PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

H.R. 3721

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PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

THURSDAY, JUNE 10, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Watt, Scott, Johnson, Jackson Lee, Chu, and Franks.

Staff present: Heather Sawyer, Majority Counsel; David Lachmann, Subcommittee Chief of Staff; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. And to begin, the Chair will recognize himself for an opening statement. Today we examine H.R. 3721, the "Protecting Older Workers Against Discrimination Act."

H.R. 3721 corrects the Supreme Court's decision in—and this is the second time we will have had to correct the Supreme Court. The last time being Ledbetter on a very similar issue, where the Supreme Court has deliberately, and I think purposefully, misread the intent of Congress and narrowly construing a statue so as to eviscerate it.

In this decision, the Supreme Court by a slim five-four majority, made it harder for older workers to prove unlawful age discrimination by holding that "mixed-motive" claims are no longer available under the Age Discrimination in Employment Act, or ADEA.

In a "mixed-motive" claim an employer is alleged to have acted for a mixture of lawful and unlawful reasons, and the burden shifts to the employer to prove that it acted lawfully once an employee proves that a protected characteristic was a motivating factor in an employment decision.

After the Court's decision in *Gross*, however, the burden of proof never shifts to the employer in a case under the ADEA, even if the employer admits that age was a factor in its decision, an improper factor, obviously.

Instead, older workers always bear the burden of proving that age was the "but for" or determinative factor for a challenged employment decision, and therefore the person must always prove

that the employer would not have made the same decision if age had not been a factor.

This new and substantially higher standard for victims of age discrimination departs from decades of precedent and from the statutory framework of Title VII, which allows for mixed-motive claims and previously had served as the model for proving discrimination under the ADEA as well as under other Federal discrimination and retaliation laws.

Title VII, like the ADEA, prohibits discrimination because of certain protected characteristics. The Supreme Court, in *Price Waterhouse v. Hopkins,* interpreted this language to prohibit discrimination motivated in whole or in part by a protected characteristic, and recognized mixed-motive claims under Title VII.

Congress approved and codified mixed-motive claims in the Civil Rights Act of 1991, and expressed its intent that the ADEA and other Federal laws should continue to be interpreted consistently with Title VII as amended by the 1991 Act.

The five-justice majority in *Gross* ignored this unambiguous history, choosing instead to adopt an interpretation previously rejected both by the Court and by Congress. As a result, the exact same words, "because of," now mean something different under the ADEA than they do under Title VII.

But the damage does not end there. In reaching this result, the majority directed the lower courts to engage in a "careful and critical" examination before applying Title VII's precedent and framework to any other Federal law, thus declaring open season on settled precedent.

The lower courts have taken up this task and have applied *Gross* in a variety of contexts, including to claims of discrimination because of disability, jury service and the exercise of free speech rights.

Coming from a Court whose chief judge voted with the five-member majority in *Gross*, but who believes that judges are like umpires, or who claims to believe that judges are like umpires, that their role is to call balls and strikes and not to pitch or bat, the *Gross* decision was quite a curve ball.

Not only did the majority reject decades of settled precedent and the longstanding presumption, consistently endorsed and relied upon by Congress when drafting legislation, that Title VII should serve as a model for other Federal laws, it did so only by raising and resolving a different issue than the one presented to the Court, a question that was not briefed or argued by the parties or by the amici.

Writing in dissent, Justice Stevens described the majority's conduct as "an unabashed display of judicial lawmaking." For Jack Gross, who is here with us today, the experience has shattered his trust in the judicial system.

We can, and should, correct this. Left standing, the *Gross* decision provides less protection and makes it much harder for older workers to prove unlawful age discrimination. It also creates substantially different standards across and between civil rights laws, thus undermining their predictability, scope and effectiveness.

The decision also makes Congress' task in drafting legislation impossible by endorsing the ridiculous notion that the same language,

here the words "because of" or "on the basis of," which have been used by Congress in countless Federal discrimination and retaliation laws to require a causal connection between a protected characteristic and an employment decision, can mean different things in different laws.

H.R. 3721 rejects this reasoning. It seeks to restore the pre-*Gross* standard for proving age discrimination and to restore the longstanding presumption that Title VII's framework and precedent applies to other Federal discrimination and retaliation laws. And that Congress can rely on that body of law when choosing the phraseology of amendments or new laws.

We should act promptly to correct the *Gross* decision before more damage is done, and I look forward to hearing more about this from our witnesses today.

Do you want to make a statement? Did you want to make a statement? No?

There being no other opening statements, without objection all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection the Chair will be authorized to declare a recess of the hearing. We will now turn to our first witness. As we ask questions of our witness and of our second panel of witnesses afterwards, the Chair will recognize Members in the order of seniority in the Subcommittee, alternating between majority and minority, provided the Member is present when his or her turn arrives. Members who are not present when their turns begin will be recognized after the other Members have had an opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

[The bill, H.R. 3721, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 3721

To amend the Age Discrimination in Employment Act of 1967 to clarify the appropriate standard of proof.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 6, 2009

Mr. GEORGE MILLER of California (for himself, Mr. CONYERS, Mr. ANDREWS, Mr. NADLER of New York, Mr. COURTNEY, Ms. CHU, Ms. CLARKE, Mr. HOLT, Mr. HARE, Mr. KILDEE, Mr. LOEBSACK, Mr. SABLAN, Mr. SCOTT of Virginia, Ms. HIRONO, Ms. WOOLSEY, Mr. BISHOP of New York, and Mr. SESTAK) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To amend the Age Discrimination in Employment Act of 1967 to clarify the appropriate standard of proof.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Protecting Older
5 Workers Against Discrimination Act".

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds the following:

(1) In enacting the Age Discrimination in Employment Act of 1967, Congress intended to eliminate discrimination against individuals in the workplace based on age.

(2) In passing the Civil Rights Act of 1991, Congress correctly recognized that unlawful discrimination is often difficult to detect and prove because discriminators do not usually admit their discrimination and often try to conceal their true motives.

(3) Congress has relied on a long line of court cases holding that language in the Age Discrimination in Employment Act of 1967, and similar antidiscrimination and antiretaliation laws, that is nearly identical to language in title VII of the Civil Rights Act of 1964 would be interpreted consistently with judicial interpretations of title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991. The Supreme Court's decision in Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents.

(4) The holding of the Supreme Court in Gross, by requiring proof that age was the "but for" cause of employment discrimination, has narrowed the

1 scope of protection intended to be afforded by the
2 Age Discrimination in Employment Act of 1967,
3 thus eliminating protection for many individuals
4 whom Congress intended to protect.

5 (5) The Supreme Court's holding in Gross, rely-
6 ing on misconceptions about the Age Discrimination
7 in Employment Act of 1967 articulated in prior de-
8 cisions of the Court, has significantly narrowed the
9 broad scope of the protections of the Age Discrimi-
10 nation in Employment Act of 1967.

11 (6) Unless Congress takes action, victims of age
12 discrimination will find it unduly difficult to prove
13 their claims and victims of other types of discrimina-
14 tion may find their rights and remedies uncertain
15 and unpredictable.

16 (b) PURPOSE.—The purpose of this Act is to ensure
17 that the standard for proving unlawful disparate treat-
18 ment under the Age Discrimination in Employment Act
19 of 1967 and other anti-discrimination and anti-retaliation
20 laws is no different than the standard for making such
21 a proof under title VII of the Civil Rights Act of 1964,
22 including amendments made by the Civil Rights Act of
23 1991.

SEC. 3. STANDARD OF PROOF.

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding after subsection (f) the following:

"(g)(1) For any claim brought under this Act or any other authority described in paragraph (5), a plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that—

"(A) an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice; or

"(B) the practice complained of would not have occurred in the absence of an impermissible factor.

"(2) On a claim in which a plaintiff demonstrates a violation under paragraph (1)(A) and a defendant demonstrates that the defendant would have taken the same action in the absence of the impermissible motivating factor, the court—

"(A) may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under paragraph (1); and

1 "(B) shall not award damages or issue an order
2 requiring any admission, reinstatement, hiring, pro-
3 motion, or payment.
4 "(3) In making the demonstration required by para-
5 graph (1), a plaintiff may rely on any type or form of
6 admissible circumstantial or direct evidence and need only
7 produce evidence sufficient for a reasonable trier of fact
8 to conclude that a violation described in subparagraph (A)
9 or (B) of paragraph (1) occurred.
10 "(4) Every method for proving either such violation,
11 including the evidentiary framework set forth in McDon-
12 nell-Douglas Corp. v. Green, 411 U.S. 792 (1973), shall
13 be available to the plaintiff.
14 "(5) This subsection shall apply to any claim that the
15 practice complained of was motivated by a reason that is
16 impermissible, with regard to that practice, under—
17 "(A) this Act, including subsection (d);
18 "(B) any Federal law forbidding employment
19 discrimination;
20 "(C) any law forbidding discrimination of the
21 type described in subsection (d) or forbidding other
22 retaliation against an individual for engaging in, or
23 interference with, any federally protected activity in-
24 cluding the exercise of any right established by Fed-
25 eral law (including a whistleblower law); or

"(D) any provision of the Constitution that protects against discrimination or retaliation.

"(6) This subsection shall not apply to a claim under a law described in paragraph (5)(C) to the extent such law has an express provision regarding the legal burdens of proof applicable to that claim.

"(7) In any proceeding, with respect to a claim described in paragraph (5), the plaintiff need not plead the existence of this subsection.

"(8) In this subsection, the term 'demonstrates' means meet the burdens of production and persuasion.".

SEC. 4. APPLICATION.

This Act, and the amendments made by this Act, shall apply to all claims described in section 4(g)(4) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(g)(4)) pending on or after June 17, 2009.

○

Mr. NADLER. Our first witness, indeed our first panel, is Jocelyn Samuels, who is the senior counsel to the Assistant Attorney General for Civil Rights at the Department of Justice. Prior to joining the Justice Department in 2009 she was the vice president for education and employment at the National Women's Law Center in Washington, D.C.

Ms. Samuels also previously served as the labor counsel to the late Senator Ted Kennedy during his tenure as Chairman of the Senate Committee on Health, Education, Labor and Pensions and as a senior policy attorney at the Equal Opportunity Commission.

Ms. Samuels earned her law degree from Columbia and her B.A. from Middlebury College. I am pleased to welcome you. Your written statement in its entirety will be made part of the record. I would ask you to summarize your testimony in 5 minutes or less.

And to help you stay within that time there is a timing light at your table, although the Chair is generally pretty liberal in seeing the light. When 1 minute remains the light will switch from green to yellow and then to red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses.

Let the record reflect that the witnesses answered in the affirmative, and you may be seated. And you are now recognized.

TESTIMONY OF JOCELYN SAMUELS, SENIOR COUNSEL, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION

Ms. SAMUELS. The light is on. Okay. It is an honor to appear before you today to address H.R. 3721, the "Protecting Older Workers Against Discrimination Act."

Legislation like H.R. 3721, which would overturn the Supreme Court's decision in *Gross v. FBL Financial Services,* is necessary to ensure that victims of age and other types of intentional discrimination are accorded the same legal protections as those subject to discrimination based on race, color, sex, national origin and religion.

The *Gross* decision upset that basic understanding, and legislation is critical to create unity in the law and to avoid the patchwork of inconsistent and unpredictable standards to which the Supreme Court's decision opens the door.

In *Gross*, the Court held that plaintiffs under the Age Discrimination in Employment Act may not rely on a mixed-motive analysis to hold their employers accountable for age discrimination. Instead, the Court held, plaintiffs must demonstrate that age was a "but for" factor in cause of an adverse employment decision.

In reaching this conclusion, as Mr. Chairman you noted in your opening remarks, the Court rejected its prior construction of identical language in Title VII. In *Price Waterhouse v. Hopkins,* the Court had held that under Title VII a plaintiff showing that discrimination was a motivating factor in an employment decision then shifted the burden to the employer to show that it would have made the same decision even absent the discrimination.

Under the *Price Waterhouse* decision, the employer was liable if it failed to make this showing. Under the ADEA after *Gross*, by contrast, a plaintiff who demonstrates that age motivated the em-

ployer's action is not entitled to the *Price Waterhouse* shift in burdens.

Under *Gross* the burden never shifts at all, and an employer need not, to avoid liability, demonstrate that it would have made the same decision even had it not relied on age. Instead, the plaintiff must meet the substantially heightened burden of showing not only that the employer relied on age, but also that the employer would not have made the same decision absent its discrimination.

The *Gross* decision raises issues that are far from merely technical. By substantially raising the burdens of proof imposed on age discrimination plaintiffs, the Court has effectively reduced the protections available to older workers.

The decision puts plaintiffs in the difficult if not impossible position of having to prove a negative; that the employer would not have made the same decision had it not been for the discrimination based on information that is often in the employer's sole possession.

And if a plaintiff cannot make this showing *Gross* deprives courts of the power to enjoin even employment practices that have been proven to be tainted by age bias.

Not surprisingly, *Gross* has led numerous courts to dismiss ADEA claims for a failure of proof. But courts have also applied the *Gross* decision to bar mixed-motive claims and impose greater burdens on plaintiffs under numerous other laws as well, including the Americans with Disabilities Act, Section 1983 of the Civil Rights Act of 1866, the Employee Retirement Income Security Act and the Jury Systems Improvement Act.

Courts have further questioned whether *Gross* should be read to bar mixed-motive claims under other statues, including the Family and Medical Leave Act. And even where courts have not yet reached the inquiry, the interpretation of other anti-discrimination laws, such as the Fair Housing Act, could well be at risk.

Under each of these laws, application of *Gross* can undermine the protections the laws were intended to provide. In addition, as these cases show, *Gross* has created and will continue to create confusion and unpredictability in the law, subjecting plaintiffs, and employers for that matter, to a patchwork of uncertain and potentially inconsistent interpretations of anti-discrimination standards.

At a minimum, this creates inefficiency and the potential for years of litigation. More fundamentally, it undermines the basic premise that all victims of intentional discrimination should have the same tools to hold their employers accountable and that those tools should create effective deterrents to discrimination.

Congress can respond to the *Gross* decision and ensure that the ADEA and other anti-discrimination laws are interpreted in the same way as Title VII. In the Civil Rights Act of 1991, Congress codified the mixed-motive approach for Title VII and made clear that plaintiffs can establish a violation of the law by demonstrating that discrimination is a motivating factor for an employer's decision, even if other factors also motivated the decision.

Under the 1991 Act, the burden of showing that the employer would have made the same decision rests appropriately on the employer. An employer that meets this standard may nonetheless limit the individual relief that is available to the plaintiff.

H.R. 3721 would adopt this standard for the ADEA and other laws. Legislation like this bill would strike an appropriate and workable balance between enabling courts to prevent and deter future violations of the law, on the one hand, and preserving employers' freedom to make non-discriminatory decisions on the other.

It would make clear that discrimination is prohibited in employment in whole or in part. It would provide the same protections from intentional discrimination that are available under Title VII to victims of discrimination on other bases.

It would thereby create unity in the law, renew the ability of older workers and others to effectively challenge discrimination against them, and move us closer to realizing the law's promise of equal employment opportunity.

The Department of Justice looks forward to providing technical assistance on the bill and to working with the Committee to achieve these goals.

Thank you again for inviting me to testify today. I look forward to your questions.

[The prepared statement of Ms. Samuels follows:]

PREPARED STATEMENT OF JOCELYN SAMUELS

Department of Justice

STATEMENT OF

JOCELYN SAMUELS
SENIOR COUNSELOR TO THE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND LIBERTIES
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 3721, THE "PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT"

PRESENTED

JUNE 10, 2010

Statement of
Jocelyn Samuels
Senior Counselor to the Assistant Attorney General for Civil Rights
Department of Justice

Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary

Concerning
H.R. 3721, the "Protecting Older Workers Against Discrimination Act"

June 10, 2010

Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee, it is an honor to appear before you today to discuss H.R. 3721, the "Protecting Older Workers Against Discrimination Act." This bill would overturn the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*[1] In doing so, the bill seeks to serve several critical purposes. The bill would advance Congress's intent to eradicate age discrimination in the workplace under the Age Discrimination in Employment Act (ADEA)[2] and restore protections against that discrimination that the Supreme Court's decision substantially undermines. The bill would also effectuate Congress's intent that the fundamental prohibitions of the ADEA be interpreted and applied consistently with Title VII of the Civil Rights Act of 1964; it would thereby promote unity in the law and avoid the patchwork of inconsistent and unpredictable standards to which the Supreme Court's decision opens the door. Importantly, the bill would also ensure that persons who face discrimination on the basis of age or other prohibited factors have the same tools that Congress provided to those who are subject to discrimination based on race, color, sex, national origin and religion to challenge the adverse treatment to which they have been subjected.

The* Gross *Decision Departed from Settled Precedent

In 2004, Jack Gross filed suit under the ADEA, claiming that his reassignment within the FBL Financial Services company was an age-motivated demotion. Applying a "mixed motive" approach in assessing the employer's liability, a jury found that Mr. Gross had proved that age was, indeed, a "motivating factor" in the reassignment and that the company had failed to prove that it would have demoted him even absent the age discrimination. The jury thus awarded Mr. Gross $46,945 in back pay.

The trial court derived its mixed motive framework of analysis from the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,[3] in which the Court held that under Title VII, a

[1] 129 S. Ct. 2343 (2009).
[2] 29 U.S.C. Sec. 621 *et seq.*
[3] 490 U.S. 228 (1989).

plaintiff's showing that discrimination is a "motivating factor" in an employment decision then shifts the burden to the employer to show that it would have made the same decision absent the discriminatory consideration. Under the *Price Waterhouse* decision, the plaintiff prevails – that is, liability is established -- if the employer fails to make this showing.[4]

The Court of Appeals in Mr. Gross's case reversed the jury's verdict, finding that the court's mixed motive instruction to the jury was impermissible in the absence of "direct evidence" of age discrimination – that is, evidence that on its face demonstrated that the employer made its decision, at least in part, on the basis of Mr. Gross's age. The Supreme Court granted certiorari to address the question of whether an age discrimination plaintiff was required to present direct evidence to obtain a mixed motive instruction or could instead rely on either direct or circumstantial evidence.

In a decision that addressed a question that had been neither presented, fully briefed, nor argued to the Court and that upended established precedent, the Supreme Court ruled that age discrimination plaintiffs may not proceed under a mixed motive theory at all. Under the Court's decision, the burden never shifts to an employer to show that it would have made the same decision even absent discrimination; instead, a plaintiff retains the burden of proving in all cases that age was a "but for" cause of the adverse employment decision – in other words, of proving that the employer would *not* have made the same decision if discrimination had not been at play. In reaching this conclusion, the Court disregarded its own prior construction, in the *Price Waterhouse* decision, of the identical language of Title VII; ignored the decision of every court of appeals to have considered whether a mixed motive framework was available under the ADEA; and dismissed its prior recognition, under the Constitution and other laws, that discrimination exists where a prohibited purpose is a "motivating factor" for a decision and that a defendant can avoid liability only if it meets the burden of showing that it would have reached the same decision anyway.

As previously noted, the Court in *Gross* flatly refused to apply to the ADEA the interpretation it had given to identical language in Title VII in *Price Waterhouse*. In *Price Waterhouse*, the Court ruled that discrimination is "because of" sex (and, by extension, race, color, religion or national origin) if the prohibited trait at issue motivated the adverse action – even if other permissible factors also motivated the action – and that the employer is liable for the discrimination unless *it* proves it would have made the same decision anyway. In *Gross*, by

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[4]The Court in *Price Waterhouse* also held that if the employer does succeed in making a "same decision" showing, there is no statutory violation. Congress reversed this aspect of *Price Waterhouse* In the Civil Rights Act of 1991. Now, a Title VII violation occurs any time a plaintiff proves that an impermissible criterion is a motivating factor in the adverse action – even if the defendant *also* proves that it would have taken the same action anyway. 42 U.S.C. Sec. 2000e-2(m). In such cases, however, plaintiffs will be entitled only to declaratory relief, injunctive relief and attorneys' fees and will not be eligible to receive monetary damages or equitable relief such as reinstatement. 42 U.S.C. 2000e-5(g)(2)(B).

contrast, the Court construed the ADEA's "because of" language to require a plaintiff to prove that her employer would *not* have made the challenged decision but for age discrimination. This departure from longstanding precedent was particularly troubling given that, as Justice Stevens noted in his dissent, the Court had "long recognized that [its] interpretations of Title VII's language apply 'with equal force in the context of age discrimination.'"[5]

It was this understanding of the applicability of Title VII precedent that had informed the holdings of the courts of appeals that considered the availability of a mixed motive analysis under the ADEA prior to the *Gross* decision. Indeed, every appellate court to address the question had applied the *Price Waterhouse* mixed motive theory of causation to ADEA claims.[6] Moreover, the mixed motive framework has been based not solely on the Court's understanding of statutory language barring discrimination "because of" prohibited factors; it is also grounded in the Court's longstanding treatment of Constitutional violations. In a First Amendment retaliation case, for example, the Court ruled that a plaintiff must show that his constitutionally-protected conduct was a "motivating factor" in the challenged decision; to avoid liability, the defendant then has the burden to show that it would have "reached the same decision . . . even in the absence of the protected conduct."[7] Similarly, the Court has applied the mixed motive analysis under the National Labor Relations Act,[8] holding that once a plaintiff shows that his protected conduct was a motivating factor in the employer's decision, the employer may then avoid liability only by showing "that the employee would have lost his job in any event."[9] As the Court recognized, this allocation of the burdens is reasonable because

> [t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.[10]

For all of these reasons, the Court's decision in *Gross* was an outlier in the Court's own well-established precedent on causation and burdens of proof in cases of intentional discrimination. The impact of this departure from precedent is troubling on numerous grounds.

---

[5]*Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2354 (Stevens, J., dissenting) (citations omitted).

[6]See *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2354 n.5 (Stevens, J., dissenting) (listing cases).

[7]*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

[8]29 U.S.C. Sec. 151 *et seq.*

[9]*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[10]*Id.* at 403.

The Impact of the* Gross *Decision is Troubling and Broad-Based

The *Gross* decision has several troubling consequences, all of which weaken the efficacy of anti-discrimination laws. Most directly, by making the plaintiff's burden more onerous in ADEA cases, the decision reduces protections against age discrimination in the workplace and limits courts' ability to enjoin biased decisionmaking. The decision also threatens the interpretation of laws well beyond the ADEA and seems likely to create a patchwork of unpredictable and inconsistent legal standards that undermine the unity of anti-discrimination law.

The Gross *Decision Reduces Protections Against Age Discrimination*

As an initial matter, the *Gross* decision narrows the scope of protections available to older workers under the ADEA and deprives them of a critical tool to hold their employers accountable for age bias. As courts have recognized, *Gross* "elevat[ed] the quantum of causation required under the ADEA,"[11] and prevents an employee from demonstrating age discrimination – even in cases in which there is "smoking gun" evidence of discriminatory animus – unless the employee can *also* demonstrate that the adverse action would not have occurred absent that animus. By significantly increasing a plaintiff's burden of proof to hold an employer liable for discrimination, the Court's opinion enshrines in law the principle that certain employment decisions that are admittedly tainted by age bias are nonetheless permissible – a principle that can undermine the deterrent effect of the law. The decision also places those subject to age discrimination in the untenable position of having to prove a hypothetical that relies on evidence often exclusively within the employer's possession: that the employer would *not* have made the challenged decision had it *not* taken the employee's age into account. Not surprisingly – and as was addressed eloquently in testimony provided by the Chair of the Equal Employment Opportunity Commission, Jacqueline Berrien, to the Senate Committee on Health, Education, Labor & Pensions -- this holding has led numerous courts to dismiss ADEA claims for a failure of proof.[12]

The availability of a mixed motive framework for proof of discrimination presents far more than a technical question about how a court will conduct a trial of discrimination claims, moreover. Indeed, courts' experience with mixed motive analysis under Title VII demonstrates

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[11] *Fuller v. Seagate Technology*, 651 F. Supp. 2d 1233, 1248 (D. Colo. Aug. 19, 2009).

[12] *See, e.g., Kelly v. Moser, Patterson & Sheridan, LLP*, No. 08-3318, 2009 WL 3236054 (3d Cir. Oct. 9, 2009) (unpublished) (finding no liability where plaintiff established that age discrimination was only a "secondary consideration" in employer's decision); *Wellesley v. Debevoise & Plimpton, LLP*, No. 08-1360, 2009 WL 3004102 (2d Cir. Sept. 21, 2009) (dismissing ADEA claim where plaintiff failed to prove that age discrimination was a but-for cause of decision); *Anderson v. Equitable Resources, Inc.*, No. 08-952, 2009 WL 4730230, at *14-15 (W.D. Pa. Dec. 4, 2009) (insufficient to carry plaintiff's burden of proof where plaintiff demonstrated that age played *a* role in the decision but not a determinative one).

that that analysis, and its shifting burdens of proof, can be significant in enabling a plaintiff to hold an employer liable, and thus accountable, for discrimination. In the *Price Waterhouse* case itself, for example, Ann Hopkins prevailed in her lawsuit challenging the company's failure to make her a partner because Price Waterhouse failed to "separate out those comments tainted by sexism from those free of sexism for the purpose of demonstrating that nondiscriminatory factors alone" could explain the decision. The court there noted that, because the company had allowed gender stereotyping to play a role in its decision, it was fair for the defendant to "bear the risk that the inference of illegal and legal motives cannot be separated."[13]

Similarly, in *Costa v. Desert Palace, Inc.*,[14] Catherina Costa was able to prevail in, and receive damages for, her sex discrimination claim where her employer had -- but failed to carry -- the burden of proving that it would have made the decision to discharge her in the absence of the discrimination. Costa was the sole female warehouse worker at Caesars, a Las Vegas casino, driving trucks and operating heavy equipment like forklifts and pallet jacks to retrieve food and beverage orders. Her work had been characterized as both "excellent" and "good," but she was disciplined more harshly than her male coworkers, was singled out for "stalking" by her supervisor, and was denied overtime opportunities awarded to men at the casino. Supervisors also used and tolerated sex-based slurs. Although the employer claimed that it had discharged her because of her disciplinary history, the court found that that history was itself infected by sex discrimination and that the jury had permissibly concluded that "Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex."[15]

The Gross *Decision Undermines Congress's Intent that the ADEA and Other Anti-Discrimination Laws be Interpreted Consistently with Title VII*

In enacting the ADEA, Congress intended to "promote employment of older persons based on their ability rather than age[, and] to prohibit arbitrary age discrimination in employment."[16] As the Supreme Court has recognized, Congress intended the ADEA to be a vital part of its ongoing "effort to eradicate discrimination in the workplace," reflecting "a

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[13]*Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206-1207 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

[14]299 F.3d 838 (9th Cir. 2002) (*en banc*). The case had gone to the Supreme Court at an earlier stage, resulting in the Court's opinion that mixed motive claims under Title VII may be based on either direct *or* circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003).

[15]299 F.3d at 863. Plaintiffs have also been able to withstand motions for summary judgment where they have produced sufficient evidence to allow a jury to determine that a prohibited factor was a motivating factor for their employers' decision. See, *e.g.*, *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir 2008); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061 (9th Cir. 2003).

[16]29 U.S.C. 621(b).

societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide."[17]

These purposes are undermined where the Court interprets the law, as it did in *Gross*, in ways that hinder employees' attempts to hold their employers accountable for discrimination. Indeed, the Court's *Gross* decision ignores legislative history explicitly manifesting Congress's intent to extend the mixed motive approach to ADEA claims. In the Civil Rights Act of 1991, in which Congress amended Title VII to codify the shifting burdens of proof of the mixed motive framework, a key Congressional report stated that a

> number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), are modeled after, and have been interpreted in a manner consistent with, Title VII. . . . [T]hese other laws modeled after Title VII [should] be interpreted in a manner consistent with Title VII as amended by this Act.[18]

More generally, moreover, as Justice Stevens recognized in his dissent in *Gross*,

> [t]he relevant language [in Title VII and the ADEA] is identical, and we have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII.'[19]

In addition, *Gross* calls into question the longstanding canon of construction that Congress intends identical language in similar anti-discrimination statutes to be construed in the same way.[20] *Gross* suggests that absent specific statutory language directing a particular approach to an issue, the Court will be reluctant to borrow accepted principles from identically worded laws in order to effectuate Congress's clear intent and broad anti-discrimination goals. As the Seventh Circuit has stated, for example, its decisions adopting a mixed motive theory "do not survive *Gross*, which holds that, *unless a statute (such as the Civil Rights Act of 1991) provides*

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[17]*McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).

[18]H.R. Rep. No. 40, Part 2, 102d Cong., 1st Sess. 4 (1991) (citations omitted); *see also Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2356 n.6 (2009) (Stevens, J., dissenting) (pointing to this legislative history as "some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well").

[19]129 S.Ct. at 2354 (Stevens, J., dissenting) (citations and internal quotation marks omitted).

[20]*See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 233-34 (2007) ("we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes"); *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (similarity of language in two statutes "is, of course, a strong indication that the two statutes should be interpreted pari passu").

otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[21] The *Gross* decision thus undermines the principle that anti-discrimination statutes with similar or identical language should be interpreted in a unified way, and could impose on Congress the burden to provide explicit statutory authorization for every principle that it intends to have courts extend beyond Title VII.

The Gross *Decision Threatens the Interpretation of Laws Beyond the ADEA*

As noted above, the *Gross* decision most directly weakens the protections available to older workers. But the decision has also been applied to bar mixed motive claims – and to require plaintiffs to prove that discrimination was a "but for" cause of an adverse decision -- under numerous other laws as well. *Gross* has been used to prohibit the mixed motive method of proof, for example, in cases challenging employment discrimination based on disability in violation of the Americans with Disabilities Act;[22] job discrimination because of protected speech under 42 U.S.C. 1983;[23] interference with pension rights in violation of the Employee Retirement Income Security Act of 1974;[24] and job discrimination based on an employee's jury service in violation of the Jury Systems Improvement Act.[25]

Courts have further questioned whether *Gross* should be read to bar mixed motive claims under other laws, including 42 U.S.C. 1981 and the Family and Medical Leave Act.[26] And even

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[21]*Fairley v. Andrews*, 578 F.3d 518, 525-526 (7th Cir. 2009) (emphasis added), *cert. denied*, 2010 WL 2025147 (May 24, 2010); *see also Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) ("Although the *Gross* decision construed the ADEA, the importance that the Court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination law lacks comparable language, a mixed-motive claim will not be viable under that statute.").

[22]42 U.S.C. 12101 *et seq*; *Serwatka*, 591 F.3d 957.

[23]*Fairley*, 578 F.3d at 525-526.

[24]29 U.S.C. 1001 *et seq.; Nauman v. Abbott Laboratories*, No. 04-7199 (N.D. Ill. April 22, 2010).

