A Pragmatic Approach to Age Discrimination Claims in Connecticut: Aligning with the Federal Standard

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I. INTRODUCTION

Did the employer discriminate? This is the ultimate question that should be answered with any claim of employment discrimination. Following and expanding upon statutory construction courts have developed different ways to answer that critical question. And over the years, the employment discrimination jurisprudence has deviated further and further from what should be the ultimate question – did the employer discriminate?

Age discrimination is different than trait discrimination. Everyone was young once, and most grow old. Generally, as people grow old they develop job-related strengths and weaknesses that correlate to their age.[1] The United States Supreme Court took a step towards recognizing the difference between age and trait discrimination[2] in its 2009 decision, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Although the word "policy" does not appear a single time in Justice Thomas's opinion, many of the arguments advanced by the majority have strong policy-based support.

Gross has had a larger impact in Connecticut because Connecticut Superior Courts rejected the holding of *Gross,* which created a split between federal law and state law regarding age discrimination claims. Connecticut employees over the age of forty enjoy a benefit that those in other states do not enjoy. But that is not the problem. The problem is that Connecticut has further deviated from the ultimate question. When a Connecticut employee is alleging age discrimination under the Connecticut Fair Employment Practices Act ("state law" or CFEPA),[3] the employee must prove that age was a "motivating factor" in the adverse employment decision.[4] Under the Age Discrimination in Employment Act ("federal law" or ADEA), however, the employee must prove that his or her age was the "but for" reason for the

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[1] This will be explored further in Section IV.

[2] Trait discrimination herein refers to discrimination based on race, color, religion, sex, or national origin.

[3] Connecticut Fair Employment Practices Act, CONN. GEN. STAT. § 46a-60 (2011).

[4] Dwyer v. Waterfront Enters., Inc., CV-126032894S, 2013 WL 2947907, at *8 (Conn. Super. Ct. May 24, 2013) ("[I]n accordance with the liberal construction afforded to CFEPA, [plaintiff] need only plead that his physical disability was a motivating factor in his termination.").

adverse employment decision.[5] The federal standard is a much higher causal bar, and is defense-friendly.

This note explores the policy considerations that arise from the consequences of the *Gross* decision, and contrasts age discrimination with claims of trait discrimination. Ultimately, this note argues that Connecticut should align its employee-discrimination standards with federal precedent and adopt the federal "but for" causation.

In addition to the arguments in favor of the "but for" standard discussed in *Gross*,[6] age discrimination differs from trait discrimination because the correlation between general job skills and age is far greater than the *non-existent* correlation between job skills and any other trait (race, color, religion, sex, and national origin). Thus, the higher standard to which age-discrimination plaintiffs must prove their case to prevail is warranted by actual differences in performance as evidenced by age, and Connecticut should adopt the federal "but for" standard applied to claims brought under federal law in cases of state suits of the same type. Essentially, the federal standard is a more reasoned one.

These differing standards create a situation whereby a plaintiff has to maintain, essentially, two completely separate and distinct causes of action: one under state law, and one under federal law. It may not appear on its face that this is a problem in need of a fix, but if we accept as true that the ultimate question is "did the employer discriminate" then it makes little sense to answer that question using two distinct legal frameworks. There should not be a case where the plaintiff prevails on his or her state claim but loses on the federal claim. Like dispositions of like cases is critical to the United States' legal system. Under the current legal framework, this is not only possible, but very likely in a wide class of cases.

A. Limitations of This Note

Although employees can bring an age discrimination claim based on disparate treatment or disparate impact theories of liability,[7] this note addresses only cases in which a plaintiff seeks to recover on a disparate treatment theory of liability. The term "disparate treatment," as used in labor and employment disputes, "simply refers to those cases where certain individuals are treated differently than others.... The principal inquiry is

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[5] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 180 (2009) ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action.").

[6] *Id.*

[7] For further discussion on the disparate treatment and disparate impact claims, *see* JODY FEDER, CONG. RESEARCH SERV., RL34652, THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA): A LEGAL OVERVIEW 8 (2010), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1553&context=key_workplace.

whether the plaintiff was subjected to different treatment because of his or her protected status."[8]

"Disparate treatment occurs when an employer intentionally discriminates against an employee or enacts a policy with the intent to treat or affect the employee differently from others because of the employee's age. Such disparate treatment claims require proof that the employer intended to discriminate against the complaining party when it took the challenged employment action. Intent, the critical element of a disparate treatment claim, may be shown directly (e.g., by discriminatory statements or behavior of a supervisor towards a subordinate) or, perhaps more likely, by circumstantial evidence."[9]

Likewise, this note does not address cases where there is a bona fide occupational qualification ("BFOQ"). "A [bona fide occupational qualification] exists only if no member of the class excluded is physically capable of performing the tasks required by the job."[10] For example, it is permissible for a fashion designer of men's clothes to hire exclusively male models because female models would not be able to model the clothes as the designer intended. As a counterexample, being female has been held to *not* be a BFOQ for in-cabin flight attendants.[11]

Finally, both the state and federal anti-discrimination statutes do not apply to all employers. It should be noted that the ADEA applies only to employers who employ twenty or more people,[12] while the CFEPA applies only to employers with three employees.[13] Therefore, this note does not pertain to employers of businesses with fewer than three employees.

