

CURING CAUSATION: JUSTIFYING A  
“MOTIVATING-FACTOR” STANDARD UNDER THE  
ADA

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I. INTRODUCTION

On July 26, 1990, Congress passed the Americans with Disabilities Act (ADA) to address the various forms of discrimination against approximately forty-three million disabled Americans<sup>1</sup> in critical areas such as employment.<sup>2</sup> Prior to the ADA’s enactment, individuals who experienced discrimination on the basis of their disability often did not have legal recourse to redress such discrimination.<sup>3</sup>

The purposes of the ADA are clear: “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”<sup>4</sup> and “to provide *clear, strong, consistent*, enforceable standards addressing discrimination against individuals with disabilities.”<sup>5</sup> A federal circuit split, however, has significantly hindered the realization of Congress’s desire to have clear and consistent enforcement standards under the ADA, particularly in the area of private employment.<sup>6</sup> Under the language of the

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1. According to the U.S. Census Bureau, nearly fifty-three million Americans, including people of all ages, have a disability. Almost two-thirds of these individuals have a severe disability. JACK MCNEIL, U.S. CENSUS BUREAU, HOUSEHOLD ECONOMIC STUDIES, CURRENT POPULATION REPORTS P70-73, AMERICANS WITH DISABILITIES: 1997 (1997), <http://www.census.gov/hhes/www/disable/sipp/disab97/asc97.html> (last visited Sept. 10, 2004).

2. Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 328, codified as amended at 42 U.S.C. §§ 12101-12213 (2000).

3. 42 U.S.C. § 12101(a)(4).

4. *Id.* § 12101(b)(1).

5. *Id.* § 12101(b)(2) (emphasis added).

6. The ADA addresses private employers at 42 U.S.C. §§ 12111-12117.

ADA, a complaining employee must prove that his employer discriminated against him “because of” his disability in order to win a claim.<sup>7</sup> The importance of these two simple words—“because of”—may not be apparent at first glance, but the courts’ failure to interpret them uniformly has left a critical issue with major implications unresolved: the standard of causation under the ADA.

Currently, some circuits take the position that Title I of the ADA imposes liability upon an employer only if an adverse employment action is taken “solely because of” a disability. Alternatively, other circuits find that Title I imposes liability where there are additional legitimate reasons for the adverse employment action, and the disability was only a motivating factor.<sup>8</sup> While a majority of the circuits have adopted the motivating-factor standard, a few circuits still apply the “solely” standard of liability.<sup>9</sup> An inconsistent causation standard under the ADA is significant for both employers and employees, especially from a policy perspective.<sup>10</sup> For example, if a “solely” standard of causation is adopted, the disabled employee faces the nearly insurmountable task of proving that an employer’s adverse employment action was strictly based on the employee’s disability alone.<sup>11</sup> Along the same lines, the “solely” standard gives employers much more discretion in their decisionmaking with regard to disabled applicants or employees. Providing employers with such freedom in their employment decisions regarding disabled employees is counterintuitive to the main purpose of the ADA, which is to eliminate discrimination against individuals with disabilities.<sup>12</sup>

In the alternative, critics claim that if courts adopt a motivating-factor standard, the burden an employee must overcome to win a claim for disability discrimination is, arguably, much lower. Therefore, the employer will have to use greater caution, or will simply have its hands tied in deciding whether to take an adverse employment action against a disabled employee.<sup>13</sup> Likewise, these critics

7. *Id.* § 12112(a).

8. This standard is also known as a “mixed-motive” standard. For background information on the current status of the mixed-motive standard, see Jeffrey A. Van Detta, “*Le Roi Est Mort; Viva Le Roi!*”: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After *Desert Palace, Inc. v. Costa* into a “Mixed-Motives” Case, 52 DRAKE L. REV. 71 (2003).

9. See *infra* Part II.

10. See Natalie Palmer Jones Storch, Comment, *The Standard of Employer Liability Under the Americans with Disabilities Act of 1990*, 66 U. CIN. L. REV. 931, 956 (1998) (arguing that a “solely” standard is correct); John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2010 (1995) (concluding that a “solely” standard should be adopted).

11. See Storch, *supra* note 10, at 956.

12. See 42 U.S.C. § 12101(b)(1); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1074 (11th Cir. 1996) (stating that a “solely” standard would do little to end discrimination, but instead would indulge it).

13. See Storch, *supra* note 10, at 956.

claim that creating a plaintiff-friendly burden would promote an onslaught of frivolous lawsuits, which would, in turn, place a heavy financial burden on employers.<sup>14</sup>

Although these arguments make sense in theory, they are critically flawed for a couple of compelling reasons. First, contrary to popular belief, “[employers] prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level.”<sup>15</sup> Second, the ADA plaintiff already shoulders a heavy burden to make out the prima facie elements of disability employment discrimination as required under the ADA, on which the courts have consistently taken a pro-employer stance.<sup>16</sup> Adopting a “solely” standard of liability, therefore, would place another significant roadblock in front of a group of already disadvantaged plaintiffs.<sup>17</sup>

Other than the aforementioned policy arguments, this Comment adopts the, supposedly, more “plaintiff-friendly”<sup>18</sup> motivating-factor standard of liability under Title I of the ADA. Thus, this Comment rejects the “solely” standard for a number of other concrete reasons: the plain language of the ADA reads “because of,” not “solely because of”;<sup>19</sup> the Rehabilitation Act of 1973 simply established a floor,<sup>20</sup> and

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14. See *id.* at 956-57.

15. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (footnotes omitted). Professor Colker’s data comes from a study of all employment discrimination cases available on Westlaw from 1992, the ADA’s effective date, to July 1998. *Id.* at 103. For further discussion regarding Professor Colker’s studies, see *infra* Part IV. See also *Most Federal Appeals Court Decisions Favor ADA Defendants, Analysis Shows*, DISABILITY COMPLIANCE BULL., Nov. 20, 1997, at 1, 8-9; Am. Bar Ass’n Comm’n on Mental & Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998).

16. In order for a plaintiff to be protected under the ADA, an individual: (1) must have a disability; (2) must be a qualified individual with a disability; and (3) must have been discriminated against by his employer because of the disability. See 42 U.S.C. § 12112.