[25]28 U.S.C. 1875; *Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) ("[t]he Court has no doubt that [plaintiff's] jury service was *a* motivating factor behind [the employer's decision to transfer her]. What is lacking is any evidence that her jury service was 'the "but-for" cause' of the decision").

[26]*Brown v. J. Kaz, Inc.*, 581 F.3d 175, 186 (3d Cir. 2009) (Jordan, J., concurring) (continuing to apply a Title VII mixed motive analysis under 42 U.S.C. 1981 "ignores the fundamental instruction in *Gross* that analytical constructs are not to be simply transposed from one statute to another without a thorough and thoughtful analysis"); *Crouch v. JC Penney Corp., Inc.*, 337 F. App'x. 399, 402 n.1 (5th Cir. 2009) (stating, in a case arising under the Family and Medical Leave Act, that "[t]he Supreme Court's recent opinion in *Gross* raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework") (citation omitted).

where courts have not yet reached the inquiry, the interpretation of anti-discrimination statutes that use the same language as Title VII and that have previously been construed to permit a mixed motive analysis – such as the Fair Housing Act – may well be at risk.[27]

In addition to extending *Gross* beyond the ADEA, moreover, some courts have distorted its holding to require plaintiffs to prove not only that age was a "but for" cause of the adverse action taken against them but that it was in fact the *sole* basis for the consequences they suffered. Indeed, this reasoning has been applied to dismiss age discrimination claims where a plaintiff alleges that the adverse decision was the product of both age and a factor *proscribed by another law*. In one case, for example, the plaintiff was forced to choose between his Title VII and his ADEA claim. Because the court interpreted *Gross* to require the plaintiff to show that age was the "only" reason for the adverse decision, it held that the plaintiff could not claim that the decision was based on age while simultaneously claiming that the employer also had another unlawful motive.[28] These cases amply illustrate the need for legislation to overturn the *Gross* decision.

The Gross *Decision Risks Creating a Patchwork of Unpredictable and Inconsistent Standards*

Gross also creates confusion and unpredictability in the law that could take years to resolve. It is unclear, for example, what standard of causation a court will apply in cases where a plaintiff alleges that the same facts make out violations of two separate statutory schemes – race discrimination in violation of both Title VII and Section 1981, for example. The problem is particularly acute where a plaintiff alleges intersectional discrimination, in a case claiming, for example, that an employer has unlawfully discriminated against older women in violation of both Title VII and the ADEA. Even assuming that the ADEA claim survives in this situation (which, in the decisions cited above, it apparently would not), it is unclear whether courts would be prepared to apply a mixed motive analysis in such cases.

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[27]The Fair Housing Act, 42 U.S.C. 3601 *et seq.*, prohibits housing discrimination "because of" various prohibited characteristics – the identical language used under both Title VII and the ADEA. Cases interpreting the law prior to *Gross* had made clear that a mixed motive framework was available. See, *e.g.*, *United States v. Big D. Enterprises, Inc.*, 184 F.3d 924, 931 (8th Cir. 1999) (under FHA, plaintiff need prove only that impermissible consideration was a motivating factor); *Cabrera v. Jackabovitz*, 24 F.3d 372, 382-82 (2d Cir. 1994) (same).

[28]*Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009). See also *Love v. TVA Board of Directors*, No. 06-754, 2009 WL 2254922 (M.D. Tenn. July 28, 2009); *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009), *aff'd*, No. 09-3666, 2010 WL 1718714 (3d Cir. April 29, 2010); cf. *Belcher v. Service Corp. Int'l*, 2009 U.S. Dist LEXIS 102611, at *8 (E.D. Tenn. Nov. 4, 2009) ("[w]hile *Gross* arguably makes it impossible for a plaintiff to ultimately recover on an age and a gender discrimination claim in the same case, the undersigned does not read *Gross* as taking away a litigant's right to plead alternate theories under the Federal Rules").

More broadly, the law should not create a hierarchy of plaintiffs where those subject to certain kinds of discrimination are entitled to more protection than those subject to other kinds of unlawful conduct. Age-based animus is no less disturbing or unacceptable than animus based on sex or national origin; protections available to victims of unlawful discrimination should be consistent and clear. *Gross* ignores this fundamental understanding, and legislation is necessary to fully realize this principle.

The "Protecting Older Workers Against Discrimination Act" Would Overturn the* Gross *Decision

For all of the reasons set forth above, legislation like H.R. 3721 is necessary to provide to ADEA plaintiffs the same core protections and standards of causation that are available to those subject to discrimination on the bases of race, color, national origin, sex and religion. Most centrally, the bill would make clear that plaintiffs may establish a violation of the ADEA by demonstrating that age was a "motivating factor" in the employer's decision, even if other factors also motivated the decision.[29] The bill would also clarify that a plaintiff may rely on any evidence, whether direct or circumstantial, in meeting this burden,[30] but allow an employer motivated in part by age to nonetheless limit the remedies available to the plaintiff where it can show it would have taken the adverse action even absent the prohibited consideration.[31] Finally, although the bill is generally couched in terms of an amendment to the ADEA, we note that there is broader language at one point that suggests application to all Federal laws and constitutional provisions barring employment discrimination and retaliation.

Codifying the mixed motive framework embodied in Title VII, as amended by the Civil Rights Act of 1991, for ADEA and other anti-discrimination claims would strike a careful and appropriate balance between preventing and deterring future violations of the law, on the one hand, and ensuring that employers are free to make nondiscriminatory choices in their employment practices, on the other. Such a codification would make clear that the law forbids *any* reliance on age or other prohibited factors in employment decision making and would provide to courts the authority to enjoin and correct the employer's unlawful practices; it would thus enhance the deterrent impact of the law that is so crucial to achievement of its purposes. At the same time, H.R. 3721 would limit the remedies available where an employer could demonstrate that it would have made the same decision even absent the discrimination; a plaintiff in this situation would be entitled to no back pay or damages and could not seek reinstatement to her position. This approach mirrors the workable, appropriate framework that has been applied under Title VII since enactment of the Civil Rights Act of 1991, and would ensure that all victims of discrimination, on all of the bases prohibited under the Federal anti-discrimination laws, would have the same protections from intentional discrimination.

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[29]H.R. 3721, Sec. 3(g)(1).
[30]H.R. 3721, Sec. 3(g)(3).
[31]H.R. 3721, Sec. 3(g)(2).

The *Gross* decision undermines this country's basic commitment to equality and to the principle that employers should be held accountable whenever they make employment decisions with discriminatory intent. Legislation like H.R. 3721 is critical to restore the ability of older workers and others to effectively challenge discrimination against them and to realize the law's promise of true equality of employment opportunity. The Department of Justice looks forward to providing technical assistance on the bill and to working with the Committee to achieve this goal.

Thank you again for inviting me to testify today. I look forward to your questions.

Mr. NADLER. Thank you. I will begin the questioning by recognizing myself for 5 minutes. Ms. Samuels, as a practical matter, what does the *Gross* ruling mean in terms of the scope of protection against discrimination for older workers under ADEA and more broadly, given that the lower courts have already applied the *Gross* ruling and reasoning to a variety of other laws?

Ms. SAMUELS. Thank you very much for that question, Chairman Nadler. As I mentioned in my statement, the *Gross* decision has

had numerous troubling consequences, both under the ADEA and under the laws to which courts have extended it.

Initially, of course, the *Gross* decision reduces the protections available to age discrimination plaintiffs. They are now subject to a new burden that they had never had to bear under all of the precedent that pre-dated the *Gross* decision. Namely the obligation to prove that age is a "but for" cause of discrimination.

That makes it harder for plaintiffs to prevail in cases even in which employers admit that they have relied on age discrimination and reduces court's power to enjoin age discrimination in the future. That, of course, also reduces the deterrent effect of the law.

In addition, the fact that other courts have extended *Gross* to laws like the Americans With Disabilities Act or the Jury Systems Improvement Act, suggests that under those laws, protections for plaintiffs that Congress intended to protect will be similarly reduced.

The decision also creates tremendous confusion and the possibility of endless litigation about the standards that should apply going forward.

Mr. NADLER. Let me ask you at this point, if the "but for" standard were left alone in the law, does that basically preclude recovery in most cases? Is it like the strict scrutiny standard which almost nothing ever meets?

Ms. SAMUELS. Well, I think that plaintiffs can prevail if they are able to show that age or another prohibited basis is a "but for" cause of discrimination, and that has long been an available theory of discrimination under Title VII and other laws. And plaintiffs have been able to win their cases. That said——

Mr. NADLER. But rarely.

Ms. SAMUELS [continuing]. The Supreme Court decision in *Gross* makes it substantially more difficult to prevail in the all too common situation in which employers act based on a combination of quotas.

Mr. NADLER. Now, we have talked about the fact that we now have different causation standards, apparently, in ADEA and Title VII, and a variety of different meanings for the same words in the same phrase because of we are "on the basis of." Is there any good that can come of that? Is there any good reason to have different meanings ascribed in different laws passed for the same purpose, to the same phrase?

Ms. SAMUELS. I think that unity in the law is a very important goal and one that has been recognized by the Court in prior cases. As Justice Stevens noted in his dissent, Title VII has provided the model for interpretation of the ADEA since the ADEA was enacted.

And there is substantial indication that Congress has intended the ADEA and other anti-discrimination laws that use identical language to Title VII to be interpreted in the same way.

Mr. NADLER. Now, do you think that H.R. 3721, as drafted, adequately restores the basic presumption that when Congress prohibits discrimination or retaliation because of or on the basis of the protective characteristic or conduct should be deemed irrelevant and not considered in whole or in part? I mean, is the language in this bill adequate to its purpose or should it be improved in some way?

Ms. SAMUELS. The Department of Justice would be delighted to work with the Committee. As you know, these are technical issues related to burdens of proof and the way in which courts conduct trials. We are very supportive of the goals of this legislation and would be delighted to provide assistance to make sure that it accomplishes Congress' intent.

Mr. NADLER. But you see no problem glaring out that will negate it.

Ms. SAMUELS. I am sorry, no problem?

Mr. NADLER. Glaring out. It is not on its face inadequate?

Ms. SAMUELS. I think that the legislation is clear in its intent to overturn the *Gross* decision and to impose standards analogous to those under the Civil Rights Act of 1991 for Title VII and is effective in doing that.

Mr. NADLER. Okay. Finally, in your testimony you say that although the bill is generally couched in terms of an amendment to the ADEA, we note that there is broader language at one point that suggests application to all Federal laws and constitutional provisions, barring employment discrimination and retaliation. "Broader language that suggests," do you think that language should be tightened up?

Ms. SAMUELS. I think that, you know, as you noted in your statement and I did in mine, courts have extended the reasoning of the *Gross* decision to numerous other laws and it is important to address the effects of those laws. We would be happy to talk about the most effective way to ensure that the legislation addresses all of the ways——

Mr. NADLER. Adequately addresses then.

Ms. SAMUELS [continuing]. That *Gross* has created problems.

Mr. NADLER. All right, I think we will have to work together on that. And I think that is it. I thank you. I yield back the balance of my nonexistent time at this point.

I now recognize the distinguished gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Ms. Samuels, you indicated it is harder, but is it possible to prove a case if the defendant doesn't admit or you have somebody on the inside admit that there was discrimination that would have made the difference?

Ms. SAMUELS. Well, the problem with the *Gross* decision, of course, is that even if the employer does admit that it relied in part on age discrimination, there is nothing that a plaintiff can do about it because the Supreme Court has said that there is no mixed-motive framework.

Certainly putting the burden on the plaintiff to prove that age was—that the employer would not have made the same decision anyway, requires the plaintiff to have access to information that is often only in the possession of the employer.

Mr. SCOTT. So if the employer doesn't admit or turn over evidence it would be virtually impossible under present standards to prove discrimination?

Ms. SAMUELS. I don't want to say it would be impossible because unfortunately under the *Gross* decision that is the situation that plaintiffs confront, but it is substantially more difficult for them.

Mr. SCOTT. Well, under the law in other cases if you have made your case and accused them of discrimination and they come back with an explanation which turns out to be bogus, a pretext, what happens in that case?

Ms. SAMUELS. Well, that standard, which was the one adopted by the Supreme Court in the McDonnell Douglas decision says that there are shifting burdens of producing evidence. And if the plaintiff makes a prima facie case that a discriminatory basis was part of the reason, the employer gets to produce evidence of a legitimate nondiscriminatory reason.

Under those cases the plaintiff has the burden of showing that the employer's reason is in fact a pretext for discrimination. Unfortunately, the Court in *Gross* suggested that there might be some doubt about whether the McDonnell Douglas standard applies under the Age Discrimination in Employment Act, something that had not previously been questioned.

Mr. SCOTT. And so if you have one of the other cases, if you show the pretext just wasn't true then that can be used as evidence that there was in fact discrimination. Is that right?

Ms. SAMUELS. Yes.

Mr. SCOTT. And would this bill restore that idea?

Ms. SAMUELS. This bill would make clear that that framework of analysis which has prevailed under Title VII for the last 40 years also clearly applies under the ADEA.

Mr. SCOTT. Now, in terms of discrimination with faith-based organizations, it is—discrimination is allowable, but is it not faith-based organizations running Federal programs where they can be running a Federal program and decide not to hire Catholics or Jews if they don't want to? Is that the present law?

Ms. SAMUELS. Well, under Title VII religious organizations, and there is a, you know, very carefully defined universe of entities that would be qualified to be religious organizations, can restrict their hiring to co-religionists. That said, the often——

Mr. SCOTT. Or they can exclude people. I mean it is not just internal.

Ms. SAMUELS. They can restrict hiring to co-religionists. They can't discriminate based on sex, ethnic origin and——

Mr. SCOTT. Well, I mean they can hire everybody they want except certain groups. It is not inclusive. It is also exclusive. Is that right?

Ms. SAMUELS. Title VII provides that authorization to religious organizations.

Mr. SCOTT. Now, it used to be the law that if you are running a federally-funded program you had to comply with ordinary anti-discrimination provisions. Is that right?

Ms. SAMUELS. Yes.

Mr. SCOTT. And if you are running a federally-funded program today can the religious organizations running a federally-funded program discriminate based on religion?

Ms. SAMUELS. Representative Scott, I am not able to tell you today what the state of the law is on that. I know that there have been concerns expressed about interpretations of the government, and I would be happy to take those concerns back.

Mr. SCOTT. What prohibition would there be? You said they are not covered by Title VII. They are not covered by Title VI. What is it—where would they be covered? It used to be Johnson's executive order from 1965 that the Bush administration undermined in the early in their Administration. What prohibition is there against discrimination based on religion?

Ms. SAMUELS. Well, there is obviously a constitutional level of protection that bars the government from establishing religion or from preventing the free exercise of religion. So to the extent that employment discrimination——

Mr. SCOTT. If someone were to come to your department and say that I was discriminated against when I applied for a job paid for with Federal money, and they told me that I wasn't the right religion, what would your reaction be?

Ms. SAMUELS. My reaction would be to consult my colleagues back at the Department of Justice so that we could provide assistance and input on that question.

Mr. SCOTT. So you are not clear as to whether or not that is legal or not.

Ms. SAMUELS. I am aware that the Office of Legal Counsel at the Department of Justice has issued an opinion on this question, and that that has been in existence for the last number of years.

Mr. NADLER. Could you ask her to find out and let her submit it for the record?

Mr. SCOTT. The Chairman has asked me to have you inquire to your colleagues to ascertain whether or not a faith-based organization running a federally-funded program can have a policy of not hiring Catholics and Jews.

Ms. SAMUELS. I would be happy to take that inquiry back.

Mr. NADLER. Would the gentleman yield?

Mr. SCOTT. I yield.

Mr. NADLER. Thank you. Let me add to that. Would there be anything to prevent a religious group, the whatchamacallit church, getting federally-funded grants to state that its religion bars hiring anybody over the age of 60?

Ms. SAMUELS. As I mentioned, the exemption given in Title VII is only to permit religious organizations to hire co-religionists. It does not authorize——

Mr. NADLER. Oh, it is to hire——

Ms. SAMUELS [continuing]. Any other form of discrimination.

Mr. NADLER [continuing]. Excuse me. I thought it was to not to enable them only to hire co-religionists, but to enable them not to have to hire people against their faith.

Ms. SAMUELS. I——

Mr. NADLER. For example, I mean—for example, we don't tell the Catholic Church you have got to hire women as priests. It is none of our business, obviously, and that is not co-religion. The women are Catholics, too. So it is not just co-religionists obviously.

Ms. SAMUELS. Right. There is a specific ministerial exemption in the law for, for example, Catholic priests. But whether faith-based organizations could exclude people based on age, I am aware of no law that would authorize them to do that.

Mr. NADLER. Thank you.

Mr. SCOTT. Would the Chairman yield?

Mr. NADLER. Yes. I yield back the time to the gentleman from Virginia.

Mr. SCOTT. Yes. If, however, it were a manifestation of the religion if you are hiring people from your youth choir, then you could essentially exclude people of age. If you are hiring people from just your co-religionists in a congregation that is racially homogeneous, that would have racial implications. Is that right?

Ms. SAMUELS. I, you know, I think under the Age Act there is a reasonable factor other than age defense. How that would apply in that situation is something that I think we would have to look at. And obviously there is a disparate impact cause of action that is available under Title VII that would cover all of the bases covered by Title VII.

Mr. SCOTT. Well, I think a lot of this will be—we will get to the bottom of this when you inquire with your colleagues whether or not a faith-based organization running a federally-funded program with Federal money, hiring people being paid for with Federal money, can have a policy of "we don't hire Catholics and Jews."

Ms. SAMUELS. I would be delighted to inquire further on that matter.

Mr. NADLER. Okay. Thank you. The gentleman's time has expired, and if there are no further questions the witness is excused with our thanks. And we will ask the—oh, hold on. The Chairman wants to——

Mr. CONYERS. Well, I just wanted to ask permission for our counsel, Heather Sawyer——

Mr. NADLER. I am sorry.

Mr. CONYERS [continuing]. To ask a couple questions?

Mr. NADLER. I recognize our counsel. The witness has a few more questions.

Ms. SAWYER. Okay, great. Thank you, Mr. Chairman. This is a treat indeed. Ms. Samuels, some commentators have suggested that plaintiffs and employees in age discrimination cases can actually be better off under the *Gross* ruling because it removes what has been termed "the same decision affirmative defense," whereby an employer bears the burden of showing, as you explained, that it would have reached the same decision anyway.

And I just wanted to give you the opportunity to explain whether or not there is any way in which you could see the *Gross* ruling both in the context of ADEA and more broadly being an advantage to employees?

Ms. SAMUELS. Thank you for that question. I vehemently disagree that the *Gross* ruling is a boon to plaintiffs or are in any way advantages them in employment discrimination suits. What the *Gross* ruling does is to increase the burden on the plaintiff.

Under pre-*Gross* treatment of the law by every Federal appellate court that had looked at it, the defendant, if the plaintiff showed that age was a motivating factor for a decision, the defendant had the burden of proving that it would have made the same decision anyway.

That burden has now been put on the plaintiff. So the plaintiff has to prove the negative, that the employer would not have made the same decision absent the discrimination. This does not mean

the—eliminating the affirmative defense idea does not mean that the employer is—that the plaintiff therefore wins.

What it means is the requirement of the showing whether the decision would have been made or not absent age has now been shifted to the plaintiff. It has not disappeared from the case. It is put on a party less well-equipped to make that showing than the employer.

In cases following *Gross* numerous cases have dismissed claims in which age discrimination plaintiffs have relied on mixed-motive jury instructions. In those cases where courts have reversed trial court ruling for the defendants, plaintiffs have been able to prevail despite the *Gross* ruling, not because of it.

Mr. NADLER. Do you have any questions? Okay.

Thank you very much. Who? I am sorry. Counsel has one other question.

[Laughter.]

Ms. SAWYER. I am sorry about that. One last question, you had spoken at some length about the fact that the *Gross* decision has now spread out to laws beyond ADEA. And I was wondering whether or not you have seen the lower courts also applying that reasoning and ruling to claims where a plaintiff brings a claim that may allege multiple or more than one unlawful reason, so an age claim and a race claim, a claim that is age and gender. Have you seen that and how has it played out?

Ms. SAMUELS. Well, I think that this is a particularly unfortunate extension of the *Gross* decision that there are various lower courts that have misinterpreted *Gross*, which held that age—plaintiffs had to prove that age was a "but for" factor, to instead mean that plaintiffs have to show that age is a full factor for the decision.

This cuts particularly cruelly in cases in which a plaintiff alleges, and there have been some in the lower courts, that the employer's decision is based on two prohibited considerations, age and race, for example.

There is a case in which the court has dismissed the plaintiff's age claims because the plaintiff also alleged race discrimination. And the court said that since the plaintiff had to show that age was the sole cause pursuant to *Gross*, she could no longer proceed with the age-based claim.

Ms. SAWYER. And so that is something that is a new and different standard that has come out of this decision?

Ms. SAMUELS. It is a new and different standard that imposes extraordinary constraints on plaintiffs, who in fact may have been subject to discrimination on multiple prohibited bases under the laws.

Mr. NADLER. It sort of rewards a triple malefactor.

Ms. SAMUELS. It creates that kind of incentive.

Mr. NADLER. Okay. I thank you, and I thank the witness, and we will now proceed with our second panel. Oh, I am sorry. Wait a minute.

I recognize another Member of the Subcommittee. I recognize for 5 minutes the gentlewoman from California.

Ms. CHU. Thank you, Mr. Chair. I wanted to ask about the fact that the *Gross* decision involved a claim under ADEA, but the Court also invited the lower courts to extend its reasoning beyond

the ADEA to other laws. Has this happened? Can you provide some examples of where *Gross* has been applied outside ADEA?

Ms. SAMUELS. Yes, thank you, Congresswoman for that question. As I mentioned in my statement, the *Gross* decision has led to the dismissal of numerous ADEA claims, but it also quite unfortunately has been applied well beyond the ADEA, to the Americans with Disabilities Act, the Employee Retirement Income Security Act, to 42 USC Section 1983, to the Jury Service Improvements Act.

And troublingly in some cases, even though courts have rejected the idea that *Gross* applies under the statutes, they have raised the question. So for example, under the Family and Medical Leave Act there are opinions that question whether or not a mixed-motive cause of action is still available under those laws.

Ms. CHU. And let me ask about the increasing numbers of age discrimination claims. According to the AARP, 24,580 discrimination claims were filed in 2008, and that is 29 percent increase over 2007. That is double the increase of overall discrimination charges, which include claims by race, sex and disability.

Why was there such an increase in age discrimination claims in 2008, and how does this compare to 2009?

Ms. SAMUELS. Well, let me make clear, the Department of Justice doesn't enforce the Age Discrimination in Employment Act, but the EEOC, which does enforce it, has testified that there has been a dramatic increase in the number of age discrimination charges that have been filed.

I believe that they have submitted to the Senate Health, Education, Labor and Pensions Committee information on the levels of those charges in both 2008 and 2009. You know, obviously this is of tremendous concern, particularly in this economy where it is critical to ensure that protections against age discrimination are robust.

Older workers, given the economy, may have to stay in the workforce longer and unfortunately there continues to be stereotypes and barriers that face older workers that the ADEA was intended to root out. And that is the reason that this legislation or legislation like it is so critical, to ensure that the protection under the law is as robust as Congress intended it to be.

Ms. CHU. In fact, do you think the recession and all the layoffs played a part in the increase in these age discrimination complaints?

Ms. SAMUELS. I have not seen studies to that effect, but I think that given the recession and the fact that numerous workers need to remain in the workforce longer makes it all the more critical that we ensure robust protection of the law.

Ms. CHU. Okay, thank you. And I yield back.

Mr. NADLER. Yes, thank you. And I just want to note before ending this panel that we will submit for the record the EEOC and Senate testimony and the EEOC and AARP Senate testimony for the record.

[The information referred to follows:]

TESTIMONY SUBMITTED TO THE

SENATE HEALTH, EDUCATION, LABOR AND PENSIONS COMMITTEE

ON

"ENSURING FAIRNESS FOR OLDER WORKERS"

May 6, 2010

AARP
601 E Street, NW
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WITNESS: GAIL ALDRICH
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Good Morning Chairman Harkin and Ranking Member Enzi.

My name is Gail Aldrich. I am a member of the Board of Directors of AARP and I am pleased to testify today on behalf of AARP. Older workers have long been an AARP priority, and roughly half of all AARP members are employed either full or half-time. On behalf of AARP's members and all older workers, we advocate for older workers both in Congress and before the courts to combat age discrimination. AARP also participates in the Senior Community Service Employment Program (SCSEP) in which we match lower-income older jobseekers and employers with available positions. We also annually recognize "Best Employers" for workers over age 50, and partner with employers stating a commitment to welcome older persons into their workforce as part of an AARP "National Employer Team." We also organize job fairs allowing employers and older workers to find one another.

I want to preface my remarks by noting that before I became an AARP Board member, I was formerly a business executive, responsible for applying federal and state employment laws on a day-to-day basis. Specifically, I previously served as chief membership officer for the Society for Human Resources Management (SHRM). During my career, I also have been the lead human resources professional for three major organizations: the California State Automobile Association, Exponent, an engineering and scientific consulting firm, and the Electric Power Research Institute. As a result, I am quite familiar with the challenges of addressing age or other discrimination claims by employees.

I want to thank you and all members of the Health, Education, Labor and Pensions Committee for extending AARP this opportunity to speak on the issue of protecting older workers against age discrimination, and in particular, the topic of proposed legislation to address the U.S. Supreme Court's troubling decision last year in *Gross v. FBL Financial Services, Inc.*, No. 08-441, 129 S. Ct. 2343 (June 18, 2009). In that decision the Supreme Court, by the narrowest of margins, announced 5-4 that older workers challenging unfair treatment based on their age, under the Age Discrimination in Employment Act (ADEA), have lesser protection than other workers protected by federal law against illegal bias. Older workers, the Court said, have to meet a higher standard to prove discrimination than workers facing bias based on their sex, race or national origin. In effect, the Court said that Congress intended – when it passed the ADEA back in 1967 – to place older workers in a second-class category of protection from unfair treatment at work. We at AARP think this decision is wrong, and that the court's understanding of what Congress meant when it enacted the ADEA is inaccurate. Unless corrected, this decision will have devastating consequences for older workers – workers who represent a growing share of the U.S. workforce and are increasingly critical to the nation's economic recovery.

The Supreme Court's decision in *Gross v. FBL* could not have come at a worse time for older workers, who are experiencing a level of unemployment and job insecurity not seen since the late 1940s. Over the past 28 months (December 2007 through March 2010), finding work has proven elusive for millions of younger *and* older workers as employers have laid off workers and scaled back hiring due to reduced demand. However, older workers face another barrier—age discrimination. Age discrimination is difficult to quantify, since few employers are likely to admit that they discriminate against older

workers. Available research does highlight, however, the extent to which younger job applicants are preferred over older ones, who more often fail to make it through the applicant screening process.[1] Older workers themselves see age discrimination on the job: 60 percent of 45-74-year-old respondents to a pre-recession AARP survey contended that based on what they have seen or experienced, workers face age discrimination in the workplace.[2] That percentage could well be higher if those workers were asked about age discrimination today. More age discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC) in FY 2008 and FY 2009 than at any time since the early 1990s, according to the latest EEOC data.[3]

One of the ways in which the *Gross* decision already has affected older workers is to make it impossible in some circumstances to bring age discrimination claims. Some courts have interpreted the *Gross* Court's language to require proof that age bias was a "sole cause" of an unfair termination, or as in Jack Gross' case, an unfair demotion. Thus in one recent case in Alabama, the plaintiff alleged both race and age discrimination. *Culver v. Birmingham Bd. of Education*, 2009 WL 2568325 (N.D. Ala. August 17, 2009). Relying on *Gross*, the court ordered Mr. Culver to either abandon his age claim or his race discrimination claim because "*Gross* h[eld] for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact that he is over 40 years old was the only . . . reason for the alleged adverse employment action." This was never the law before Gross, and it makes no sense now. Surely Congress meant for victims of age and other bias to bring claims on whatever grounds they can assemble proof to support a charge of discrimination. Not to choose between one of several grounds of illegal unfair treatment. Similarly, in a case in Pennsylvania, a federal court recently relied on *Gross* to force a

plaintiff to choose between claims of age and sex discrimination. *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890 (E.D. Pa. Aug. 11, 2009). The court cited the plaintiff's allegations that she was treated less favorably because she was an "older female" to conclude that her age was not the "but-for" cause of the discrimination she complained of According to this court, "The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the *only* reason for discrimination." Once again, AARP submits this makes no sense and fundamentally misunderstands the ADEA. We cannot wait for these sorts of rulings to spread. This must end.

Thus, AARP strongly endorses the Protecting Older Workers Against Discrimination Act or "POWADA", S. 1756, of which many members of this Committee are a sponsor. POWADA would correct the wrong turn in the law that the *Gross* decision represents. It would eliminate the second-class status for victims of age bias that the Court in *Gross* seemed to embrace. It would tell lower courts not to treat older workers who face discrimination law differently, in key respects, than they treat workers who face bias on grounds of race or sex under Title VII of the 1964 Civil Rights Act. Congress, after all, consistently has followed Title VII as the model for other employment discrimination laws, like the ADEA and the Americans with Disabilities Act.

Let me say a few more words about the impact on older workers of this Court decision. It takes away a vital legal protection at the very time that the economy does not give older workers the luxury of ignoring discrimination and simply finding another job.

The unemployment rate for persons aged 55 and over has more than doubled since the start of the recession, rising from 3.2 percent in December 2007 to 6.9 percent in March 2010. Although the unemployment rate for this age group has traditionally been and remains lower than that for younger persons, the increase in unemployment for older persons has been greater, thus significantly narrowing the age gap in unemployment.

Once out of work, older job seekers face a prolonged and often discouraging job search. Newspapers and news programs have profiled many older jobs seekers who report sending out hundreds of resumes and receiving few if any responses from employers. Statistics back up the anecdotes of the job-seeking frustrations of older workers. Average duration of unemployment has soared since the start of the recession and is substantially higher for older job seekers than it is for their younger counterparts— 38.4 weeks verse 31.1 weeks in March -- a difference of nearly two months. In December 2007, average duration of unemployment for older persons was 20.2 weeks.

Older workers also are more likely to be found among the long-term unemployed— those who have been out of work for 27 or more weeks. Just over half (50.6 percent) of job seekers aged 55 and over and 42 percent of those under age 55 could be classified as "long-term" unemployed in March. Once out of work, older persons are more likely than the younger unemployed to stop looking for work and drop out of the labor force. If they do find work, they are more likely than younger job finders to earn less than they did in their previous employment.