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[8] Levy v. Comm'n On Human Rights & Opportunities, 236 Conn. 96, 104 (1996).

[9] JODY FEDER, CONG. RESEARCH SERV., RL34652, THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA): A LEGAL OVERVIEW 8 (2010), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1553&context=key_workplace.

[10] Evening Sentinel v. NOW, 168 Conn. 26, 36 (1975). *See, generally*, Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971); 29 C.F.R. § 1604.2 (2009).

[11] Diaz v. Pan. Am. World Airways, Inc., 442 F.2d 385, 388 (1971) (holding that being a female was not a bona fide occupational qualification for job of flight cabin attendant and the employer's refusal to hire the plaintiff's class solely because of their sex constituted a violation of the Civil Rights Act of 1964).

[12] 29 U.S.C. § 630(b) (2006) ("The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees...").

[13] CONN. GEN. STAT. § 46a-51 (2016) ("'Employer' includes the state and all political subdivisions thereof and means any person or employer with three or more person in such person's or employer's employ.").

II. BACKGROUND OF FEDERAL LAW AND STATE LAW

A. The Age Discrimination in Employment Act of 1976[14]

The Age Discrimination in Employment Act of 1967,[15] prohibits employment discrimination on the basis of age against person over the age of forty.[16] The statute applies not only to hiring, discharge, and promotion, but also prohibits discrimination in employee benefit plans such as pensions and health coverage.[17] Congress intended to address the unfairness experienced by "older workers [who] find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs."[18]

"The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'"[19] The federal law prohibits discrimination based on age, in a manner reminiscent of Title VII of the Civil Rights Act of 1964's[20] prohibition of discrimination based on race, color, religion, sex, and national origin.[21]

Federal courts apply the same analysis to claims of age discrimination under federal law as to claims of discrimination on the basis of race, color, religion, sex, or national origin under Title VII. [22] Until recently, claims brought under the state act were litigated using the same standard as Title VII and the federal law.

The ADEA provides, in relevant part, that "[i]t 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."[23]

To recover under the ADEA, a plaintiff must prove "(1) that the employee is a member of a protected class, (2) that the employee is qualified

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[14] The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, codified, 29 U.S.C. § 621 et. seq. (amended 2006).

[15] The original federal law covered employees between the ages of forty and sixty-five. In 1978, Congress changed the upper age limit to 70 years, Pub.L. 95–256, § 3(a), 92 Stat. 189, and then struck the upper age limit entirely in 1986, Pub.L. 99–592, § 2(c)(1), 100 Stat. 3342. Subsequent amendments removed the upper age limit, and, as it remains today, the ADEA protects all employees over the age of forty. 29 U.S.C. § 631(a) (2006) ("(a) Individuals at least 40 years of age").

[16] For a comprehensive analysis of federal age discrimination claims see, Jonathan M. Purver, PROOF OF DISCRIMINATION UNDER AGE DISCRIMINATION IN EMPLOYMENT ACT, 44 Am. Jur. Proof of Facts 3d 79 (April 2016 Update).

[17] 29 U.S.C. § 623 (2006).

[18] 29 U.S.C. § 621 (2006).

[19] *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

[20] CONN. GEN. STAT. § 46a-60.

[21] *Id.*

[22] *See* Reeves v. Sanderson Plumbing Pods. Inc., 530 U.S. 133, 141-42 (2000) (discussing the importance of the "because of" language in both statutes).

[23] 29 U.S.C. § 623 (2006) (emphasis added).

for the position, (3) that the employee suffered adverse employment action, and (4) that the circumstances surrounding the action give rise to an inference of age discrimination."[24]

B. Connecticut Fair Employment Practices Act[25]

Federal law has a separate statute to address age discrimination; Connecticut addresses age discrimination in the same statute that addresses trait discrimination. The Connecticut Fair Employment Practices Act is the state counterpart to the ADEA, encompassing both age discrimination. It provides, in relevant part, that "[i]t shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, to refuse to hire or employ or to bar or to discharge from employment any individual or to discrimination against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex."[26] By its terms the statute pertains only to those persons who have sought or obtained an employment relationship with the employer.[27]

