

# Fourth Circuit Adopts ‘But For’ Standard for Proof of Discrimination under Americans with Disabilities Act

By Paul Holscher

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A plaintiff’s discrimination claims under the Americans with Disabilities Act must be proven using the “but-for” standard, instead of the less demanding “motivating factor” test, the federal appeals court for the Fourth Circuit, in Richmond, has held, joining the Sixth and Seventh Circuits in adopting the tougher standard of proof. *Gentry v. East West Partners Management Co., Inc., et al.*, No. 14-2382, 2016 U.S. App. LEXIS 4128 (4th Cir. 2016).

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

## Background

The plaintiff, Judith Gentry, was a former Executive Housekeeper at the Maggie Valley Club and Resort (the “Club”), which was owned by Maggie Valley Resort Management, LLC (“Maggie Valley”). In September 2008, Maggie Valley hired East West Partners Club Management Company, Inc., to operate the Club and in October 2008 East West hired Jay Manner as the Club’s General Manager.

Following a workplace injury, Gentry filed a workers’ compensation claim and later received a 30-percent permanent physical impairment to her ankle. Her workers’ compensation claim was settled at mediation in November 2010. Gentry was terminated a month later and, according to the employers, her termination was part of a restructuring plan to cut the Club’s costs.

However, Gentry testified that when she met with Maggie Valley Executive Ray Hobby after her termination, he allegedly informed her that Manner had admitted to terminating Gentry due to “issues with [her] ankle” and because she “could be a liability to the club.” Gentry also presented the testimony of Equal Employment Opportunity Commission Investigator John Brigman, who had interviewed Hobby while investigating Gentry’s EEOC charge. According to Brigman, Hobby confirmed that Manner had told him Gentry was “let go due to her disability and her liability to the club.” Gentry also presented evidence that contradicted the employers’ cost-saving justification that allegedly supported her termination.

Gentry’s claims included: (1) a disability discrimination claim under the ADA and North Carolina common law; (2) a sex discrimination claim under Title VII of the Civil Rights Act and North Carolina common law; (3) a retaliation claim premised upon the plaintiff’s pursuit of her workers’ compensation claim, in violation of North Carolina common law; and (4) a tortious interference with contract claim. At trial, Gentry prevailed on her workers’ compensation retaliation claim and tortious interference with contract claim. However, the jury found in favor of the defendants as to Gentry’s other claims. Subsequent to the district court’s entering a judgment, Gentry moved for a new trial, which was denied by the district court.

On appeal, Gentry argued, among other things, that the district court incorrectly instructed the jury on the causation standard applicable to her ADA discrimination claim. In that regard, the district court had instructed the jury that in order to prevail on her ADA discrimination claim, Gentry had to demonstrate that her disability was the “but-for” cause of her termination. On appeal, Gentry argued that the district court should have used Title VII’s “motivating factor” causation standard in its instruction to the jury as to her ADA discrimination claim.

## Tougher Standard

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The Fourth Circuit Court of Appeals disagreed with Gentry and refused to read Title VII's "motivating factor" standard into the ADA. In the process, the Court joined the Sixth and Seventh Circuits in holding that a plaintiff asserting a discrimination claim under the ADA must show that his or her disability was the "but-for" cause of the adverse employment action.

The Court explained that the U.S. Supreme Court's reasoning in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), dictated that the district court's instruction as to Gentry's ADA's claim, which included a "but-for" causation standard, was proper. The Court further explained that in *Gross*, the Supreme Court held that in pursuing an Age Discrimination in Employment Act claim, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision," based on the statutory language. Ultimately, in the Court's view, the language of the relevant ADA provision, similar to the relevant provision in the ADEA examined in *Gross*, connoted "but for" causation, and, as a result, the Court held, "The Supreme Court's analysis in *Gross* dictates the outcome here."

## Takeaway

In addition to requiring a plaintiff to show that his or her disability was the "but-for" cause of the challenged employment action, the Fourth Circuit's decision is instructive for an additional reason. A close read of the case reveals that John Brigman, the EEOC Investigator who investigated Gentry's Charge of Discrimination, provided significant evidence in support of Gentry's claims, including evidence that was obtained during the course of a witness interview with Hobby. This fact underscores the importance of the need for employers to adequately prepare for any communications that they may have with the EEOC, including communications that their managers or other employees may have during witness interviews.

Jackson Lewis attorneys are available to answer inquiries regarding this case and other workplace developments.

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