Today, older workers are more likely than younger workers to be displaced. As of December 2009, 78 percent of unemployed workers aged 55 and over were out of work

because they lost their jobs or because a temporary job ended. This compares to 65 percent of the unemployed under age 55. Job loss has risen substantially for both age groups since the start of the recession two years earlier and far more than it had in the two years before December 2007. (See Table 1.)

Hence, older workers need effective age discrimination laws when employers choose to displace them based on their age, due to stereotypes or other forms of bias, rather than their performance or other legitimate business reasons. And there can be no doubt that unfounded stereotypes about older workers linger. In cases in which AARP has played a role over the last decade, AARP attorneys have battled employer perceptions that older workers have less energy and are less engaged, despite AARP research data showing that on the contrary, older workers are more engaged in their jobs, as well as more reliable (*i.e.*, less likely to engage in absenteeism). Some employers also still believe older workers are a poor investment and are disinclined to include them in training programs. Again, AARP research shows that older workers are more loyal to (*i.e.*, less likely to leave) their current employers, and thereby may be better bets in terms of employer investments in training. And finally, some employers have outdated notions of older workers as incapable of adapting in industries -- such as computers and information technology -- requiring acquisition of new skills, despite Baby Boomers' enthusiastic embrace of virtually all forms of rapidly changing IT products and services.

Research also shows why failing to protect older workers from discriminatory exclusion from employment is not only unjust but also counterproductive for a nation facing enormous challenges supporting a growing aging population. That is, there is growing evidence that older persons need to work and that they would benefit financially from

working longer: millions lack pension coverage, have not saved much for retirement, have lost housing equity, and have seen their investment portfolios plummet. Many have exhausted their savings and tapped their IRA and 401(k) accounts while unemployed. Some workers seem to be opting for Social Security earlier than they might have otherwise. The Urban Institute (UI), for example, points to a surge in Social Security benefit awards at age 62 in 2009. To a large extent, this is a result of a sharp rise in the aged 62 population. However, the UI reports that the benefit take-up rate was substantially higher in 2009 than in recent years, which they say is likely due to an inability to find work.[4] One out of four workers in the 2010 Retirement Confidence Survey maintains that their expected retirement age has increased in the past year, most commonly because of the poor economy (mentioned by 29 percent) and a change in employment situation (mentioned by 22 percent). [5]

Failing to allow older workers a fair chance to fight age discrimination is directly contrary to other federal policies envisioning that Americans will work longer. Public policies such as the 1983 Social Security amendments that increased the age of eligibility for full benefits and the benefits for delaying retirement, as well legislation in 2000 that eliminated the Social Security earnings test for workers above the normal retirement age, were designed to encourage longer work lives. Eliminating discrimination is critical if older persons are to push back the date of retirement.

Working longer is good for society as earners typically pay more in taxes than retirees and contribute to the productive output of the economy. It is also good for workers, who have more years to save and less time in retirement to finance. And it is good for employers who retain skilled and experienced employees. This last advantage

may be less clear in a deep recession; however, the economy will recover eventually – we hope sooner rather than later! With the impending retirement of the boomers, many experts predict sizable labor and skills shortages in many industries.

In closing, I want to emphasize AARP's commitment to vigorous enforcement of the ADEA and other civil rights law as one part of a broad-based strategy to serve the needs and interests of older workers consistent with the overall public interest. We recognize that prudent employers, indeed we hope most employers, follow the law and respect the rights of older workers. But we also believe that the ADEA and other civil rights law must be preserved so that they act as a real deterrent, and if need be, a tool for redress, when employers are tempted to discriminate or actually violate the rights of older workers. Unless POWADA returns the law to the state of affairs that existed before the *Gross* decision, legal advocates will have a very hard time defending older workers who encounter workplace bias. And we also urge Congress to make sure that POWADA protects older workers from the expansion of the reasoning in *Gross* to other employment laws. For instance, we are aware of decisions restricting application of other laws important to older workers – such as the ADA and ERISA, see *Serwatka v. Rockwell Automation, Inc.*, --- F.3d ----, 2010 WL 137343 (7th Cir., January 15, 2010) (NO. 08-4010)(ADA) and *Nauman v. Abbott Laboratories*, CA 04-7199 (N.D. Ill. April 22, 2010) – based on the flawed logic of the narrow Supreme Court majority in *Gross*.

We believe the Protecting Older Workers Against Discrimination Act (POWADA), S. 1756, is a vital and reasonable effort to restore the law to the state of play prior to the *Gross* decision. At that time, employers were able to manage their proof obligations in ADEA cases. Virtually no court in the U.S. believed age had to be the only reason for an

employer terminating an older worker for the worker to have a claim under the ADEA. But now, based on Gross, some courts have been embracing this new and onerous interpretation. And the same view has been applied to other civil rights laws, to the detriment of older workers and other discrimination victims. This is not right. In the worst economic conditions in decades for older workers, Congress should act now to correct the misguided ruling in the *Gross* decision and pass POWADA.

Thank you.

Table 1.
Percent of Workers Giving Job Loss or End of Temporary Job as the Reason They Were Unemployed, by Age, December 2005, December 2007, and December 2009

Age and Reason for Unemployment	December 2005	December 2007	December 2009
Aged 55+			
Job loser/on layoff	21.0	23.8	14.0
Other job loser	33.8	36.8	55.8
Temporary job ended	8.3	8.2	8.6
Total	63.1	68.8	78.4
Under Age 55			
Job loser/on layoff	13.7	13.2	11.0
Other job loser	25.9	26.9	43.9
Temporary job ended	11.0	12.5	9.8
Total	50.6	52.6	64.7

Source: AARP PPI calculations of data in the Current Population Survey.

[1] M. Bendick, L. E. Brown, and K. Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination against Older Workers, *Journal of Aging & Social Policy*, 1999 *10*(4), 1999, pp. 5-23; J. Lahey, *Age, Women, and Hiring: An Experimental Study* (Chestnut Hill, MA: Center for Retirement Research at Boston College, 2006).

[2] AARP, *Staying Ahead of the Curve 2007: The AARP Work and Career Study* (Washington, DC: AARP, 2008).

[3] U.S. Equal Employment Opportunity Commission, April 29, 2010 at http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm.

[4] R. W. Johnson and C. Mommaerts, *Social Security Retirement Benefit Awards Hit All-Time High in 2009*, Fact Sheet on Retirement Policy (Washington, DC: Urban Institute, 2010).

[5] EBRI, "The 2010 Retirement Confidence Survey: Confidence Stabilizing, but Preparations Continue to Erode," *EBRI Issue Brief*, No. 340, March 2010 at www.ebri.org/pdf/briefspdf/EBRI_IB_03-2010_No340_RCS.pdf.

STATEMENT OF
JACQUELINE A. BERRIEN, CHAIR
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
UNITED STATES SENATE
MAY 6, 2010

Introduction

Mr. Chairman, and distinguished members of the Committee, thank you for the opportunity to appear before you at this important hearing to discuss the "Protecting Older Workers Against Discrimination Act" (S. 1756), which would supersede the Supreme Court's 2009 decision in *Gross v. FBL Financial Services*.[1]

The Supreme Court in *Gross* held that "mixed-motives" claims are not cognizable under the Age Discrimination in Employment Act of 1967 (ADEA), and that older workers cannot prevail on a claim of age discrimination unless they prove that age was the "but for" cause of the employment practice at issue. In practice, this means that an ADEA plaintiff will no longer have a valid claim, and therefore will be entitled to no relief whatsoever – even if a defendant *admits* that it took an adverse employment action in part because of the plaintiff's age – unless the plaintiff can show that the defendant would not have made the same decision anyway (i.e., if the employer had not actually taken the victim's age into account).

The *Gross* decision was a startling departure from decades of settled precedent developed in federal district and intermediate appellate courts. It erected a new, much higher (and what will often be an insurmountable) legal hurdle for victims of age-based employment decisions. Indeed, recent case law reveals that *Gross* already is constricting the ability of older workers to vindicate their rights under the ADEA, as well as other anti-discrimination statutes.

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) believes that legislation like S.1756 is needed to restore and bolster the basic protections that applied to ADEA claims pre-*Gross*. This would more fully effectuate Congress's original intent in passing the ADEA – to "promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[2]

The Surge in ADEA Charges and the Staying Power of Age-Based Stereotypes

The *Gross* ruling could not have come at a worse time. More than 40 years after Congress passed the ADEA, age discrimination may be at historic highs. EEOC receipts of ADEA charges certainly are at or near record-levels. In fiscal year 2008, age discrimination charges

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[1] 129 S. Ct. 2343 (2009).

[2] 29 U.S.C. § 621(b).

jumped nearly 30 percent over the previous year, and represented nearly 26 percent of all charges the EEOC received that year.[3] In 2009, age-based charges were at their second-highest level ever (exceeded only by the previous year), and constituted over 24 percent of all receipts.[4]

It is difficult to pinpoint the causes of this surge in age discrimination charges. It is clear, however, that negative stereotypes about older workers remain deeply entrenched.[5] These stereotypes include unwarranted assumptions that older workers are more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, and less energetic than younger employees.[6] Employers also may be reluctant to invest in training and other developmental opportunities for older workers based on the perception that they have less time remaining in their careers.[7]

While extensive research has shown that these negative age-based stereotypes have little basis in fact,[8] they undoubtedly influence far too many employment decisions. For instance, as a result of these stereotypes, older persons with the same or similar qualifications typically receive lower ratings in interviews and performance appraisals than younger counterparts (and thus are apt to have more trouble finding or keeping a job or securing a promotion).[9] Older workers also typically are rated as having less potential for development than younger workers, and thus are given fewer training and development opportunities.[10]

Further, it appears that age-based stereotypes operate to disadvantage older workers in corporate "downsizing" situations, in particular. Because the main goal of such downsizing is usually to

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[3] In fiscal year 2008, the EEOC received 24,582 charges containing ADEA allegations (an increase from the 19,103 ADEA charges received in fiscal year 2007). *See* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[4] In fiscal year 2009, the EEOC received 22,778 ADEA charges. *See id.*

[5] *See* Daniel Kohrman & Mark Hayes, *Employers Who Cry "RIF" and the Courts That Believe Them,* 23 HOFSTRA LAB. & EMP. L.J. 153, 160 (2005) (studies show that bias against older people is more deeply embedded than other forms of bias including race, gender, religion, and sexual orientation).

[6] *See* Remarks of Professor Michael Campion, EEOC Meeting of July 15, 2009: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers, http://www.eeoc.gov/eeoc/meetings/7-15-09/campion.cfm.

[7] *See id.*

[8] *See id.* (while older workers face stereotypes that job performance declines with age, extensive research actually shows that it improves with age); *see also* Towers Perrin, *The Business Case for Workers Age 50 , Planning for Tomorrow's Talent Needs in Today's Competitive Environment* (AARP), at 33 (Dec. 2005) (it is a myth that performance suffers over time, and "mounting evidence—both anecdotal and statistical—demonstrates that older workers bring experience, dedication, focus, stability and enhanced knowledge to their work, in many cases to a greater degree than younger workers"); William McNaught & Michael C. Barth, *Are Older Workers "Good Buys"? A Case Study of Days Inns of America,* SLOAN MGMT. REV. 53-63 (Spring 1992) (net cost of employing older reservations agents was nearly identical to the net cost of employing younger workers; with regard to flexibility, older workers were just as quick as younger workers to adapt to modern computer technology, and training times for the two groups were virtually identical).

[9] *See* Remarks of Professor Campion, *supra* note 6.

[10] *Id.*

cut costs, age-based stereotypes that older workers are more costly, harder to train, less flexible, or less competent may become much more prominent in the minds of the decision-makers.[11] To make matters worse, once older workers are laid off, they often are again vulnerable to age-based stereotyping as they attempt to find new jobs. It seems older workers who have been laid off are less likely to obtain reemployment than younger workers, take longer to find new jobs than younger workers, and generally fail to obtain jobs paying the same wages as their previous positions.[12]

The EEOC has brought numerous cases under the ADEA involving the manifestation of just these sorts of ageist stereotypes. These include:

- *EEOC v. Lockheed Martin Global Telecommunications, Inc.* The EEOC alleged that the employer violated the ADEA by firing eight employees as part of a reduction-in-force. To determine who would be laid off, employees were placed in comparison groups, and with only one exception, the oldest employee within the comparison group was the one laid off. The RIF rated employees using subjective criteria that included the "ability to get along with others." Again, with only one exception, the ratings for "ability to get along with others" corresponded to employee ages, with the youngest employees being ranked highest in this area and the oldest employees the lowest. This case was settled for $773,000.

- *EEOC v. Mike Albert Leasing, Inc.* The charging party, aged 60, was the oldest area manager for a company that leased cars, trucks, and vans throughout several states. There was evidence that about a year before the charging party was fired, the company president commented at a sales meeting that the sales force was "old and aging" and that the company needed some fresh young blood. Shortly before firing the charging party, the company hired a 38-year-old male to take over the charging party's accounts. The EEOC alleged that although the charging party's job evaluations and sales numbers indicated he was outperforming the majority of his peers, the company fired him for his failure to meet "goals" that were intentionally unrealistic. This case was settled for $100,000.

- *EEOC v. Dawes County, Nebraska.* After working for the respondent for more than 30 years, the charging party was fired at the age of 71 from his position with the county roads department, even though there was no evidence of performance problems. The EEOC alleged that the county decided to impose a stress test for workers 70 or older to determine whether they could meet the physical requirements of their job and the charging party was fired based on the assumption that he would not be able to pass the test. The respondent never actually implemented the stress test, and no one other than the charging party was fired because of the test. This case was settled for $50,000.

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[11] *Id.*

[12] *Id.*

The Unfavorable Legal Climate for Age Discrimination Plaintiffs

Unfortunately, older workers who are victims of such age-based decision-making now must seek to assert their ADEA rights in a legal landscape that increasingly minimizes the significance of age discrimination. The prevailing judicial approach distinguishes ADEA claims from those brought under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, or national origin. Notably, for example, in a statement that appears to reflect the erroneous but widespread stereotypes about older workers, the Supreme Court has said that a lower level of protection under the ADEA than under Title VII is "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[13]

This judicial antipathy to age discrimination claims also can be seen in lower court decisions in which courts apply crabbed interpretations of the ADEA to rule against plaintiffs even when plaintiffs present evidence of age-based comments by managers. For example, courts have dismissed as "stray remarks" not probative of age discrimination comments calling the plaintiff "the old guy in the department,"[14] stating that the plaintiff looked "old and tired,"[15] repeatedly calling the plaintiff "old man,"[16] saying that the company goal was to "attract younger talent,"[17] and stating that some workers "were just too old to get the job done" and that the company "wanted to go to a young aggressive group of people."[18]

Given this relatively inhospitable legal climate, it is perhaps not surprising that while all discrimination plaintiffs face enormous challenges in proving their claims, success seems to be especially elusive for age discrimination plaintiffs.[19]

The* Gross *Decision

Against this already-challenging legal backdrop, the Supreme Court's recent ruling in *Gross* is particularly troubling. *Gross* is the latest, and in some respects the most problematic, in a string of judicial decisions that have weakened the ADEA significantly. Moreover, because lower courts have begun to extend *Gross*'s reasoning beyond the ADEA context, the decision threatens to undermine numerous other federal anti-discrimination laws, as well.

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[13] *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). Of course, as already indicated, the Court's statement seems to assume a closer correlation between age and inability than research suggests exists. *See supra* note 8.

[14] *Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049, 1055 (7th Cir. 2006).

[15] *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007).

[16] *EEOC v. Republic Servs., Inc.*, 640 F. Supp. 2d 1267, 1286 (D. Nev. 2009).

[17] *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 351-52 (5th Cir. 2007).

[18] *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000).

[19] *See* Kohrman and Hayes, *supra* note 5, at 153 (data collected by the Administrative Office of the U.S. Courts for 1998-2001 shows that ADEA plaintiffs win 20.93 percent of bench trials while the win rate for bench trials in employment discrimination cases overall is 25.94 percent).

The Supreme Court granted certiorari in *Gross* to answer what appeared to be an arcane legal question – whether "direct evidence" is needed to obtain a "mixed-motives" jury instruction in an ADEA case. In the end, however, the Court's ruling in *Gross* struck at the heart of the ADEA's core anti-discrimination provision.

In the 1989 decision in *Price Waterhouse v. Hopkins*, the Supreme Court had held that a Title VII plaintiff who had shown that discrimination was a "motivating factor" in an employment decision could request a mixed-motives jury instruction, which would shift the burden of proof to the employer to show that it would have taken the same action in the absence of discrimination.[20] The Supreme Court subsequently held that a Title VII plaintiff could rely on either direct or circumstantial evidence to request such a mixed-motives instruction.[21] While lower courts agreed that mixed-motives claims were cognizable under the ADEA, as well, the lower courts were split as to whether ADEA plaintiffs needed to present "direct evidence" to obtain a mixed-motives instruction (or whether, like Title VII plaintiffs, they could present either direct or circumstantial evidence to justify the instruction).[22]

The majority in *Gross* ultimately decided that it was unnecessary to address this issue – the question on which the Court had granted certiorari – because it concluded that mixed-motives claims are never available under the ADEA at all. The Court held that in an ADEA case, the burden of proof *never* shifts to the employer to defend its action, and that an ADEA plaintiff must always prove that age was the "but for" factor in the adverse employment action. This issue was never briefed by the parties or amici, and counsel for the United States had urged the Court during oral argument not to reach the issue.[23] And, as already indicated, lower courts had unanimously concluded that ADEA plaintiffs could indeed obtain a mixed-motives instruction and had only disagreed as to whether direct evidence was needed.[24]

***Need for Legislation to Supersede* Gross**

While the *Gross* decision dealt with seemingly abstract concepts about causation and burdens of proof, it is having real-world implications for age discrimination litigants. Now, after *Gross*, ADEA plaintiffs are unable to prove age discrimination by showing that age was one factor (of perhaps several factors) that motivated the challenged employment practice, unless they can also prove that age was the "but for" factor for the decision. Thus, ADEA plaintiffs with cases involving "mixed motives" are subject to a more demanding standard of causation and burden of proof than similar Title VII plaintiffs.

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[20] 490 U.S. 228, 258 (1989).

[21] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003).

[22] *Compare Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008) (ADEA plaintiff must produce direct evidence in order to obtain mixed-motives instruction), *with Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004) (direct evidence not needed for mixed-motives instruction under ADEA).

[23] *Gross*, 129 S. Ct. at 2353 n.2 (Stevens, J., dissenting).

[24] *Id.* at 2355 & n.5 (collecting cases).

When Congress enacted the Civil Rights Act of 1991, it confronted a similar issue. Congress responded by expressly "authorizing discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision."[25]

Similar to the negative impact *Price Waterhouse* had on victims of sex-based and race-based discrimination, the Supreme Court's decision in *Gross* is damaging the ability of victims of age discrimination to vindicate their statutory rights. In the *Gross* case itself, the Eighth Circuit on remand reversed a jury verdict and nearly $47,000 in lost compensation the jury had awarded to Jack Gross.[26] In addition to the adverse effect it had in Mr. Gross's ADEA case, the Supreme Court's ruling has begun to negatively impact other litigants. One district court affirmed summary judgment for the employer even though there was sufficient evidence for a jury to conclude that age was one of the factors that motivated the plaintiff's termination. Relying on *Gross*, the court noted that "just because age may have played a role in the decision does not mean that it was a 'but for' cause of his termination."[27] Similarly, the Third Circuit has concluded that a plaintiff could not prevail on his termination claim under the ADEA despite evidence that the employer wanted to get rid of "older and better paid" employees and to retain "younger and cheaper" employees. The court stated that such evidence showed at most that age was a "secondary consideration" in the plaintiff's termination, not a "but for" factor as required by *Gross*.[28]

In addition, some courts now have interpreted *Gross* as not only requiring a plaintiff to prove that age was a "but for" cause, but also to show that it was the *sole* cause, for the challenged employment action. For example, in one case, the plaintiff was forced to choose between his Title VII claim and his ADEA claim. The court concluded that, under *Gross*, the plaintiff was required to demonstrate that age was "the only or the but-for reason for the alleged adverse employment action," and thus, the plaintiff could not claim that the action was based on age while simultaneously claiming that there was another unlawful motive involved.[29] Similarly, another court dismissed a plaintiff's ADEA claim because she had alleged not only age discrimination but also discrimination based on gender, race, and disability. The court interpreted the *Gross* decision as requiring a plaintiff to present direct evidence that age was the sole reason for the challenged action.[30] This particular interpretation of *Gross* would appear to preclude "intersectional" discrimination claims (e.g., those alleging that discrimination occurred because of a combination of two or more protected traits). This doctrinal development would

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[25] *Id.* (*quoting* 42 U.S.C. § 2000e-2(m)).

[26] *Gross v. FBL Fin. Servs., Inc.*, 588 F.3d 614 (8th Cir. 2009).

[27] *Anderson v. Equitable Res., Inc.*, 2009 WL 4730230, at *14-15 (W.D. Pa. Dec. 4, 2009).

[28] *Kelly v. Moser, Patterson & Sheridan, L.L.P.*, 2009 WL 3236054 (3d Cir. Oct. 9, 2009) (unpublished).

[29] *Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009).

[30] *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009).

upend decades of settled law allowing for such claims, and represent an alarming restriction on longstanding civil rights protections.[31]

Finally, the *Gross* decision not only impedes the ability of older workers to successfully challenge various forms of age discrimination. It has also begun to undermine the enforcement of other federal anti-discrimination statutes. For example, the Seventh Circuit recently determined, citing *Gross*, that plaintiffs alleging discrimination under the Americans with Disabilities Act (ADA) now must show that disability is a "but for" cause of a challenged employment practice.[32]

Clarifying legislation will thus not only protect plaintiffs who bring claims under the ADEA, but also plaintiffs who seek redress under other anti-discrimination laws which may be similarly weakened by the application of the *Gross* decision.

S. 1756

S. 1756 would legislatively overturn *Gross* to ensure that ADEA plaintiffs receive the same core protections and are subject to the same basic standards of causation with respect to disparate treatment claims as Title VII plaintiffs. This aspect of the legislation would simply restore the law to the state of parity that existed between ADEA and Title VII pre-*Gross*. Such parity reflects the Congressional intent evident in the original passage of the ADEA – namely, that age discrimination should be no more permissible than discrimination based on race, color, sex, religion, or national origin.[33]

The bill would make clear that the ADEA may be violated any time age is a motivating factor for the complained of practice; that plaintiffs can use any evidence, direct or circumstantial, to make that showing; and that every method of proof, including the *McDonnell-Douglas*[34] framework, can be used to prove a violation. In addition, the bill would have other important effects:

- The bill would apply to the ADA and other federal employment discrimination laws, thus ensuring more uniform standards and protection across various statutes.
- The bill would apply to prohibitions against retaliation, including the protections against retaliation contained in Title VII.

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[31] *Cf.* Remarks of Cathy Ventrell-Monsees, EEOC Meeting of July 15, 2009: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers, http://www.eeoc.gov/eeoc/meetings/7-15-09/ventrell-monsees.cfm (noting *Gross* "is extremely problematic for older women and older minorities who often bring claims under both the ADEA and Title VII").

[32] *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 964 (7th Cir. 2010).

[33] *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting the "important similarities" between the two statutes, "both in their aims – the elimination of discrimination from the workplace – and in their substantive provisions").

[34] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

- The bill would ensure that where an employer shows that it would have taken the same action in the absence of discrimination, plaintiffs will be entitled to the same remedies in mixed-motives cases under the ADEA and other employment discrimination laws as Title VII plaintiffs now may recover.

The EEOC believes, however, that a bill like S. 1756 is just the first step that is needed to ensure that older workers are protected against age discrimination. As already noted, *Gross* reflects the general view of the Supreme Court that age discrimination claims are qualitatively different than race or sex discrimination claims, and that protections and legal standards under the ADEA are not the same as those in Title VII. For example, the Supreme Court recognized in *Smith v. City of Jackson* that the disparate impact theory of liability is available to age discrimination plaintiffs, but at the same time also determined that the scope of disparate impact liability is narrower under the ADEA than under Title VII.[35] Similarly, while the Supreme Court has held that a policy that facially discriminates on the basis of sex is unlawful even if an employer has benevolent motives for the policy,[36] the Court upheld, in *Kentucky Retirement System v. EEOC*, a disability retirement plan that was explicitly based on age, reasoning that the differences in treatment were not "actually motivated" by age.[37] These decisions have placed victims of age discrimination at a legal and practical disadvantage compared with victims of other forms of discrimination, and thus have impeded effective enforcement of the ADEA.

The EEOC's Response and Enforcement Role

As the nation's chief enforcer of protections against age-based employment discrimination, the EEOC is especially concerned by these developments. In response, we have sought to determine how best to use our limited resources to counteract (or at least contain) the damage done by the deteriorating legal landscape for victims of age discrimination.

The recent spate of case law restricting the rights of age discrimination plaintiffs, coupled with the rise in age discrimination charges, prompted the EEOC to hold a public Commission meeting on these issues in July 2009.[38] At this meeting, witnesses discussed Supreme Court decisions, including *Gross*, that have significantly undermined the protections that Congress intended to confer when it enacted the ADEA. Experts at the meeting urged a variety of potential enforcement and policy solutions to counteract these adverse rulings, such as issuing regulations to fully define the components and burdens of pleading and proof of the "reasonable factor other than age" defense to an ADEA disparate impact claim, developing policy guidance to make uniform the relevance and weight of ageist comments, and using the EEOC's rulemaking

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[35] 544 U.S. at 240.

[36] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991).

[37] 128 S. Ct. 2361, 2367 (2008).

[38] The transcript and other materials from this meeting can be found at http://www.eeoc.gov/eeoc/meetings/7-15-09/index.cfm.

authority under the ADEA to clarify the factors announced by the Supreme Court in *Kentucky Retirement*.

The EEOC is carefully evaluating these and other ideas, and implementing them as appropriate. In February 2010, the Commission issued a notice of proposed rulemaking to address an employer's "reasonable factors other than age" defense to an ADEA disparate impact claim. This proposed regulation clarifies the circumstances under which an employer may adopt a facially neutral policy that disproportionately harms older workers. It also explains the steps that employers need to take to minimize the potential for age-based stereotyping when managers are granted wide discretion to engage in subjective decisionmaking.[39]

The Commission will continue to use all available means at its disposal – including issuing regulations and policy guidance, providing outreach and training, conducting administrative enforcement, and litigating ADEA cases – to safeguard equal employment opportunity for older workers. However, these tools alone may no longer be sufficient to the task. As some of the experts at the EEOC's recent public meeting noted, a legislative response now is needed to overcome recent legal setbacks, and to restore the original potency and promise of the ADEA.

To that end, the Commission stands ready and eager to help this Committee with technical assistance on S. 1756 – and on any future related legislation.

Conclusion

Thank you again for inviting me here today to testify on this very important issue. I look forward to your questions.

[39] These proposed regulations are available at http://edocket.access.gpo.gov/2010/2010-3126.htm.

Mr. NADLER. And while I have said that we have been joined by yet another Member of the Subcommittee.

I now recognize the gentleman from Georgia for 5 minutes.

Mr. JOHNSON. Thank you, Mr Chairman, and I will defer my questions until the very end.

Mr. NADLER. This is the very end of this——

Mr. JOHNSON. Mr. Chairman is——

Mr. WATT. Well, since he is deferring could I just ask one question?

Mr. NADLER. The gentleman from North Carolina.

Mr. JOHNSON. Well, I will waive my right to speak after transferring it to my colleague from North Carolina.

Mr. WATT. I just wanted one point of information, the number of cases that Justice has filed under the age discrimination provisions since the *Gross* decision?

Ms. SAMUELS. The Department of Justice doesn't have the authority to file cases under the Age Discrimination in Employment Act. Those cases are brought by the EEOC.

Mr. WATT. Do you track how many cases the EEOC has filed?

Ms. SAMUELS. We do not separately track that, but the EEOC certainly has that information.

Mr. WATT. Okay. Without tracking it do you have some idea? I mean, do you have that information even though you don't track it?

Ms. SAMUELS. Well, I know that the Chair of the EEOC, Jacqueline Berrien, testified several weeks ago before the Senate Health, Education, Labor and Pensions Committee and did make note in her testimony and follow-up questions of the dramatic increase in the number of age discrimination charges that have been filed.

Mr. WATT. That wasn't the question I asked. I assume that that response was about the number of age discrimination charges that have been filed with the EEOC. I am asking the number of lawsuits that have been filed?

Ms. SAMUELS. The number of age discrimination lawsuits that have been filed?

Mr. WATT. Right.

Ms. SAMUELS. I don't know the answer to that, but I would be happy to take that back and look into the matter.

Mr. WATT. That would be very helpful if you could do that and provide the information to us. Thank you.

Ms. SAMUELS. I would be happy to do so.

Mr. WATT. I yield back.

Mr. NADLER. I thank the gentleman. And finally I will say the witness can be excused with our thanks. We will now proceed with our second panel. And I would ask the witnesses to take their place. In the interest of time I will introduce the witnesses while they are taking their seats.

Jack Gross was—I am informed, was an intern once, to answer your question, but we will have to let that go by. Jack Gross was the plaintiff in the recent Supreme Court case *Gross v. Farm Bureau Financial Services.*

In 2003 he was demoted from his position as director of claims administration at FBL. This was despite having performance reviews in the top 5 percent of the company for the prior 13 consecutive years. Mr. Gross filed his age discrimination suit in 2003 and won a jury verdict in 2005, which was subsequently overturned on appeal. Mr. Gross is a graduate of Drake University.

Eric Dreiband—is that Dreiband or Dreiband?

Mr. DREIBAND. Dreiband.

Mr. NADLER. Eric Dreiband is currently a partner at the Jones Day law firm. From 2003 to 2005, Mr. Dreiband served as the general counsel of the U.S. Equal Employment Opportunity Commission.

Before becoming EEOC general counsel he served as deputy administrator of the U.S. Department of Labor's Wage and Hours Division from 2002 to 2003. He earned a J.D. from Northwestern University Law School and a B.A. from Princeton University.

Helen Norton is an associate professor at the University of Colorado Law School, where she teaches and writes on issues related to constitutional law, civil rights and employment discrimination law.

Ms. Norton previously served as deputy assistant attorney general for civil rights at the U.S. Department of Justice, where she managed the Civil Rights Division employment litigation, educational opportunities and coordination and review sections. She holds a J.D. from Boalt School of Law at the University of California, Berkeley and a B.A. from Stanford University.

I am pleased to welcome you all. Your written statements will be made part of the record in their entirety. I would ask each of you to summarize your testimony in 5 minutes. To help you stay within that time there is a timing light at your table. When 1 minute remains the light will switch from green to yellow, and then red when the 5 minutes are up.

It is customary for the Committee to swear in its witnesses.