Under the analysis of the disparate treatment theory of liability, there are two methods to allocate the burdens of proof. The first, and most favorable to plaintiffs, is the mixed-motive/*Price Waterhouse* model,[28] the second is the pretext/*McDonnell Douglas-Burdine* model.[29]

Prior to *Gross* (2009), discussed in greater detail below, courts applied the mixed-motive, *Price Waterhouse* model when the employee could prove that the employee's age played a role in the adverse employment decision.[30] In all other cases where the plaintiff could not prove intent or motivation, through direct evidence the court would apply the pretext, *McDonnell Douglas-Burdine* model.[31]

In *Gross*, the Supreme Court removed the mixed-motive burden shifting for federal age discrimination claims.[32] Connecticut state claims have traditionally proceeded under the same analysis as federal claims.[33] Since Connecticut Superior Courts rejected *Gross* and the Connecticut Supreme Court has not addressed the issue, it is no longer true that federal and state

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[24] Fetcho v. Hearst Conn. Post, LLC, 103 F. Supp. 3d 207, 210 (D. Conn. 2015), *quoting* Abrahamson v. Bd. of Educ., 374 F.3d 66, 71 (2d Cir. 2004).

[25] CONN. GEN. STAT. §§ 46a-60.

[26] *Id.*

[27] McWeeny v. City of Hartford, 287 Conn. 56, 67 (2008); *See, e.g.*, Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243 (11th Cir. 1998).

[28] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).

[29] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).

[30] *Price Waterhouse*, 490 U.S. at 258.

[31] Levy v. Comm'n On Human Rights & Opportunities, 236 Conn. 96, 107 (1996); *Green,* 411 U.S. 792 (1973); *Burdine,* 450 U.S. at 248.

[32] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 175 (2009).

[33] McInnis v. Town of Weston, 375 F. Supp. 2d 70, 85 (D. Conn. 2005).

claims proceed under the same analysis. State and federal claims are now subject to divergent types of analysis. This is no different than having two distinct causes of action. However, age discrimination claims brought under state *and* federal law involve the same set of facts and the laws are pragmatically identical. Thus, different standards make little sense, violating notions of justice as well as presenting issues for judicial efficiency and jury confusion.

The Connecticut Supreme Court has not considered whether the limitations *Gross* articulated completely do away with the *Price Waterhouse* test in the context of state law claims. "In other words, the question of whether the CFEPA – in contrast to the ADEA – permits a claim of disparate treatment based on mixed motives has not been addressed by the Connecticut Supreme Court."[34] This is because Connecticut State Superior Courts and Federal Superior Courts differ in their adjudication creating problems and confusion for litigants maintaining both a federal and state age discrimination claim, often resulting in litigants arguing to the trial courts that they ought to follow federal precedent and adopt the "but for" causal approach.

III. HOW CONNECTICUT CAME TO HAVE TWO STANDARDS

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

The mixed-motive model originated in the United States Supreme Court decision, *Price Waterhouse*,[35] a sex discrimination case. The Court held that once a plaintiff proves that sex played a motivating part in an employment decision, the defendant can avoid a finding of liability only by proving that it would have made the same decision regardless of the plaintiff's gender.[36]

The court explained that a mixed-motive case exists when an employment decision is motivated by both legitimate and illegitimate reasons.[37] In such instances, a plaintiff must prove that the employer's decision was motivated by one or more prohibited statutory factors.[38] A plaintiff must submit enough evidence, whether direct or circumstantial, that, if credited, could reasonably allow a fact finder to conclude that the adverse employment consequences resulted would not have happened unless the plaintiff was a woman.[39]

"The critical inquiry [in a mixed-motive case] is whether [a] discriminatory motive was a factor in the [employment] decision *at the*

[34] Fetcho v. Hearst Conn. Post, LLC, 103 F. Supp. 3d 207, 216 (D. Conn. 2015).
[35] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).
[36] *Id.* at 250.
[37] *Id.* at 247-48.
[38] Levy v. Comm'n On Human Rights & Opportunities, 236 Conn. 96, 104 (1996).
[39] *Id.*

moment it was made."[40] "Once the plaintiff has established [his or her] prima facie case, the burden of production *and persuasion* shifts to the defendant. The defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [the impermissible factor] into account."[41]

In comparing the ADEA and Title VII, the Supreme Court stated, "Since we know that the words "because of" do not mean "solely because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[42]

Price Waterhouse is relevant to any discussion of age discrimination because the framework the Court articulated was carried over from trait discrimination to age discrimination,[43] and is still used by federal courts and state courts, including Connecticut State Courts interpreting state law with regards to age discrimination.[44]

B. McDonnell Douglas Corp. v. Green, *411 U.S. 792 (1973);* Texas Dept. of Comm. Affairs v. Burdine, *450 U.S. 248 (1981)*

Under the *McDonnell Douglas-Burdine*[45] model – also called the Pretext[46] model – a plaintiff may establish actionable discrimination by inference rather than direct evidence.[47] This model is applied in cases where a plaintiff cannot directly prove the reasoning that motived an employment decision. In these instances, a plaintiff "may establish a prima facie case of discrimination through inference by presenting facts [that are] sufficient to remove the most likely bona fide[48] reasons for an employment action… [f]rom a showing that an employment decision was not made for illegitimate reasons."[49]

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[40] Miko v. Comm'n on Human Rights & Opportunities, 220 Conn. 192, 205 (1991), (quoting *Price Waterhouse*, 490 U.S. at 241 (emphasis in original).