17. In explaining the heavy burden on ADA plaintiffs, Professor Ruth Colker stated:

These [employer-favored] results at the trial and appellate levels are very troubling because they appear to run counter to Congress’ intent in passing the ADA. When Congress passed the statute, it stated in the findings and purpose section that it sought to eliminate discrimination for the 43 million Americans with disabilities. Its recitation of the 43 million figure suggests that it did not intend the courts to consider acts of discrimination to be rare, isolated events. It intended the courts to use realistic burdens of proof to reflect Congress’ belief that discrimination was widespread and needed to be swiftly redressed. Creating unduly high burdens of proof does not help redress the “serious and pervasive social problem” that Congress hoped to solve by enacting the ADA.

Colker, *supra* note 15, at 126 (footnotes omitted).

18. See *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996).

19. See Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (2000).

20. See Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 220 (2002). Professor Colker states that Congress meant for section 504 of the Rehabilitation Act to act as a “floor” in determining the meaning of the ADA. Professor Colker also men-

not a ceiling, for the level of protection given to disabled individuals in the workplace; the legislative history of the ADA overwhelmingly supports a motivating-factor standard;<sup>21</sup> and finally, the ADA is modeled after, and has been interpreted in a manner consistent with, Title VII, which explicitly invokes a motivating-factor standard of liability.<sup>22</sup>

Part II of this Comment examines the current circuit split in greater detail. Part III presents the arguments for adopting a motivating-factor standard of liability (and rejecting the “solely” standard) across the board. Part IV examines policy justifications that support a motivating-factor standard. Lastly, Part V provides a brief conclusion.

## II. THE CIRCUIT SPLIT

The federal circuits have yet to adopt a uniform standard of causation for employment discrimination cases under the ADA.<sup>23</sup> A majority of the circuits, though, have adopted the motivating-factor standard of liability; these circuits comprise the First,<sup>24</sup> Second,<sup>25</sup> Fourth,<sup>26</sup> Seventh,<sup>27</sup> Eighth,<sup>28</sup> and Eleventh.<sup>29</sup> Alternatively, circuits that currently utilize the minority view—the “solely” standard—are the Third,<sup>30</sup> Fifth,<sup>31</sup> Sixth,<sup>32</sup> Ninth,<sup>33</sup> and Tenth<sup>34</sup>. The common trend

tions that the passage of the ADA had a rather unexpected consequence: it narrowed the rights that were existent under § 504 of the Rehabilitation Act. *Id.*; see also *infra* Part III.A.

21. See *infra* Part III.B.

22. See 42 U.S.C. § 2000e-2(m) (2000). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court interpreted this section to mean that direct evidence of discrimination is not required in order to prove discrimination in mixed-motive cases under Title VII. Therefore, there is no heightened burden on a plaintiff in a mixed-motive case. *Id.* at 101-02. For further discussion comparing the similarities between the ADA and Title VII, see *infra* Part III.C.

23. Some of the cases discussed in this Part involve claims brought under Title II of the ADA, which covers the public sector. See 42 U.S.C. §§ 12131-12134. These cases are relevant because courts tend to treat the causation standards for Title I and II claims similarly. Title II contains nearly identical causation language: “no qualified individual shall . . . by reason of such disability, be . . . subjected to discrimination by any such entity.” *Id.* § 12132 (emphasis added).

24. See *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996).

25. See *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000), *rev'd on other grounds*, 260 F.3d 100 (2d Cir. 2001).

26. See *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999).

27. See *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029 (7th Cir. 1999).

28. See *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300 (8th Cir. 1995).

29. See *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996).

30. See *McDonald v. Pennsylvania*, 62 F.3d 92 (3d Cir. 1995).

31. *Rizzo v. Children's World Learning Center's, Inc.*, 173 F.3d 254 (5th Cir. 1999).

32. See *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995).

33. See *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999).

34. See *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995).

among the circuits that continue to employ the “solely” standard is to argue that, because the ADA contains much of the same language as the Rehabilitation Act of 1973, which imposes a “solely because of” standard, the ADA should require the same. Part III of this Comment, however, explains in greater detail why this view is flawed—a position that a majority of the circuits have already accepted.

#### A. Circuits That Apply the “Solely” Standard

Surprisingly, the Ninth Circuit continues to use a “solely” standard of liability for ADA claims. In *Zukle v. Regents of the University of California*,<sup>35</sup> Sherrie Lynn Zukle, a learning-disabled medical school student, brought claims under both the Rehabilitation Act and Title II of the ADA after the school dismissed her for failing to meet the school’s academic standards.<sup>36</sup> The district court granted summary judgment for the University of California on the grounds that, because Zukle could not meet the minimum standards of the University with reasonable accommodation, she was not a qualified individual under either the Rehabilitation Act or the ADA.<sup>37</sup>

The Ninth Circuit affirmed the district court’s decision on the grounds that the student’s requested accommodations were not reasonable; thus the court did not have to rule on the proper standard of causation under the ADA.<sup>38</sup> The Ninth Circuit, however, did state that Ms. Zukle would need to demonstrate that “she was dismissed *solely because of her disability*” under either the ADA or the Rehabilitation Act.<sup>39</sup> The court justified establishing the same standard of liability under both the ADA and the Rehabilitation Act by explaining that “[b]ecause the language of the two statutes is substantially the same,” they should be “interpreted consistently.”<sup>40</sup>

In similar fashion, the Sixth Circuit, in *Sandison v. Michigan High School Athletic Ass’n*,<sup>41</sup> also held that Title II of the ADA re-

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35. 166 F.3d 1041 (9th Cir. 1999).

36. *Id.* at 1042-43, 1045.

37. *Id.*

38. *Id.* at 1051.

39. *Id.* at 1045 (emphasis added).

40. *Id.* at 1045 n.11.

41. 64 F.3d 1026 (6th Cir. 1995); *see also* *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996) (stating that in order to “recover on a claim of discrimination under the [ADA], a plaintiff must show that: 1) he is an individual with a disability; 2) he is ‘otherwise qualified’ to perform the job requirements, with or without reasonable accommodation; and 3) he was discharged *solely by reason of his handicap*”) (emphasis added); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 n.2 (6th Cir. 1995) (asserting that the analysis under the ADA roughly parallels that under the Rehabilitation Act of 1973). The Sixth Circuit, in a later slip opinion, acknowledged that a majority of the other circuits have adopted the motivating-factor standard. *See Layman v. Alloway Stamping & Mach. Co.*, No. 01-6568, slip op. at 5 (6th Cir. Mar. 31, 2004). The court even hinted that the causation standard under the ADA would be an “interesting question for the *en banc* court.” *Id.*

quires that the discrimination occurred “solely by reason of [one’s disability].”<sup>42</sup> In *Sandison*, a group of nineteen-year-old high school students with learning disabilities challenged one of the Michigan High School Athletic Association’s (MHSAA) regulations, which prohibited nineteen-year-olds from participating in cross-country.<sup>43</sup> The district court granted a preliminary injunction, and the Sixth Circuit held that the MHSAA policy did not violate either section 504 of the Rehabilitation Act or the ADA.<sup>44</sup>