Let the record reflect that the witnesses answered in the affirmative. You may be seated, and I will recognize first Mr. Gross. And please make sure the light is on at your mic.

TESTIMONY OF JACK GROSS, DES MOINES, IA

Mr. GROSS. There we go. Okay. Thank you, Chairman Nadler and Conyers for inviting me here to tell my story and state my position regarding the outcome of the Supreme Court in my case *Gross v. FBL.*

It is an honor for me to be here and to be given this opportunity to speak out on behalf of millions of older workers, all too many of whom, like myself, have experienced age discrimination in the workplace.

While my name has now become associated with age discrimination, my story is being duplicated millions of times across this country. I ask that you envision those millions of citizens who are depending on you as standing behind me today. I certainly never imagined that my case would end up here when it all started 7 years ago.

That is when my employer, Farm Bureau Insurance or FBL, suddenly demoted all claims employees who were over 50 and had supervisor or higher positions. I was included in that wholesale sweep, even though I had 13 consecutive years of performance reviews in the top 3 to 5 percent of my company, and had dedicated most of my working career to making Farm Bureau a better company.

My contributions were exceptional, and they were well-documented for the jury. Since age was the obvious reason I filed a com-

plaint and 2 years later a Federal jury spent a week listening to all the testimony, seeing all the evidence and being instructed in the law, your law, the ADEA.

The verdict came back in my favor, and I thought the ordeal was over in 2005. As we now know, that was just the beginning. FBL appealed and the verdict came back, and the 8th Circuit overturned my verdict because I had received a mixed-motive jury instruction.

And they said that required so-called direct evidence instead of just the preponderance of circumstantial evidence that we had provided. That left us no choice but to appeal it to the Supreme Court.

We were elated when the Court accepted certiorari on that one issue because 30 years of precedent and legislation were overwhelmingly on our side.

At the hearing, however, the Supreme Court broke with their own protocol and allowed the defense to advance an entirely new argument, one that had not been briefed nor had we been given an opportunity to prepare a rebuttal.

In effect they pulled a bait and switch on us, accepting cert on our question and then ignoring it to water down the clear intent of the ADEA by creating a hierarchy of discrimination.

Those that were specifically named in Title VII were at the top hierarchy and required a lower standard of evidence, and age and all the others were at a lower tier and now required a new and significantly higher standard of proof.

I believe Congress, the branch of government closest to the people, intended to abolish discrimination in the workplace not to create exceptions for it. My wife and I came to D.C. last June believing our highest court would uphold the rule of law and consistently apply it to all areas of discrimination.

We were disappointed and quite frankly disillusioned by their arrogance in putting their own ideology ahead of the clear will of Congress and decades of their own precedents. Since the Court's decision I have been particularly distressed over the collateral damage that is being inflicted on others because of the Court's ruling.

I hate having my name associated with the pain and injustice that is now being inflicted not only on older workers, but now victims of many other types of discrimination, because it is nearly impossible to provide the level of proof now required by this Court.

I have to keep reminding myself that I am not the one who changed your law. Five justices did. Congress has a long history of working together on a bipartisan basis to create and maintain a level playing field in the workplace. The ADEA is but one example.

I urge you on behalf of myself and the millions of other older workers from both parties, who simply want to continue working, to again rise to the challenge in that same bipartisan spirit you demonstrated before on civil rights issues to pass the Protecting Older Workers Against Discrimination Act.

I grew up in a small town in southern Iowa. My dad was a highway patrolman, my mother a school teacher. I overcame 25 years of chronic health problems to achieve my education and success.

My wife, Marlene, to whom I have been married for 43 years and I, started with absolutely nothing but a strong work ethic and a de-

termination to build a good life together. And we did so against all odds. We have two wonderful grown children and two granddaughters who are the great joys of our lives.

I am here before you as a man who agonized over the decision to pursue this case. As much as I hate discrimination in all its forms, this was a company I had poured my heart and soul into for most of my adult life, and I knew that I would be burning my career bridges once I was labeled as litigious.

Marlene and I prayed about it, decided it had to be done, and then left the outcome in God's hands, never expecting he would bring us here.

If my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God's plan for my life. Thank you.

[The prepared statement of Mr. Gross follows:]

PREPARED STATEMENT OF JACK GROSS

Testimony of
Jack Gross, CPCU, CLU, ChFC, AIC, AU

U.S. House of Representatives
Committee on the Judiciary

Subcommittee on the Constitution,
Civil Rights and Civil Liberties

Hearing on H.R. 3721
"Protecting Older Workers Against
Discrimination Act"

June 10, 2010

Thank you, Chairmen Nadler and Conyers and Ranking Member Sensenbrenner for inviting me to tell my story and state my position regarding the outcome of the Supreme Court decision in my case, Gross v. FBL.

I was born in 1948 in Creston, Iowa, and lived in Chariton, Iowa until first grade, when we moved to Mt. Ayr, Iowa. My father was an Iowa Highway Patrolman and my mother was a third grade teacher. Mt. Ayr is a small town in southern Iowa of about 1,700. (My dad always said the population never changed because whenever a baby was born, some guy sneaked out of town!) Mt. Ayr is in Ringgold County, which was always called the "poverty" county because it traditionally had the lowest per capita income in Iowa. It is the only county in Iowa without a single stoplight. The nearest "city" was Creston, population about 7,000, which was 30 miles away. Growing up in a small town in the 50's was like living in a Norman Rockwell painting. It's farm country.

I spent most of my summers when I was young working on my grandpa's farm, and was fortunate to have my dad, both grandfathers and many others as mentors and role models. One of the lessons I learned from all of them was to always find the hardest working person wherever I went, and make sure I worked at least 10% harder than that person. They assured me it was the "secret" to success. It's the same advice I passed on to my son. It was never that difficult, and it always worked for us.

Much of my childhood was defined by my health issues. I developed chronic ulcerated colitis at age five, and spent 25 years in constant chronic pain. I was kept alive for many years by heavy daily doses of cortisone. However, I learned how to deal with the pain at an early age and function at a very high level. For instance, my last two summers in high school, I started my days at 5:00 to take papers to nearby towns, came home and did chores (I always rented pastures and raised sheep and horses), then went to work for the county scooping gravel on roads all day until 5, when I headed to the hay fields to pick up hay bales until dark. During the school year, I delivered the papers, did chores, and then was a janitor for the vocational agriculture building before and after school. I was also president of the FFA (the largest chapter in the state), on the student council, editor of the paper, etc. On Sundays, I had rural paper routes that I started at 3:00 a.m. My sophomore year, I had a bad accident with my horse and missed an entire semester with a badly broken leg. I made up for that semester during the second semester.

I started going with my wife, Marlene, the week before our junior prom in 1965, and we've been together ever since. We were engaged to be married soon after

high school graduation and one year later were married after I completed my freshman year of college and transferred to Drake University in Des Moines, Iowa. During my freshman year, in addition to a part-time job, I was class president, editor of the school paper, member of the student council and other organizations. I did not ask for nor accept a single cent of help from my parents in getting my college degree. They were very lean years for a young married couple.

By the time I graduated, we had our two children. I spent the last two years of college working more than full-time in a factory, and we got student loans for the amount I couldn't earn. I worked every spare minute to take care of my family and get my education, in spite of my bad health. I weighed 87 pounds when I graduated from Drake University with a B.S. degree in Personnel Management.

Upon graduation, I went to work as a claims adjuster for Farm Bureau (FBL). I had always had old "junker" cars that I kept pieced together and running the best I could, and was attracted by the company car. Also, aptitude tests that I took at that time scored very high for an adjusting career.

We moved to a rented farm house in southeast Iowa, and were there for about five years when Farm Bureau had an opening for a Regional Manager on the Federation side of the organization in southwest Iowa, closer to my home town. I took that job, and Marlene became a district sales Manager with Avon, so we both had company cars and life was finally comfortable, financially. I still had my strong work ethic, and excelled at this quasi-political job until 1978, when I was approached by a seed corn company with an offer to be a sales manager for Nebraska and Southwest Iowa.

In 1979, soon after I started my seed corn career, the doctors told me I probably only had a few more months to live because of the condition of my colitis. On December 19 of that year, they removed my entire colon and a large part of my small intestine. With that surgery, I became pain-free for the first time in my memory.

The family-owned seed corn company sold out to British Petroleum in the eighties, and most of the sales managers and I declined to go with them. I applied to Farm Bureau to come back as an adjuster, and was hired again in 1987.

I was assigned three counties, but volunteered to also work the two counties I was driving through to get to them, making me the highest volume adjuster in the company. I worked long hours and excelled at that, as well as taking professional

classes at a rate never before attempted. By doing that, and also coming up with some better ways of doing things, I got noticed and promoted. Once I had all of my professional designations, (CPCU, CLU, ChFC, AIC and AU) I also began teaching several classes to other employees. To make a long story short, I kept adding value to the company and coming up with successful proposals and implementing them until I became Claims Administration Vice President. In 1997, I was asked to rewrite all of Farm Bureau's policies and combine them into a totally unique package policy. I did that in record time (working extremely long hours) and gave them the modular package policy they are now using as their exclusive product. In addition, I was writing a quarterly newsletter that was being circulated around the country and was managing the subrogation and call center departments (which I proposed and developed from scratch), the property claims area, the physical damage claims area, the work comp area, the medical claims review area, the claims information technology area, etc. all of which were functioning at extremely high levels.

My performance and contributions were reflected in my annual reviews, which were in the top 3-5% of the company for 13 consecutive years. That was my status with the company at the time of my first demotion in 2000, which also affected several others.

In 2003, all claims department employees over age fifty with a title of supervisor and above were demoted on the same day. In my case, I was replaced with a person I had hired who was in her early forties, but who did not have the required skills for the position as stated on the company job description, nor did she have my breadth of experience.

I filed an age discrimination suit in Federal Court, and a jury ruled in my favor after a very aggressive week-long trial in 2005. FBL appealed to the 8th Circuit on the "mixed motive" jury instruction, and we ended up in the U.S. Supreme Court in 2009. The High Court accepted certiorari on the single issue of whether direct evidence was required to obtain a mixed-motive jury instruction. Rather than answer that question, however, they vacated the 8th Circuit's decision, ignored decades of precedent and the clear intent of the ADEA, and set a new standard of proof for age discrimination.

In the meantime, I endured seven years of retaliation at FBL, and retired in December, 2009 because the stress was exacting a physical toll.

I've learned that some of the platitudes I've heard over the years are true. One of those is that "justice delayed is justice denied". It's been more than seven years since the wholesale demotions that started my case. That is a long time to go to an office every day knowing that I would endure retaliation for exercising a legal right. This all began in January of 2003, in a much different economic environment. My employer merged with the Kansas Farm Bureau. However, they did not want to add any more employees who were over the age of 50, and offered all the Kansas employees who were over 50 with a certain number of years of employment a buyout, to purge them from the company. At the same time, in Iowa and the other states of operation, they demoted virtually everyone who was over 50 and was a supervisor or above. They claimed that this was not discrimination, but simply a reorganization.

Now, if I may, I want to put my case and life in context for what is the much larger and broader issue of age discrimination.

My family, on both sides, has always been very conservative, in lifestyle and politically. My great-uncle was H.R. Gross, congressman from Iowa's third district from 1948-1968. His moniker was "watchdog of the treasury". Prior to that, he was the news broadcaster for WHO radio in Des Moines, Iowa at the same time as Ronald Reagan.

I am a hard-working, patriotic 61 year old, as are my friends. I did not pursue this case just for myself. I had watched the new management at FBL push the envelope of what they could get by with further and further without being challenged. Most people are simply just not in a position to fight back, financially, emotionally or intellectually. I was in that position, and I was raised to always stand up to bullies. Many of my friends are also farm or small town "kids" who now feel like they are the forgotten minority. Many of them have been forcibly retired or laid off. Some have been aggressively looking for work for months, only to find doors closed when they reveal the year they graduated. Others have accepted janitor jobs in spite of successful careers and college educations. They all know that age discrimination is very real and pervasive. They are coloring their hair and doing everything possible to look young enough to get an interview. This fight has become more about them than it is for me. I am just one person in this fight, but I know that what happens here will affect literally millions. That is what this is about, making the protection of the law for older people no less than the protection afforded to people of color, for women, or for people of different faiths.

One of the things I have always counted on was the rule of law. I believed it was consistent, it was blind, and it applied to all equally. If the rule of law had been applied to my case, I would have won at the Supreme Court level. Instead, they threw out 20 years of case law precedent and gutted the clear intent of congress and the ADEA. The jury in my case heard the law as written, listened to a week of testimony from both sides, and applied the law to the evidence. They didn't parse each word like the attorneys and judges tend to do, they just measured the law as stated against the evidence. As Souter said during the oral arguments, "juries are smarter than judges".

Age discrimination suits, I've learned, are very hard to win under any rule of law, and only a small percentage of them prevail. And, the process is onerous and not well known to anyone but lawyers who specialize in that area of practice. For instance, if a complaint is not filed with the Civil Rights Commission within three-hundred days and a Right to Sue letter is not issued by them, the claim is statutorily estopped. That process eliminates frivolous lawsuits not only because the short time frame is not well known, but also because the Commission will not grant a Right to Sue letter unless a prima facie case is shown. Once I received the Right to Sue Letter, it took two years to get to a jury trial. After a jury of my peers heard the evidence and the law and decided in my favor, the appeals process began four years ago. We are now facing the prospect that we could be starting all over with a new trial under a new set of rules, five years after the first trial. In that time, witnesses have moved out of state and memories have faded. While we are confident that our evidence will meet even the new higher standard, a new trial and new round of appeals could end up with this litigation consuming 20 percent of my life instead of the 10 percent it has already exacted. That, in itself, is unjust and extremely stressful.

I feel like my case has been hijacked by the high court for the sole purpose of rewriting both the letter and the spirit of the ADEA. I believe the overwhelming majority of my fellow citizens share my disappointment in activist judges, from either party, who use their personal ideology to misinterpret the law as clearly intended. In this case, the clear intent was to abolish discrimination in the workplace, not to make exceptions for it. I am especially mortified when the only people (judges) who are immune from age discrimination vis a vis their lifetime appointments, can rewrite laws that are designed to protect people in the "real" world.

As our former Iowa Lieutenant Governor recently stated in an editorial, "the party of Abraham Lincoln is against discrimination in all its forms". She (Joy Corning)

happens to be a Republican, but this should be a non-partisan issue. The branch of government closest to the people long ago recognized that age discrimination was a problem, and they legislated against it. I relied on that legislation. Now, it appears, the Supreme Court has decided that age discrimination is not like all the other forms of discrimination and should have it's own set of (much tougher) rules. To accomplish this outcome, the Court had to disregard its own rules. They did not address the single issue upon which certiorari was granted, and they allowed the opposing side to introduce for the first time an entirely new argument that had not been previously raised nor briefed. This was clearly motivated by ideology, much like it was in the Lily Ledbetter case. In both instances, the Court seemed to be directly challenging the congress to write new and tighter legislation if they don't want 5 lifetime appointees to circumvent their clear intent. I don't know Lily Ledbetter, but I think all citizens owe both her and congress a "thank you" for correcting a clearly unjust ruling. It is my understanding, however, that while Ms. Ledbetter got an act named after her, she still did not receive justice in the way of an award. That was unfair both to her and to her attorneys who, judging from my own experience, put in countless hours fighting for her and for a common sense ruling.

My own attorneys, Beth Townsend and Mike Carroll from Des Moines, Iowa, have likewise been fighting tirelessly on my behalf for over seven years without a dime of compensation. They took this case on a contingency basis because they believe in me, in the evidence, and now in the need to get some essential corrective action from our elected representatives. This case has become much larger in scope than we ever imagined, and thus much more expensive. I have personally spent over $30,000 in costs and expenses. That is money that was intended to help my grandchildren get a college education so they wouldn't have to starve their way through like I did.

I have been encouraged by the comments made about my case by Senators Harkin and Leahy, Representatives Miller and Andrews, and others. And I am grateful to all who signed on as sponsors. However, I am also keenly aware of the current agenda faced by this congress. I am hopeful that each of you recognize that this also needs immediate attention. Headline after headline have proclaimed that it is now easier for employers to discriminate based on age, following the decision in my case. I am not at all comfortable with having my name associated with a decision that is now causing pain to other employees in my age bracket simply because I took a stand seven years ago. And, as expected, my employer is pushing for a new trial as quickly as possible to take advantage of the new court-made law

before it can be corrected. For both reasons, I urge corrective legislation be taken as soon as possible.

I hope my story puts a real and human face on this issue for you. I am before you as a man who agonized over the decision to pursue this case, knowing it would not be an easy ride, and that I would effectively be burning my career bridges behind me once I was branded as "litigious". My wife and I prayed about it, decided it had to be done, and then we left the outcome in God's hands. We never dreamed it would end up here. If my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God's plan for my life.

What you do here with what the Court did to your law may or may not help me, but I know for sure you are in a position to help millions of your constituents who have stories like mine. Justice Thomas challenged you to clearly state that age has to be a "motivating factor" in age discrimination if that is what you intended. The Protecting Older Workers Against Discrimination Act does that, and I urge you on behalf of myself and millions of others who want to continue working, to pass it in the same bi-partisan spirit you've shown in the past on civil rights issues.

Sincerely and Respectfully,

Jack Gross, CPCU, CLU, ChFC, AIC, AU

Mr. NADLER. Thank you.
Mr. Dreiband, you are recognized for 5 minutes.

TESTIMONY OF ERIC S. DREIBAND, PARTNER, JONES DAY

Mr. DREIBAND. Thank you. Good morning, Chairman Nadler and Chairman Conyers and Members of the Committee. My name is

Eric Dreiband and I thank you and the entire Committee for affording me the privilege of testifying today.

I am here at your invitation to speak about the proposed Protecting Older Workers Against Discrimination Act. I do not believe the bill would advance the public interest. In particular, the bill as drafted will do nothing to protect workers from age discrimination, other forms of discrimination, retaliation or any other unlawful conduct.

I say this for three reasons. First, the bill incorrectly asserts that the decision by the Supreme Court of the United States in *Gross v. FBL Financial Services* eliminated protections for many individuals. In fact, the Court's decision does not eliminate any protection for victims.

Before the decision, age discrimination defendants could prevail, even when they improperly considered a person's age, if they demonstrated that they would have made the same decision or taken the same action for reasons unrelated to age.

The Court's decision stripped away this so-called "same decision" or same action defense and it therefore deprived entities that engage in age discrimination of this defense. For this reason, since the *Gross* decision, the Federal courts have repeatedly ruled in favor of discrimination plaintiffs and against defendants.

In fact, the United States Courts of Appeals for the first, second, third, sixth, seventh, eighth, 9th, 10th and 11th Circuits have relied upon the *Gross* decision to rule in favor of alleged discrimination victims.

Second, the bill, as written, will restore the "same action" defense eliminated by the *Gross* decision. As a result, discrimination victims may prove that a protected trait such as age was a motivating factor for the practice complained of, yet still lose their case.

This is because the bill would deprive discrimination victims of any meaningful remedy in so-called "same action" cases. Their lawyers may receive payment for fees directly attributable to a motivating factor claim, but the alleged victim will get nothing, no job, no money, no promotion—nothing.

A discrimination may win a moral victory perhaps, but nothing else. And the bill may enable some lawyers to earn more money, but who does this benefit? The answer is lawyers. Not discrimination victims, not unions and not employers.

Third, the bill is overly broad, vague and ambiguous and may open up a Pandora's box of litigation. The bill purports to apply to "any Federal law forbidding employment discrimination," and several other laws. But the bill does not identify which laws it will amend.

And as a result discrimination victims, unions, employers and others will unnecessarily spend years or decades and untold amounts of money fighting in court about whether the bill changes particular laws. The public will have to wait years or decades until the matter trickles up to the Supreme Court to settle the question case by case about one law after another.

In the meantime, litigants and courts will waste time, money and resources litigating this issue with no benefit for anyone. The threat of decades of litigation about these issues is not merely hypothetical.

Note in this regard that it took 38 years of litigation before the Supreme Court and the United States finally decided in 2005 that the Age Discrimination in Employment Act permits claims for unintentional age discrimination.

Congress can fix this vagueness problem rather easily by amending the bill to apply solely to the Age Discrimination in Employment Act, the only statue at issue in Mr. Gross' case, or at a minimum listing the laws that Congress intends to amend.

I would note in this regard that the recently enacted Lilly Ledbetter Fair Pay Act of 2009 specifically identified the laws that it amended, and Congress can do the same here.

Thank you. And I look forward to your questions.

[The prepared statement of Mr. Dreiband follows:]

PREPARED STATEMENT OF ERIC S. DREIBAND

STATEMENT OF ERIC S. DREIBAND

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY

Hearing About the Protecting Older Workers Against Discrimination Act

Thursday, June 10, 2010

10:00 am

2141 Rayburn House Office Building

I. Introduction

Good morning Chairman Conyers, Ranking Member Smith, and Members of the Subcommittee. I thank you and the entire Subcommittee for affording me the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm Jones Day here in Washington, D.C.

I previously served as the General Counsel of the United States Equal Employment Opportunity Commission ("EEOC" or "Commission"). As EEOC General Counsel, I directed the federal government's litigation of the federal employment discrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases.

During my tenure at the EEOC, the Commission continued its tradition of aggressive enforcement. We obtained relief for thousands of discrimination victims, and the EEOC's litigation program recovered more money for discrimination victims than at any other time in the Commission's history. The Commission settled thousands of charges of discrimination, filed hundreds of lawsuits every year, and recovered, literally, hundreds of millions of dollars for discrimination victims.

I am here today, at your invitation, to speak about the proposed Protecting Older Workers Against Discrimination Act, H.R. 3721. I do not believe that the bill would advance the public interest.

First, the bill incorrectly asserts that the decision by the Supreme Court of the United States in *Gross v. FBL Financial Services, Inc.* eliminated "protection for many individuals whom Congress intended to protect." In fact, the *Gross* decision will not eliminate protections at all. Before the *Gross* decision, age discrimination defendants could prevail, even when they improperly considered a person's age, if they demonstrated that they would have made the same decision or taken the same action for additional reasons unrelated to age. The Court in the *Gross* case eliminated this so-called "same decision" or "same action" defense. For this reason, since the *Gross* decision issued, the federal courts have repeatedly ruled in favor of age discrimination plaintiffs and against defendants.

Second, the bill as proposed will enable age discrimination and other victims to prove a violation if an impermissible factor "was a motivating factor for the practice complained of, even if other factors also motivated that practice." It will also restore the "same action" defense and may render the "motivating factor" standard nearly irrelevant. The proposed bill would deprive discrimination victims of any meaningful remedy in "same action" cases. Their lawyers may receive payment for fees "demonstrated to be directly attributable only to the pursuit of" a "motivating factor" claim. But the alleged victim will get nothing – no job, no money, no promotion. Mr. Gross, for example, will receive nothing if he proves age motivated his employer to demote him and his employer establishes its same action defense. His lawyer, though, will receive some money. As a result, if enacted in its current form, the bill may enhance protections for lawyers, but do nothing for individuals.

Third, the bill is overly broad, vague, and ambiguous. It purports to apply to "any Federal law forbidding employment discrimination," and several other laws, but the bill does not identify which laws the bill will amend. As a result, discrimination victims, unions, employers, and others will unnecessarily spend years or decades, and untold amounts of money, fighting in court over whether the bill changes particular laws. This will have no positive consequences for anyone. Congress can fix this vagueness problem rather easily by amending the bill to apply solely to the Age Discrimination in Employment Act – the only statute at issue in the *Gross* case – or at a minimum listing the laws that Congress intends it to apply.

II. Background

A. Age Discrimination in Employment Act of 1967

Congress enacted the Civil Rights Act of 1964 to make unlawful race and other forms of discrimination in employment and other areas. Title VII of that Act prohibits employment discrimination based on race, color, religion, sex and national origin.[1] Title VII also prohibits discrimination against any individual who has opposed unlawful discrimination or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or Title VII hearing.

Title VII also created the EEOC. EEOC enforcement authority over Title VII is plenary, with the exception of litigation against public employers. EEOC also enforces several other federal employment discrimination laws, including the employment provisions of Americans with Disabilities Act, the Equal Pay Act, and the Age Discrimination in Employment Act ("ADEA").

During the debate that led to Title VII's enactment, Congress considered whether or not to include age as a protected class under Title VII. Congress determined that it did not have sufficient information about age discrimination to legislate on the issue.[2] So, Congress directed the Secretary of Labor to study the issue and to report to Congress.[3]

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.

[2] *See* 110 CONG. REC. 2597 (1964) (remarks of Representative Celler ("[Congress] do[es] not have sufficient information, concerning discrimination based on age, to act intelligently. I believe ... it would be rather

Then-Secretary of Labor W. Willard Wirtz studied age discrimination in employment, and on June 30, 1965, he issued his report to the Congress. The report became known as the "Wirtz Report."[4] The Wirtz Report found that little age discrimination arose from dislike or intolerance of older people, but that arbitrary age discrimination was then occurring in the United States. Secretary Wirtz concluded that there was substantial evidence of arbitrary age discrimination, which he defined as "assumptions about the effect of age on [an employee's] ability to do a job *when there is in fact no basis for these assumptions*," particularly in the hiring context.[5]

Secretary Wirtz suggested that Congress deal with the problem of arbitrary age discrimination by enacting a bill called "The Age Discrimination in Employment Act of 1967." President Lyndon Johnson and majorities of both Houses of Congress agreed, and President Johnson signed the bill into law at the end of 1967.

The ADEA prohibits employment discrimination based on age.[6] Specifically, the ADEA makes it unlawful for employers, unions, and others to:

(1) fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) reduce the wage rate of any employee in order to comply with the ADEA.[7]

The ADEA also contains protections against retaliation. The ADEA has never had any mixed motive provision.

(continued...)

brash to rush into this situation without having sufficient information to legislate intelligently upon this very vexatious and difficult problem.").

[3] *See* H.R. Rep. No. 88-914, pt.1, at 15 (1963) ("Sec. 718. The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.").

[4] Secretary of Labor, The Older American Worker: Age Discrimination in Employment 1 (1965).

[5] *Id.* at 2, 5 (emphasis in original). *See also Smith v. City of Jackson*, 544 U.S. 228, 254-55 (2005) (discussing Wirtz Report).

[6] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 to 634.

[7] *Id.* at § 623(a).

B. The Mixed Motive Doctrine

There are two general ways to prove individual Title VII claims. The Supreme Court established the first in 1973 when it decided *McDonnell Douglas Corporation v. Green*.[8] In that case, an African-American employee of a manufacturing company alleged that his discharge and his employer's general hiring practices were racially motivated and violated Title VII. The Supreme Court in *McDonnell Douglas* clarified the proof structure that applies to a private, non-class action Title VII cases. The Court explained that a plaintiff in a Title VII case must first establish a "prima facie" case of discrimination by proving that:

(i) the plaintiff is a member of a protected class;

(ii) the plaintiff applied and was qualified for a job for which the employer was seeking applicants;

(iii) despite the plaintiff's qualifications, the employer rejected the plaintiff; and

(iv) after the employer rejected the plaintiff, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.[9]

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate "some legitimate, nondiscriminatory reason for the employee's rejection."[10] The plaintiff then must be "afforded a fair opportunity to show that [the employer's] stated reason for [plaintiff's] rejection was in fact pretext."[11]

In 1989, the Supreme Court established another way for a Title VII plaintiff to prove a Title VII violation. In *Price Waterhouse v. Hopkins*, the Court considered the case of Ann Hopkins.[12] Ms. Hopkins was a female senior manager at an accounting firm. She alleged that the firm denied her a promotion because of her sex. Ms. Hopkins was very accomplished and competent. The Company cited her lack of interpersonal skills and abrasiveness as the reasons for its decision not to promote her.[13]

The Supreme Court in *Price Waterhouse* explained that a plaintiff may prove a Title VII violation when a challenged decision is the product of both permissible and impermissible considerations. When a Title VII plaintiff proves that an illegitimate factor such as race or sex

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[8] 411 U.S. 792 (1973).

[9] *Id.* at 802.

[10] *Id.*

[11] *Id.* at 804.

[12] 490 U.S. 228 (1989).

[13] *Id.* at 233-34.

plays a motivating or substantial part in the employer's decision, the Court decided, the burden of persuasion shifts to the defendant to show by a preponderance of evidence that it would have made the same decision even in the absence of the illegitimate factor.[14] The Court also determined that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision."[15]

The "same decision" defense created by *Price Waterhouse* was a complete defense to liability. The Court explained:

> [W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[16]

Two years after the Court decided *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991. As part of the 1991 Act amendments, Congress codified the mixed motive concept first described by *Price Waterhouse*. Congress added the following to Title VII:

> Except 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.[17]

The Civil Rights Act of 1991 modified the *Price Waterhouse* "same action" defense slightly, as follows:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken 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 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).[18]

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[14] *Id.* at 258.

[15] *Id.* at 276 (O'Connor, J., concurring).

[16] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

[17] 42 U.S.C. § 2000e-2(m).

[18] 42 U.S.C. § 2000e-5(g)(2)(A).

The Civil Rights Act of 1991 also amended the ADEA.[19] It did not add any "motivating factor" claim or "same action" defense to the ADEA, nor has Congress ever done so.

Nine years later, in 2000, the Supreme Court decided *Reeves v. Sanderson Plumbing Products, Inc.* and applied the *McDonnell Douglas* burden shifting framework to the ADEA.[20] In *Reeves*, a discharged employee alleged that his employer unlawfully fired him because of his age. The Court recognized that "Courts of Appeals . . . have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence."[21] The Court assumed that the *McDonnell Douglas* framework applies to ADEA claims[22] and addressed "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action."[23] The Court concluded that the employee presented sufficient evidence to show that the defendant violated the ADEA.[24]

C. ***Gross v. FBL Financial Services, Inc.***

Jack Gross sued his employer, FBL Financial Group, Inc. for alleged ADEA violations. Mr. Gross alleged that his employer violated the ADEA when it demoted him in January 2003 because of his age.

Mr. Gross began his employment with the Company in 1971, and he received several promotions over the years. By 2003, he held the position of claims administration director. In that year, when he was 54 years old, the Company reassigned Mr. Gross to the position of claims project coordinator. At that same time, FBL transferred many of his job responsibilities to a newly created position – claims administration manager. The Company gave that position to Lisa Kneeskern, a former subordinate of Mr. Gross. Ms. Kneeskern was also younger than Mr. Gross. She was then in her early forties. Mr. Gross and Ms. Kneeskern received the same pay, but Mr. Gross considered the reassignment a demotion because FBL reallocated his former job responsibilities to Ms. Kneeskern.