[41] *Levy*, 236 Conn. at 106 (emphasis added).

[42] *Price Waterhouse*, 490 U.S. at 241. This language was ignored by Connecticut Superior Courts. *See* Gonska v. Highland View Manor, Inc., No. CV-126030032-S, 2014 WL 3893100 (Conn. Supp. Ct. June 26, 2014).

[43] *Price Waterhouse*, 490 U.S. at 228.

[44] Congress codified *Price Waterhouse*'s interpretation of the plaintiff's burden of proof. *See* 42 U.S.C. § 2000e (2012) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[45] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).

[46] Pretext means "a reason that you give to hide your real reason for doing something." Merriam-Webster, http://www.merriam-webster.com/dictionary/pretext (last visited (Dec. 2, 2015).

[47] Levy v. Comm'n On Human Rights & Opportunities, 236 Conn. 96, 107 (1996).

[48] Not to be confused with bona-fide occupational qualification. *See generally* Levy v. Comm'n On Human Rights & Opportunities, 236 Conn. 96 (1996).

[49] Dwyer v. Waterfront Enters., Inc., CV-126032894S, 2013 WL 2947907, at *5 (Conn. Super. Ct. May 24, 2013) (quoting *Levy*, 236 Conn. at 107-19).

Under this model, the burden of persuasion remains with the plaintiff *at all times*.[50] However, the burden of establishing a prima facie case, "is not onerous."[51] The plaintiff must prove by a preponderance of the evidence:

> (1) that he or she belongs to a protected class; (2) that he or she applied and was qualified for the position in question; (3) that despite his or her qualifications, the individual was rejected; and (4) that after the individual was rejected, the position remained open… Once a plaintiff has established a prima facie case of discrimination, a presumption of discrimination is created.[52]

Once the plaintiff is successful in establishing the presumption of discrimination, the burden of *production* shifts to the defendant to rebut the presumption by articulating – not proving – some legitimate, nondiscriminatory reason for the plaintiff's adverse employment decision.[53] Once that burden of production is satisfied by the employer articulating a nondiscriminatory reason for the decision, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the proffered reason was pre-textual.[54]

The pre-textual model is less favorable to plaintiffs.[55] "The *McDonnell Douglas-Burdine* analysis keeps the doors of the courts open for persons who are unable initially to establish a discriminatory motive.[56] If a plaintiff, however, establishes a *Price Waterhouse* prima facie case, thereby proving that an impermissible reason motivated a defendant's employment decision, then the *McDonnell Douglas-Burdine* model does not apply, and the plaintiff should receive the benefit of the defendant bearing the burden of persuasion."[57]

C. Gross v. FBL Fin. Serv., Inc., 557 U.S. 167 (2009) [58]

In *Gross v. FBL Fin. Serv., Inc.*, the plaintiff claimed that he had been demoted because of his age. The trial court found in the plaintiff's favor and awarded him $46,945 in lost compensation.[59] The United States Court of

[50] *Id.* (emphasis added).
[51] Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
[52] *Dwyer*, 2013 WL 2947907, at *5.
[53] *Levy*, 236 Conn. at 108.
[54] *Burdine*, 450 U.S. at 255-56.
[55] *Levy*, 236 Conn. at 108.
[56] *Id.*
[57] *Id.*
[58] For more information on the *Gross* decision, *see* JODY FEDER, CONG. RESEARCH SERV., R41279, MIXED-MOTIVE CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: A LEGAL ANALYSIS OF THE SUPREME COURT'S RULING IN *GROSS V. FBL FINANCIAL SERVICES, INC.* (2010).
[59] Gross v. FBL Fin. Serv. Group Inc., No. 4:04-CV-60209-TJS, 2006 WL 6151670, at *1 (Dist. Ct. Iowa June 23, 2006).