In deciding the students’ ADA claims on the merits, the court stated: “a plaintiff proceeding under title II of the ADA must, similar to a section 504 plaintiff, prove that the exclusion from participation in the program was ‘solely by reason of [disability].’”<sup>45</sup> Since the MHSAA’s regulation prohibited the students from participating because of their age, and not solely because of their disability, the court held in favor of the MHSAA.<sup>46</sup>

Neither the Tenth Circuit, in *White v. York International Corp.*,<sup>47</sup> nor the Third Circuit, in *McDonald v. Pennsylvania*,<sup>48</sup> required the courts to define the proper standard of liability under the ADA, but both claimed in dicta that the “solely” standard was proper. In *White*, the Tenth Circuit affirmed the district court’s grant of summary judgment for the employer because the disabled employee failed to establish that he was a qualified individual with a disability for purposes of the ADA.<sup>49</sup> The court did, however, state that because the plaintiff was not a qualified individual with a disability, the court did not need to consider whether the employer “terminated him *solely* because of his disability.”<sup>50</sup>

The Third Circuit, in *McDonald*, was more cryptic in asserting the standard of liability under the ADA.<sup>51</sup> Again, the court did not need to define a standard of liability because the court upheld the district court’s grant of summary judgment for the employer because the employee failed to prove that she was an “otherwise-qualified” individual with a disability.<sup>52</sup> The opinion does not mention the word “solely,” especially regarding a standard of liability, but it does men-

42. *Sandison*, 64 F.3d at 1036.

43. *Id.* at 1028-29.

44. *Id.* at 1037.

45. *Id.* at 1036 (alteration in original). The Sixth Circuit has continued to use the “solely” standard. In *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003), the court stated that an ADA plaintiff must demonstrate that she is “being subjected to discrimination under the program solely because of her disability.”

46. *See Sandison*, 64 F.3d at 1036.

47. 45 F.3d 357 (10th Cir. 1995).

48. 62 F.3d 92 (3d Cir. 1995).

49. 45 F.3d at 363.

50. *Id.* (emphasis added).

51. 62 F.3d at 97.

52. *Id.*

tion that the Rehabilitation Act and the ADA should impose the same “substantive standards for determining liability.”<sup>53</sup>

The common analysis among every circuit that has either adopted or shown support for the “solely” standard of causation is that the ADA imposes similar, if not identical, substantive standards of liability as those under the Rehabilitation Act of 1973.

### B. Circuits That Apply the “Motivating-Factor” Standard

While the Third, Fifth, Sixth, Ninth, and Tenth Circuits continue to employ a “solely” standard of liability under the ADA,<sup>54</sup> the rest of the circuits, which make up a majority, have finally recognized that: the Rehabilitation Act and the ADA are not only different causes of action but have different causation standards. These circuits have decided to adopt a motivating-factor standard of liability under the ADA for a variety of reasons. These reasons, along with others supporting the motivating-factor standard, are analyzed in greater detail in Part III.

The Eleventh Circuit initiated the shift away from the “solely” standard with its influential decision in *McNely v. Ocala Star-Banner Corp.*,<sup>55</sup> in which it became the first circuit to give in-depth justifications for adopting the motivating-factor standard. Until *McNely*, the rest of the circuits had taken the view that the ADA and the Rehabilitation Act required the same substantive standards. The *McNely* court distinguished these two similar statutes by analyzing the differences in statutory language, reviewing the legislative history, observing the similarities in causal language between the ADA and Title VII, and, lastly, finding a lack of clear support for the “solely” standard in the other circuits.<sup>56</sup>

Among the reasons the court gave for declining to follow the “solely” standard was the plain language of the ADA, which states: “No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual.”<sup>57</sup> The court also found support for adopting the plain-language interpretation of the ADA’s causation language from the Supreme Court’s decision in *Price Waterhouse v. Hopkins*.<sup>58</sup> In *Price Waterhouse*, the Supreme Court found that “because of,” as used in Title VII, did not

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53. *Id.* at 94-95.

54. *See supra* Part II.A.

55. 99 F.3d 1068 (11th Cir. 1996). Although *McNely* was the first decision to give a detailed explanation supporting a motivating-factor (“but-for”) standard, the Eighth Circuit, in *Pedigo v. P.A.M. Transportation, Inc.*, 60 F.3d 1300 (8th Cir. 1995), was the first to reject the “solely” standard. Strangely enough, the Eleventh Circuit does not cite this opinion in *McNely*. *See McNely*, 99 F.3d 1068.

56. *McNely*, 99 F.3d at 1073-78.

57. 42 U.S.C. § 12112(a) (2000) (emphasis added); *McNely*, 99 F.3d at 1073-75.

58. 490 U.S. 228 (1989).

mean “solely because of.”<sup>59</sup> In addition, the *McNely* court reasoned that using the restrictive term “solely” from the Rehabilitation Act cannot be reconciled with the main purpose of the ADA: “the elimination of discrimination against individuals with disabilities.”<sup>60</sup>

Next, the court looked to the legislative history of the ADA and concluded that it provided additional support for rejecting the “solely” standard.<sup>61</sup> The court focused on the House Committee Reports that explain why “solely” was left out of Title II’s language. The Committee’s reason for not imposing a “solely” standard was that it would lead to “absurd results.”<sup>62</sup> For example, with a “solely” standard, a disabled black employee would never be able to have a successful claim under the ADA because the employer would simply need to demonstrate that the adverse employment action was taken “because of” the employee’s race, not his disability.<sup>63</sup> The report does mention that the employee could have a claim of race discrimination under Title VII, but rejects that this was the intended result of the “solely” language.<sup>64</sup> Although Mr. McNely, the plaintiff, brought his claim under Title I of the ADA, the court concluded that there was no reason to believe that the Committee’s reasoning should be limited to Title II claims, especially since Titles I and II contain substantially identical language.<sup>65</sup>

Furthermore, the court found that every circuit, except for the Seventh, had not adopted a “solely” standard because the other circuits merely supported it in dicta. The *McNely* court did observe, however, that the Seventh Circuit, in *Despears v. Milwaukee County*,<sup>66</sup> was the only circuit to truly *hold* that a “solely” standard was correct.<sup>67</sup> While the *McNely* court did acknowledge the Seventh Circuit’s stance on the matter, the court declined to agree with the Seventh Circuit.<sup>68</sup> Subsequently, the Seventh Circuit declared that the Eleventh Circuit misinterpreted its holding in *Despears*, stating:

Such a reading of *Despears* puts it at odds with a host of decisions holding that the ADA prohibits employment discrimination if a covered disability is one motivating factor, even if not necessarily the sole cause, of the adverse employment action. But these cases misread *Despears*, which holds only that the plaintiff’s alcoholism

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59. *Id.* at 241.