Mr. Gross sued FBL in 2004. Before the case went to the trial, counsel for both sides asked the trial judge to instruct the jury about the burden of proof. FBL's lawyer requested that the judge tell the jury the following:

> Your verdict must be for Plaintiff if both of the following elements have been proven by the preponderance of the evidence:

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[19] *See, e.g.*, Pub.L. 102-166, Title I, § 115, Nov. 21, 1991, 105 Stat. 1079 (eliminating tolling period).

[20] 530 U.S. 133 (2000).

[21] *Id.* at 141.

[22] *Id.* at 142.

[23] *Id.* at 137.

[24] *Id.* at 146-48.

> 1) Defendant demoted Plaintiff to claims project coordinator effective January 1, 2003; and
>
> 2) Plaintiff's age was the determining factor in Defendant's decision.
>
> If either of the above elements has not been proven by the preponderance of the evidence, your verdict must be for Defendant.
>
> "Age was a determining factor" only if Defendant would not have made the employment decision concerning plaintiff but for his age; it does not require that age was the only reason for the decision made by Defendant.[25]

Mr. Gross' attorney asked the trial judge to tell the jury the following:

> Your verdict must be for plaintiff on plaintiff's age discrimination claim if all the following elements have been proved by the preponderance of the evidence:
>
> *First*, defendant demoted plaintiff; and
>
> *Second*, plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.
>
> However, your verdict must be for defendant if any of the above elements has not been proved by a preponderance of the evidence, or if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. You may find age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination.[26]

The trial judge generally agreed with Mr. Gross' lawyer and told the jury the following:

> Your verdict must be for the plaintiff if all the following elements have been proved by a preponderance of the evidence:
>
> *First*, defendant demoted plaintiff to claims project coordinator effective January 1, 2003; and
>
> *Second*, plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.

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[25] Eighth Circuit Model Jury Instruction 5.11A (applying to determining factor cases); *Gross v. FBL Financial Services, Inc.* No. 4:04-CV-60209, 2006 WL 6151670 (S.D. Iowa June 23, 2006), Def. Proposed Jury Instr. No. 10, filed Oct. 30, 2005.

[26] Eighth Circuit Model Jury Instruction 5.11B (applying to motivating factor/same decision cases); *Gross*, 2006 WL 6151670, Pl. Proposed Jury Inst. p. 16, filed Oct. 25, 2005.

> However, your verdict must be for the defendant if any of the above elements has not been proved by the preponderance of the evidence, or if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. You may find age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination.[27]

The jury found in favor of Mr. Gross and awarded him $46,945. After the trial, FBL asked the trial judge to overturn the jury's verdict. The court declined.[28] The court applied a *McDonnell Douglas* analysis and upheld the jury's verdict. The court found that Mr. Gross had established a prima facie case of age discrimination, that FBL had presented a legitimate, nondiscriminatory reason for the change in Mr. Gross' responsibilities, and that the jury nonetheless could have reasonably found that FBL's stated reason for the demotion was not credible.

FBL appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed and remanded for a new trial because it found that a mixed motive jury instruction was not proper. The court applied *Price Waterhouse* and held that a mixed motive jury instruction was improper because Mr. Gross did not present "direct evidence" of age discrimination.[29] According to the court, the trial judge should have instructed the jury consistent with the *McDonnell Douglas* framework.[30]

The Supreme Court granted certiorari and vacated and remanded the Eighth Circuit's opinion. The Court decided that a plaintiff who brings an intentional age discrimination claim must prove that age was the "but-for" cause of the challenged adverse employment action.[31] The Court determined that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.[32]

The Court identified the issue as "whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[33] The Court held that the burden does not shift. Title VII explicitly sets forth the motivating factor and same action burdens, but, the Court explained, the ADEA says nothing about any motivating factor or same action defense. The Court observed that when Congress amended Title VII in

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[27] *Id.* Final Jury Instr. No. 11.

[28] *Id.* at *1-14.

[29] *Id.* at 359-60.

[30] *Gross v. FBL Financial Services, Inc.*, 526 F.3d 356 (2008).

[31] *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

[32] *Gross*, 129 S.Ct. at 2352.

[33] *Gross*, 129 S.Ct. at 2348.

1991 and added the motivating factor and same action provisions, it did not add those provisions to the ADEA, even though it made other changes to the ADEA.[34]

The Court observed that the ADEA makes it "'unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.'"[35] The Court then applied what it said was the ordinary meaning of "because of," and reasoned that the ADEA's "because of" standard requires a plaintiff who alleges intentional age discrimination to "prove that age was the 'but-for' cause of the employer's adverse action."[36]

The Court rejected the contention that *Price Waterhouse*'s "motivating factor," "same decision," and "direct evidence" standards should govern ADEA cases. The Court observed that *Price Waterhouse*'s burden-shifting framework is "difficult to apply" and that the "problems" associated with *Price Waterhouse*'s "application have eliminated any perceivable benefit to extending its framework to ADEA claims."[37]

III. The Protecting Older Workers Against Discrimination Act

If enacted in its current form, the Protecting Older Workers Against Discrimination Act will do nothing to protect workers from age discrimination, other forms of discrimination, retaliation, or any other unlawful conduct. Individual employees who prove an unlawful motive will win nothing when the defendant establishes the same action defense. They will "win" a moral victory, perhaps, but nothing else. The bill may enable some lawyers to earn more money, but who does this benefit? The answer is: lawyers, not discrimination victims, not unions, and not employers. Furthermore, the bill will hurt victims, unions, employers, and others because it will force these individuals and entities to spend years or decades fighting in court about whether the bill applies to what the bill vaguely describes as various laws that "forbid[] employment discrimination." The bill will thus help empty the bank accounts of plaintiffs and defendants alike, and it will unnecessarily consume the limited resources of the federal courts.

Section 2 – Findings and Purpose. The bill asserts that the *Gross* decision "has narrowed the scope" of the ADEA's protection and that *Gross* "rel[ied] on misconceptions about the [ADEA]."[38] These assertions are incorrect. Nothing in the text or legislative history of the

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[34] *Id.* at 2348-49.

[35] *Id.* at 2350-51 (quotations omitted and emphasis added).

[36] *Id.*

[37] *Id.* at 2352 (citing *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (referring to "the murky water of shifting burdens in discrimination cases"); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J., dissenting) ("The difficulty judges have in formulating [burden-shifting] instructions and jurors have in applying them can be seen in the fact that jury verdicts in ADEA cases are supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally"); and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47, (1977) (reevaluating precedent that was subject to criticism and "continuing controversy and confusion"); and *Payne v. Tennessee*, 501 U.S. 808, 839-844 (1991) (Souter, J., concurring)).

[38] Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. § 2(a)(4)-(5) (2009).

ADEA authorizes mixed-motive discrimination claims.[39] The ADEA prohibits employment discrimination "because of" an individual's age.[40] And, because *Gross* actually strips away the same action defense, *Gross* deprives entities that engage in age discrimination from a defense previously thought available.[41]

The bill also asserts that unless Congress takes "action," age discrimination victims will "find it unduly difficult to prove their claims and victims of other types of discrimination may find their rights and remedies uncertain and unpredictable."[42] This assertion is also incorrect. The "but for" causation standard does not render discrimination victims helpless, nor does that standard mean that victims will lose their cases.

For example, in the *Gross* case itself, the trial judge applied the *McDonnell Douglas* standards after the trial, overruled the defendant's request the court overrule the jury, and sustained the verdict. Moreover, since the *Gross* decision issued, the federal courts have repeatedly ruled in favor of age discrimination plaintiffs.[43] Consider:

- In *Hrisinko v. New York City Department of Education*, decided two months ago, the United States Court of Appeals for the Second Circuit reversed the district court's grant of summary judgment and ruled in favor of an age discrimination plaintiff. The court noted that the plaintiff "faced changes in the terms and conditions of her employment that rise to the level of an adverse employment action," and therefore she "has set forth a prima facie case of age discrimination [under the *McDonnell Douglas* framework]."[44]

- In *Mora v. Jackson Memorial Foundation, Inc.*, also decided this year, the United States Court of Appeals for the Eleventh Circuit observed that *Gross* established that "no 'same decision' affirmative defense can exist." The court reversed the district court's grant of summary judgment in favor of the employer and instead ruled in the plaintiff's favor.[45] The court concluded that "a reasonable juror could accept that [the employer] made the discriminatory-sounding remarks and that the

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[39] 29 U.S.C. § 623; *Gross*, 129 S. Ct. at 2350-51; Secretary of Labor, The Older American Worker: Age Discrimination in Employment 21-22 (1965).

[40] 29 U.S.C. § 623(a)(1)-(2), (b), (c)(1)-(2).

[41] *See Gross*, 129 S. Ct. at 2350-51 & n.5.

[42] Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. § 2(a)(6) (2009).

[43] Federal courts of appeal have also applied *Gross* in favor of plaintiffs alleging discrimination under other employment statutes. *See, e.g.*, *Serafinn v. Local 722, Int'l Bhd. Of Teamsters*, 597 F.3d 908, 914-15 (7th Cir. 2010) (Labor Management Reporting and Disclosure Act; citing *Gross* to reject defendant's challenge to jury instructions); *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 943-44 (9th Cir. 2009) (Rehabilitation Act; citing *Gross* to conclude that § 504 covers independent contractors).

[44] No. 08-6071, 2010 WL 826879, at *2-*3 (2d Cir. Mar. 11, 2010).

[45] 597 F.3d 1201, 1202 (11th Cir. 2010).

remarks are sufficient evidence of a discriminatory motive which was the 'but for' cause of [the plaintiff's] dismissal."[46]

- Last year, the United States Court of Appeals for the First Circuit similarly reversed a district court's pro-employer summary judgment decision and found in favor of the plaintiff. In *Velez v. Thermo King de Puerto Rico, Inc.*, the court applied the *McDonnell Douglas* framework,[47] and noted that that "several aspects of the evidence . . . are more than sufficient to support a factfinder's conclusion that Thermo King was motivated by age-based discrimination . . . . These include Thermo King's shifting explanations for its termination for Velez, the ambiguity of Thermo King's company policy . . ., and, most importantly, the fact that in response to arguably similar conduct by younger employees, Thermo King took no disciplinary action."[48]

- In *Baker v. Silver Oak Senior Living Management Company*, the United States Court of Appeals for the Eighth Circuit reversed the district court's pro-employer grant of summary judgment, cited *Gross* decision, and ruled for the plaintiff. The court concluded that "[the plaintiff] . . . presented a submissible case of age discrimination for determination by a jury" when she introduced evidence that senior executives stated that they had a "preference for younger workers."[49]

Several other courts, including the Third, Sixth, Seventh, Ninth, and Tenth Circuits, relied upon *Gross* to rule in favor of plaintiffs.[50]

Section 3 – Standard of Proof. The Protecting Older Workers Against Discrimination Act would amend the ADEA to make an employment action unlawful if a plaintiff proves that an improper factor such as age motivated the employment action, even if other, legitimate factors

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[46] *Id.* at 1204.

[47] 585 F.3d 441, 447 n.2 (1st Cir. 2009).

[48] *Id.* at 449.

[49] 581 F.3d 684, 688 (8th Cir. 2009).

[50] *Kodish v. Oakbrok Terrace Fire Prot. Dist.*, 604 F.3d 490 (7th Cir. 2010); *Serafinn v. Local 722, Int'l Bhd. Of Teamsters*, 597 F.3d 908 (7th Cir. 2010); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2d Cir. 2010); *Bolmer v. Oliveria*, 594 F.3d 134 (2d Cir. 2010); *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009); *Leibowitz v. Cornell Uni.*, 584 F.3d 487 (2d Cir. 2009); *EEOC v. TIN, Inc.*, 349 F. App'x 190 (9th Cir. Oct. 20, 2009); *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009); *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009); *Hunter v. Valley View Local Schs.*, 579 F.3d 688 (6th Cir. 2009). The following courts cited *Gross* and found in favor of the defendant: *Thompson v. Solis*, No. 09-3280, 2010 WL 2134563 (2d Cir. May 28, 2010); *Johnson v. Franklin Farmers Coop.*, No. 09-5483, 2010 WL 1994853 (6th Cir. May 19, 2010); *Wood v. Summit County Fiscal Office*, No. 08-4534, 2010 WL 1957496 (6th Cir. May 14, 2010); *Wardlaw v. City of Philadelphia Street's Dep't*, No. 09-3666, 2010 WL 1718714 (3d Cir. April 26, 2010); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010); *Reeder v. Wasatch County Sch. Dist.*, No. 08-4048, 2009 WL 5031335 (10th Cir. Dec. 23, 2009); *Senske v. Sybase, Inc.*, 588 F.3d 501 (7th Cir. 2009); *Phillps v. Centrix Inc.*, 354 F. App'x 527 (2d Cir. Dec. 1, 2009); *Spencer v. UPS*, 354 F. App'x 554 (2d Cir. Dec. 1, 2009); *Kelly v. Moser, Patterson & Sheridan, LLP*, 348 F. App 'x 746 (3d Cir. Oct. 9, 2009); *Milby v. Greater Phila. Health Action*, 339 F. App'x 190 (3d Cir. July 27, 2009).

were also motivators."[51] But if a defendant can show that it would have taken the same action despite the improper factor, the plaintiff loses his or her right to damages, reinstatement, hiring, promotion, or payment.[52] In the end, only the lawyers win; the Protecting Older Workers Against Discrimination Act would allow courts to award certain attorney's fees and costs and would do nothing to enhance the ADEA's protections of victims of discrimination.[53]

Title VII cases provide sobering examples of how the mixed motive framework turns winning plaintiffs into losers. Like the bill, Title VII's mixed motive framework contains a same action defense and prevents victims from receiving a job, money, or anything else, other than money for their lawyers.[54] The types of injunctive relief that plaintiffs want, such as a job or back pay, are expressly excluded.[55] And, in fact, since the 1991 amendments to Title VII, mixed motive plaintiffs have received nominal injunctive relief, or nothing.[56] Some plaintiffs "won" only a hollow declaration that he or she prevailed.[57] To add insult to injury, former employees are unlikely to receive any form of meaningful relief at all, as courts have found that even injunctive relief is not warranted when the plaintiff is a former employee.[58] And, while some courts have suggested that injunctive relief may be appropriate when there is widespread discrimination or an employer maintains a discriminatory policy, the courts may issue only an order to comply with the law – something the law already requires even if no such order issues.[59]

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[51] Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. § 3 (2009).

[52] *Id.* § (3); *cf. id.* § 2(b).

[53] *Id.* § (3); *cf. id.* § 2(a).

[54] 42 U.S.C. § 2000e-5(g)(2)(B).

[55] *Id.* § 2000e-5(g)(2)(B)(ii).

[56] *See, e.g.*, *Coe v. N. Pipe Products*, 589 F. Supp. 2d 1055, 1097-98 (N.D. Iowa 2008) ("Thus, although the trier of fact may well find liability on a 'mixed motives' claim, the plaintiff may ultimately recover nothing if the trier of fact also finds for the defense on the 'same decision' defense. When faced with the real possibility of passing through the gauntlet of an employment discrimination trial, this court doubts that many plaintiffs would be willing to run the risk of prevailing on liability, but still receiving no monetary compensation for their efforts. This court also doubts that many plaintiffs would be happy to find that insult is added to injury, when they will receive nothing, but their lawyers will be compensated by the employer.").

[57] *See, e.g.*, *Thibeaux v. Principi*, No. 04-1609, 2008 WL 2517170, at *5 (W.D. La. June 20, 2008) (finding injunctive relief inappropriate because employee no longer reported to supervisor about whom she complained and did not allege any ongoing discrimination); *Crosby v. Mobile County*, No. 04-0144, 2007 WL 4125885, at *3 (S.D. Ala. Nov. 14, 2007) ("declaratory and injunctive relief is granted only to the extent that the court will declare that [defendant] engaged in discriminatory conduct . . . "); *Templet v. Hard Rock Constr. Co.*, No. 02-0929, 2003 WL 22717768, at *1 (E.D. La. Nov. 17, 2003) (finding that plaintiff is entitled to a judgment declaring that defendant violated law but finding no injunctive relief appropriate).

[58] *See, e.g.*, *Cooper v. Ambassador Personnel, Inc.*, 570 F. Supp. 2d 1355, 1359-60 (M.D. Ala. 2008) (holding that no injunctive relief is appropriate because plaintiff is no longer employed at the company).

[59] *See id.* at 1360 (stating that "injunctive and declaratory relief might be appropriate . . . where, for example, the company engaged in widespread gender discrimination of the type challenged or had an official policy for such or where the company continued to engage in such gender discrimination").

Section 3 – Application of Amendment. The Protecting Older Workers Against Discrimination Act does not identify the laws to which it applies. Section 3 of the bill simply states that the mixed motive proof structure would apply to "any Federal law forbidding employment discrimination."[60] This language is hopelessly overbroad, vague and ambiguous, and would open up a Pandora's Box of litigation dedicated to deciphering this section.

For example, will the bill cover the Fair Labor Standards Act, which prescribes standards for the basic minimum wage and overtime pay? Or, will it cover only Section 15 of the Fair Labor Standards Act because that is the only Section of the Act that uses the word "discriminate?"[61]

Consider also the Family and Medical Leave Act. That law, known as the "FMLA," provides eligible employees with up to twelve weeks of unpaid leave each year for several reasons, including for the birth and care of a newborn child of the employee; placement with the employee of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; to take medical leave when the employee is unable to work because of a serious health condition; or for qualifying exigencies that occur because the employee's spouse, son, daughter, or parent is on active duty or is called to active duty status as a member of the National Guard or Reserves in support of a contingency operation.[62]

The FMLA's terms are gender neutral, and the Act protects both men as well as women.[63] Is the FMLA a "Federal law forbidding employment discrimination" under the Protecting Older Workers Against Discrimination Act? If the bill is enacted in its current form, the public will have to wait years or decades until the issue trickles up to the Supreme Court to settle the issue. In the meantime, litigants and courts will waste time, money, and resources litigating this issue, with no benefit for anyone.

The threat of decades of litigation about these issues is not merely hypothetical. Note in this regard that it took 38 years of litigation before the Supreme Court finally decided, in 2005, that the ADEA permits claims for unintentional age discrimination in certain circumstances.[64] The Protecting Older Workers Against Discrimination Act, as currently proposed, will create litigation, confusion, and needless wasted resources and money because it does not precisely identify the laws it purports to amend. No victim of employment discrimination will benefit from any of this, and many will be hurt as will unions and employers. At a minimum, the bill should identify specifically the laws that it amends. The recently-enacted Lilly Ledbetter Fair

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[60] Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. § 3 (2009) (proposed to be codified at 29 U.S.C. § 623(g)(5)(B)).

[61] 29 U.S.C. § 215.

[62] 29 U.S.C. § 2612(a).

[63] *Nevada v. Hibbs*, 538 U.S. 721, 737 (2003)("By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes").

[64] *Smith v. City of Jackson*, 544 U.S. 228 (2005).

Pay Act of 2009 specifically identified the laws it amended, and Congress can do the same here.[65]

IV. Conclusion

I respectfully suggest that Congress re-examine the bill and its impact on Mr. Gross and other litigants. The bill will not restore any pre-*Gross* protections because *Gross* did not narrow the ADEA's protections. In fact, Mr. Gross already lost under those standards: the U.S. Court of Appeals for the Eighth Circuit applied the *Price Waterhouse* standard and overturned the jury's verdict in Mr. Gross' favor. Mr. Gross and many others will likewise gain nothing if the bill passes in its current form. The bill may provide greater income for some lawyers, but it will do so at a terrible cost. Discrimination victims, unions, employers, and others will become embroiled in years of unnecessary litigation about the bill's meaning. None of this is necessary, and I request that the Congress resist the urge to enact the bill as proposed.

[65] Pub. L. No. 111-2, §§ 3-5, 123 Stat. 5, 5-7 (2009).

Mr. NADLER. Thank you.
And I recognize Ms. Norton for 5 minutes.

TESTIMONY OF HELEN NORTON, ASSOCIATE PROFESSOR, UNIVERSITY OF COLORADO LAW SCHOOL

Ms. NORTON. And thank you, Mr. Chairman and Members of the Subcommittee for inviting me to testify today. The Supreme Court's decision in *Gross* significantly undermines older workers' ability to enforce their rights under the ADEA, and it threatens to do the same for workers seeking to enforce their rights under a wide range of other Federal anti-discrimination laws.

In response, H.R. 3721 would replace the Court's new rule in *Gross* with Title VII's longstanding causation rule, a rule that more effectively furthers Congress' interest in dismantling barriers to equal opportunity.

Current Federal law prohibits job discrimination "because of" certain characteristics. For example, the ADEA prohibits employers from discriminating against an individual because of such individual's age. Now, of course, employment decisions, like so many human decisions, are sometimes driven by multiple motives.

And these mixed-motive cases raise a causation challenge. When multiple reasons motivate an employment decision, some of which are discriminatory and some of which are not, under what circumstances should we conclude that the employer made such a decision "because of" discrimination in violation of Federal law?

The Supreme Court's decision in *Gross* departed from nearly 20 years of precedent on this question to articulate a brand new causation standard for the ADEA. And it vacated Mr. Gross' jury award, a jury award that had been issued based on instructions that were consistent with longstanding case law.

Under the Court's new rule, which adopts an approach rejected both by an earlier Supreme Court in its 1989 *Price Waterhouse* decision and by Congress in the Civil Rights Act of 1991, the burden of persuasion always remains on the plaintiff, not only to prove that age motivated the decision, but also to prove that age was the "but for" cause of the decision.

Now, requiring the plaintiff to bear the burden of proving that age was the "but for" cause of an action requires him or her to not only prove that age was a motivating factor, but also to prove that the employer would not have taken the same adverse action if it had not engaged in age discrimination.

Bearing the burden of proving what the employer would not have done in such an imaginary scenario is especially difficult for the plaintiff, as the defendant obviously has greater access to information about its state of mind in such a situation.

As lower courts have repeatedly confirmed and emphasized, *Gross* now erects substantial new barriers in the path of older workers seeking to enforce their rights to be free from age discrimination. And as Mr. Gross' own case makes clear, the Court's new rule can strip discrimination victims.

Mr. Gross proved that he was a victim of age discrimination. Nonetheless, the Court's new rule can strip him and other victims of hard fought victories. And my written statement offers other examples as well.

Moreover, the *Gross* rule undermines Congress' efforts to stop and deter workplace discrimination by permitting an employer

under some circumstances entirely to escape liability for a workplace infected by bias. And here is an example.

An older worker applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he prefers not to hire older workers because he considers them to be less productive, less creative and generally less energetic.

Suppose, too, that that employer ultimately hires another applicant who is arguably even more qualified for the position than the plaintiff. Under *Gross*, even if the plaintiff can prove that the employer relied on inaccurate and stigmatizing age-based stereotypes in its decision to reject her, the employer will escape ADEA liability altogether unless the plaintiff can also prove the employer would not have rejected her if it had not engaged in age discrimination.

Unless the plaintiff can prove this hypothetical negative, the *Gross* rule permits an employer completely to avoid liability for its proven bias with no incentive to refrain from similar discrimination in the future.

Gross threatens workers' rights to be free from discrimination and retaliation in a wide range of other contexts as well. And in fact, lower courts increasingly understand *Gross* to be the default rule in Federal litigation.

In other words, they increasingly interpret *Gross* to mean that mixed-motive claims are never available to plaintiffs under Federal statutes unless and until Congress expressly provides otherwise. And for this reason lower courts now apply *Gross* to a growing number of Federal statutes in addition to the ADEA.

In response, H.R. 3721 would replace the *Gross* rule with a uniform causation standard that would apply to the ADEA and other Federal laws that prohibit discrimination and retaliation. It would replace *Gross* with the same standard adopted by Congress with respect to Title VII in 1991.

H.R. 3721 thus rejects the *Gross* Court's unreasonable demand that a plaintiff who successfully proves that discrimination did in fact motivate the decision, must bear the additional burden of proving that some other factor was not in the defendant's mind.

Furthermore, as Congress recognized in the Civil Rights Act of 1991, this approach best prevents and deters future discrimination by ensuring that employers proven to have engaged in discrimination can be held liable for their actions.

Again, thank you for inviting me to join you today, and I look forward to your questions.

[The prepared statement of Ms. Norton follows:]

PREPARED STATEMENT OF HELEN NORTON

Testimony of Associate Professor Helen Norton

University of Colorado School of Law

On H.R. 3721, the "Protecting Older Workers Against Discrimination Act"

before the United States House of Representatives Committee on the Judiciary

June 10, 2010

Thank you for the opportunity to join you today. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's employment discrimination enforcement efforts.

The Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*[1] significantly undermines older workers' ability to enforce their rights under the Age Discrimination in Employment Act (ADEA), and threatens to do the same for workers seeking to enforce their rights to be free from discrimination and retaliation under a wide range of other federal employment laws. H.R. 3721 responds by replacing the causation rule articulated by the *Gross* Court with the causation standard long in place under Title VII that more effectively furthers Congress' commitment to dismantling barriers to equal opportunity.

"Causation" and Federal Antidiscrimination Law

Current federal law prohibits job discrimination "because of" certain specified characteristics, such as race, color, sex, national origin, religion, age, genetic information, and disability.[2] The ADEA, for example, prohibits an employer from discriminating against any individual "because of such individual's age."[3] Federal employment laws also frequently include antiretaliation provisions that prohibit an employer from discriminating against an individual "because" that individual objected to potentially unlawful behavior, filed a charge of discrimination, or otherwise engaged in activity protected from retaliation under the statute.[4] These causation provisions thus require proof of a nexus or connection between the defendant's discriminatory behavior and the adverse employment action experienced by the plaintiff.

In many discrimination cases, the competing parties agree that a single factor "caused" an adverse employment decision, but vigorously disagree in identifying that factor. This is the case, for example, when the plaintiff contends that his employer discharged him "because of" his age, while the employer contends instead that it acted "because of" some nondiscriminatory reason

[1] 129 S. Ct. 2343 (2009).
[2] *See* 42 U.S.C. § 2000e-2 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12101 et seq. (Americans with Disabilities Act); 42 U.S.C. § 2000ff-1(a) (Genetic Information Nondiscrimination Act).
[3] 29 U.S.C. § 623(a)(1).
[4] *See, e.g.*, 42 U.S.C. § 2000e-3 (Title VII) (prohibiting discrimination against an individual "because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter"); 29 U.S.C. §623(d) (ADEA) (same).

like performance. In such cases, the plaintiff bears the ultimate burden of persuading the fact-finder that the decision was made "because of" age.[5]

But employment decisions – like so many human decisions – are sometimes driven by multiple motives. "Mixed-motive" claims thus raise a challenging causation question: when multiple motives inform an employment decision – some of which are discriminatory and some of which are not -- under what circumstances should we conclude that the employer made such a decision "because of" discrimination in violation of federal law?

The Supreme Court first addressed this question in 1989 in *Price Waterhouse v. Hopkins*,[6] where six Justices interpreted Title VII's statutory language prohibiting job discrimination "because of" race, sex, color, religion and national origin to prohibit adverse employment actions motivated in whole or in part by the plaintiff's protected characteristic. In that case, more specifically, they concluded that a plaintiff who successfully proves that sex was a motivating or a substantial factor in an employment decision shifts the burden of persuasion to the employer, who may escape liability "only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[7]

Congress next addressed this issue, along with several others, with the enactment of the Civil Rights Act of 1991 and its series of amendments to Title VII. Agreeing with the *Price Waterhouse* Court that the defendant employer is in a better position than the plaintiff employee to reconstruct history and prove whether an employer who has been found to have engaged in discrimination would have taken the same action in a workplace uninfected by bias, Congress codified the *Price Waterhouse* burden-shifting framework, under which the burden of proof shifts to the employer when the plaintiff proves that discrimination based on a protected characteristic was a motivating factor in the employer's decision.

Expressing concern, however, that the *Price Waterhouse* rule still did not sufficiently deter employers from discrimination, Congress took a step further to provide additionally that a plaintiff has conclusively established the defendant's Title VII liability once he or she proves that race, sex, color, religion, or national origin was a motivating factor in the employer's decision,[8]

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[5] *See, e.g.*, Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143 (2000).

[6] 490 U.S. 228 (1989).

[7] *Id.* at 244-45 (plurality opinion); *see also id.* at 241 ("It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision. . . . When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of sex' and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account."); *id.* at 259-60 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring).

[8] *See, e.g.*, H.R. REP. NO. 102-40(I) at 47 (1991) ("If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price Waterhouse* jeopardizes this fundamental principle."); H. R. REP. NO. 102-40 (II) at 18 (1991) ("[T]he Committee intends to restore the rule applied by the majority of 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."); S. REP. NO. 315, 101st Cong., 2nd Sess. 48-49 (1990) (describing Congress' intent to replace the *Price Waterhouse* causation standard with one that better deters discrimination).

shifting the burden to the defendant at the remedies – rather than at the liability – stage.[9] Under this framework, an employer that then proves that it would have made the same decision even absent discrimination remains liable for a Title VII violation but can limit available remedies to declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs – thus relieving the employer from exposure for backpay, damages, or reinstatement.[10] This causation standard ensures that federal courts retain the power to enjoin the defendant's proven discrimination through declaratory and injunctive relief, thus ensuring equal employment opportunity in the future.

The 1991 Act's amendments with respect to Title VII causation, however, did not expressly apply to the ADEA. For the approximately twenty years between *Price Waterhouse* and *Gross,* lower courts uniformly interpreted the ADEA's causation standard as consistent with the *Price Waterhouse* Court's interpretation of the identical Title VII language at the time, thus permitting a plaintiff who proves that age was a motivating factor in an employer's decision to establish liability unless the employer can prove that it would have made the same decision in a workplace free from age discrimination.[11]

The Damaging Consequences of the Supreme Court's Decision in *Gross v. FBL Financial Services, Inc.*

The Supreme Court's 5-4 decision in *Gross v. FBL Financial Services, Inc.*[12] brought a dramatic – and unwelcome – change to this landscape. There the plaintiff, Jack Gross, alleged that he had been illegally demoted because of his age after his employer reassigned him from his longstanding position as claims administrations director to the position of claims project coordinator, and transferred many of his previous responsibilities to a younger employee placed in the newly-created position of claims administration manager. At trial, his lawyers requested

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[9] In other words, Congress adopted the *Price Waterhouse* burden-shifting framework, but modified it to ensure that some remedies still remain available to the plaintiff when both parties satisfy their burdens of persuasion under that framework. Under *Price Waterhouse,* if the plaintiff proves that sex was a motivating factor in the employer's decision *and* the employer proves that it would have made the same decision even if it had not engaged in sex discrimination, the employer is not liable for a Title VII violation and no remedies are available. Under the Civil Rights Act of 1991, if the plaintiff proves that sex was a motivating factor in the employer's decision *and* the employer proves that it would have made the same decision even if it had not engaged in sex discrimination, the employer *has* violated Title VII and the plaintiff is entitled to limited relief as described above. Under either framework, if the employer fails to prove that it would have made the same decision absent sex discrimination once the plaintiff has proved that sex was a motivating factor, the employer is liable for the full range of Title VII remedies.

