Still Out of Step: The Sixth Circuit’s Adoption of a “But-For” Standard for ADA Plaintiffs in Lewis v. Humboldt Acquisition Corp.

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STILL OUT OF STEP: THE SIXTH CIRCUIT’S ADOPTION OF A “BUT-FOR” STANDARD FOR ADA PLAINTIFFS IN LEWIS V. HUMBOLDT ACQUISITION CORP.

ALLISON J. ZIMMON*

Abstract: On May 25, 2012, the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, reversed seventeen years of precedent and joined its sister circuits by discarding the “sole cause” standard for proving discrimination under Title I of the Americans with Disabilities Act (ADA). By declining to adopt the “motivating factor” standard used in the majority of the other circuits, and instead adopting a “but-for” standard, the Sixth Circuit’s ADA jurisprudence continues to be an outlier. This Comment argues that the “but-for” standard imposes an unfair burden on vulnerable and disabled employees who are seeking relief from employers’ discriminatory treatment, and therefore fails to effectuate the congressional intent behind the ADA.

INTRODUCTION

In May of 2012, the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, reversed seventeen years of precedent and joined its sister circuits by setting aside the “sole cause” standard for proving discrimination under Title I of the Americans with Disabilities Act (ADA).1 Until its decision in Lewis v. Humboldt Acquisition Corp., the Sixth Circuit required an ADA plaintiff to prove that her disability was the “sole cause” of an employer’s adverse action against her.2 By holding ADA plaintiffs to this standard, the Sixth Circuit was out of step with other circuits, none of which apply a “sole cause” standard.3 The majority of circuits instead apply a “motivating factor” standard under which a plaintiff need only prove that his or her disability was one of several potential factors that contributed to his or her employer’s adverse employment action.4

The imposition of a “sole cause” standard in ADA discrimination claims required plaintiffs in the Sixth Circuit to meet a much higher burden of proof

1 See Lewis v. Humboldt Acquisition Corp. (Lewis II), 681 F.3d 312, 314 (6th Cir. 2012) (en banc); see also Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213 (2012).
2 See Lewis II, 681 F.3d at 314.
3 See id. at 315.
4 See id. at 324–25 (Clay, J., concurring in part and dissenting in part).
than what was required of plaintiffs in other circuits. The Sixth Circuit took steps to level the playing field for ADA claimants in its jurisdiction by eliminating the “sole cause” requirement in Lewis and adopting a “but-for” standard. By adopting a “but-for” standard, however, plaintiffs in the Sixth Circuit will still have a high bar to meet in order to make a successful ADA discrimination claim. Adoption of this standard runs counter to the purpose of anti-discrimination laws like the ADA and introduces a disparity in the remedies available to plaintiffs who pursue claims under the ADA, as opposed to Title VII of the Civil Rights Act.

Part I of this Comment briefly summarizes the factual and procedural history of Lewis’s claim. Part II explores the history of ADA jurisprudence in the Sixth Circuit and traces the reasoning that led to the Sixth Circuit’s abandonment of the “sole cause” standard. Part II also discusses the court’s decision not to adopt the “motivating factor” standard and the contrary conclusions advocated in the concurring opinions. Part III argues that although the court was correct to abandon the “sole cause” standard, its decision to adopt a “but-for” standard imposes an unfair burden on vulnerable, disabled employees who seek relief from employers’ discriminatory treatment.

I. SUSAN LEWIS’S TERMINATION AND THE “SOLE CAUSE” STANDARD IN THE SIXTH CIRCUIT

In July of 2004, Susan Lewis, a registered nurse, began working at Humboldt Manor Nursing Home as a supervisor. Just a few months later, in September, Lewis developed a medical condition that impacted her lower extremities and made it difficult for her to walk. In October, after a one-month medical leave of absence, Lewis sought and received permission from the facility administrator to return to work and use a wheelchair as needed. Lewis alleged that after she returned to work, her supervisors and co-workers began to treat her negatively. On March 15, 2006 Lewis became ill and had to lie