60. *McNely*, 99 F.3d at 1074 (quoting 42 U.S.C. § 12101(b)(1)).

61. *See id.* at 1074-75.

62. *Id.* at 1075.

63. *Id.*

64. *Id.*

65. *Id.*

66. 63 F.3d 635 (7th Cir. 1995).

67. *See McNely*, 99 F.3d at 1077.

68. *See id.*

was a partial cause of his drunk driving incident, but that his drunk driving incident was the sole cause of his demotion.<sup>69</sup>

After determining the “solely” standard was incorrect under the ADA, the *McNely* court found that the district court’s jury instruction,<sup>70</sup> which stated that liability could be imposed only if Star-Banner had terminated McNely solely because of his disability, was improper because it did not accurately reflect the law.<sup>71</sup> The case was then remanded with the instruction to use a motivating-factor standard of liability.<sup>72</sup>

A few years later, the Fourth Circuit, in *Baird v. Rose*,<sup>73</sup> fully accepted the Eleventh Circuit’s decision to adopt a motivating-factor-standard of liability under the ADA. In doing so, the court rejected its prior decision in *Doe v. University of Maryland Medical System Corp.*,<sup>74</sup> in which it imposed the “solely because of” standard of liability for claims under both the Rehabilitation Act and the ADA. In addition to relying on *McNely* to reject the “solely” standard, the court reasoned that since the plain language of the ADA is similar to that of Title VII, there should be a consistent standard of causation—a motivating-factor standard.<sup>75</sup>

Furthermore, in *Parker v. Columbia Pictures Industries*,<sup>76</sup> the Second Circuit adopted the motivating-factor standard of liability. The court noted that other circuits, including the Fourth and Eleventh, had held that a motivating-factor-standard analysis available in a Title VII context also applied to claims brought under the ADA.<sup>77</sup> Moreover, the court noted that Congress must have meant to cover more extensive ground with the ADA than the Rehabilitation Act because it eliminated the word “solely” from the causation provision of the ADA.<sup>78</sup> The court, therefore, concluded that the ADA imposes liability upon employers where discrimination on the basis of disability is one factor, but not the only factor, behind an adverse employment action.<sup>79</sup>

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69. *Pernice v. City of Chicago*, 237 F.3d 783, 786 n.3 (7th Cir. 2001) (citing *Despears*, 63 F.3d at 636-37).

70. The jury instruction stated, in part: “Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated *solely* because of his alleged disability?” *McNely*, 99 F.3d at 1071 (emphasis added).

71. *See id.* at 1078.

72. *Id.*

73. 192 F.3d 462 (4th Cir. 1999).

74. 50 F.3d 1261 (4th Cir. 1995).

75. *Baird*, 192 F.3d at 470.

76. 204 F.3d 326 (2d Cir. 2000).

77. *Id.* at 336.

78. *Id.* at 337.

79. *Id.*

Likewise, in *Foster v. Arthur Anderson, LLP*,<sup>80</sup> the Seventh Circuit adopted the motivating-factor standard under the ADA. Although the court upheld summary judgment for the employer because the plaintiff failed to establish a prima facie case of disability discrimination,<sup>81</sup> the court stated that an employer violates the ADA if the disability was “a motivating factor” although it “need not be the employer’s only reason for termination.”<sup>82</sup> In coming to this conclusion, the court compared the similarities in language between the ADA and Title VII.<sup>83</sup> Additionally, the court distinguished the language of Title VII from that of the Rehabilitation Act.<sup>84</sup>

The rest of the circuits, including the First and Eighth, have supported the motivating-factor standard of liability under the ADA for similar reasons.<sup>85</sup> In sum, a majority of the circuits have rejected the “solely” standard of liability.

### III. REASONS FOR ADOPTING A “MOTIVATING-FACTOR” STANDARD

#### A. *Separate Statutes: The ADA and the Rehabilitation Act*

The primary reason a minority of circuits have refused to adopt a motivating-factor standard of liability is the belief that the ADA and the Rehabilitation Act impose the same substantive requirements. It is true that these two federal statutes are similar in many ways.<sup>86</sup> In fact, the ADA even provides that it should be interpreted consistently with the Rehabilitation Act.<sup>87</sup> This Comment, however, argues that the Rehabilitation Act imposes a higher causation standard than the ADA for two distinct reasons: (1) the ADA’s plain language relating to causation is inconsistent with that of section 504 of the Rehabilitation Act; and (2) the preexisting rights provided under section 504 of the Rehabilitation Act were meant to serve as a “floor,” not a ceiling, for rights provided to disabled individuals.

The Supreme Court has declared that “[w]hen . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except ‘in rare and exceptional circumstances.’”<sup>88</sup> Title I of the ADA, which applies to the private sector, is unambiguous. Title I provides:

80. 168 F.3d 1029 (7th Cir. 1999).

81. *Id.* at 1033.

82. *Id.*

83. *Id.*

84. *Id.* at 1033 n.7.

85. Colker, *supra* note 15, at 119.

86. See Storch, *supra* note 10, at 953-54; Brief for Petitioner at 9, *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996) (No. 96-1318).