[10] *See* 42 U.S.C. § 2000e-2(m) (providing that "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"); 42 U.S.C. § 2000e-5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations under § 2000e-2(m) when the defendant proves that it would have taken the same action in the absence of the impermissible motivating factor).

[11] For examples of lower courts' application of the *Price Waterhouse* causation standard to the ADEA in the years before *Gross, see* Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000); Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171 (2nd Cir. 1992); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3rd Cir. 1995); EEOC v. Warfield-Rohr Casket Co., 364 F. 3d 160 (4th Cir. 2004); Rachid v. Jack in the Box, Inc., 376 F. 3d 305 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F. 3d 564 (6th Cir. 2003); Visser v. Packer Engineering Assocs., Inc., 924 F.2d 655 (7th Cir. 1991); Hutson v. McDonnell Douglas Corp., 63 F. 3d 771 (8th Cir. 1995); Lewis v. YMCA, 208 F.3d 1303 (11th Cir. 2000).

[12] 129 S. Ct. 2343 (2009).

and received jury instructions consistent with *Price Waterhouse* and nearly 20 years of case law under the ADEA. Applying those instructions, the jury concluded that Mr. Gross had proved that his age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. The jury thus found that Mr. Gross had established an ADEA violation, and awarded him approximately $47,000 in lost compensation. The Supreme Court, however, vacated Mr. Gross' award. Departing from twenty years of precedent, it articulated a brand-new causation standard that significantly narrows the scope of protections available to older workers under the ADEA.[13]

The *Gross* Court first characterized Congress' 1991 decision to amend Title VII's causation standard – but not that of the ADEA – as evidence that Congress intended the two statutes to provide different levels of protection against discrimination.[14] Next, after suggesting that *Price Waterhouse* was wrongly decided,[15] the *Gross* Court limited *Price Waterhouse* in any event as applicable only to Title VII and its language at the time.[16] The *Gross* Court then insisted upon a new interpretation of the ADEA's identical causation language, holding that the burden of persuasion never shifts to the defendant even after the plaintiff proves that age was a motivating factor in an adverse employment decision. Under the *Gross* Court's new causation rule – a causation standard rejected both by the *Price Waterhouse* Court[17] and by Congress in the Civil Rights Act of 1991 -- the burden of persuasion always remains on the plaintiff not only to prove that age motivated the decision, but also to prove that age was the "but-for" cause of the decision: "The burden of persuasion does not shift to the employer to show that it would have

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[13] For additional discussion of the *Gross* decision and its implications, *see* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc. *and the Unfulfilled Promise of the Civil Rights Act of 1991,* 58 BUFF. L. REV. 69 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-09 Labor and Employment Cases,* 13 EMP. RTS. & EMP. POL'Y J. 253, 263-73 (2009); Martin J. Katz, *Gross Disunity,* 114 PENN ST. L. REV. 857 (2010); Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions,* 51 B.C. L. REV. 279 (2010); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399 (2009).

[14] *See Gross,* 129 S. Ct. at 2349 ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

[15] *See id.* at 2351-52 ("[I]t is far from clear that the Court would have taken the same approach were it to consider the question today in the first instance.").

[16] *See id.* at 2352 ("Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.").

[17] Indeed, the *Price Waterhouse* Court explicitly rejected such a "but-for" standard when interpreting Title VII's parallel prohibition of job discrimination "because of" sex:

> We take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for' causation . . . is to misunderstand them. But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs [in Title VII] in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made.*

Price Waterhouse, 490 U.S. at 240-41 (plurality opinion) (emphasis in original).

taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[18]

As numerous lower courts have observed, *Gross* thus erects substantial new barriers in the path of older workers seeking to enforce their right to be free from discrimination under the ADEA.[19] The Second Circuit, for example, explained *Gross* as imposing "a more stringent causation standard" on plaintiffs than that under *Price Waterhouse*[20] and another federal court described *Gross* "as elevating the quantum of causation required under the ADEA."[21] Indeed, as Mr. Gross's own case makes clear, the Court's new rule can strip discrimination plaintiffs of hard-fought victories.[22]

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[18] *Gross,* 129 S. Ct. at 2352.

[19] *See, e.g.,* Baker v. Silver Oak Senior Living Management Co., 581 F.3d 684, 689-90 (8th Cir. 2009) (describing the "motivating factor" causation standard under Missouri state antidiscrimination law as "less demanding" for age discrimination plaintiffs than that under the ADEA after *Gross*); Dudley v. Lake Ozark Fire Protection Dist., 2010 WL 1992188 at *5 (W.D. Mo. 2010) (same); Mojica v. El Conquistador Resort and Golden Door Spa, 2010 WL 1992575 at *1 (D. Puerto Rico 2010) (observing that *Gross* "in some aspects raised the standard for proving an ADEA claim").

[20] Bolmer v. Oliveira, 594 F.3d 134, 148-49 (2nd Cir. 2010)

[21] Fuller v. Seagate Technology, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009). Moreover, some lower courts have relied on *Gross* to narrow the protections available for older workers even more dramatically. For example, some have misinterpreted the Court's requirement that the plaintiff prove that age was the but-for cause of the adverse employment action to mean that the plaintiff must prove that age was the *sole* reason for the adverse action. *See, e.g.,* Whitaker v. Tennessee Valley Authority Bd. Of Directors, 2010 WL 1493899 *9 (M.D. Tenn. 2010) ("Here, plaintiff has not presented a jury question on whether his age was the *sole* reason for his non-selection. . . . Post-*Gross,* it is incongruous to posit such alternate theories because the very presentation of different reasons for an action suggests that age was not the *sole* reason for the action.") (emphasis in original); Culver v. Birmingham Bd. of Education, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009) ("*Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact he is over 40 years old was the ***only*** or the *but for* reason for the alleged adverse employment action. The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was ***any*** other proscribed motive involved.") (emphasis in original); Wardlaw v City of Philadelphia, 2009 WL 2461890 at *7 (E.D. Pa. 2009) ("The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the only reason for discrimination. Even if Wardlaw's assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination and retaliation she alleges to have experienced. . . . Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, Wardlaw is foreclosed from prevailing on a claim for age-related discrimination.").

[22] At trial, Mr. Gross's lawyers requested and received the *Price Waterhouse* motivating factor instruction. A jury then applied those instructions to conclude that Mr. Gross had proved that age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. It thus found that Mr. Gross had established that his employer had violated the ADEA, and awarded him approximately $47,000 in lost compensation. On appeal, the defendant employer challenged the trial judge's decision to use the *Price Waterhouse* instruction, arguing that such a motivating factor instruction is appropriate only when the plaintiff has direct evidence of discrimination and that Mr. Gross did not have such evidence. The Eighth Circuit agreed, ruling against Mr. Gross *not* because he could not satisfy the *Price Waterhouse* standard – in fact he did – but instead because it found that the *Price Waterhouse* motivating-factor instruction is only available in cases when the plaintiff has direct evidence of age discrimination (e.g., where the employer acknowledges its discrimination, which of course is very rare). The Supreme Court granted certiorari to decide whether a plaintiff must present direct evidence of age discrimination to obtain a motivating factor instruction under the ADEA or whether instead circumstantial evidence could suffice – an issue that had divided the lower courts. The Court's ultimate decision in *Gross,* however, failed to address this question and instead vacated Mr. Gross's jury verdict under its brand-new causation standard.

Moreover, the *Gross* rule undermines Congress' efforts to stop and deter workplace discrimination by permitting an employer under some circumstances entirely to escape liability for a workplace infected by bias, with no incentive to refrain from similar discrimination in the future. Consider the following example: An older worker applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he prefers not to hire older workers because he finds them to be less energetic, less creative, and generally less productive. Suppose too that the employer ultimately hires another applicant who was arguably even more qualified for the position than the plaintiff. Under the *Gross* Court's new rule, even if the plaintiff can prove that the employer relied on inaccurate and stigmatizing age-based stereotypes in its decision to reject her,[23] the employer will escape ADEA liability altogether unless the plaintiff can also prove that the employer would not have taken the adverse action if it had been free of age discrimination. Unless the plaintiff can prove this hypothetical negative, the *Gross* rule thus permits an employer completely to avoid liability for its proven discrimination – indeed, even when the plaintiff has "smoking gun" evidence that discrimination played a role in its decision.

The *Gross* decision threatens workers' rights to be free from discrimination and retaliation in a wide range of other contexts as well. Lower courts now increasingly understand *Gross* to mean that the motivating factor framework is *never* available to plaintiffs under federal antidiscrimination and antiretaliation statutes unless and until Congress expressly provides otherwise.[24] The Seventh Circuit, for example, describes *Gross* as holding that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[25]

For this reason, lower courts now apply *Gross* to a growing number of federal antidiscrimination and antiretaliation statutes in addition to the ADEA, requiring the plaintiff not only to prove that discrimination or retaliation motivated the decision, but also to bear the additional burden of proving that such discrimination was the "but-for" cause of the decision. Examples include cases alleging job discrimination because of disability in violation of the

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[23] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

[24] Indeed, the *Gross* Court signaled its unwillingness to interpret other statutes in a manner consistent with the *Price Waterhouse* Court's interpretation of identical causation language, thus destabilizing the longstanding expectation that Congress incorporated the same language in different antidiscrimination laws because it intended consistent interpretation of those laws. *See Gross,* 129 S. Ct. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'") (citation omitted).

[25] Fairley v. Andrews, 578 F. 3d 518, 525-26 (7th Cir. 2009); *see also* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963 (7th Cir. 2010) (emphasizing "the import of explicit statutory language rendering an employer liable for employment decisions that were motivated in part by a forbidden consideration but which the employer still would have made in the absence of that proscribed motive. In the absence of such language, the limited remedies that Title VII otherwise makes available to plaintiffs in such cases . . . are foreclosed."); Serafinn v. Local 722, Int'l Brotherhood of Teamsters, 597 F.3d 908, 915 (7th Cir. 2010) (holding that, after *Gross,* "[m]ixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act's authorization of claims that an improper consideration was 'a motivating factor' for the contested action.").

Americans with Disabilities Act,[26] job discrimination because of protected speech under 42 U.S.C. § 1983,[27] interference with pension rights in violation of ERISA,[28] and job discrimination based on an employee's jury service in violation of the Jury Systems Improvement Act.[29]

In these contexts, too, the *Gross* rule has deprived plaintiffs of victory. Consider the experience of Dr. LilliAnn Williams-Jackson, a public school guidance counselor who alleged a violation of the Jury Systems Improvement Act and successfully proved that her jury service was a motivating factor in her employer's decision to cut her position. The trial court nonetheless rejected Dr. Williams-Jackson's claim in light of the new and more stringent causation standard under *Gross*:

> This is a close case of mixed motives leading to the decision to "excess" Dr. Jackson from [the school] and one in which Dr. Jackson's credibility is distinctly superior to her former principal. Nonetheless, the Court concludes that Dr. Jackson has not carried her burden to prove that her jury service "was the 'but-for' cause of the challenged employment action."
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[26] Serwatka v. Rockwell Automation, Inc. 591 F.3d 957, 961 (7th Cir. 2010). Note that the ADA, properly construed, authorizes mixed motive claims consistent with the standards identified in the Civil Rights Act of 1991. The ADA's enforcement provisions specifically incorporate the powers, remedies and procedures of Title VII, including the Title VII provision authorizing certain remedies where the plaintiff has proven that discrimination was a motivating factor in an employment decision. 42 U.S.C. §12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment."). Thus, Congress clearly envisioned that relief would be available for mixed motive discrimination under the ADA, just as it is available under Title VII. In addition, in amendments to the ADA in 2008, Congress changed the Act's employment provisions to bar discrimination "on the basis of disability" rather than "because of" disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a) (codified at 42 U.S.C. § 12112(a)). This change to the ADA's causation language was intended to align the ADA even more clearly with Title VII. *See, e.g.*, Senate Statement of Managers for Pub. L. No. 110-325; H. REP. NO. 110-730 (I), at 6 (2008). Despite these indications of congressional intent in both the original ADA and the ADA Amendments Act, the Seventh Circuit, as noted above, relied on *Gross* to conclude that the original ADA does not permit such claims because the ADA's employment title does not directly mirror Title VII's explicit scheme concerning mixed motive claims. The court noted, however, that it was not deciding whether the ADA Amendments Act of 2008 necessitated a different result, since the amendments did not control the case before it. *Serwatka*, 591 F.3d at 962 n.1.

[27] *E.g.*, Fairley v. Andrews, 578 F. 3d 518, 525-26 (7th Cir. 2009).

[28] *See* Nauman v. Abbott Laboratories, CA 04-7199 (N.D. Ill. April 22, 2010) (observing that, in light of *Gross*, "plaintiffs have apparently withdrawn their theory that defendants could be found liable for ERISA violations if plaintiffs proved an intent to interfere with benefits partially motivated defendants' implementation of the spin and attendant policies. The court agrees with defendants that the *Gross* line of cases stands for the proposition that, unless a statute such as Title VII of the Civil Rights Act specifically provides for liability in a 'mixed motive' case, the prohibited motivation must be the motivating factor, rather than simply a motivating factor.") (citation omitted).

[29] Williams v. District of Columbia, 646 F. Supp. 2d. 103, 109 (D.D.C. 2009). Other courts have speculated about the application of the *Gross* standard to still other federal laws providing important employment protections, such as 42 U.S.C. § 1981 and the Family and Medical Leave Act. *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 187 (3rd Cir. 2009) (Jordan, J., concurring) ("[I]t seems quite possible that, given the broad language chosen by the Supreme Court in *Gross*, a critical re-examination of our [section 1981] precedent may be in order."); Crouch v. J.C. Penney Corp., Inc., 337 Fed. Appx. 399, 402 n.1 (in the context of an FMLA case, noting that "[t]he Supreme Court's recent opinion in *Gross* raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework") (citation omitted).

> [U]nder *Gross*, Dr. Jackson must prove by a preponderance of the evidence that she was "excessed" "by reason of" her jury service -- that is, that jury service was the "but-for" cause of the decision to excess her. The Court has no doubt that Dr. Jackson's jury service was *a* motivating factor behind [the principal's] acceptance of the loss of a guidance counselor, who otherwise is of particular assistance to a principal in dealing with behavior and other student problems. What is lacking is any evidence that her jury service was "the 'but-for' cause" of the decision. . . ."[30]

Under the *Gross* standard, Dr Williams-Jackson receives nothing, and her employer remains unsanctioned even though it was proven to have punished her for her jury service.[31]

The Seventh Circuit similarly applied the *Gross* rule in an Americans with Disabilities Act case to strip a plaintiff of relief that she had been awarded by the trial court.[32] There the jury concluded that the plaintiff had proven that defendant fired her based on its perception that she had a disability, and also found that the defendant still would have fired her absent her perceived disability. Applying Title VII's motivating factor causation standard to the ADA,[33] the district court then awarded the plaintiff declaratory and injunctive relief along with some of her attorney's fees and costs (for a total of approximately $30,000). The employer appealed this award of partial costs, fees, declaratory, and injunctive relief, arguing that the *Gross* causation rule should apply instead. The Seventh Circuit agreed, applying *Gross* to leave the plaintiff with nothing:

> [The plaintiff] did not show that her perceived disability was a but-for cause of her discharge. Although the jury agreed with her that [the employer's] perception of her limitations contributed to the discharge, it also found that [the employer] would have terminated [the plaintiff] notwithstanding the improper consideration of her (perceived) disability. Relief is therefore not available to her under the ADA, and [the employer] was entitled to judgment in its favor. . . . .[I]n view of the Court's intervening decision in *Gross*, it is clear that the district court's decision to award [the plaintiff] declaratory and injunctive relief along with a portion of her attorney's fees and costs cannot be sustained.[34]

Once again, the *Gross* rule left the plaintiff with nothing, and her employer remains unsanctioned even though it was proven to have discriminated against her based on disability.

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[30] Williams, 646 F. Supp. 2d. at 103, 109 (quoting *Gross*).

[31] In contrast, under H.R. 3721, Dr. Williams-Jackson would have been entitled at a minimum to injunctive and declaratory relief and partial attorney's fees and costs, plus the possibility of additional relief (such as backpay and reinstatement) if the employer could not bear its burden of proving that it would have demoted her regardless of her jury service.

[32] Serwatka v. Rockwell Automation, Inc., 591 F.3d 957(7th Cir. 2010).

[33] The ADA's enforcement provisions specifically incorporate the powers, remedies and procedures of Title VII, including the Title VII provision authorizing certain remedies where the plaintiff has proven mixed motive discrimination. 42 U.S.C. §12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment.").

[34] *Serwatka*, 591 F.3d at 963-64.

In short, requiring the plaintiff to bear the burden of proving that age (or some other protected characteristic) was the "but-for" cause of an action requires him or her to prove that the employer would have not taken the same adverse action if it had not engaged in age discrimination. Requiring the plaintiff to bear the burden of proving what the employer would or would not have done in such an imaginary scenario is especially difficult after the fact, as the defendant is in a better position than the plaintiff to show how it would have acted in such a hypothetical situation. Justice Breyer's observation in his *Gross* dissent anticipates plaintiffs' challenges under *Gross*:

> It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.[35]

H.R. 3721 Would Replace the *Gross* Standard with a Uniform Standard that Furthers Congress' Interest in Preventing and Deterring Job Discrimination and Retaliation

H.R. 3721 – the "Protecting Older Workers Against Discrimination Act" – responds by applying the standard adopted by Congress with respect to Title VII in the Civil Right Act of 1991 to make clear that a plaintiff establishes an unlawful employment practice under the ADEA (and other federal antidiscrimination and antiretaliation statutes) by proving that age (or other protected characteristic) was a motivating factor for an employment decision.[36] The burden of proof then shifts to the employer to establish that it still would have taken the same action absent its discrimination. If the employer then satisfies this burden, it can substantially reduce the plaintiff's relief, but cannot escape liability altogether.

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[35] *Gross*, 129 S. Ct. at 2359 (Breyer, J., dissenting); *see also id.* (explaining that *Price Waterhouse* permitted the employer an affirmative defense to liability, "not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation.") (emphasis in original).

[36] H.R. 3721, § 3 ("[A] plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that . . . an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice.").

H.R. 3721 thus rejects the *Gross* Court's unreasonable demand that a plaintiff who successfully proves that discrimination did in fact motivate the decision must bear the additional burden of proving that some other factor was NOT in the defendant's mind – i.e., that some nondiscriminatory factor was *not* the but-for cause of the adverse employment decision. H.R. 3721's burden-shifting framework instead appropriately recognizes and responds to employers' and employees' asymmetric access to information about the employer's state of mind. Indeed, this approach tracks that in other areas of the law, where defendants' greater access to information that is key to proving or disproving an element of a particular claim commonly triggers burden-shifting.[37] Such burden-shifting is especially appropriate, moreover, when the defendant's wrongdoing – here, its discriminatory consideration of protected status or activity in its decisionmaking – has created uncertainty in determining the but-for cause of the actual employment decision.

Furthermore, as Congress recognized in the Civil Rights Act of 1991, this approach -- which shifts the burden of proof to the employer to limit remedies[38] rather than entirely to defeat liability -- best prevents and deters future discrimination by ensuring that employers proven to have engaged in discrimination cannot completely escape liability for their actions.[39] Indeed, this approach enables federal courts to retain judicial power to order and monitor correction of a employer's proven discriminatory conduct in the form of declaratory and certain injunctive relief. For an illustration, consider our earlier example of an older worker who is rejected for a job opportunity because of invidious age discrimination but who nonetheless would not have been hired for a nondiscriminatory reason as well. H.R. 3721 would provide a tool for remedying such proven discrimination by empowering the federal court to enjoin the employer from engaging in such discrimination in the future, thus serving the important deterrent functions of antidiscrimination law while leaving employers free to make decisions based on ability or any other nondiscriminatory factor.[40]

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[37] *See* Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE 105 (3d ed. 2003) (describing the appropriateness of shifting the burden of proof to the defendant on a contested issue when the defendant has greater access to evidence probative of that issue).

[38] Section 3 of H.R. 3721 makes clear that once the plaintiff proves that the employer engaged in discrimination and thus violated federal law, the employer may still substantially limit the available remedies by showing that it would have made the same decision in a discrimination-free environment. If the employer satisfies that burden, it will be liable only for declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs, and a court may not order the hiring, reinstatement, or promotion of the individual, nor the payment of backpay to the individual.

[39] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (identifying Title VII's "primary purpose" as "prophylactic" in removing barriers that have operated to limit equal employment opportunity).

[40] Note too that the availability of limited attorney's fees and costs encourages individuals to act as private attorneys general in the public interest to vindicate Congress' commitment to equal employment opportunity. *See* City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in §1988 over and above the value of a civil rights remedy to a particular plaintiff. . . .'") (citations omitted); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) ("If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they

In enacting the Civil Rights Act of 1991, Congress wisely clarified the causation standard to be applied to Title VII and its prohibition of discrimination because of race, color, sex, religion, and national origin. H.R. 3721 would apply the same causation standard – proven workable under Title VII after nearly two decades in operation -- to other federal laws that prohibit discrimination because of age and other protected characteristics. Ensuring that the standard for proving unlawful disparate treatment under the ADEA (and other antidiscrimination and antiretaliation laws) tracks that available under Title VII – as H.R. 3721 would do – not only codifies the standard that most effectively furthers Congress' commitment to equal opportunity, but also offers great practical value by establishing a principle of uniformity. Such a consistent approach to causation is especially helpful in cases involving claims under multiple statutes – such as an older African-American plaintiff who brings claims under both Title VII and the ADEA – by ensuring that courts, litigants, and jurors will proceed under the same "motivating factor" instruction for all claims.[41]

H.R. 3721 Also Clarifies Federal Antidiscrimination Law in Other Important Ways

H.R. 3721 also addresses an important question left unanswered by the Supreme Court's opinion in *Gross*. The *Gross* Court actually granted certiorari to decide an issue that had divided lower courts: whether a plaintiff must present direct evidence of age discrimination to obtain a motivating factor instruction under the ADEA or whether instead circumstantial evidence could suffice.[42] The Court's ultimate decision in *Gross*, however, failed to address this question and instead decided a very different matter, articulating a brand-new causation standard that significantly undercut protections for older workers without the benefit of full briefing by the parties or development by the lower courts.[43]

H.R. 3721 provides valuable clarification of the law by finally answering the question that the *Gross* Court failed to address, making clear that plaintiffs seeking to prove discrimination in violation of the ADEA (or other federal antidiscrimination or antiretaliation law) "may rely on any type or form of admissible circumstantial or direct evidence" to prove their claims.[44] H.R. 3721's standard thus tracks that under Title VII, as confirmed by a

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know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.").

[41] *See Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) ("Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims."). The same is true for a wide variety of case involving multiple claims – for example, those alleging violations of both Title VII and 42 U.S.C. 1981, or those alleging violations of Title VII's antiretaliation protections as well as its antidiscrimination provision.

[42] *Id.* at 2348 (majority opinion). Indeed, the Supreme Court has twice granted certiorari on this question whether the motivating factor framework is available only upon a heightened evidentiary showing: in *Desert Palace v. Costa* (with respect to Title VII) and in *Gross* (with respect to the ADEA). Lower courts' division on this issue has been driven largely by the questions created by Justice O'Connor's concurring opinion in *Price Waterhouse* that suggested the importance of direct evidence to a plaintiff's ability to bring a mixed-motive claim under antidiscrimination law. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

[43] *See Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting) ("[T]he Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.").

[44] H.R. 3721, § 3.

unanimous Supreme Court in *Desert Palace, Inc. v. Costa*.[45] As the Court observed in that case, "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'"[46] Indeed, circumstantial evidence -- which can take a variety of forms, including decisionmakers' remarks suggesting animus or hostility based on protected status, differential comparative treatment, statistical evidence, suspicious timing, and evidence that the employer's testimony is not credible -- is of enormous value in discrimination cases and elsewhere. Moreover, as a practical matter, direct evidence is quite rare in discrimination cases, as employers who engage in discrimination rarely confess their bias. By codifying the traditional legal rule permitting plaintiffs to rely on any available probative evidence -- circumstantial as well as direct -- to establish that discrimination was a motivating factor in an employment decision, H.R. 3721 again not only ensures uniformity in the standards to be applied to federal antidiscrimination laws, but provides the standard that most effectively advances the purposes of such laws.

Finally, H.R. 3721 addresses an additional ambiguity created by the *Gross* Court's suggestion that the application of the Supreme Court's familiar *McDonnell Douglas*[47] evidentiary framework outside the context of Title VII remains an open question.[48] By making clear that the *McDonnell Douglas* framework remains available for disparate treatment claims under the ADEA and other federal laws that prohibit job discrimination and retaliation,[49] H.R. 3721 would eliminate any confusion on this issue.[50]

In sum, H.R. 3721 responds to the *Gross* Court's significant narrowing of workers' rights under the ADEA, along with the decision's potential to do the same for a wide range of other federal antidiscrimination and antiretaliation laws. By replacing the causation rule articulated by the *Gross* Court with the causation standard long in place under Title VII, H.R. 3721 more effectively furthers Congress' efforts to remove and deter barriers to equal opportunity.

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[45] 539 U.S. 90 (2003).

[46] *Id.* at 100 (citation omitted); *see also id.* (noting also that "we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.").

[47] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that the plaintiff's demonstration of a prima facie case under Title VII creates a presumption that the defendant employer unlawfully discriminated against the plaintiff, and thus shifts the burden of production to the defendant to articulate a legitimate nondiscriminatory reason for its action, although the burden of persuasion remains on the plaintiff to prove that discrimination was the real reason).

[48] *Gross*, 129 S. Ct. at 2349 n.2 ("|T|he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* utilized in Title VII cases is appropriate in the ADEA context.") (citation omitted).

[49] H.R. 3721, § 3.

[50] *See, e.g.*, Geiger v. Tower Automotive, 579 F.3d 614, 622 (6th Cir. 2009) ("The Supreme Court [in *Gross*] expressly declined to decide whether the *McDonnell Douglas* test applies to the ADEA."); Bell v. Raytheon, Co., 2009 WL 2365454 at *4 (N.D. Tex. 2009) ("Recently, however, the United States Supreme Court issued a decision that questions whether the *McDonnell Douglas* approach should be applied in ADEA cases."); Holowecki v. Federal Express Corp., 644 F. Supp. 2d 338, 352 (S.D.N.Y. 2009) (observing that "whether *Gross*, by implication, also eliminates the *McDonnell Douglas* burden-shifting framework in ADEA cases was left open by the Court").

Mr. NADLER. Thank you. And I will begin the questioning by recognizing myself for 5 minutes. Ms. Norton, unlike Title VII, the ADEA does not have a statutory provision recognizing mixed-motive claims. Can you explain briefly how and why mixed-motive claims previously were recognized under the ADEA?

Ms. NORTON. Yes, certainly. Most anti-discrimination statutes include a key phrase "because of." In other words, they prohibit discrimination because an employee has a certain characteristic, like race or age, or because an employee engaged in a certain protected action like——

Mr. NADLER. Could you use perhaps Mr. Dreiband's mic? Yours doesn't seem to be functioning properly. Was she on the mic? And turn yours off. Okay. I am sorry, proceed.

Ms. NORTON. It is commonplace for Federal law to prohibit discrimination "because of" a certain characteristic like race or age or because an employee engaged in a certain activity, like Federal jury service or reporting possibly illegal behavior.

In *Price Waterhouse* in 1989, the Supreme Court interpreted that phrase, what does it mean for an employer to discriminate "because of" sex? And the Supreme Court held that that means an employer cannot rely on sex in whole or in part and created the motivating factor mixed-motive framework.

The ADEA uses the same phrase. It prohibits employers from discriminating "because of" age. So not surprisingly and without dissent, since *Price Waterhouse,* all lower courts have assumed that Congress meant the same phrase to mean the same thing in different anti-discrimination statutes.

Mr. NADLER. And also since *Price Waterhouse* Congress saw no necessity for spelling it out since it was clear.

Ms. NORTON. Correct. And in fact, Congress codified that standard in the Civil Rights Act of 1991.

Mr. NADLER. Now, Mr. Dreiband takes a position that plaintiffs are better off under the *Gross* ruling, and cites the several post-*Gross* rulings to support his claim. Are you familiar with those cases and do you reach the same or different conclusion as Mr. Dreiband's?

Ms. NORTON. I haven't seen Mr. Dreiband's statement for today, but I have seen his statement from the Senate, and I see that they are largely similar. I disagree. I disagree about all of those cases with care, and I do not believe they support the assertion for which they are cited.

In fact, a number of them explicitly confirm the fact that *Gross* poses a more onerous, more stringent causation standard on plaintiffs than does *Price Waterhouse*. And they went on to rule for the plaintiffs because they found that the plaintiff's evidence of discrimination was sufficiently strong that it could satisfy any causation standard, including the more onerous standard.

Several of the other cases cited actually distinguish *Gross*, making clear that they will continue to rely on *Price Waterhouse* in statutes other than the ADEA. So rather than relying on *Gross* they, in fact, declined to rely on *Gross*.

Mr. NADLER. So could you comment on the following couple of sentences in Mr. Dreiband's testimony as to whether you agree or disagree and why? He said, "Before the *Gross* decision, age discrimination defendants could prevail, even when they improperly consider the person's age, if they demonstrated that they would have made the same decision or taken the same action for additional reasons unrelated to age."

The Court in the *Gross* case eliminated this "so-called same decision or same action defense." For this reason and since the *Gross* decision issue, the Federal courts have repeatedly ruled in favor of age discrimination plaintiffs and against defendants.

Ms. NORTON. Mr. Dreiband characterizes *Gross* as eliminating a defense that had been available to plaintiffs and that had been available to defendants. And he argues that that is beneficial to plaintiffs. But at what—it is important to understand what *Gross* did.

It replaced the *Price Waterhouse* rule, the *Price Waterhouse* rule that required at some point the defendants to bear the burden of proving that they would have made the same decision absent age discrimination. If you are a litigant you want the other party to bear the burden of proof because that means the other party bears the burden of any uncertainty.

You especially want the other party to bear the burden of proof when the other party is the one that has access to information that is key to that issue. For example, if the issue is the other party's state of mind, you want the other party to bear the burden of proof as to his or her state of mind.

So by eliminating the burden shifting mechanism that *Price Waterhouse* established and that Congress codified with respect to the Civil Rights Act of 1991, *Gross* ensured that the burden never shifts to the defendant.