Appeals for the Eighth Circuit reversed the decision.[60] The Supreme Court affirmed, finding that the plaintiff must prove by a preponderance of the evidence, that age was the "but for" cause of the adverse employment action.[61]

Gross eliminated the *Price-Waterhouse* standard in age discrimination claims brought under the ADEA where there is evidence of mixed motive.[62] "Under *Gross*, the mixed-motive-model is never appropriate in ADEA cases and thus a plaintiff must prove by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[63]

In *Gross*, the issue was whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case."[64] The court held that, in an alleged mixed-motives discrimination claim brought under the ADEA, the burden of persuasion *never* shifts to the defendant.[65]

The Court in *Gross* distinguished the burden of persuasion relevant to Title VII claims and those claims brought under the ADEA.[66] Since the burden of persuasion is different, the court found that the decisions under Title VII are not binding on the court's ADEA jurisprudence.[67] The court went as far as to say that "[t]his Court has never held that this burden-shifting framework applies to ADEA claims."[68] The distinguishing factor for the Supreme Court was 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.[69] Further, the court found a lack of Congressional intent to apply a burden-shifting framework to ADEA claims. Congress did not amend the ADEA to mirror the language of the amended Title VII, and thus the court was confident that Congress acted with intention, and that creating a burden-shifting paradigm was not within Congress's intent.[70] "As a result, the Court's interpretation of the ADEA is not governed by the Title VII decisions such as *Desert Palace* and *Price Waterhouse*."[71]

The court considered the text of the ADEA and determined it does not authorize a mixed-motives age discrimination claim.[72] The court looked to the ordinary meaning of the words contained in the statute, and even relied

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[60] Gross v. FBL Fin. Serv., Inc., 588 F.3d 614 (8th Cir. 2009).
[61] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 180 (2009).
[62] *See id.*
[63] Dwyer v. Waterfront Enters., Inc., CV-126032894S, 2013 WL 2947907, at *6 (Conn. Super. Ct. May 24, 2013).
[64] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 173 (2009).
[65] *Id.* (emphasis added).
[66] *Id.*
[67] *Id.*
[68] *Id.* at 174.
[69] *Id.*
[70] *Gross*, 557 U.S. at 174.; *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991).
[71] *Gross*, 557 U.S. at 175; *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).
[72] *Gross*, 557 U.S. at 175.

on the definition of "because of" in several dictionaries.[73] The words "because of," in light of the rest of the statute, were found by the court to mean, that the plaintiff's age must be the "reason" that the employer decided to act.[74] This ignores language from *Price Waterhouse* that is arguably dictum – "we know that the words 'because of' do not mean 'solely because of.'"[75]

The court's ultimate holding was that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action.[76] Thus, it was reversible error for the trial court to instruct the jury using Title VII's "a motivating factor" formulation.[77] This holding called into question the correct way to interpret previous appellate court cases applying the "motivating factor" standard to disparate treatment or retaliation claims.[78]

D. Gonska v. Highland View Manor, Inc., 2014 WL 3893100 (Conn. Supp. Ct. June 26, 2014)

In *Gonska*,[79] a licensed practical nurse was terminated and filed suit against her former employer, in Connecticut state court.[80] In considering the defendant's motion for summary judgment the court addressed precedent in and out of Connecticut, and stated that, "[the Connecticut Superior Court for the Judicial District of Hartford] has also rejected an invitation to apply the 'but for' test to state age discrimination claims.[81] Other Superior Courts have done the same;[82] even though the Second Circuit has, on multiple occasions, applied the 'but-for' standard to such claims."[83]

The court in *Gonska* denied the defendant's motion for summary judgment[84] and ultimately held that, "the court will not adopt the 'but for'

[73] *Id.* at 176.
[74] *Id.*
[75] *Price Waterhouse*, 490 U.S. at 241.
[76] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 180 (2009).
[77] *Id.*
[78] *See generally Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000)("The analysis under Title VII is the same as that under ADEA."); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1180 n.11 (9th Cir. 1998) ("This Court applies the same standards to disparate treatment claims pursuant to Title VII [and] the Age Discrimination in Employment Act. . . ."); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) ("Section 623(d) is the ADEA equivalent of the anti-retaliation provision of Title VII. . . .").
[79] Gonska v. Highland View Manor, Inc., No. CV-126030032-S, 2014 WL 3893100 (Conn. Supp. Ct. June 26, 2014).
[80] *Id.*
[81] *See* Wagner v. Board of Trustees, No. CV–08–5023775–S, (Conn. Super. Ct. January 30, 2012, Peck, J.) (memorandum of decision available on Connecticut Judicial Branch's website).
[82] *See, e.g.* Frederick v. Gladeview Health Care Cent. Inc., 58 Conn. L. Rptr. 47 (2014).
[83] *See* Rubinow v. Boehringer Ingelheim Pharm., Inc., 496 Fed. Appx. 117, 118–19 (2d. Cir. 2012); Timbie v. Eli Lilly & Co., 429 Fed. Appx. 20, 21–22 n.1 (2d Cir. 2011); Gonska v. Highland View Manor, Inc., No. CV-126030032-S, 2014 WL 3893100, *8 (Conn. Super. Ct. June 26, 2014).
[84] *Gonska*, 2014 WL 3893100, at *11.

test with respect to the causation element in § 19a-532.[85] Instead, the court will apply the *McDonnell Douglas* burden shifting analysis, coupled with the more lenient 'motivating factor's standard.'[86] Following the *Gonska* decision, Connecticut Superior Courts were left without binding authority.