87. See 42 U.S.C. § 12117(b) (2000).

88. *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (internal quotation marks omitted)). The Supreme Court also stated that “[w]e must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.” *Shaw v. Delta*

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.<sup>89</sup>

Also unambiguous is the fact that this language does not include the word “solely,” unlike section 504 of the Rehabilitation Act, which, in pertinent part, states:

No otherwise qualified individual with a disability in the United States . . . 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.<sup>90</sup>

Some scholars argue that since Congress relied heavily upon the language of the Rehabilitation Act in drafting the ADA, the same substantive requirements should apply.<sup>91</sup> As previously discussed, a minority of circuits have taken the same approach in requiring the “solely” standard of liability under both statutes.<sup>92</sup> In fact, the ADA does state that complaints under both the ADA and the Rehabilitation Act should be addressed “in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements.”<sup>93</sup> Preceding this part, however, the same section of the ADA provides that “[t]he agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 . . . shall develop *procedures* . . . that avoid[] duplication of effort.”<sup>94</sup> It is,

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Air Lines, Inc., 463 U.S. 85, 97 (1983). For a textualist perspective on the differences in language between the Rehabilitation Act and the ADA, see Flynn, *supra* note 10, at 2023-38. John Flynn, in arguing for a “solely” standard, asserts that “textualism not only asserts that legislative history cannot trump plain meaning, it eschews the use of ubiquitous and ostensibly unreliable committee reports in any way. Instead, textualism focuses on plain meaning of specific terms and a more general structural analysis of the statute.” *Id.* at 2025-26 (footnotes omitted).

89. 42 U.S.C. § 12112(a) (emphasis added). Likewise, Title II, which applies to public sector employment, provides a nearly identical provision:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of* such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

*Id.* § 12132(a) (emphasis added).

90. 29 U.S.C. § 794 (2000) (emphasis added).

91. See Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 475-76 (1991) (stating that the interpretation of the ADA is consistently based on the Rehabilitation Act); Storch, *supra* note 10, at 953-56.

92. See *supra* Part II.A.

93. 42 U.S.C. § 12117(b).

94. *Id.* (emphasis added).

therefore, reasonable to infer that Congress's intent was that claims brought under the Rehabilitation Act and the ADA are merely supposed to receive nonduplicative procedural treatment by the EEOC.

To further support this reasoning, § 12117(b) is entitled, "Coordination."<sup>95</sup> Meanwhile, the preceding section under the same heading, § 12117(a), is entitled, "Powers, remedies, and procedures," and states that the powers of Title VII of the Civil Rights Act are provided to Title I claimants.<sup>96</sup> This is significant because, as this Comment later discusses in Part III.C, Title VII imposes liability when discrimination occurs "because of" race, religion, and the like, thus supporting a motivating-factor standard of liability.<sup>97</sup>

The Rehabilitation Act and the ADA do not need to be interpreted identically because the Rehabilitation Act merely acts as a "floor," and not a ceiling, for the substantive rights provided under the ADA.<sup>98</sup> The ADA, in 42 U.S.C. § 12201(a), states that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973."<sup>99</sup> If the ADA, therefore, does provide a more "plaintiff-friendly" standard of liability than the Rehabilitation Act because it imposes liability upon an employer if it discriminated because of, instead of solely because of, a disability, then this standard of liability is perfectly consistent with the language of the ADA.

The defendant in *McNely* argued that the ADA provides no greater protection to victims of discrimination than they receive under the Rehabilitation Act, which requires a "solely because of" standard.<sup>100</sup> This argument, however, is inconsistent with the language of the ADA in 42 U.S.C. § 12202(a) because the Rehabilitation Act merely sets a "floor," not a ceiling, for the amount of substantive rights afforded to victims of disability discrimination.<sup>101</sup> The Eleventh Circuit nevertheless entertained the defendant's argument and still came to the conclusion that the "solely" standard was improper.<sup>102</sup> The court, however, in arriving at this decision, mistakenly relied upon the introductory portion of § 12201(a), which states, "[e]xcept as otherwise provided in this chapter," instead of using the floor-versus-

95. *Id.*

96. 42 U.S.C. § 12117(a).

97. *See generally* Van Detta, *supra* note 8.

98. *See* Colker, *supra* note 20, at 220 (stating that Congress intended section 504 to be the "floor" in determining the meaning of the ADA). Professor Colker, however, maintains that the result of the ADA has been the opposite of providing a floor for disability rights; "[i]nstead, the ADA has pulled the rug out from under Section 504 [of the Rehabilitation Act]." *Id.* at 228.

99. 42 U.S.C. § 12201(a).

100. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996).

101. *See* 42 U.S.C. § 12201(a).

102. *McNely*, 99 F.3d at 1074.

ceiling theory.<sup>103</sup> Utilizing this language, the court held that since Congress used broader language in the ADA than in comparable provisions of the Rehabilitation Act, the restrictive standards of the Rehabilitation Act should not be imported into the ADA.<sup>104</sup> Nevertheless, the court correctly concluded that the Rehabilitation Act does not set a ceiling of substantive rights for individuals subject to disability discrimination in the workplace.

*B. Legislative History Favors a “Motivating-Factor” Standard*

Further support for the premise that the ADA imposes a motivating-factor standard of liability is grounded in the ADA’s legislative history. Although the legislative history does not provide a smoking gun confirming a motivating-factor standard, it does, quite convincingly, point in the direction of adopting a motivating-factor standard. Specifically, the legislative history explains why Congress decided to leave the word “solely” out of Title II<sup>105</sup> and how the ADA should be “interpreted in a manner consistent with . . . Title VII.”<sup>106</sup>

According to the House Committee Reports, Congress left the word “solely” out of the causation language in the liability provision of Title II of the ADA because “[a] literal reliance on the phrase ‘solely by reason of his or her handicap’ leads to absurd results.”<sup>107</sup> In order to illustrate this point, one report gave the following example:

[A]ssume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.<sup>108</sup>

Congress, therefore, explicitly omitted this key term from the Rehabilitation Act and substituted it with different language in Title II of the ADA. An argument could be made that this legislative history is

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103. *Id.*

104. *Id.*

105. H.R. REP. No. 101-485, pt.2, at 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368.

106. H.R. REP. No. 102-40, pt.2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 696-97.

107. H.R. REP. No. 101-485, pt.2, at 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368.

108. *Id.*

only applicable to prevent absurd results arising from discrimination claims brought under Title II of the ADA. It is unlikely, however, that Congress intended to prevent absurd results from Title II discrimination claims but allow them to occur in Title I claims, especially when both Titles employ nearly identical causation language.<sup>109</sup>

Nevertheless, even if this piece of legislative history could be pigeonholed as only applying to discrimination claims under Title II of the ADA, a more recent piece of legislative history, which the *McNely*<sup>110</sup> court did not have an opportunity to utilize, appears to apply to all forms of discrimination under the ADA, not just under Title II. In relevant part, this legislative history asserts that “[a] number of other laws banning discrimination, including the [ADA] and the [ADEA] are modeled after, and have been interpreted in a manner consistent with, Title VII.”<sup>111</sup> Discussing how these acts, specifically the ADA and Title VII, should be interpreted similarly, the legislative history further instructs that “mixed motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.”<sup>112</sup> The language in section 5 asserts that “an unlawful employment practice is established when a complaining party demonstrates that [any protected trait under Title VII] was a contributing factor [and not the only reason] for an employment practice . . . .”<sup>113</sup> These statements from the committee report forcefully point toward adopting a motivating-factor standard of causation for discrimination claims under the ADA, regardless of which ADA title the claim is brought under.<sup>114</sup>

### C. *The ADA’s Similarities with Title VII*

The final reason that a motivating-factor standard of causation should be adopted under the ADA is the similarity of its causation

109. See *McNely*, 99 F.3d at 1075. The causation language under Title I of the ADA states, “[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability.” 42 U.S.C. § 12112(a) (2000) (emphasis added). Title II of the ADA provides, “no qualified individual with a disability shall, *by reason of such disability* . . . be subjected to discrimination.” *Id.* § 12132 (emphasis added).