And the plaintiff must bear the burden not only of proving that age was a motivating factor, but also that some other factor did not or would not have motivated the employer's decision in the hypothetical, the imaginary scenario in which age did not play a role.

If I could just complete my earlier answer in terms of the cases cited in Mr. Dreiband's Senate testimony, he also cites a number of cases in which the courts, lower courts cite *Gross* but then go on to decide for the plaintiffs under McDonnell Douglas. So they are certainly relying not on *Gross* but on longstanding ADEA and anti-discrimination law to reach its conclusion.

There is one case that Mr. Dreiband dites in that statement that I do agree can be characterized as relying on *Gross* to find for plaintiffs, the Mora case. But I think if you look closely at that case that you will see that the plaintiff's evidence in that case was so strong it would have survived any causation standard before or after *Gross*.

And in fact the court in that case did rely on mixed-motive cases, *Price Waterhouse* cases, to reach that conclusion.

Mr. NADLER. Can you submit the citations of these cases for the record? Or rather, I am sorry, can you cite your analysis of these cases for the record?

Ms. NORTON. Yes, sir.

Mr. NADLER. Thank you. I have one more question. Do you agree that there is no "meaningful remedy" where an employer succeeds in bearing the burden of proving the mixed-motive "same decision" defense?

Ms. NORTON. No, sir, I do not agree. First of all, H.R. 3721 would provide to full relief, full relief damages, reinstatement, et cetera, so plaintiffs like Jack Gross and other victims like him who prove

that their employer acted based on age or some other prohibited discrimination.

And where their employers, as was the case with Mr. Gross, cannot prove that they would have made the same decision absent age discrimination fully, that Mr. Gross prevailed under the existing *Price Waterhouse* instructions. He would have prevailed under H.R. 3721. He would have been entitled to full relief.

Even in those cases in which both the plaintiff and the defendant meet their burdens of proof under the framework articulated under H.R. 3721, so even those cases where the plaintiff, like Mr. Gross, proves that age was a motivating factor and the defendant, unlike the defendant in Mr. Gross' case, can also prove that it would have made the same decision absent age.

H.R. 3721, unlike the *Gross* rule, ensures that declaratory and injunctive relief and partial attorney's fees and costs will still remain available. This is hugely important to achieving the deterrent purpose of anti-discrimination law.

Anti-discrimination laws as the Supreme Court has repeatedly recognized, has two purposes: to compensate victims of discrimination for the losses that they have suffered because of discrimination, and to serve the larger public purpose of stopping and deterring discrimination.

And as the Supreme Court has repeatedly emphasized, injunctive relief, which this bill would make possible once the plaintiff has proved that age played a role in the decision, injunctive relief is key to ensuring that—to vindicating the important public interest in deterring discrimination regardless from and apart from any monetary remedy to the plaintiff.

Mr. NADLER. Thank you. I will now recognize—my time is expired.

I will now recognize the gentleman from Arizona for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. Thank you all for being here.

Mr. Dreiband, let me, if I could, I was interested in if you had any response to Ms. Norton's—some of her analyses of your own Senate testimony? Just give me an idea of what your response might be to that?

Mr. DREIBAND. Let me see if this is on. Okay. Professor Norton and I, I think, respectfully disagree. The Mora case decision by the United States Court of Appeals to the 11th Circuit is an example I think where we may part company, as is Mr. Gross' case itself.

I would note that under the pre-existing *Price Waterhouse* standard a unanimous United States Court of Appeals ruled against Mr. Gross because the court said he failed to present direct evidence of discrimination, which is a necessary requirement established by the *Price Waterhouse v. Hopkins* decision that apparently Professor Norton thinks is a better rule than is the Supreme Court's decision.

He lost under that standard. And in the Mora case that Professor Norton cited, I would note that in that case the plaintiff was an individual named Josephine Mora, the chief executive officer of her employer made comments to her and about her that he needed someone younger than her.

And yet under the pre-existing standard that governed her case, that is the standard that governed before the *Gross* decision, the

district court granted summary judgment in favor of the employer and said she did not even have a right to present her case to a jury.

The United States Court of Appeals for the 11th Circuit read the Supreme Court's decision in *Gross* and concluded that this so-called "same decision" or same action defense that existed under the *Price Waterhouse* framework is no longer available to employers. And so the Court reversed the decision and sent the case back to the trial court for a trial.

Now, let me clarify one other point that I think Chairman Nadler made about my remarks. I did not mean to suggest that Mr. Gross is better off today as a result of the Supreme Court's decision than he was after the jury's verdict.

Certainly the Supreme Court did not reinstate the jury's verdict that the court of appeals reversed, but nevertheless, the notion that the *Gross* decision is some, you know, part of some master plan to assault working people or to increase burdens on plaintiffs is simply not being borne out by the cases that we have seen since the decision came down.

Mr. FRANKS. Well, like, I guess it is in a sense for me it is the scope of H.R. 3721 that concerns me. Despite its title, Protecting Older Workers, the bill seems to go far beyond simply adopting the mixed-motive *Price Waterhouse* mode of proof to the ADEA and protecting older workers in general.

But it seems that in actuality the bill would adopt this standard to a range of Federal laws including the ADEA and any other "Federal law forbidding employment discrimination" at all or discrimination against an individual participating in any federally protected activities, like perhaps even the whistleblower law and perhaps statutes ranging from labor relations laws including those with extensive case law interpretive history such as the National Labor Relations Act and the Labor Management Reporting and Disclosure Act.

You know, just innumerous whistleblower statutes in entirely different areas of law. I mean there is just a—it seems like there is a host of areas that this could affect. Can you give me some idea of whether or not you think this is or could be problematic, and why should we be cautious before taking such a sweeping act here in the form of H.R. 3721?

Mr. DREIBAND. Yes. I think, yes. The bill does not identify the laws that it intends to amend. This is very different than the approach the Congress took in 2009 when Congress enacted the Lilly Ledbetter Fair Pay Act and explicitly identified the laws that Congress intended to change.

It would not be difficult to amend the bill to simply list the statutes that Congress intends to amend as a result of the bill. That could be done very easily.

I think if Congress decides not to do that and enacts the bill in this form, what we are likely to see then will be unnecessary litigation between the plaintiffs and defendants who will argue whether or not the bill amends to the particular law that they are litigating over.

Let me give you an example. The Fair Labor Standards Act which sets standards for the minimum wage, for overtime pay-

ments, for child labor and other wage issues, does not explicitly say that this is a law forbidding employment discrimination.

One section of the bill, though, prohibits employers from discriminating against people if they cooperate, for example, with the United States Department of Labor in an investigation or testify.

The bill as written here it is unclear about whether this bill would apply to the Fair Labor Standards Act or not, or whether it might apply to parts of it or not. And I think if the bill is enacted in its current form what we are likely to see are several years of courtroom fights over that question and litigation over that question with no benefit to victims of discrimination.

No benefit to unions or employers who have to spend unnecessarily amounts of money and attorney's fees in order to get a decision ultimately from the Supreme Court and that could come, you know, decades later. And so I think it is a very real concern but one that I think Congress can fix very easily.

Mr. FRANKS. Well, thank you, and thank you Mr. Chairman. I think I got my full 5 minutes, but the light didn't go from green to red so I don't know.

I was just going to—I think I am fine. I think you kind of answered the question. Is there any additional examples of unintended negative consequences that could result when the laws other than ADEA might be impacted in a way by this legislation?

Mr. DREIBAND. Well, I think, if I understand the question, I think the concern is that in many areas of the law like in the National Labor Relations Act, which regulates relationships between unions and employers, that the law is well-established on questions about the so-called mixed-motive framework.

Very often that is a result of either statutes or case law, and I think that the bill is written because it does not identify the laws which it would amend, would call into question as to whether or not the existing state of the law is changed at all by this bill or not.

And my own view is I don't see how that, the uncertainty that that would create helps anybody. I mean, victims of unlawful conduct or unions or employers, but one I would encourage the Congress to think and give some thought to to correct if it can, if it will.

Mr. FRANKS. Thank you. And thank you, Mr. Chairman for indulging me. I obviously have some concerns with the bill on broader terms, but it might be at least worth considering making sure it is specified as to what other statutes that this affects.

Mr. NADLER. Thank you.

I will now recognize the gentleman from North Carolina for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Gross, you have been sitting there quietly as lawyers have been sparring. Can you just tell us what the current status of your case is? I assume you had to go back and re-litigate the—or was it resolved?

Mr. GROSS. Yes. Actually what the Supreme Court did was to vacate what the 8th Circuit had done. And so that means we are basically headed back to a new trial. I think it is November 8th of this year. This is going to be nearly 8 years after the original act,

over 5 years since the first trial. And we don't know right now what the standard of rule is going to be until Congress takes an action on this.

Mr. WATT. Are you still employed by this employer?

Mr. GROSS. I was until December of last year.

Mr. WATT. You retired?

Mr. GROSS. Yes, I had been experiencing retaliation since I filed this suit for 7 years, and my wife and I had to have a little heart to heart talk about whether the stress was still worth it or not. And we had decided to retire.

Mr. WATT. Mr. Dreiband, I wasn't clear from your testimony of whether you were of the opinion that we should be doing nothing legislatively or whether you just have some concerns about the content of this. What is your position on whether we should be trying to at least make consistent the standard in ADEA cases and other Title VII cases?

Mr. DREIBAND. And in other—I am sorry, what was that?

Mr. WATT. Title VII cases.

Mr. DREIBAND. Well, as I understand the bill it would not change Title VII.

Mr. WATT. No, I am not asking you what——

Mr. DREIBAND. Right.

Mr. WATT [continuing]. Your understanding of the bill is. I am just asking you whether you think we should be doing anything in this area, or you think we should be doing nothing?

Mr. DREIBAND. I don't believe that the Supreme Court's decision changes anything, so I, as a result, my recommendation would be to do nothing.

Mr. WATT. So you are saying that a plaintiff like Mr. Gross should have to prove the negative that the employer would not have done this "but for" this. That is what you are saying?

Mr. DREIBAND. That is not what I am saying.

Mr. WATT. As opposed to the employer having to come forward and submit evidence on that?

Mr. DREIBAND. No. No, that is not what I am saying. If I could clarify?

Mr. WATT. Okay. Well, I am trying to get clarification. It is just——

Mr. DREIBAND. Right, okay. Well it is——

Mr. WATT [continuing]. It is not a trick question. I am just trying to find out what your——

Mr. DREIBAND. Right, I understand, but——

Mr. WATT [continuing]. Opinion is.

Mr. DREIBAND. No. I don't accept the premise of the question, respectfully. The standard that governs a so-called "but for" causation generally speaking means the plaintiff has to prove that the prohibited characteristic, in this case age, was a determining factor. The jury instructions in the 8th Circuit, which govern Mr. Gross' case has defined determining factor as not the only factor.

Mr. WATT. Mr. Dreiband, I appreciate your taking my 5 minutes to explain the laws to me. I am just asking a simple question. You don't think the burden should ever shift to the defendant in the case when defendant has really access to the information about what their own motivation?

You don't think that there should ever be a shifting of that, of that burden to the defendant? Is that what—or you do?

Mr. DREIBAND. Well, there are times when the burden under affirmative defenses will shift to a defendant in a discrimination case.

Mr. WATT. Okay. I am asking in this case, in Mr. Gross' case, do you think there should—in ADEA cases should there ever be a time when that burden shifts?

Mr. DREIBAND. Yes.

Mr. WATT. Okay. All right, fine. Okay, that is all I am trying to find out. I don't, so I mean so there is no sense in us arguing about—so now, let me just ask one other question and maybe you will be more direct.

Do you think I am trying to trick you? I am not. I am just trying to make sure that I understand what the witnesses are saying and who are testifying here because we have got to make some decisions about this going forward.

I didn't understand the point you were making about this only benefitting lawyers as opposed to benefitting plaintiffs. Explain that to me.

Mr. DREIBAND. The bill would essentially transform the Title VII mixed-motive framework into the Age Discrimination in Employment Act. What that means is that as a general matter, if a plaintiff proves the motivating factor standard and the employer carries its same action or "same decision" defense, the plaintiff wins nothing.

The only award that the plaintiff gets is that the court will order the defendant to pay a portion of the attorney's fees, which means the attorney may get some money, but the plaintiff doesn't.

Mr. WATT. But if the plaintiff wins the case you are saying there is no difference here? Or is there a difference?

Mr. DREIBAND. If the plaintiff wins under a, let us call it the determining-factor standard, the plaintiff gets a job, money, promotion, potentially liquidated damages. If the plaintiff wins under the mixed-motive framework and the employer establishes its affirmative defense, that plaintiff, Mr. Gross in this case, will not get anything—nothing, no job, no money, no promotion, nothing. And——

Mr. WATT. Ms. Norton maybe you can help me understand that. I don't for the life of me understand what Mr. Dreiband is saying. Maybe you understand it better. I mean I haven't done any employment discrimination cases since at least 1992 when I got elected here. So maybe you understand better what he is saying.

Ms. NORTON. I can't speak for Mr. Dreiband. I will offer my observations with respect to Mr. Gross under this bill, if this bill is in effect by the time Mr. Gross' new trial takes place. It is currently scheduled for November.

The Supreme Court's decision had the result of stripping him of his jury verdict of $47,000 in lost compensation and ordered him to undergo a new trial under the *Gross* rule's more difficult causation standard.

But if Congress is able to enact this bill before his new trial, he will be entitled to full relief if he has to do this again, if he again proves that age was a motivating factor in his demotion, and if his

employer again fails to prove that it would have demoted him even apart from his age.

But even if—this is a hypothetical because it hasn't happened—but even if his employer could prove, could have proved that it would have demoted him regardless of age, under H.R. 3721 that would ensure that he would get injunctive relief, stopping the employer from continuing discrimination and retaliation.

As Mr. Gross testified, he remained employed, although demoted, at FBL at the time of his trial through the Supreme Court's case and through this last December. Under H.R. 3721, he would have been protected by an injunction from continuing discrimination and retaliation. That is very valuable, and the public would have benefitted from a court order stopping that discrimination.

Mr. WATT. Okay. I think I understand it now. I thank you, Mr. Chairman.

I thank you, Mr. Dreiband. I am sure you made an effort. I just didn't understand what you were saying. I wasn't ignoring you or trying to cut you off. But I am just trying to understand what the state of the law is now, and so I yield back.

Mr. NADLER. Thank the gentleman.

I now recognize the gentleman from Virginia for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Norton, Mr. Dreiband suggested that the case didn't do that much. Can you remind us about the damage done in this case?

Ms. NORTON. I am sorry, Congressman. I didn't hear you.

Mr. SCOTT. What Mr. Dreiband said that the case didn't do that much. Mr. Gross' case didn't do that much damage. Can you remind us of the damage the case did?

Ms. NORTON. Well, in Mr. Gross' case he lost his $47,000 jury verdict compensating him for lost pay and benefits and now will have to face retrial currently under a much more difficult causation standard.

I will give you another example. Dr. LilliAnn Jackson, Williams-Jackson, a public school guidance counselor, alleged that she had been demoted because of her Federal jury service because she was away from work serving her civic duty as a juror and that her employer punished her as a result of it. And she alleged a violation of the Jury Systems Improvement Act.

The trial court agreed that Dr. Jackson had substantially greater credibility than the defendant, and the trial court agreed that Dr. Jackson had proven that she was the victim of discrimination, that her jury service was in fact a motivating factor in her demotion.

However, the trial court says, "We are obliged to apply *Gross*." *Gross* requires Dr. Jackson to also prove that the jury service was the "but for" cause, and that Dr. Jackson could not bear the burden of proving there was not some other reason, like budgetary reasons, for her demotion.

The trial court made clear that *Gross* was the difference between winning and losing for Dr. Jackson.

Mr. SCOTT. Can you say a word about the requirement for direct evidence in the case? When is direct evidence needed?

Ms. NORTON. Yes, sir. Sir, direct evidence is generally characterized as evidence that leaves no doubt as to the role of discrimination in the decision. It is basically a confession. When an employer

says, "I am firing you because of your age." It is very powerful evidence, but as you can imagine, it is also very rare.

Much more common in all types of cases, criminal cases, civil cases, employment discrimination cases, is circumstantial evidence, which can take any of a number of forms: suspicious timing, different comparative evidence, different folks treated differently when it doesn't appear that they should be treated differently, hostile remarks, et cetera.

In almost all areas of the law, plaintiffs are permitted to offer whatever evidence they have, and it is up to the fact finders, the jury to determine whether or not it is sufficient. This bill would make clear that that is also the case with respect to all employment discrimination complaints, including and not limited to Age Discrimination in Employment Act cases.

There had been a split in the lower courts as to whether or not a plaintiff needed direct evidence of age discrimination to get a mixed-motive instruction. And this bill would clarify once and for all that circumstantial as well as direct evidence is sufficient for a plaintiff to establish that discrimination was a motivating factor.

Mr. SCOTT. Can you say a word about the same decision, how that plays out? Whether or not that is a defense, if you have done the same thing to others?

Ms. NORTON. This bill would make clear, first of all, that the plaintiff has established a violation once he or she has proved that discrimination was a motivating factor, there is a violation of law.

It also permits, however, the employer not to escape liability but to limit its remedies if it can then bear the burden of proving that it still would have made the same decision even in the hypothetical situation in which it did not engage in age discrimination.

If the employer is able to make out that defense then it doesn't have to reinstate the plaintiff. It doesn't have to pay out damages. It is subject to an injunction stopping it from any continuing discrimination or retaliation. And it is subject to partial attorney's fees and costs to compensate the plaintiff for establishing discrimination.

Mr. SCOTT. In Title VII. So that if you have a policy of discriminating but the plaintiff couldn't prove that they were a victim of that policy you would essentially have no damages, but you can show that you can stop the ongoing discrimination. And that would be the benefit to the public.

Ms. NORTON. Yes, sir.

Mr. SCOTT. Mr. Dreiband, isn't that a benefit if you have a policy of discrimination and the person who appears to be a victim but turns out can't prove their case? Can't prove his or her case? Isn't it a benefit to enjoin the ongoing policy of discrimination?

Mr. DREIBAND. Certainly if an employer has an ongoing policy or pattern or practice of discrimination, yes, I agree entirely that that practice or policy or pattern should be enjoined.

I think the reality, though, is as we have seen in the Title VII context, is that because there are no damages available to the individuals that individuals, including the government, the Equal Employment Opportunity Commission, rarely if ever assert a mixed-motive claim.

I mean I, you know, when I served as general counsel at the Equal Employment Opportunity Commission I was involved in hundreds of cases. And I am not aware of a single mixed-motive Title VII that EEOC brought. And I have spoken with other EEOC lawyers who have served there for many years and theyr'e not aware of any cases either.

So I agree with you and I agree with Professor Norton that certainly an injunction that prohibits such a policy is in the public interest. I have never seen a case where an employer maintains such a policy or pattern or practice of discrimination and a plaintiff couldn't demonstrate that they were a victim of that. Normally they do demonstrate that.

Mr. SCOTT. Well, but I think in Mr. Gross's case they said they demoted everyone over a certain age. Isn't that right Mr. Gross? Now, the individual plaintiff might not be able to show that their demotion was because of that policy. All they know is they were demoted along with everybody else.

And so if they would bring the case, assuming that they would have benefits, but if it gets thrown out nobody else can enjoy the benefits of an injunction.

Mr. DREIBAND. Well, but even in the kind of case that you have described there is a whole different essentially class action framework under a 1977 Supreme Court case. Not the mixed-motive framework but the so-called pattern or practice framework that governs those cases.

And certainly the Supreme Court of the United States has said that in that kind of case that a court has authority separate and apart from the mixed-motive provisions to enjoin an ongoing pattern or practice of discrimination even if the particular or some individuals are not victimized by it and so that would be unaffected by the bill.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. SCOTT. I yield the balance of my time.

Mr. NADLER. Thank you. Ms. Norton, you said that there was on the question of direct and circumstantial evidence there was some split in the lower courts. I just want you to clarify in the *Desert Palace v. Costa* case, didn't the Supreme Court clarify that at least with respect to Title VII cases the Court clarified that with respect to Title VII and mixed-motive case you could use direct or circumstantial evidence?

Ms. NORTON. That is correct.

Mr. NADLER. And the point is that H.R. 3721 would confirm that and extend it to non-Title VII or to all cases.

Ms. NORTON. That is correct. And the *Desert Palace* case is also an excellent example in response to Congressman Scott's question. It is an example of a plaintiff who brought a mixed-motive claim under Title VII, under the Congress' 1991 standard, a mixed-motive claim, and proved that sex was a motivating factor in her termination.

The employer could not prove that it would have fired regardless of her sex, and she received full relief. That is the standard that would be available to Mr. Gross and some of the plaintiffs under this bill as well.

So it is a further illustration of the fact that this bill in fact ensures that plaintiffs and the public have access to the full range of meaningful remedies once discrimination is proven.

Mr. NADLER. Thank you.

I now recognize the gentleman from Georgia for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Dreiband, is it not a fact that the Title VII mixed-motive precedent, that that precedent did not apply to ADEA claims? That was not the reason why the U.S. Supreme Court granted certiorari. Is that true?

Mr. DREIBAND. Yes. The Supreme Court——

Mr. JOHNSON. Not the—you say yes?

Mr. DREIBAND. Well——

Mr. JOHNSON. I just need a yes or no answer to that question.

Mr. DREIBAND. So is the question about whether the Title VII, if that applies to the age discrimination laws?

Mr. JOHNSON. Yes. In other words the U.S. Supreme Court did not grant cert on that issue in the *Gross* case, is that correct?

Mr. DREIBAND. If I understand the question, the answer is yes.

Mr. JOHNSON. Okay. And in fact the Supreme Court granted cert to settle a circuit split on the issue of whether or not plaintiffs must present direct evidence in an ADEA case in order to receive a mixed-motive jury instruction. Is that correct?

Mr. DREIBAND. Yes.

Mr. JOHNSON. Then the U.S. Supreme Court without having the parties either brief the issue that was ultimately decided, which was that this mixed-motive framework does not apply to ADEA cases. Nobody briefed that issue before the Court, correct?

Mr. DREIBAND. I believe that to be correct, although I have not personally reviewed all the briefs. But I believe that is correct.

Mr. JOHNSON. Okay. Now, that to me, to take on a case for one reason and then to decide it based on another reason, that it is not what I would call properly before the Court, constitutes a clear case of judicial activism. Would you agree?

Mr. DREIBAND. It certainly is unusual to do that. That I would agree. You know, whether you would call it judicial activism, I will leave that to others. It is unusual.

Mr. JOHNSON. Yes.

Ms. Norton, would you agree with that?

Ms. NORTON. I agree it is ill-advised to decide an issue that has not been adequately briefed by all the parties in the case.

Mr. JOHNSON. Do you think there is legislation could perhaps be imposed that would prevent the U.S. Supreme Court from engaging in this kind of practice which seems to be becoming a trend?

Ms. NORTON. I will have to think about that. I know for sure that you can enact legislation that would solve the problem that the Supreme Court created in *Gross* with this bill.

Mr. JOHNSON. Well, it goes a little beyond my question. Let me ask you, Mr. Dreiband, do you think that the legislative branch has the authority to prevent scenarios, procedural scenarios from occurring such as the one that we are speaking of that occurred in the *Gross* litigation?

Mr. DREIBAND. I don't—I think like Professor Norton, I am not sure. I don't know whether Congress has the authority to do that

or not. It is possible. I just haven't thought about that or looked at that question.

Mr. JOHNSON. Yes. It seems rather disturbing to me that we could get a clear case of judicial activism which can go unrestrained, that we can ignore judicial and legislative precedent and legislative intent via unchecked judicial activism, which I would also say constitutes legislating from the bench.

What do you have to say about that, Ms. Norton? Legislating from the bench, is this a clear case of that?

Mr. DREIBAND. Well, it was the question directed at me or?

Mr. JOHNSON. Well, yes, Ms. Norton.

Mr. DREIBAND. Oh.

Ms. NORTON. So I am hesitating because I am not sure what legislating from the bench means in this context. I agree that this——

Mr. JOHNSON. Well, it means overturning legislative intent in a case where that issue has not even been set forth by the parties to be decided by the Court.

Ms. NORTON. Well, I certainly do wish very much that the Supreme Court had answered the question on which it granted cert. I wish it had answered the question that had divided the lower courts as to whether or not a plaintiff can get a mixed-motive instruction in an ADEA case with circumstantial evidence.

If the Court had answered that question we wouldn't be here today, and I am actually pretty confident Mr. Gross would still have his jury verdict. So I certainly wish that they had answered the question that they granted certiorari on.

Mr. JOHNSON. Thank you. You are very diplomatic, Ms. Norton.

Mr. Dreiband, if you would answer the question I would appreciate it.

Mr. DREIBAND. Well, certainly I think there are times when the Supreme Court engaged in what you have described as legislating from the bench. This particular case is not unique in that respect.

Mr. JOHNSON. And that is kind of troubling to me. Is it to you?

Mr. DREIBAND. Well, it certainly is, you know, I would agree that it is troubling when the Supreme Court engages in the type of decision making that is—after the Congress of the United States. I certainly agree with that.

Mr. JOHNSON. And you are disagreeing that the Congress of the United States should even deal with this particular issue to clarify it and to etch it into stone by way of legislation?

Mr. DREIBAND. Well, that is not—no. That is not—I don't think the bill is going to change a lot if it is enacted——

Mr. JOHNSON. Well, it should——

Mr. DREIBAND [continuing]. With the exception of the uncertainty that it will create because it doesn't identify the laws it enacts. But in terms of what happens in actual cases, I think the Title VII mixed-motive framework is instructive, which is while there are occasional cases they are very rare.

And what I would encourage the Committee to do is what you could easily do is go ask the Equal Employment Opportunity Commission how many mixed-motive cases the EEOC has brought since 1991. And what you would find is it is——

Mr. JOHNSON. Well, it would certainly——

Mr. DREIBAND [continuing]. Almost none.

Mr. JOHNSON [continuing]. Mr. Gross and his lawyers brought one and actually prevailed.

Mr. DREIBAND. Well, they——

Mr. JOHNSON. As other plaintiffs have done under the then current state of the law——

Mr. DREIBAND. If——

Mr. JOHNSON [continuing]. If it was changed by judicial activism, if you will.

Mr. DREIBAND. Well, but that ignores what happened in the United States Court of Appeals, though. I mean, under the existing standard he lost in a unanimous decision before the Court of Appeals.

That is my point. I mean, but as the bill is written, Congress can enact it, I mean, but what you will find in enacting it is that very few plaintiffs will pursue it.

And the best example of that or the best evidence of that is that what we have seen from the Equal Employment Opportunity Commission in nearly 20 years since Title VII codified the mixed-motive standard, that that agency, which has brought thousands of cases, has filed very few mixed-motive cases, very few.

Mr. JOHNSON. Yes.

Mr. NADLER. Just on your observation that Mr. Gross lost in the Court of Appeals. He lost on the question of the direct versus the circumstantial evidence, but had the Court of Appeals followed the Title VII *Price Waterhouse* decision, I am sorry.

Had the Court of Appeals followed the *Desert Palace* decision he would have won on that point, and this bill would clarify that the courts have to apply that standard from Title VII also.

So had this bill been in—so had the court followed the *Desert Palace* case he would have won in the Court of Appeals. Had this bill been in effect he would have won in the Court of Appeals, correct, because this bill clarifies that the direct and circumstantial evidence can be used elsewhere as it is in Title VII?

Ms. NORTON. I am sorry. Is that directed——

Mr. NADLER. I was asking Mr. Dreiband. I mean——

Mr. DREIBAND. I am sorry. Oh, I thought it was to Professor Norton.

Mr. NADLER. No, I was asking you. I mean, you said that this bill would not have affected Mr. Gross' situation because he lost in the Court of Appeals.

The point is had the Court of Appeals followed the *Desert Palace* decision or had this bill been in effect, both of which, that is the *Desert Palace* decision and this bill, say that you apply the direct answer—you can use either direct or circumstantial evidence in other laws as you can in Title VII, he would have won the Court of Appeals.

Mr. DREIBAND. Well, certainly—look, I agree the problem was the *Price Waterhouse* decision itself and this establishment of this direct evidence standard. So to that extent I encourage the Congress to act. That I agree with.

Mr. NADLER. So you agree with that part of the bill.

Mr. DREIBAND. Yes. The problem though is that very few cases will be brought under the mixed-motive standard as a result. I

mean, Mr. Gross is here. I would ask him if he prevails would he want to pursue this——

Mr. NADLER. Yes. Well, if that is the case what is wrong with allowing it?

Mr. DREIBAND. What is that?

Mr. NADLER. If very few cases will be brought under the mixed-motive provision, what is the harm of allowing it as the bill would do?

Mr. DREIBAND. Oh, the only harm in that will happen if you enact the bill in my judgment is the fact that you don't define which statues the Congress——

Mr. NADLER. All right. Then let me ask you my last question——

Mr. DREIBAND. Otherwise I agree. There is no harm.

Mr. NADLER [continuing]. And with Mr. Johnson's continued indulgence, let me ask you my last question which I was going to ask certainly.

Mr. JOHNSON. Certainly, Mr. Chairman.

Mr. NADLER. Thank you. You expressed, sir, concern that the legislation is not sufficiently specific with respect to the laws it reaches. You have said that several times. It is a valid point, but we are in a bit of a bind here.

While *Gross* itself was an ADEA case, the Court did invite the lower courts to expand the ruling beyond the ADEA and placed no limit on the laws to be reached. As a result, we have seen decisions in a wide variety of contexts ranging from jury service to First Amendment to disability discrimination.

Do you have any suggestions for how we might clarify in Title VII's causation standard should apply broadly?

Mr. DREIBAND. Is this question directed at me?

Mr. NADLER. Yes.

Mr. DREIBAND. Okay. Yes. What I think is that the Congress could simply list the statutes that it intends to enact in the same way that the Congress did last year in the Lilly Ledbetter——

Mr. NADLER. The problem with that—excuse me—but the problem with that, I mean, that is an obvious thing to do, but the problem with that is that in *Gross* the Court invited lower courts to expand the ruling wherever they want to expand it basically.

It placed no limit on the laws to be reached. So if we name 10 laws and if we say this is now to apply, the danger is that the courts will expand it to an 11th or 12th or 15th that we didn't think of. How do we deal with that problem? That is my real question.

Mr. DREIBAND. Yes, that is a legitimate concern. I think what I would say to the Congress, though, is who do you want making that decision? Do you want the Supreme Court that you don't like because of the *Gross* decision, or can Congress itself make that decision?

And that is the problem that I see here without identifying the laws is you are essentially condemning victims to spending money fighting over whether the bill applies to the law that they are seeking relief under or not. And I don't see that doing any good for anyone.

Mr. NADLER. Well, what about a clause that says you shall apply broadly unless Congress specifically says otherwise? How would you feel about that?