IV. THE DIFFICULTIES TWO STANDARDS PRESENT, AND WHY IT NEEDS RESOLUTION

A. Connecticut's Admirable Goal

By deviating from federal precedent in the adjudication of age discrimination claims brought under state law, Connecticut courts have afforded plaintiffs with a lower standard of proof. While it is admirable of the Connecticut judicial system to have a policy in place that favors the little man or woman, the difficulties that the differing standards present outweigh any benefit a plaintiff might receive from the lower standard.

B. Litigation Difficulties

The problems the differing standards create are most prevalent during two stages of litigation: when arguing a motion for summary judgment and when crafting a jury charge.

1. Arguing motion for summary judgment

The burden-shifting framework of *Price Waterhouse* and *McDonnel-Douglas Burdine* was originally meant to be a way for judges to think about age discrimination claims when considering motions for summary judgment.[87] These two frameworks were a mental exercise to consider whether there existed a material fact in dispute, and was never meant to be something that gets submitted to juries.[88]

2. Jury instructions and jury comprehension

Although it is rare for an employment discrimination case to go to trial, there are model jury instructions if a case of this nature were to go to trial. The following is the Model Civil Jury Charge available on the federal court's website:

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[85] *Id.* at *8.

[86] *Id.*

[87] *See generally* Christopher J. Emden, *Subverting Rule 56? McDonnell Douglas,* White v. Baxter Healthcare Corp., *and the Mess of Summary Judgement in Mixed-Motive Cases*, 1 WM. & MARY BUS. L. REV. 139 (2010) (positing that both *McDonnell Douglas* and mixed-motive summary judgment standards violate Federal Rules of Civil Procedure Rule 56).

[88] As shown by the two example jury instructions cited herein, the jury is not asked to shift the burden. The procedure at trial does not include burden shifting. Instead, employment discrimination trials are procedurally identical to other tort claims.

11.1 AGE DISCRIMINATION—DISPARATE TREATMENT—ELEMENTS AND BURDEN OF PROOF[89]

The plaintiff has brought a claim of employment discrimination against the defendant. The plaintiff claims the defendant [discharged] [*specify other adverse action*] the plaintiff because of [his] [her] age. The defendant denies that the plaintiff was [discharged] [*specify other adverse action*] because of [his] [her] age [[and further claims the decision to [discharge] [*specify other adverse action*] the plaintiff was based upon [a] lawful reason[s]].

In order to prevail on this claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the defendant [discharged] [*specify other adverse action*] the plaintiff;

2. the plaintiff was 40 years of age or older at the time [he] [she] was [discharged] [*specify other adverse action*]; and

3. the defendant [discharged] [*specify other adverse action*] the plaintiff because of [his] [her] age, that is, the defendant would not have [discharged] [*specify other adverse action*] the plaintiff but for [his] [her] age.

If you find that the plaintiff has proved all three of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

The words "because of" appear in the articulation of the third element of an age discrimination claim that a plaintiff must prove. Compare that to the state law model jury charge on age discrimination:

[89] FEDERAL MODEL JURY INSTRUCTIONS CIVIL 11.1 – AGE DISCRIMINATION – DISPARATE TREATMENT – ELEMENTS AND BURDEN OF PROOF (2016).

> 3.14-1 Discriminatory Employment Practices – General Statutes § 46a-60[90]
>
> In order to prevail on her claim under § 46a-60, the plaintiff must prove by a preponderance of the evidence that ((his/her) discharge / the adverse employment action) was due to intentional discrimination based on (his/her) [age]. Intentional [age] discrimination is proved in this case if the plaintiff demonstrates by a preponderance of the evidence that (his/her) [age] was a *motivating factor* for ((his/her) discharge / the adverse employment action) even though other factors also motivated the defendant's decision to (discharge / take adverse action) against (him/her). A "motivating factor" is a factor that made a difference in the defendant's decision.
>
> The plaintiff does not have to prove that [age] was the sole or even the principal reason for the decision, as long as (he/she) proves that (his/her) [age] was a determinative influence in the decision. (He/She) may prove intentional discrimination directly by proving that a discriminatory reason more likely motivated the defendant's action in (discharging (him/her) / taking the adverse employment action) or indirectly by proving that the reason[s] given by the defendant for the discharge (was/were) unworthy of belief. If you find that the defendant's stated reason[s] are not credible, then considering all the circumstances, you may infer, although you are not required to infer, that [age] was a *motivating factor* in the defendant's decision, even if it may not have been the only motivating factor.