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5 See id.
6 See id. at 325.
7 See id.
9 See Position Brief of the Plaintiff/Appellant Susan Lewis at 6, Lewis v. Humboldt Acquisition Corp. (Lewis I), 634 F.3d 879 (6th Cir. 2011) (No. 09-6381), rev’d en banc, 681 F.3d 312 (6th Cir. 2012) [hereinafter Position Brief of the Plaintiff/Appellant].
10 Id. at 6; see Lewis v. Humboldt Acquisition Corp. (Lewis II), 681 F.3d 312, 314 (6th Cir. 2012) (en banc).
11 Position Brief of the Plaintiff/Appellant, supra note 9, at 6; see Lewis II, 681 F.3d at 314.
12 Position Brief of the Plaintiff/Appellant, supra note 9, at 6; Brief of the Defendant-Appellee Humboldt Acquisition Corp. at 10, Lewis I, 634 F.3d 879 (No. 09-6381) (contending that Lewis did not present any convincing evidence to support her claim and that she never complained to the administrator of Humboldt Manor about any negative treatment from her co-workers.)
down on the floor of a resident’s room. A co-worker confronted her and Lewis became very upset. This confrontation resulted in what Humboldt Manor termed an “outburst” at the nurses’ station by Lewis that involved the use of profanity, yelling, and criticism of her supervisors. Although Lewis acknowledged that she was upset, she denied engaging in any inappropriate behavior. Nevertheless, Humboldt Manor terminated Lewis on March 20, 2006, citing the incident at the nurses’ station as the reason. Lewis contended that her employers’ reason was mere pretext and that she was actually fired because of her disability. As a result, on March 16, 2007, she filed suit in the U.S. District Court for the Western District of Tennessee for wrongful termination under the ADA.

After the first jury to hear the case in March of 2009 was unable to reach a verdict, the case was reheard in November of that year. At the charge conference, the two sides argued for competing versions of jury instructions. Lewis requested that the jury be instructed that she had to prove that her disability was either a “motivating factor” or a “substantial factor” and not the “sole cause” of her termination. Humboldt Manor requested that the jury be given instructions consistent with Sixth Circuit precedent, namely that Lewis must prove that her disability was the “sole cause” for her termination. The district court used Humboldt Manor’s requested instructions, following Sixth Circuit precedent, and instructed the jury that they could only find an ADA violation if they first found that Lewis’s disability was the “sole cause” of her termination.

During deliberations, the jury submitted two questions to the judge regarding this instruction, indicating that they were struggling with the “sole cause” requirement. The trial judge instructed the jury to obey the instructions as written. On November 16, 2009, the jury came back with a judgment

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13 See Position Brief of the Plaintiff/Appellant, supra note 9, at 6–7.
14 See id. at 7.
15 Lewis II, 681 F.3d at 314.
16 See Position Brief of the Plaintiff/Appellant, supra note 9, at 7.
17 Lewis II, 681 F.3d at 314.
18 See id.
19 See id. at 313; Position Brief of the Plaintiff/Appellant, supra note 9, at 4.
20 See Position Brief of the Plaintiff/Appellant, supra note 9, at 4–5.
21 See Lewis II, 681 F.3d at 313–14; Position Brief of the Plaintiff/Appellant, supra note 9, at 7–8.
22 See Lewis II, 681 F.3d at 313–14; Position Brief of the Plaintiff/Appellant, supra note 9, at 7–8.
23 See id. at 314.
24 Petition for Rehearing En Banc on Behalf of Plaintiff/Appellant Susan Lewis at 2, Lewis I, 634 F.3d 879 (No. 09-6381) [hereinafter Petition for Rehearing En Banc]. The jury asked the following questions: “Do we have to find under section 3 . . . that the reason for Ms. Lewis’s termination was . . . solely because of her disability? What if we believe it may only have been a contributing factor? Do we still answer ‘no?’” Id. (quoting Transcript of Trial at 96, Lewis I, 634 F.3d 879 (No. 09-6381)).
25 Id.
that Lewis was disabled and met the qualifications for coverage by the ADA.\textsuperscript{27} Nevertheless, the jury found that Lewis’s disability was not the sole cause of her termination.\textsuperscript{28} Therefore, as defined by the jury instruction, Humboldt Manor did not illegally discriminate against Lewis when they terminated her employment.\textsuperscript{29} The district court accordingly entered a judgment in favor of Humboldt Manor.\textsuperscript{30}