110. 99 F.3d 1068 (11th Cir. 1996).

111. H.R. REP. No. 102-40, pt.2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 649, 696-97 (citations omitted).

112. *Id.*

113. *Id.* at 16-17.

114. While the committee report is strong support for adopting a motivating-factor standard of causation under the ADA, the argument could be made that “Congress could have made clear any intention to apply the motivating-factor amendment to the ADA simply by inserting the word ‘disability’ in § 2000e-2(m) or adding a similar provision to the ADA.” Flynn, *supra* note 10, at 2046. In fact, one could argue that, using a textualist approach to statutory interpretation, the fact that Congress did not include the word “disability” is instead dispositive that the committee language was not incorporated into the legislation itself. *Id.* at 2048.

language to that in Title VII; in fact, both provide the exact same causal language—“because of.”<sup>115</sup> Under Title VII, employers are prohibited from discriminating “because of” any protected characteristic, including “race, color, religion, sex, or national origin.”<sup>116</sup> In the Civil Rights Act of 1991, Congress codified the meaning of the “because of” standard of liability under Title VII by providing, “an unlawful employment practice is established when the complaining party demonstrates that [a protected trait] was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”<sup>117</sup> Among these protected traits, however, the term “disability” is missing.<sup>118</sup> Nevertheless, courts have not found this exclusion dispositive; for example, the Second Circuit, in *Parker v. Columbia Pictures Industries*, held that:

[N]othing in either the language or purpose of either statute suggests that Congress intended different causation standards to apply to the different forms of discrimination. Rather, the “substantially identical . . . causal language” used in Title VII and the ADA . . . indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well. In light of the statutory language and purpose underlying the ADA, therefore, we join those circuits<sup>[119]</sup> that have held that, in establishing a prima facie case of disability discrimination, a plaintiff need not demonstrate that disability was the sole cause of the adverse employment action. Rather, he must show only that disability played a *motivating role* in the decision.<sup>120</sup>

The *Parker* court relied on the virtually identical causation language in Title VII and the ADA, and the lack of language in either statute to clarify whether Congress desired different causation standards under each statute.<sup>121</sup>

It is, in fact, true that in 42 U.S.C. § 2000e-2(m) of Title VII does not include “disability” as a protected trait,<sup>122</sup> and nowhere in the ADA itself does it state that a motivating-factor standard of liability is proper. While there is a lack of a definitive statutory language that permits a motivating-factor standard, a more detailed examination of the ADA’s statutory language reveals that the ADA does, rather indi-

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115. Compare 42 U.S.C. § 12112(a) (2000) with 42 U.S.C. § 2000e-2(a)(1).

116. 42 U.S.C. § 2000e-2(a)(1). Cf. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000) (holding that a motivating-factor standard of liability is proper under the ADA because of the similarity in causation language with Title VII).

117. 42 U.S.C. § 2000e-2(m) (emphasis added).

118. See *id.*

119. See *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996); *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995).

120. 204 F.3d 326, 337 (2d Cir. 2000) (emphasis added) (citations omitted).

121. *Id.*

122. 42 U.S.C. § 2000e-2(m).

rectly, reference the Title VII section that permits a motivating-factor standard of liability. The ADA, in 42 U.S.C. § 12117, entitled “Enforcement,” incorporates all the “powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9,” which are provisions of Title VII.<sup>123</sup> Therefore, of the Title VII provisions that the ADA incorporates, the motivating-factor provision—§ 2000e-2(m)—is not one of them,<sup>124</sup> but § 2000e-5—an incorporated provision—directly references § 2000e-2(m).<sup>125</sup> Thus, the ADA does indeed reference § 2000e-2(m) by incorporating § 2000e-5, which, in turn, incorporates § 2000e-2(m).

A student-written comment noted that, while this argument has “substantive appeal,” it amounts to the ADA’s “impermissible bootstrapping” of the motivating-factor provision of Title VII—42 U.S.C. § 2000e-2(m)—because the motivating-factor standard is not a power, remedy, or procedure, but rather a “substantive standard of liability.”<sup>126</sup> Furthermore, the author proposed that even if the motivating-factor standard of liability could be considered a “remedy,” it would still amount to impermissible bootstrapping because § 2000e-5, when amended in 1991, did not add to the list of previously available remedies; instead, this provision acted to *limit* the remedies previously available under Title VII.<sup>127</sup> This proposition, however, is incorrect because, as the author acknowledged, the amended § 2000e-5(g) does not grant any additional remedies that were not available under the pre-amended Title VII.<sup>128</sup> What the 1991 amendments to Title VII did was give the courts the ability to grant the previously available remedies to plaintiffs if they prove that an employer would have taken the same action without the presence of the impermissible motivating factor—in other words, a violation of the motivating-factor amendment.<sup>129</sup> Therefore, the remedies, *per se*, were neither expanded nor limited by the amendment, but the court’s ability to award these remedies was altered.

Given that the underlying argument is that the ADA incorporates the “powers, remedies, and procedures” of Title VII, the question becomes whether the ADA’s definition of “remedies” under § 12117 is referring to the actual remedies available or the court’s ability to grant the plaintiff these remedies.<sup>130</sup> If the answer is the former, the

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123. *Id.* § 12117 (emphasis added).

124. *Id.*

125. *Id.* § 2000e-5.

126. Flynn, *supra* note 10, at 2042.

127. *Id.* at 2042-46.

128. 42 U.S.C. § 2000e-5(g).

129. *Id.* § 2000e-2(m).