The instructions given to juries in federal court are very similar to the instruction given in state court with the exception of the substitution and explanation of "but for" versus "motivating factor" considerations. Practitioners often discuss the difficulties of keeping the jury's attention while assuring that they know which law to apply to the facts. Common sense tells us that asking jurors to answer two questions is more difficult than asking the jurors to answer one. Furthermore, answering two questions is further complicated when each involves the same facts, people, and scenario, but require the answer to be the result of two different frameworks.

Asking jurors to distinguish between 'but for' causation and 'motivating factor' causation while the judge reads the jury charge is simply too much

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[90] CONNECTICUT JUDICIAL BRANCH CIVIL JURY INSTRUCTIONS, 3.14-1 Discriminatory Employment Practices – General Statutes § 46a-60 (rev. 2008), http://www.jud.ct.gov/ji/civil/Civil.pdf.

to ask of even the most competent juror. If we keep in mind the end goal – determining whether the employer discriminated – using two different methods of answering the same question is illogical.

a. Plaintiff's counsel will inevitably have to prove federal standard

Currently, for a plaintiff to prevail on his or her federal age discrimination claim, he or she must first prove the state claim. Just like a thermometer cannot go from thirty degrees to seventy degrees without reading all temperatures in between, age discrimination claims cannot prevail under a federal claim unless they first pass, meritoriously, through the state claim. This is because, if an employee's age is the "but for" reason for his or her adverse employment action, the employee's age is also one of the "motivating factors" in his or her adverse employment action.

The difficulties described above, pertaining to jury deliberation, result in a difficult position whereby the jury is asked to split hairs between two causal standards, is something that is difficult for even the most experienced litigators. One reason why this dichotomy between standards has survived seven years is because, for the Connecticut Appellate Courts to address the issue – or recognize a problem – a plaintiff would have to prevail on his or her state claim and lose on his or her federal claim. For that to happen, a panel of six laypersons would have to feel confident in their collective distinction between 'but for' and 'motivating factor' causation that they can find, by a preponderance of the evidence, that the employee's age was a factor that motivated his or her adverse employment decision, but the employee's age was not the only reason he or she was terminated and the employer may not have terminated the employee had they been of a different age. This is a difficult, if not impossible, distinction to make, and one we, as a legal system, should not be asking untrained jurists to make.

b. Comparing age discrimination to trait discrimination

It is not a bona-fide occupational qualification to be young and hip. Yet, newly formed businesses may want employees who are young and hip. The reasons for this desire are anything but nefarious. The identity of a newly formed business is tied up in their employees. Think of a growing fashion line, or a restaurant. It would make sense for the proprietor of any business to hire employees that are like-minded, and compatible on all levels.

For example, the skills required to be an asset to an up and coming technology company are more prevalent in younger employees. Yes, there are workers over forty who may be able to do as good of a job as the young employees, but the proprietor of the business should at least have the option to select young employees over employees of advanced age because young employees are more likely to have the necessary job skills.

The same cannot be said about an employee's other traits, such as race, gender, ethnicity, sexual orientation, or gender identity. There is no correlation between someone's Title VII-protected trait and his or her ability to work at a technology company. If there are two potential employee vying for a job as at a technology start up and the only thing the employer knew about them was each of their graduation years (Employee A graduated from college in 1980 while Employee B graduated from college in 2012, both with degrees in computer science), it is very likely that Employee B will have more of the skills necessary to excel at the job because of his more recent computer-based education, even though Employee A might have more experience.

This is strictly a correlational argument. There exists *some* correlation between the age of an employee and his or her job skills. There does not exists *any* correlation between the trait of an employee and his or her job skills. Since age more closely correlates to job skills, the higher causal standard for plaintiff's to prevail on age discrimination claims is warranted and should be adopted by the Connecticut Judicial System in line with federal precedent articulated in *Gross*.

An employer that desires young employees has not violated state law until it allows age to play *any* motivating role in the employer's employment decisions. On the other hand, an employer that desires young employees has not violated the federal law until that desire results in the exclusion of older employees *because of* their age. Under the federal law, an employer can be open about wanting a young workforce and even show preferential treatment to young employees, as long as it can show that the employee that did not get the job for a reason other than his or her age.

Readers of this should not mistake the arguments contained herein to be that of an ageist, but only someone who values freedom of choice, and someone who recognizes the importance of a workforce tailored to fit the needs of each individual business. And, of course, in certain industries older employees are more valuable to the business, because of their experience, yet neither the federal nor state law protects the inexperienced, young employee from being passed on for a job "because of" his or her age.