On November 18, 2009, Lewis appealed the district court’s decision to the U.S. Court of Appeals for the Sixth Circuit.\textsuperscript{31} Lewis asserted that the district court committed a reversible error when it instructed the jury to use the “sole cause” standard.\textsuperscript{32} On March 17, 2011, a panel of the Sixth Circuit found that the jury instructions were consistent with the Sixth Circuit’s precedent and affirmed the district court’s ruling.\textsuperscript{33} Although he concurred with the decision, Judge Richard Allen Griffin delivered a separate opinion in which he stated directly that the Sixth Circuit’s ADA precedent was wrong and that he believed that the matter should be heard en banc.\textsuperscript{34}

Lewis heeded Judge Griffin’s call and petitioned for a rehearing en banc in April of 2011.\textsuperscript{35} The Sixth Circuit granted her request and all sixteen judges heard the case in November.\textsuperscript{36} On May 25, 2012, Judge Jeffrey Sutton issued the en banc majority’s decision with nine judges joining and seven remaining judges issuing three separate opinions that concurred in part and dissented in part.\textsuperscript{37} The judges unanimously found that the Sixth Circuit’s use of the “sole cause” standard was incorrect and “out of sync” with the other circuits because it was based on an erroneous application of the causation standard contained in the Rehabilitation Act.\textsuperscript{38} Despite recognizing that its “sole cause” standard was incorrect, the court declined to adopt the “motivating factor” standard used by the majority of the circuits.\textsuperscript{39} Instead it adopted a “but-for” standard in line with the Supreme Court’s holding in \textit{Gross v. FBL Financial Services}.\textsuperscript{40} Because the district court relied upon precedent that was now overruled, the en

\textsuperscript{27} Lewis I, 634 F.3d at 880.
\textsuperscript{28} Id.
\textsuperscript{29} See Lewis II, 681 F.3d at 314; Lewis I, 634 F.3d at 880.
\textsuperscript{30} See Lewis II, 681 F.3d at 314; Lewis I, 634 F.3d at 880.
\textsuperscript{31} Position Brief of the Plaintiff/Appellant, \textit{supra} note 9, at 4.
\textsuperscript{32} See Lewis I, 634 F.3d at 880.
\textsuperscript{33} See \textit{id}. at 879 (holding that the court was constrained by a prior decision mandating that plaintiffs who allege violations of the ADA must meet a sole cause standard of proof in the Sixth Circuit).
\textsuperscript{34} See \textit{id}. at 882 (Griffin, J., concurring).
\textsuperscript{35} See \textit{Petition for Rehearing En Banc, supra} note 25, at 17.
\textsuperscript{36} Lewis II, 681 F.3d at 312–13.
\textsuperscript{37} See \textit{id}.
\textsuperscript{38} See \textit{id}. at 314–15.
\textsuperscript{39} Id. at 317.
\textsuperscript{40} See \textit{Gross v. FBL Fin. Servs.}, 557 U.S. 167, 177–78 (2009); Lewis II, 681 F.3d at 321.
banc court reversed the district court’s decision and remanded the case for a new trial.41

II. COMPETING APPROACHES TO ADA JURISPRUDENCE

All sixteen Sixth Circuit judges agreed that the court should no longer require ADA plaintiffs to meet the “sole cause” standard of proof.42 The judges were divided, however, in their conclusions about which standard should be applied in the “sole cause” standard’s stead.43 The majority favored a “but-for” standard, while the seven concurring judges advocated that the court adopt a “motivating factor” standard instead.44

A. Unanimous Decision to Abandon the “Sole Cause” Standard

The en banc court reached the unanimous conclusion that the Sixth Circuit’s use of the “sole cause” standard in its ADA jurisprudence was incorrect and needed to be abandoned.45 The majority opinion began its discussion of the origin of the Sixth Circuit’s error with an analysis of the text of three relevant statutes: Title VII of the Civil Rights Act, The Rehabilitation Act of 1973, and the ADA.46 Title VII of the Civil Rights Act was enacted in 1964.47 As enacted, Title VII made it unlawful “for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”48 In 1991, Congress revised Title VII of the Civil Rights Act

