Dec. 8, 2011). Some courts have applied the *Gross* but-for standard to ADEA retaliation cases. *See Barton vs. Zimmer, Inc*., 662 F.3d 448, 457 (7th Cir. 2011); *See also Pantoja vs. Monterey Mushrooms, Inc*., 2011 WL 4737407 at *6 (C.D. Ill. Oct. 6, 2011) (FMLA, observing that *Gross* but-for standard applies in all employment cases unless the statutory language indicates otherwise). On the other hand, other courts have held that *Gross* should not be applied beyond the context of an ADEA case.

Iowa's Morass

In *DeBoom v. Raining Rose, Inc*., the Iowa Supreme Court expressed its intention to follow, rather than deviate from, the companion federal analytical framework when analyzing the Iowa Civil Rights Act ("ICRA"). 772 N.W.2d 1, 13–14 (Iowa 2009). Rather than distinguishing the ICRA from federal law, in *DeBoom*, the Iowa Supreme Court adopted the Eighth Circuit Court of Appeals Model Jury Instructions for a Title VII claim. Yet in *DeBoom*, the Iowa Supreme Court adopted a Title VII model jury instruction that was based on Title VII's "motivating factor" standard (i.e., the 1991 Act) rather than the ICRA's "because of" causation standard. Although the Iowa Supreme Court has recognized distinctions between the ICRA and federal law when clear textual differences in the statutory language exist, the ICRA does not mirror Title VII's 1991 amendments. The ICRA, like the ADEA, establishes liability if an employer discharges an employee "because of" a protected characteristic. *See* Iowa Code § 216.6. The Eighth Circuit Court of Appeals has noted the inconsistency between the ICRA's statutory text and the standard outlined in *DeBoom*. *See Newberry v. Burlington Basket Co*., 622 F.3d 979, 982 (8th Cir. 2010). The Iowa Supreme Court has not yet had the opportunity to follow up on the *DeBoom* decision and resolve lingering questions.

The appellate briefing in *DeBoom* reveals that neither litigant addressed the textual difference in Title VII (the "motivating factor"–"same decision" framework) and the ICRA's "because of" causation standard. Neither party notified the Iowa Supreme Court about the Supreme Court's *Gross* decision or its possible impact on the ICRA's interpretation. The Iowa Supreme Court's decision makes no reference to *Gross*. Ironically, it appears that even the appellant ignored the U.S. Supreme Court decision interpreting identical statutory language. The *DeBoom* decision has been cited as committing Iowa to a "motivating factor" analysis in all discrimination claims. This is simply not true. In *DeBoom*, the court was faced with the choice between a common law tort proof standard and an Eighth Circuit model instruction. Faced with that difficult choice, the Supreme Court of Iowa opted for one of the choices. Were it to have been made aware of the simple logic of the *Gross* analysis, there is every reason to believe that the Iowa Supreme Court would have applied *Gross* to the ICRA. Hopefully the Iowa Supreme Court will be presented with an opportunity to do so in the near future.

Conclusion

POWADA is a solution in search of a problem that does not exist. If enacted, it will certainly breathe new life into the plaintiff's employment bar. It probably will not have any impact on the number of age discrimination claims that are pursued before state and federal nondiscrimination agencies. It will, however, undoubtedly increase the number of state and federal lawsuits alleging age discrimination. Faced with the prospect of recovering attorney's fees even if they fail to recover monetary damages for a client, if POWADA is enacted, plaintiff's lawyers will not be able to resist asserting mixed-motives discrimination and retaliation claims under ADEA, the ADA, and Title VII's retaliation standard. POWADA might more appropriately be dubbed a "lawyer's full employment bill." As members of the Iowa defense bar understand that every plaintiff's claim must be defended, perhaps the IDCA should stand mute in the POWADA argument. This cynical approach, however, overlooks the fact that encouraging litigation where only the lawyers are the winners is ultimately self-destructive. ■