V. SOLUTION AND UNIFICATION – THE 'BUT FOR' APPROACH

With unification comes a recognition of the difference between age discrimination claims and trait discrimination claims. The United States Supreme Court used the minor differences in the text of the ADEA and Title VII to recognize the difference between the two. Connecticut rejected the difference based upon the text of the CFEPA, but ignored the implicit policy arguments that support a higher standard for allegations of age discrimination.

A. What Problems Would be Solved by Connecticut Aligning with Federal Precedent?

All of the difficulties described in Section IV of this note would disappear. Litigants, and potentially juries, would be unburdened with the task of splitting hairs between causal standards, and the justice system can get back to answering the ultimate question in discrimination claims – "did the employer discrimination against this employee?"

B. What Problems Would the Unified Approach Create?

As discussed above, currently, plaintiffs have an easier road to recovery on their state claims versus their federal claims. So, aligning with federal precedent may result in less plaintiff success, which may be unfavorable to the masses, since more people are employees versus employers. The tradeoff, however, would be freedom of choice for business professionals to make business decisions without having to fret about hiring a younger employee over an employee over forty for fear of a lawsuit.

VI. HYPOTHETICAL FACT PATTERN, AND ADJUDICATION

In this section, the doctrinal framework suggested above (adopting "but for" causation) will be applied to the case of Angela Smith.[91]

A. Facts of the Case

Angela Smith is a forty-five-year-old marketing consultant currently employed at Brown Marketing in Hartford, CT.[92] Smith has worked for Brown for twelve years, starting back when Brown's main source of revenue was print-based marketing. Brown Marketing recently updated its computer system and business plan, requiring each marketing consultant to do most of his or her marketing within its newly developed software. Smith has trouble with the new software. She was excellent at her job prior to the change in systems, but now it takes her longer than most to work on an individual matter and Brown Marketing's margins have gone down as a result of Smith's slow performance.

In the last six months Smith has been passed on for two promotions. Both promotions went to employees under forty. Smith's manager told the CEO that Smith did not receive either promotion because the company is looking to promote youthful managers who have the ability to navigate the complex new software.

Smith heard her manager make this comment and immediately filed a two-count complaint in federal court alleging age discrimination under the

[91] This is an entirely fictitious fact pattern and has no basis in an actual case.

[92] Brown Marketing has the requisite number of employees to fall subject to both federal and state law anti-discrimination statutes.

federal anti-age discrimination statute and under the Connecticut anti-age discrimination statute.[93]

B. Results Under Current CT Law

The outcome of this case under state law is fairly clear. This is a quintessential example of disparate treatment. Smith's manager verbally recognized that Brown Marketing desires young managers, and since Smith is not a "youth," her age was a motivating factor in not receiving the promotion. If this case went to trial the jury should find in favor of Smith on her state law claims.

C. Results Under Current Federal Law

Smith's manager did not say that she wants only young managers. Smith's manager also said that Brown Marketing wants managers who can navigate the complex new software. Thus, since Smith was not promoted *both* because she was not young *and* because she cannot navigate the new software, it cannot be said that she did not receive the promotions *because of* her non-youthfulness. If this case were tried, the jury should find for the employer on Smith's federal age discrimination allegation.[94]

D. Why Federal Law is Better for Connecticut's System as a Whole

Smith's situation is an example of a factual scenario where an employer is looking out for the prosperity of the business when making promotional decisions. Just because Smith is older, it looks like age discrimination. In no other allegation of discrimination can it be said that an employee's protected trait makes them better or worse at their job, with the exception of age, and thus a higher causal standard is warranted.

VII. CONCLUSION

Whether you disagree with the premise that underlies this entire note,[95] one can step away from the premise and understand the difficulties these differing standards present, such that a change ought to be made. Because age is often tied to job skills, and because traits are not tied to job skills, the

[93] For this example we are assuming Smith first filed her claim with the EEOC and was cleared to file her claim in federal court.

[94] *Compare* Miller v. National Life Ins. Co., No. 07-CV-00364, 2009 WL 347567 at *7-8 (D. Conn. Feb. 11, 2009) (alleged comments by employer's new CEO that "we need younger wholesalers," and that we "could replace our wholesalers with twice as many 25 year olds and have them do the job" could not be characterized as mere stray remarks given the significant influence he was likely to have over the company's new business plan and personnel policies).

[95] The underlying premise of the conclusion contained herein is that the correlation between age and general job skills is far greater than the non-existent correlation between any other trait (race, ethnicity, gender, etc.) and job skills.

higher standard that the federal courts have adopted for allegations of age discrimination should be applied in state claims.

The ultimate question of any discrimination lawsuit is, "did the employer discriminate?" Asking a jury, or even a judge, to answer that question using two frameworks creates difficulties that can be easily addressed by Connecticut state courts aligning the state's age discrimination jurisprudence with that of the federal court's as articulated in *Gross*.