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42 Lewis v. Humboldt Acquisition Corp. (Lewis II), 681 F.3d 312, 315 (6th Cir. 2012) (en banc); id. at 322, 325 (Clay, J., concurring in part and dissenting in part); id. at 331 (Stranch, J., concurring in part and dissenting in part); id. (Donald, J., concurring in part and dissenting in part).
43 See id. at 321 (majority opinion); id. at 324 (Clay, J., concurring in part and dissenting in part); id. at 326 (Stranch, J., concurring in part and dissenting in part); id. at 341 (Donald, J., concurring in part and dissenting in part).
44 See id. at 321 (majority opinion); id. at 324 (Clay, J., concurring in part and dissenting in part); id. at 326 (Stranch, J., concurring in part and dissenting in part); id. at 341 (Donald, J., concurring in part and dissenting in part).
45 Id. at 315 (majority opinion).
46 Id. at 314–15.
48 Civil Rights Act of 1964, § 703, 78 Stat. at 253–57. This Act stated that:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

Id.
to address mixed-motive discrimination cases. The new language in Title VII established that an employment practice is unlawful if the plaintiff can show that race, color, religion, sex, or national origin was a “motivating factor” behind the employer’s adverse action, even if the employer also had other reasons for that action.

The Rehabilitation Act of 1973 prohibits discrimination against people with disabilities if the plaintiff can show that his or her disability was the sole cause of the discrimination. Because the Rehabilitation Act only applied to entities that received federal funds, Congress passed the ADA in 1990 to cover entities that were not federally funded. When Lewis filed her lawsuit in 2007, Title I of the ADA provided that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual.” The ADA Amendments Act of 2008 amended Title I by replacing the “because of” language with “on the basis of.” Even as amended, the ADA does not contain the “sole cause” language found in the Rehabilitation Act.

Notwithstanding the textual differences between the three statutes, the Sixth Circuit imported the “sole cause” causation standard from the Rehabilitation Act into its ADA jurisprudence. Beginning with Maddox v. University of

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49 Civil Rights Act of 1991, 42 U.S.C. § 2000e-2m (2006) (stating that “[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”); see Lewis II, 681 F.3d at 317.

50 See 42 U.S.C. § 2000e-2m; Lewis II, 681 F.3d at 317.


No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.


53 See Americans with Disabilities Act, § 102(a), 104 Stat. at 331–32 (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”); Lewis II, 681 F.3d at 315.


55 See 42 U.S.C. § 12112(a) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”); Lewis II, 681 F.3d at 315.

56 Lewis II, 681 F.3d at 314.
Tennessee, a 1995 case involving claims under both the ADA and the Rehabilitation Act, the court began to require ADA plaintiffs to prove that their disability was the sole cause of the employer’s adverse employment action against them.57 In 1996, the court imposed the “sole cause” standard in Monette v. Electronic Systems Corp., a case that involved only an ADA claim.58 Since 1996, the Sixth Circuit has required ADA plaintiffs to meet the “sole cause” standard to prevail.59 The Lewis majority opinion posited that because Maddox involved both ADA and Rehabilitation Act claims, the court “blurred the distinction between the laws.”60 Additionally, the common goals of both the Rehabilitation Act and the ADA most likely contributed to the court’s erroneous choice.61 By the time Lewis filed her lawsuit in 2007, no other circuits imposed a “sole cause” standard onto ADA claimants.62

In addition to recognizing that the text of the ADA did not support the use of a “sole cause” standard, the court also relied upon a recent Supreme Court decision to bolster its decision to change course after seventeen years.63 Gross v. FBL Financial Services, decided in 2009, concerned a claim made under the Age Discrimination in Employment Act of 1967 (ADEA).64 In Gross, a fifty-four year old employee alleged that he was demoted by his employer and replaced with a younger employee because of his age.65 As with the court in Lewis, the Supreme Court in Gross was asked to decide whether the causation standard from one statute could be imported into or applied to another statute.66 Specifically, the Court had to determine whether the ADEA’s “because of” language meant that a “but-for” standard was required, or whether Title VII’s “motivating factor” language could apply instead.67

In Gross, the Court refused to apply Title VII’s language to the ADEA and instead required the plaintiff to meet a “but-for” standard.68 The Court held that it was improper to apply the causation standards from one discrimination