130. The damages are listed under § 2000e-5(g)(2)(B). The section reads:

(B) On a claim in which an individual proves a violation under section [2002e-2(m)] and a respondent demonstrates that the respondent would have taken

ADA may not indirectly incorporate Title VII's motivating-factor statute—§ 2000e-2(m). But if it is the latter, there is no doubt that the ADA incorporates Title VII's motivating-factor standard of liability.

Although the question arguably remains unresolved as to whether the motivating-factor standard of liability is a “remedy” under Title VII, it is also feasible to pigeonhole it as a “power,”<sup>131</sup> which would be another way the ADA incorporates the motivating-factor standard through § 12117. This section, in relevant part, states, “[t]he powers . . . [of Title VII<sup>132</sup>] shall be the powers . . . this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability . . . .”<sup>133</sup> Neither the ADA nor Title VII defines the meaning of “power.”

According to *Webster's Third New International Dictionary*, “power” is defined as the “ability to act or produce an effect.”<sup>134</sup> Since 42 U.S.C. § 12117 of the ADA states that this “power” is given to “any person alleging discrimination,” the argument is that an ADA plaintiff is empowered with the same powers as a Title VII plaintiff,<sup>135</sup> who has the *ability to produce* certain remedies—the *effect*—by proving that a discriminatory reason played a motivating factor in the employer decision, regardless of whether the employer would have made the same decision anyway.<sup>136</sup> And unlike the “remedies” argument, which would not justify the ADA's adoption of the motivating-factor standard under Title VII if it refers to the court's ability to grant the plaintiff the same pre-amendment remedies,<sup>137</sup> the “powers” argument is not dependent on the actions of the court. Therefore, a plaintiff that alleges disability discrimination, regardless of the court's propensity, has the power—or *ability to produce*—limited relief if he is able to prove that a discriminatory reason played a motivating factor in the employer's decision.

Another persuasive reason to explain why a motivating-factor analysis is improper under both the ADA and Title VII merely be-

the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [2002e-2(m)] and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

*Id.* § 2000e-5(g)(2)(B).

131. *See id.* § 12117(a).

132. The specific Title VII sections are codified at 42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9.

133. 42 U.S.C. § 12117(a).

134. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1778 (1986).

135. 42 U.S.C. § 12117(a).

136. *Id.* § 2000e-2(m).

137. *See infra* notes 117-20 and accompanying text.

cause they have the same “because of” causation language has been provided by the Sixth Circuit.<sup>138</sup> The court asserted that Title VII is subject to a motivating-factor analysis not on the basis of the “because of” language, but because Congress expressly modified the standard in the Civil Rights Amendment of 1991.<sup>139</sup> To demonstrate this point, the court noted that since Congress amended Title VII by specifically including the term “motivating factor,” it did not mean that “because of” imposed a motivating-factor standard of liability prior to the adoption of the amendment.<sup>140</sup>

Although the Sixth Circuit’s logic is compelling, it is critically flawed for one main reason: Congress was merely codifying a standard that was in effect prior to the Supreme Court’s decision in *Price Waterhouse v. Hopkins*,<sup>141</sup> but with an additional wrinkle. The House Judiciary Committee, in its committee report, made this clear when it noted that by establishing a “motivating factor”<sup>142</sup> standard, it intended to “restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability.”<sup>143</sup> In fact, the committee report indicated that the change being instituted was to ensure that the presence of a contributing discriminatory factor can still establish a Title VII violation, even if an employer can establish that it would have made the same adverse employment decision without considering the discriminatory factor.<sup>144</sup> Congress, therefore, was not creating a motivating-

138. See *Layman v. Alloway Stamping & Mach. Co.*, 98 Fed. Appx. 369, 375 n.3 (6th Cir. 2004) (unpublished decision), available at 2004 WL 719262.

139. *Id.* (citing 42 U.S.C. § 2000e-2(m) (1994)).

140. *Id.* (stating that “[t]he modification of Title VII to adopt the ‘motivating factor’ standard suggests that the ‘because of’ language is not alone sufficient to trigger ‘mixed motives’ review”).

141. 490 U.S. 228 (1989).

142. The committee report did not call it a “motivating factor” standard; instead, the report called it a “contributing factor” standard. H.R. REP. NO. 102-40, pt.2, at 18 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 711.

143. *Id.* (emphasis added).

144. In greater detail, the committee report stated:

This provision would not make mere discriminatory thoughts actionable. Rather, to establish liability under the proposed Subsection 703(1), the complaining party must demonstrate that discrimination was a contributing factor in the employment decision—*i.e.*, that discrimination actually contributed to the employer’s decision with respect to the complaining party.

Requiring that a Title VII violation is only established when discrimination is shown to be a contributing factor to an employment decision further clarifies that intent of this legislation to prohibit only an employer’s actual discriminatory actions, rather than mere discriminatory thoughts . . . .

. . . . [W]here two independent contributing factors, one discriminatory and the other nondiscriminatory, [are] present, the remedies available to the complaining party will be limited where the employer establishes that it would have made the same adverse employment decision even absent the discriminatory contributing factor. Where the employer makes such a showing, the employee

factor standard of liability; it was only *reenacting* it, with a new avenue for finding liability, after the Supreme Court strayed from the previous standard in *Price Waterhouse*.<sup>145</sup>

#### IV. A “MOTIVATING-FACTOR” STANDARD: “PLAINTIFF FRIENDLY”?

The basic policy argument disfavoring the adoption of a motivating-factor standard of liability under the ADA is that it would critically impede employers from making adverse employment decisions against disabled employees; and, logically, these adversely affected employees would have much more favorable claims against their employers.<sup>146</sup> On the other hand, if a “solely” standard of causation is adopted, disabled employees would face the nearly insurmountable task of proving that an employer’s adverse employment action was strictly based on their disabilities alone.<sup>147</sup> These arguments make sense on their face, but the effect of adopting a motivating-factor standard of liability may not have the drastic effect that employers fear.

In fact, according to a recent set of studies conducted by Professor Ruth Colker,<sup>148</sup> the only type of cases in a comparable area of law that fare worse than disability discrimination cases are prisoner rights cases.<sup>149</sup> The studies gave shocking statistics about the success rate of ADA plaintiffs who must prove that it is not a “lifelong buffet of perks, special breaks, and procedural protections” for people with borderline disabilities.<sup>150</sup> For example, the first set of studies indicated that “defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level.”<sup>151</sup> Because these numbers caused great controversy, Professor Colker came out with a later study, which considered factors such as the type of discrimination claims that were brought and the categories of disabilities.<sup>152</sup> Even after looking

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would be precluded from receiving court-ordered hiring, reinstatement, promotion, or back pay. However, the presence of a contributing discriminatory factor would still establish a Title VII violation, and a court could order other appropriate relief, including injunctive or declaratory relief, compensatory and punitive damages where appropriate, and attorney’s fees.