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57 Id.; Maddox v. Univ. of Tenn., 62 F.3d 843, 846 (6th Cir. 1995).
59 See Lewis II, 681 F.3d at 314; see also Macy v. Hopkins Cnty. Sch. Bd. of Educ., 484 F.3d 357, 363–64 (6th Cir. 2007); Cotter v. Ajilon Servs., Inc., 287 F.3d 593, 598 (6th Cir. 2002).
60 Lewis II, 681 F.3d at 314.
61 See id.
62 Id. at 315 (citing cases to support the proposition that no other circuits import the “sole cause” standard into the ADA).
63 See Gross v. FBL Fin. Servs. 557 U.S. 167, 174–75 (2009); Lewis II, 681 F.3d at 314. Compare ADA Amendments Act of 2008, § 12112(a) (“No covered entity shall discriminate . . . on the basis of disability . . . .”), with Rehabilitation Act of 1973, § 794(a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability . . . be . . . subjected to discrimination.”).
64 See Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–634 (2012); Gross, 557 U.S. at 170; Lewis II, 681 F.3d at 318.
65 See Gross, 557 U.S. at 170.
66 See id. at 174–78; Lewis II, 681 F.3d at 318.
67 See Gross, 557 U.S. at 176; Lewis II, 681 F.3d at 318.
68 See Gross, 557 U.S. at 174, 176; Lewis II, 681 F.3d at 318.
statute to another, especially without closely examining the text of the statutes for clear language indicating the standards to be met.\footnote{See Lewis II, 681 F.3d at 316 (citing Gross, 557 U.S. at 174).} The Lewis court reasoned that the Gross decision required it to likewise refrain from importing a causation standard from one statute to another.\footnote{See id. at 318–19.} The Lewis court decided that its long-standing application of the “sole cause” standard to ADA plaintiffs was an incorrect importation of the causation standard from the Rehabilitation Act and must be abandoned.\footnote{See id. at 317.}

B. Disagreement on the Standard to Apply

After determining that the “sole cause” standard used for the last seventeen years needed to be jettisoned, the Sixth Circuit turned to the question of which standard of causation should replace it.\footnote{See id. at 321.} The Sixth Circuit majority relied on Gross once again for guidance.\footnote{See id. at 320.} The Supreme Court in Gross was not convinced that legislative history indicating common statutory goals was sufficient to overcome the textual differences between the ADEA and Title VII to apply the same standard to both laws.\footnote{See id. at 320.} Despite arguments from both parties in Lewis that the textual cross-references between the ADA and Title VII and the legislative history of the two statutes pointed to either a “sole cause” or a “motivating factor” standard, the court declined to impose either standard.\footnote{See id. at 319.} Because the Supreme Court in Gross was not swayed by similar arguments, the Lewis majority was also not moved.\footnote{See id. at 320.} Instead, the Lewis majority held that the “because of” language in the ADA, like the “because of” language in the ADEA, meant that an employee must prove that his or her disability was a “but-for” cause of the employer’s adverse action.\footnote{See id. at 321.}

The entire en banc court did not embrace the majority’s adoption of a “but-for” standard.\footnote{See id. at 325 (Clay, J., concurring in part and dissenting in part); id. at 325–26 (Stranch, J., concurring in part and dissenting in part); id. at 341–42 (Donald, J., concurring in part and dissenting in part).} Judges Eric L. Clay, Jane B. Stranch, and Bernice B. Donald all wrote decisions concurring with the court’s abandonment of the “sole cause” standard and dissenting with the court’s imposition of a “but-for” standard.\footnote{See id. at 322, 325 (Clay, J., concurring in part and dissenting in part); id. at 325–26 (Stranch, J., concurring in part and dissenting in part); id. at 331, 341 (Donald, J., concurring in part and dissenting in part).} Rejecting the majority’s use of Gross to justify its refusal to adopt
the “motivating factor” standard, Judges Clay, Stranch, and Donald looked instead to congressional intent, legislative history, and the rules of statutory construction to guide their conclusion that the “motivating factor” standard should apply to ADA claims.⁸⁰

All three judges disagreed with the majority’s treatment of the relationship between Title VII and the ADA.⁸¹ Judge Clay wrote that it is essential to look at a civil rights statute in relation to other civil rights statutes in order to determine both the meaning of the text and the congressional intent behind its enactment.⁸² Because the ADA was enacted to expand the protection of Title VII, and the ADA explicitly cross-references Title VII in its text, Judge Clay noted that Congress meant for the two statutes to be treated as companions.⁸³ The U.S. House of Representatives Report on the ADA explained that any amendments made to Title VII would apply to the ADA.⁸⁴ Judge Clay therefore reasoned that the ADA’s use of “because of” should be defined by Title VII’s “motivating factor” language.⁸⁵ According to Judge Clay, the majority’s reliance on Gross and dismissal of the relationship between the ADA and Title VII was the wrong approach.⁸⁶

In addition, Judge Clay considered the purpose of an en banc hearing when reaching his opinion.⁸⁷ Judge Clay observed that by leaving the Sixth Circuit in opposition to the other circuits, the majority did not accomplish the goal of an en banc hearing, which was to bring the Sixth Circuit in line with the predominant approach in the other circuits.⁸⁸ Judge Clay pointed out that the majority of the circuits use the “motivating factor” standard.⁸⁹ In addition, Judge Clay noted that the Sixth Circuit’s adoption of a “but-for” standard imposes a different, higher burden on plaintiffs in the Sixth Circuit than on plaintiffs in other circuits.⁹⁰

Like Judge Clay, Judge Stranch determined that adopting the “but-for” standard was incorrect.⁹¹ According to Judge Stranch, congressional intent,

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⁸⁰ See id. at 322, 324–25 (Clay, J., concurring in part and dissenting in part); id. at 325–27 (Stranch, J., concurring in part and dissenting in part); id. at 332, 340 (Donald, J., concurring in part and dissenting in part).
⁸¹ See id. at 322 (Clay, J., concurring in part and dissenting in part); id. at 327, 329 (Stranch, J., concurring in part and dissenting in part); id. at 331–32 (Donald, J., concurring in part and dissenting in part).
⁸² See id. at 322 (Clay, J., concurring in part and dissenting in part).
⁸³ See id.
⁸⁵ See id. at 322–23.
⁸⁶ See id. at 324.
⁸⁷ See id. at 322.
⁸⁸ See id.
⁸⁹ See id. at 324–25.
⁹⁰ See id.
⁹¹ See id. at 325–26 (Stranch, J., concurring in part and dissenting in part).
legislative history, and the rules of statutory construction pointed to the conclusion that the majority incorrectly interpreted the relationship between the ADA and Title VII.92 Although the majority relied on Gross to draw a dividing line between statutes, the rules of statutory construction mandate that the two statutes be looked at in concert.93 According to Judge Stranch, Congress intended to establish the same powers, remedies, and procedures in the ADA and that existed in Title VII of the Civil Rights Act.94 Because the ADA was passed in 1990, a year before the Civil Rights Act was amended by Congress in 1991, Congress made sure the two statutes would be linked by incorporating Title VII provisions into the ADA by reference.95 Judge Stranch believed that Congress, by linking Title VII and the ADA, intended that the two statutes would evolve jointly going forward.96

In addition, Judge Stranch noted that the rules of statutory construction compel courts to assume that Congress was aware of current law when enacting legislation.97 The current law at the time Congress passed the ADA in 1990 and amended Title VII in 1991 was the “motivating factor” standard, as held by the Supreme Court in 1989 in Price Waterhouse v. Hopkins.98 Therefore, Judge Stranch reasoned, Congress meant to impose a “motivating factor” standard onto the ADA.99

The concurring judges observed that the burden a “but-for” standard places on employees in the Sixth Circuit violated the congressional intent behind the ADA.100 Judge Clay noted that under a “but-for” standard, the employee must prove that even if other reasons were present and could have caused the employer to take an adverse action against the employee, it was the employee’s disability that caused the employer to act.101 This standard requires the employee to have knowledge of the employer’s internal decision-making process and determine how much weight the employer placed on a variety of factors.102

In contrast, under a “motivating factor” standard, an employee would only have to prove that his or her disability was one factor that the employer con-
sidered when imposing the adverse consequence. With a “but-for” standard, an employer could rather easily rebut the employee’s allegations by offering other performance related reasons for the adverse action. With a “motivating factor” standard, the employer cannot avoid liability simply by pointing to other factors; the employee is only required to prove that his or her disability was one of the factors resulting in the employer’s action, not that other factors were not present. Judge Clay reasoned that imposing a “but-for” standard erroneously and unfairly places a burden on employees in the Sixth Circuit that is “greater than the burden intended by Congress.”

III. THE SIXTH CIRCUIT REMAINS AN OUTLIER

When Congress passed the ADA in 1990, it noted the persistence of discrimination against Americans with disabilities in many areas of life, including employment. According to Congress, the ADA was intended to provide legal recourse for the disabled who, unlike people who were discriminated against on the basis of race, color, sex, national origin, religion, or age, had no legal avenue to pursue redress. Congress further noted that the disabled should not be segregated from the rest of the population and prevented from competing in the working world. Discrimination, which can deny disabled individuals fair access to employment, was deemed by Congress to perpetuate a costly culture of dependency on the state and to run contrary to the American ideals of self-sufficiency and independence.