*Id.* at 18-19.

145. *See* 490 U.S. 228 (1989).

146. *See* Storch, *supra* note 10, at 956.

147. *Id.*

148. Professor Colker is the Heck-Faust Memorial Chair in Constitutional Law at The Ohio State University College of Law.

149. *See* Colker, *supra* note 15, at 100.

150. *Id.* at 99 (quoting Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Apr. 25, 1997, at 116).

151. *Id.* at 100 (footnotes omitted).

152. *See* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001).

at the prior results through a “sharper lens,”<sup>153</sup> the study indicated that nearly “87% of the [ADA] cases appealed and made available on Westlaw had resulted in dismissals or grants of summary judgment for [employers] at the trial court level.”<sup>154</sup>

The study also indicated that one of the reasons for the significantly pro-defendant numbers was a result of the courts abusing the summary judgment standard by creating a higher threshold of proof for ADA plaintiffs.<sup>155</sup> In a Title VII claim, all a plaintiff needs to do is come up with enough evidence—regardless of whether it is direct or circumstantial—for a court to find that his protected trait, typically an immutable characteristic such as race, played a motivating factor in the adverse employment action.<sup>156</sup> However, an ADA claim requires the plaintiff to prove numerous gateway matters before the causation issue is ever considered, such as: that he is disabled under the ADA;<sup>157</sup> that he is a qualified individual with a disability;<sup>158</sup> and that the employer can reasonably accommodate the employee without incurring undue hardship.<sup>159</sup> If these noncausation issues raise genuine issues of material fact, the jury, rather than the judge, should be deciding them.<sup>160</sup> The study indicated, however, that judges are “routinely deciding fact-intensive [ADA] cases without sending them to the jury.”<sup>161</sup>

Another interesting aspect of this study was that included among the circuits guilty of deciding fact-intensive issues in ADA claims were the First, Second, Fourth, Seventh, Eighth, and Eleventh—all of which have adopted the motivating-factor standard.<sup>162</sup> Thus, even among the circuits that have adopted a motivating-factor standard, it is unlikely to aid the high number of ADA plaintiffs that are unable to get past the gateway matters. However, the fact that it may not cause a significant impact in the success rate of ADA claims should not discount the importance of the causation issue because, quite frankly, an employee that has proven that he is disabled, qualified, and that his employer has failed to reasonably accommodate him without incurring an undue hardship, should be entitled to some form of remedy. But under a “solely” standard, a plaintiff would not be able to recover a dime if the employer did not make the adverse employment decision solely because of the plaintiff’s disability. If an

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153. *Id.* at 240.

154. *Id.* at 246.

155. *See Colker, supra* note 15, at 102.

156. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

157. *See* 42 U.S.C. § 12112(a) (2000).

158. *See id.* § 12111(8).

159. *See id.* §§ 12111(9)-(10).

160. *See* FED. R. CIV. P. 52.

161. *Colker, supra* note 15, at 115-16.

162. *See id.* at 119. For further discussion about the circuit split, *see supra* Part II.

employer can therefore come forward with any other reason for its actions, it is completely absolved from any liability. This is a harsh standard for ADA plaintiffs, especially for those who have claims that merit an analysis of the causation issue.

Finally, a “solely” standard of liability cannot be reconciled with the underlying purpose of the ADA—to “eliminat[e] . . . discrimination against individuals with disabilities.”<sup>163</sup> Under this standard, an employer is absolved of all liability if it can show that it took an adverse employment action against a qualified disabled employee for any reason—no matter how miniscule—other than the employee’s disability. As the *McNely* court rightly opined, “[a] liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to ‘eliminate’ discrimination; instead, it indulges it.”<sup>164</sup> The circuits that currently apply the “solely” standard are essentially shielding employers that have a discriminatory motive against disabled employees. If a motivating-factor standard is adopted across the board, a discriminatory employer would not be protected, and as Professor Colker’s studies indicate, the number of frivolous ADA lawsuits is not likely to increase because the success rate of ADA claims remains low.

## V. CONCLUSION

The ADA requires a motivating-factor standard of causation. The purposes of the ADA—“to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”<sup>165</sup> and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities”<sup>166</sup>—cannot be accomplished through a “solely” standard of causation. If an employer has discriminatory intent when taking an adverse employment action against a qualified disabled employee, it should be penalized, and the employee should be able to recover damages. However, with a “solely” standard, an employer can use this favorable causation standard to defend itself from legitimate ADA claimants, who have suffered discrimination in the workplace.

There are a number of justifications for adopting a motivating-factor standard of liability under the ADA:<sup>167</sup> the plain language of the ADA reads “because of,” not “solely because of”;<sup>168</sup> the Rehabilita-

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163. 42 U.S.C. § 12101(b)(1).

164. 99 F.3d 1068, 1074 (11th Cir. 1996) (emphasis added).

165. 42 U.S.C. § 12101(b)(1).

166. *Id.* § 12101(b)(2).

167. *See supra* Part III.

168. *See* 42 U.S.C. § 12112(a).

tion Act of 1973 simply established a floor,<sup>169</sup> and not a ceiling, for the level of protection given to disabled individuals in the workplace; the legislative history of the ADA overwhelmingly supports a motivating-factor standard;<sup>170</sup> and, furthermore, the motivating-factor standard of liability should be adopted because the ADA is modeled after, and has been interpreted in a manner consistent with, Title VII, which explicitly invokes a motivating-factor standard of liability.<sup>171</sup>

Contrary to popular belief, a motivating-factor standard is unlikely to increase the number of frivolous ADA lawsuits because of the qualifying hurdles that stand in the way of ADA claimants. Therefore, employers are not going to have to face the heavy administrative and financial burdens defending these lawsuits; furthermore, employers are still going to be given leeway in their employment actions so long as they are not discriminatory. Adopting a motivating-factor standard of liability is a vital step toward ending discrimination against disabled employees in the workplace.

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169. See Colker, *supra* note 20, at 220 (2002) (discussing how section 504 of the Rehabilitation Act is meant to act as a “floor” in determining the meaning of the ADA).

170. H.R. REP. NO. 102-40, pt.2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 697, 711.

171. See 42 U.S.C. § 2000e-2(m).