The Sixth Circuit, by declining to adopt the “motivating factor” standard advocated by the concurring judges, did not effectuate Congress’s goal of providing a consistent standard for the treatment of the disabled. Instead, the

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103 See id.
104 See id.
105 See id.
106 See id. at 325.
107 See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(3) (2012) (“[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodation, institutionalization, health services, voting, and access to public services.”)
108 See 42 U.S.C. § 12101(a)(4) (“[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”).
109 See 42 U.S.C. § 12101(a)(2) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities.”).
110 See 42 U.S.C. § 12101(a)(9) (explaining that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity”).
111 See Lewis v. Humboldt Acquisition Corp. (Lewis II), 681 F.3d 312, 324–25 (6th Cir. 2012) (en banc) (Clay, J., concurring in part and dissenting in part); see also 42 U.S.C. § 12101(b)(1) (“It is the purpose of this Act . . . to provide a clear and comprehensive national mandate for the elimination
Sixth Circuit remains out of step with the majority of the country and provides an uneven playing field for Sixth Circuit plaintiffs. As Judge Clay correctly noted, the majority decision took the Sixth Circuit “a step back” by placing a burden of proof on employees that was not intended by Congress. Congress purposefully linked the ADA with Title VII of the Civil Rights Act with the goal of helping disabled workers when it passed the ADA. Therefore, it remains incongruous for the Sixth Circuit to interpret the law in such a way that hinders the very workers it was designed to help.

In addition to being required to meet a higher burden of proof than claimants in other circuits, ADA claimants in the Sixth Circuit are also required to meet a higher burden of proof than Title VII claimants in their own circuit. As Judges Clay and Stranch noted, Congress linked the ADA and Title VII, with the plan that the remedies available to plaintiffs would be the same under both laws. By requiring ADA plaintiffs to meet a “but-for” standard and Title VII plaintiffs to meet a “motivating factor” standard, the plaintiffs in effect have different remedies available to them. The legislative history recounted by Judges Clay and Stranch indicates that Congress did not intend for an employee discriminated against on account of his or her race to have to meet a lower standard of proof than an employee discriminated against on account of his or her disability.

By relying on Gross to support its adoption of a “but-for” standard, the majority sidestepped the contextual analysis required to reach an accurate conclusion. In Gross the Supreme Court cautioned that a statute’s context must be considered when resolving disputes about its interpretation. Although the Court did such an analysis for the ADEA in the Gross case, the Lewis majority neglected to perform a similar analysis for the ADA. Instead, the Lewis majority applied the Gross Court’s conclusion about the ADEA to the ADA and concluded that the ADA, like the ADEA, required a “but-for” standard of
proof. Had the Lewis majority thoroughly examined the context in which the ADA was enacted, including its textual and legislative relationship to Title VII of the Civil Rights Act and the Rehabilitation Act, it would have reached the correct conclusion that a “motivating factor” standard of proof should be required.

CONCLUSION

Although the Sixth Circuit reached the appropriate conclusion in eliminating the “sole cause” standard of proof from its ADA jurisprudence, the majority’s refusal to adopt a “motivating factor” standard, choosing instead to require a “but-for” standard, does little to move the Sixth Circuit into line with its sister circuits. Rather than level the playing field for disabled employees who face discrimination from employers, disabled employees who seek to sue their employers for discrimination under the ADA in the Sixth Circuit are still required to meet a very high standard of proof. Employers may continue to skirt discrimination laws with near impunity by claiming that they acted for reasons other than the employee’s protected characteristic. Disabled employees in the Sixth Circuit will in effect continue to receive a weaker level of protection from discrimination than their counterparts in the rest of the country. The Sixth Circuit’s approach runs counter to the purpose of anti-discrimination statutes like the ADA, Title VII, and the Rehabilitation Act, which seek to protect employees from unfair discrimination based on race, color, religion, sex, national origin, and disability. With its decision in Lewis, the Sixth Circuit has turned laws designed to help disabled employees into additional hurdles those employees must clear in their quest for justice.

123 See id. at 330–31.
124 See id.