Mr. DREIBAND. It would say what, that it——

Mr. NADLER. There should be—the *Gross* standard, the *Gross* standard—the provision that we are writing into the bill shall be applied to all laws except where Congress specifically says otherwise, except where the statute by its terms specifically says no.

Mr. DREIBAND. So it would apply to all laws in the United States Code unless the law says otherwise? Is that it?

Mr. NADLER. All laws where this is applicable, in other words, where the question is causation and so forth. Or in other words all laws where the question is causation of discrimination, you have the "but for" standard, et cetera. Wherever that is the question this shall apply unless Congress specifically says to the contrary.

Mr. DREIBAND. Okay. Well, I would have to give that some thought. The question I would have, though, is do you mean as I understand, as the Title VII standard currently exists that it would be an alternative.

In other words you could assert a claim without mixed-motive and pursue the one framework which currently exists under Title VII or alternatively the mixed-motive. And so this would be an alternative under all the other laws or?

Mr. NADLER. Okay.

Mr. DREIBAND. But I would have to think about it and——

Mr. NADLER. All right. You are entitled to think about it. If you want to submit an opinion in writing after the Committee, after the hearing, we would be happy to review it.

I thank you, and I yield back to the gentleman from Georgia. And I thank him for his indulgence.

Mr. JOHNSON. And I yield the balance of my time, and thank you, Mr. Chairman.

Mr. NADLER. Ah, okay. I think that is it. Well, thank you all. Without objection all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward. And ask the witnesses to respond as promptly as they can so that their answers can be made part of the record.

Without objection all Members will have 5 legislative days to submit any additional materials for inclusion in the record. And with that I want to thank the witnesses and the Members and this hearing is adjourned.

[Whereupon, at 11:49 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Hearing Statement of Ranking Member F. James Sensenbrenner, Jr.
Subcommittee on the Constitution
Hearing on "H.R. 3721, the "Protecting Older Workers Against Discrimination Act"
Thursday, June 10, at 10:00 a.m. in Room 2141 Rayburn

H.R. 3721, the "Protecting Older Workers Against Discrimination Act," was introduced in response to the Supreme Court's decision last year in *Gross v. FBL Financial Services, Inc.*, a case arising under the ADEA, the Age Discrimination in Employment Act. In that case, the Supreme Court held in a 5-4 decision that a plaintiff suing for age discrimination under the ADEA has a higher burden of proof than, for example, a plaintiff suing for race or sex discrimination under Title VII of the Civil Rights Act. H.R. 3721 would amend the ADEA to conform the burden of proof in that statute to that of Title VII. However, while the title of the bill limits itself to age discrimination, H.R. 3721 goes far beyond merely amending the ADEA, and would by its terms apply to numerous statutes, including many with no clear connection to employment issues.

Under federal anti-discrimination law, there are two ways in which a plaintiff who believes she was the victim of discrimination can prove her case. The first is commonly called the "*McDonnell Douglas*" method of proof, named after the case in which it was first established by the Supreme Court. That is the most frequently used method of proof. The second is known as a "mixed motive" case, or the "*Price Waterhouse*" model of proof, which is named after the Supreme Court decision of the same name.

Essentially, under the *McDonnell Douglas* framework, the burden of persuading the jury always rests with the plaintiff, who must rebut claims by an employer that the action the employer took was a mere "pretext" designed to conceal a discriminatory motive. And under the "*Price Waterhouse*" framework, the burden of proof ultimately rests with the employer, who must show that, even if a discriminatory motive was one factor contributing to an employment action, the same employment action would have been taken anyway, even absent a discriminatory motive, because of other, legitimate employment reasons.

In the *Gross* case, the Supreme Court held that as a matter of law, a "mixed motive" instruction is not available under the ADEA, insofar as the language used in that statute is different than that of Title VII. It found that when Congress amended Title VII in 1991 to statutorily adopt the *Price Waterhouse* mixed-motive framework, it specifically did not amend the ADEA, and so Congress must have not intended the "mixed motive" framework to be available to ADEA plaintiffs.

As the Supreme Court described its decision, a plaintiff who brings an intentional age discrimination claim must prove that age was the "but-for" cause of the challenged adverse employment action. The Court determined that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. The Court observed that the ADEA makes it "'unlawful for an employer … to fail or refuse to hire or to discharge any individual or otherwise discriminate against respect to his

compensation, terms, conditions, or privileges of employment, *because of* such individual's age.'" The Court then applied what it said was the ordinary meaning of "because of," and reasoned that the ADEA's "because of" standard requires a plaintiff who alleges intentional age discrimination to "prove that age was the 'but-for' cause of the adverse action."

H.R. 3721 would amend the ADEA to make an employment action unlawful if a plaintiff proves that an improper factor such as age motivated the employment action, even if other, legitimate factors were also motivators. But, as is the case with Title VII claims, if a defendant can show that it would have taken the same action despite the improper factor, the plaintiff loses his or her right to damages, reinstatement, hiring, promotion, or payment. In that case, the only people who gain money and employment are the lawyers, since the bill would allow courts to award certain attorney's fees and costs but would do nothing to enhance the ADEA's protections of victims of discrimination.

Also of concern is the scope of this legislation. Despite its title referring to "Older Workers," the bill goes far beyond simply adopting the mixed-motive mode of proof to the ADEA and adopts that standard to a wide range of federal laws, including "any other "Federal law forbidding employment discrimination;" any law forbidding discrimination against an individual for participating in an investigation or proceeding relating to discrimination; any law protecting against retaliation for engaging in any federally-protected activity (including any whistleblower law); and any provision of the Constitution that "protects against discrimination or retaliation."

Such different statutes applying to diverse areas will often be based on decades of well-developed caselaw and interpretations that could be overriden by H.R. 3721. And whether they would be or not would depend on decades of costly litigation.

With those concerns in mind, I look forward to hearing from all our witnesses here today.

Congressman Henry C. "Hank" Johnson, Jr. Statement for the Hearing on H.R. 3721, the Protecting Older Workers Against Discrimination Act

June 10, 2010

Thank you, Mr. Chairman, for holding this important hearing on H.R. 3721, the Protecting Older Workers Against Discrimination Act.

This hearing will give Members the opportunity to examine H.R. 3721, which is the proposed legislative response to *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 557 U.S. _____, (2009).

In *Gross*, the Supreme Court ruled that plaintiffs cannot bring mixed-motive claims under the Age Discrimination in Employment Act of 1967 (ADEA). The ADEA is a critical civil rights law that protects individuals who are forty years of age or older by prohibiting age discrimination in hiring, promotions, wages, or termination of employment.

Mixed-motive claims are useful where an employer may have considered unlawful factors, such as age, race or religion, as well as legitimate factors, such as tardiness or non-performance, in making an employment decision. In a mixed-motive claim, the burden shifts to the employer to prove that it acted lawfully once the employee shows that the unlawful factor played a role.

The problem with the *Gross* decision is that these mixed-motive claims are already available under Title Seven of the Civil Rights Act of 1964 and were also part of the ADEA before the Gross decision. Prior to *Gross*, plaintiffs could bring mixed-motive claims under the ADEA. Thus, the Gross decision has drastically

curtailed the plaintiffs' opportunity to seek relief under the ADEA, and arguably under Title Seven.

As a member of the Seniors Task Force, I believe that we must protect our aging population. These older Americans have contributed greatly to our society. The least that we can do to honor these Americans, in recognition of their skill and experience, is to protect them and contribute to their welfare.

Americans are living longer and working longer. Because of the economy, many older Americans are delaying retirement and staying in the workplace in order to make ends meet.

We need to ensure that older Americans are protected in the workplace. Unfortunately, the Gross decision can hurt workers by making it harder for older Americans facing age discrimination to bring suits to enforce their rights.

Congress has a responsibility to step in and restore the basic protections and civil rights that have been chipped away. The Protecting Older Workers Against Discrimination Act appears to be the tool that will restore fundamental fairness by reversing the Gross decision and specifically restoring the availability of mixed-motive claims under the ADEA.

Mr. Gross, I commend you for being here and sharing your story with us. I look forward to hearing from all of the witnesses today and yield back the balance of my time.

House Subcommittee on the Constitution
Hearing on H.R. 3721, the "Protecting Older Workers Against Discrimination Act"

Chairman Nadler's Question for the Record for Professor Norton:

In his testimony before the Subcommittee, Mr. Dreiband took the position that the Supreme Court's decision in *Gross v. FBL Financial Services* does not harm victims of age discrimination and, in fact, may benefit older workers because it "stripped away [the] so-called 'same decision' or same action defense," which allowed a defendant to prove that it would have made the same decision, or taken the same action, for reasons unrelated to age. According to Mr. Dreiband, "[f]or this reason, the federal courts have repeatedly ruled in favor of discrimination plaintiffs and against defendants" in reliance on the *Gross* decision.

Mr. Dreiband cited cases from several circuit courts of appeal to support his conclusion. Do you agree with Mr. Dreiband's analysis and the conclusion(s) that he draws from these cases?

Professor Norton's response:

No. The cases listed in Mr. Dreiband's testimony do not support the assertion that the *Gross* Court's "but-for" rule is beneficial to plaintiffs. Indeed, cases that Mr. Dreiband's written testimony cites as examples of courts that "relied upon *Gross* to rule in favor of plaintiffs"[1] actually confirm the additional barriers that *Gross* places in the path of workers seeking to vindicate their antidiscrimination rights. These include *Bolmer v. Oliveira,* in which the Second Circuit characterizes *Gross* as imposing a "more stringent causation standard" than that under *Price Waterhouse*,[2] and *Serafinn v. Local 722, International Brotherhood of Teamsters,* in which the Seventh Circuit explains how the "but-for" standard benefits *defendants* in close cases.[3] In

[1] *See* Statement of Eric S. Dreiband at pages 10-11 and notes 43 and 50.

[2] 594 F.3d 134, 148-49 (2nd Cir. 2010) (declining to decide whether *Gross* applied to a claim under Title II of the ADA because the court concluded that the plaintiff's evidence of disability discrimination was sufficiently strong to survive summary judgment under either causation standard).

[3] 597 F.3d 908, 914 (7th Cir. 2010) (observing that the defendant's proposed mixed-motive and motivating factor instruction was "ill-advised" because it is "disadvantageous to the local [defendant] if the evidence was in equipoise. Both the but-for instruction and the [defendant's] proposed composite instruction score complete victory for the [defendant] if a jury finds that the [defendant] would have prosecuted [the plaintiff] regardless of his outspoken politics. But whereas the but-for cause instruction maintains the burden of persuasion on the plaintiff, giving a tie to the [defendant], the [defendant's] proposed composite instruction shifts the burden of persuasion to itself, giving a tie to [the plaintiff].") (citations omitted). Another decision cited by Mr. Dreiband as an example of a federal court ruling for plaintiffs after *Gross* took pains to describe motivating factor causation standards as "less demanding" for age discrimination plaintiffs than the *Gross* "but-for" standard, and then concluded that the plaintiff's evidence of age discrimination was sufficiently strong to survive summary judgment under either causation standard. Baker v. Silver Oak Senior Living Management Co., 581 F. 3d 684, 689 (8th Cir. 2009). Lower courts have confirmed that *Gross* adds to the challenges faced by workers seeking to enforce their rights to be free from discrimination and retaliation in a wide variety of other cases as well. *See, e.g.,* Fuller v. Seagate Technology, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009) (describing *Gross* "as elevating the quantum of causation required under the ADEA"); Marquez v. Drugs Unlimited, Inc., 2010 WL 1133808 at *7 (D. Puerto Rico 2010) ("The Court declared in *Gross* that this 'but for' standard is a much higher standard than that which has been applied in Title VII cases."); Miller v. Nat'l Ass'n of Securities Dealers, Inc., 2010 WL 1371029 at *9 (E.D.N.Y. 2010) ("According to *Gross,* the burden of persuasion required by the ADEA is more onerous" than that under Title VII); Mojica v. El Conquistador Resort

each of these cases, the courts ruled that the plaintiffs' evidence of discrimination was sufficiently strong to survive summary judgment under even the new and more demanding standard created by *Gross*.

Mr. Dreiband's written statement also lists as examples of courts that "relied upon *Gross* to rule in favor of plaintiffs"[4] several decisions that in fact ruled for the plaintiff only after distinguishing, *and thus refusing to rely upon,* the Court's decision in *Gross*. These include Thompson v. Weyerhauser Co., in which the 10th Circuit distinguished *Gross* as limited to individual disparate treatment cases and thus refused to rely upon it in an ADEA pattern-or-practice case;[5] Brown v. J. Kaz, Inc., in which the Third Circuit observed that the parties agreed that *Gross* did *not* apply to a section 1981 case and then applied the *Price Waterhouse* motivating factor framework;[6] and Hunter v. Valley View Local Schools, in which the Sixth Circuit distinguished, and thus refused to rely upon, *Gross* in a case involving the Family and Medical Leave Act.[7] Another "relied upon" *Gross* only for the general proposition that courts should not reflexively apply rules applicable under one statute to another without examination, rather than for any proposition related to causation rules (much less for the proposition that the new *Gross* rule benefits plaintiffs).[8]

Moreover, all but one of the remaining decisions cited in Mr. Dreiband's statement simply cite *Gross* as the Court's most recent ADEA decision before instead relying on the longstanding *McDonnell Douglas* analysis for pretext cases, in which the plaintiff bears the burden of proving that the employer's proffered nondiscriminatory reason for its action is actually a pretext for discrimination.[9] In other words, these courts relied on standards in

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and Golden Door Spa, 2010 WL 1992575 at *1 (D. Puerto Rico 2010) (observing that *Gross* "in some aspects raised the standard for proving an ADEA claim")

[4] *See* Statement of Eric S. Dreiband at page 11 and note 50.

[5] 582 F.3d 1125, 1131 (10th Cir. 2009) ("We are not persuaded by Weyerhauser's argument. *Gross* does not involve the pattern-or-practice procedure at issue here.").

[6] 581 F.3d 175, 182-83 & n.5 (3rd Cir. 2009) (concluding that the plaintiff survived summary judgment on her claim under 42 U.S.C. § 1981 based on the *Price Waterhouse* motivating factor framework after noting that "the parties agreed that *Gross* . . . has no impact on this case").

[7] 579 F.3d 688, 692 (6th Cir. 2009) (distinguishing, rather than relying on, *Gross* as inapplicable to FMLA retaliation claims and concluding that the plaintiff survived summary judgment under the motivating factor standard: "[W]e continue to find *Price Waterhouse*'s burden-shifting framework applicable to FMLA retaliation claims."). Mr. Dreiband's testimony similarly cites Kodish v. Oakbrook Terrace Fire Protection Dist., 604 F.3d 490 (7th Cir. 2010), as an example of a decision in which a court "relied upon" *Gross* to rule for a plaintiff, but here too the court actually distinguished *Gross* from the case at hand and declined to apply it. *See id.* at 501 ("[W]hether such a burden shifting analysis survives the Supreme Court's declaration in *Gross* in non-Title VII cases remains to be seen. In this case, however, we need not concern ourselves with whether burden shifting survives *Gross*, as [the plaintiff] has set forth a direct case of retaliation – one that does not require a burden-shifting analysis.").

[8] Fleming v. Yuma Regional Medical Ctr., 587 F.3d 938, 943-44 (9th Cir. 2009) (concluding that the Rehabilitation Act should not be interpreted to track the ADA's exclusion of independent contractors from its job discrimination provisions).

[9] *See* Hrisinko v. New York City Dep't of Ed., 2010 WL 826879 at *1-3 (2nd Cir. 2010) (concluding that the plaintiff had sufficient evidence of pretext under *McDonnell Douglas* to survive summary judgment); Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 447-48 (1st Cir. 2009) (same); Liebowitz v. Cornell Univ., 584 F.3d 487, 503-05 (2nd Cir. 2009) (same); EEOC v. TIN, 349 Fed. Appx. 190 at *2 (9th Cir. 2010) (concluding that the plaintiff's evidence of pretext survived summary judgment); Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 106-07 (2nd Cir. 2010) (concluding that the plaintiff's evidence was sufficiently strong to survive summary judgment under either *McDonnell Douglas* or *Gross*).

existence before *Gross* to rule for plaintiffs, and thus cannot be characterized as cases in which plaintiffs benefited from *Gross*. Indeed, only one of the cases cited in Mr. Dreiband's written statement in fact purports actually to "rely" on the *Gross* causation standard to find for the plaintiff.[10] But even in that case, the plaintiff's evidence of age discrimination – which included testimony that the chief executive told the plaintiff that she was too old and that he needed a younger employee -- was sufficiently strong that she should have survived summary judgment under *any* causation standard.[11] Indeed, the court cited mixed-motive cases decided under *Price Waterhouse* and before *Gross* as "instructive" to its ruling for the plaintiff.[12] In short, winning after or despite the Court's decision in *Gross* is not the same as winning *because* of it; that some plaintiffs have survived *Gross* does not mean that they have benefited from the decision.

Indeed, as Mr. Gross's own case – and others[13] -- make painfully clear, the *Gross* rule has stripped other discrimination plaintiffs of hard-fought victories by unreasonably demanding that a plaintiff who successfully proves that discrimination did in fact motivate the decision must bear the additional burden of proving that some other factor was NOT in the defendant's mind – i.e., that some nondiscriminatory factor was *not* the but-for cause of the adverse employment decision. Mr. Gross won under the *Price Waterhouse* motivating factor standard and its same-decision defense, and he would have won under H.R. 3721's motivating factor standard. Only under the *Gross* Court's new "but-for" causation rule did he lose his verdict.

Indeed, recall that Mr. Gross's lawyers requested and received the *Price Waterhouse* motivating factor instruction over the objections of the defendant. Under *Price Waterhouse* (and before *Gross*), once a plaintiff proved that age was a motivating factor in an employment decision, the ADEA burden of persuasion shifted to the defendant to prove that it would have made the same decision even absent discrimination. As the First Circuit explained in another case, "most plaintiffs perceive the *Price Waterhouse* framework and its concomitant burden-shifting as conferring a profound advantage. In the average case, the employee thirsts for access to it, while the employer regards it as anathema."[14] This is because such burden-shifting appropriately recognizes and responds to employers' and employees' asymmetric access to information about the employer's state of mind and whether it would have made the same decision even absent discrimination.[15] Such burden-shifting is especially appropriate, moreover, when the uncertainty in determining whether the employer would have made the same decision has been created by the defendant's discriminatory consideration of protected status or activity in its decisionmaking.

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[10] *See* Mora v. Jackson Memorial Hosp., 597 F.3d 1201, 1203-04 (11th Cir. 2010).

[11] *Id.* at 1203.

[12] *Id.* at 1205 ("While these cases [in which an ADEA plaintiff survived summary judgment] were litigated under the now-defunct ADEA mixed motive theory, they remain instructive. Plaintiff's situation is similar. A reasonable juror could find that [the defendant's] statements should be taken at face value and that he fired Plaintiff because of her age.").

[13] My June 10, 2010 written statement discusses additional examples in more detail. *See, e.g.*, Serwatka v. Rockwell Automation, Inc. 591 F.3d 957, 961 (7th Cir. 2010); Williams v. District of Columbia, 646 F. Supp. 2d. 103, 109 (D.D.C. 2009).

[14] Febres v. Challenger Caribbean Corp., 214 F.3d 57, 60 (1st Cir. 2000) (internal citations omitted).

[15] Indeed, defendants' greater access to information that is key to proving or disproving an element of a particular claim commonly triggers burden-shifting in many other areas of the law. *See* Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE 105 (3d ed. 2003) (describing the appropriateness of shifting the burden of proof to the defendant on a contested issue when the defendant has greater access to evidence probative of that issue).

A jury then applied the *Price Waterhouse* instructions to conclude that Mr. Gross had proved that age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have made the same decision regardless of his age. It thus found that Mr. Gross had established that his employer had violated the ADEA, and awarded him approximately $47,000 in lost compensation.

On appeal, the defendant employer challenged the trial judge's decision to use the *Price Waterhouse* instruction, arguing that such an instruction is appropriate only when the plaintiff has direct evidence of discrimination and that Mr. Gross did not have such evidence. The Eighth Circuit agreed. Note that the Eighth Circuit ruled against Mr. Gross *not* because he could not survive the "same decision" defense – in fact he did -- but instead because it found that the *Price Waterhouse* motivating-factor instruction is only available in cases when the plaintiff has direct evidence of age discrimination (e.g., where the employer acknowledges its discrimination, which of course is very rare). Other courts had ruled, in contrast, that the *Price Waterhouse* instruction is available in ADEA cases when the plaintiff proves that age was a motivating factor by any available evidence, circumstantial or direct.

The Supreme Court granted certiorari in *Gross* to resolve that controversy. Its actual decision, however, failed to address this question. Instead it vacated Mr. Gross's jury verdict, and articulated a brand-new causation standard that significantly undercut protections for older workers. Unless this legislation is enacted, upon re-trial Mr. Gross will bear the burden of proving not only that his age was a motivating factor, but additionally that it was the but-for factor for his demotion. Because the plaintiff is not as well-positioned as the employer to prove what the employer would have done in a hypothetical workplace without discrimination, Mr. Gross will be at a disadvantage if his case is re-tried under the Court's new rule rather than under H.R. 3721.

Written Testimony Submitted to the

Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

on

H.R. 3721, Protecting Older Workers Against Discrimination Act

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Older workers have long been an AARP priority, and roughly half of all AARP members are employed either full or half-time. On behalf of AARP's members and all older workers, AARP advocates for older workers both in Congress and before the courts to combat age discrimination. AARP also participates in the Senior Community Service Employment Program (SCSEP) in which we match lower-income older jobseekers and employers with available positions. We also annually recognize "Best Employers" for workers over age 50, and partner with employers stating a commitment to welcome older persons into their workforce as part of an AARP "National Employer Team." We also organize job fairs allowing employers and older workers to find one another.

AARP appreciates the opportunity to submit this statement on the issue of protecting older workers against age discrimination, and in particular, the topic of proposed legislation to address the U.S. Supreme Court's troubling decision last year in *Gross v. FBL Financial Services, Inc.*, No. 08-441, 129 S. Ct. 2343 (June 18, 2009). In that decision the Supreme Court, by the narrowest of margins, announced 5-4 that older workers challenging unfair treatment based on their age, under the Age Discrimination in Employment Act (ADEA), have lesser protection than other workers protected by federal law against illegal bias. Older workers, the Court said, have to meet a higher standard to prove discrimination than workers facing bias based on their sex, race or national origin. In effect, the Court said that Congress intended – when it passed the ADEA back in 1967 – to place older workers in a second-class category of protection from unfair treatment at work. We at AARP think this decision is wrong, and that the Court's understanding of what Congress meant when it enacted the ADEA is inaccurate. Unless corrected, this decision

will have devastating consequences for older workers – workers who represent a growing share of the U.S. workforce and are increasingly critical to the nation's economic recovery.

The Supreme Court's decision in *Gross v. FBL* could not have come at a worse time for older workers, who are experiencing a level of unemployment and job insecurity not seen since the late 1940s. Over the past 28 months (December 2007 through March 2010), finding work has proven elusive for millions of younger *and* older workers as employers have laid off workers and scaled back hiring due to reduced demand. However, older workers face another barrier—age discrimination. Age discrimination is difficult to quantify, since few employers are likely to admit that they discriminate against older workers. Available research does highlight, however, the extent to which younger job applicants are preferred over older ones, who more often fail to make it through the applicant screening process.[1] Older workers themselves see age discrimination on the job: 60 percent of 45 to 74-year-old respondents to a pre-recession AARP survey contended that based on what they have seen or experienced, workers face age discrimination in the workplace.[2] That percentage could well be higher if those workers were asked about age discrimination today. More age discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC) in FY 2008 and FY 2009 than at any time since the early 1990s, according to the latest EEOC data.[3]

One of the ways in which the *Gross* decision already has affected older workers is to make it impossible in some circumstances to bring age discrimination claims. Some courts have interpreted the *Gross* Court's language to require proof that age bias was a "sole cause" of an unfair termination, or as in Jack Gross' case, an unfair demotion. Thus in one recent case in Alabama, the plaintiff alleged both race and age discrimination.

Culver v. Birmingham Bd. of Education, 2009 WL 2568325 (N.D. Ala. August 17, 2009). Relying on *Gross*, the court ordered Mr. Culver to either abandon his age claim or his race discrimination claim because "*Gross* h[eld] for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact that he is over 40 years old was the only . . . reason for the alleged adverse employment action." This was never the law before Gross, and it makes no sense now. Surely Congress meant for victims of age and other bias to bring claims on whatever grounds they can assemble proof to support a charge of discrimination, not to choose between one of several grounds of illegal unfair treatment. Similarly, in a case in Pennsylvania, a federal court recently relied on *Gross* to force a plaintiff to choose between claims of age and sex discrimination. *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890 (E.D. Pa. Aug. 11, 2009). The court cited the plaintiff's allegations that she was treated less favorably because she was an "older female" to conclude that her age was not the "but-for" cause of the discrimination of which she complained. According to this court, "The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the *only* reason for discrimination." Once again, AARP submits this makes no sense and fundamentally misunderstands the ADEA. We cannot wait for these sorts of rulings to spread. This must end.

Thus, AARP strongly endorses the Protecting Older Workers Against Discrimination Act or "POWADA", H.R. 3721, of which many members of this Committee are a sponsor. POWADA would correct the wrong turn in the law that the *Gross* decision represents. It would eliminate the second-class status for victims of age bias that the Court in *Gross* seemed to embrace. It would tell lower courts not to treat older workers who face

discrimination law differently, in key respects, than they treat workers who face bias on grounds of race or sex under Title VII of the 1964 Civil Rights Act. Congress, after all, consistently has followed Title VII as the model for other employment discrimination laws, like the ADEA and the Americans with Disabilities Act.

This decision could not come at a worse time. It takes away a vital legal protection at the very time that the economy does not give older workers the luxury of ignoring discrimination and simply finding another job.

The unemployment rate for persons aged 55 and over has more than doubled since the start of the recession, rising from 3.2 percent in December 2007 to 6.9 percent in March 2010. Although the unemployment rate for this age group has traditionally been and remains lower than that for younger persons, the increase in unemployment for older persons has been greater, thus significantly narrowing the age gap in unemployment.

Once out of work, older job seekers face a prolonged and often discouraging job search. Newspapers and news programs have profiled many older jobs seekers who report sending out hundreds of resumes and receiving few, if any, responses from employers. Statistics back up the anecdotes of the job-seeking frustrations of older workers. Average duration of unemployment has soared since the start of the recession and is substantially higher for older job seekers than it is for their younger counterparts—38.4 weeks versus 31.1 weeks in March -- a difference of nearly two months. In December 2007, average duration of unemployment for older persons was 20.2 weeks.

Older workers also are more likely to be found among the long-term unemployed—those who have been out of work for 27 or more weeks. Just over half (50.6 percent) of

job seekers aged 55 and over and 42 percent of those under age 55 could be classified as "long-term" unemployed in March. Once out of work, older persons are more likely than the younger unemployed to stop looking for work and drop out of the labor force. If they do find work, they are more likely than younger job finders to earn less than they did in their previous employment.

Today, older workers are more likely than younger workers to be displaced. As of December 2009, 78 percent of unemployed workers aged 55 and over were out of work because they lost their jobs or because a temporary job ended. This compares to 65 percent of the unemployed under age 55. Job loss has risen substantially for both age groups since the start of the recession two years earlier and far more than it had in the two years before December 2007. (See Table 1.)

Hence, older workers need effective age discrimination laws when employers choose to displace them based on their age, due to stereotypes or other forms of bias, rather than their performance or other legitimate business reasons. And there can be no doubt that unfounded stereotypes about older workers linger. In cases in which AARP has played a role over the last decade, AARP attorneys have battled employer perceptions that older workers have less energy and are less engaged, despite AARP research data showing that on the contrary, older workers are more engaged in their jobs, as well as more reliable (*i.e.*, less likely to engage in absenteeism). Some employers also still believe older workers are a poor investment and are disinclined to include them in training programs. Again, AARP research shows that older workers are more loyal to (*i.e.*, less likely to leave) their current employers, and thereby may be better bets in terms of employer investments in training. And finally, some employers have outdated notions of

older workers as incapable of adapting in industries -- such as computers and information technology -- requiring acquisition of new skills, despite Baby Boomers' enthusiastic embrace of virtually all forms of rapidly changing IT products and services.

Research also shows why failing to protect older workers from discriminatory exclusion from employment is not only unjust but also counterproductive for a nation facing enormous challenges supporting a growing aging population. That is, there is growing evidence that older persons need to work and that they would benefit financially from working longer: millions lack pension coverage, have not saved much for retirement, have lost housing equity, and have seen their investment portfolios plummet. Many have exhausted their savings and tapped their IRA and 401(k) accounts while unemployed. Some workers seem to be opting for Social Security earlier than they might have otherwise. The Urban Institute (UI), for example, points to a surge in Social Security benefit awards at age 62 in 2009. To a large extent, this is a result of a sharp rise in the aged 62 population. However, the UI reports that the benefit take-up rate was substantially higher in 2009 than in recent years, which they say is likely due to an inability to find work.[4] One out of four workers in the 2010 Retirement Confidence Survey maintains that their expected retirement age has increased in the past year, most commonly because of the poor economy (mentioned by 29 percent) and a change in employment situation (mentioned by 22 percent). [5]

Failing to allow older workers a fair chance to fight age discrimination is directly contrary to other federal policies envisioning that Americans will work longer. Public policies such as the 1983 Social Security amendments that increased the age of eligibility for full benefits and the benefits for delaying retirement, as well legislation in 2000 that

eliminated the Social Security earnings test for workers above the normal retirement age, were designed to encourage longer work lives. Eliminating discrimination is critical if older persons are to push back the date of retirement.

Working longer is good for society as earners typically pay more in taxes than retirees and contribute to the productive output of the economy. It is also good for workers who have more years to save and less time in retirement to finance. And it is good for employers who retain skilled and experienced employees. This last advantage may be less clear in a deep recession; however, the economy will recover eventually – we hope sooner rather than later! With the impending retirement of the boomers, many experts predict sizable labor and skills shortages in many industries.

In closing, AARP wants to stress its commitment to vigorous enforcement of the ADEA and other civil rights law as one part of a broad-based strategy to serve the needs and interests of older workers consistent with the overall public interest. We recognize that prudent employers, indeed we hope most employers, follow the law and respect the rights of older workers. But we also believe that the ADEA and other civil rights law must be preserved so that they act as a real deterrent, and if need be, a tool for redress, when employers are tempted to discriminate or actually violate the rights of older workers. Unless POWADA returns the law to the state of affairs that existed before the *Gross* decision, legal advocates will have a very hard time defending older workers who encounter workplace bias. And we also urge Congress to make sure that POWADA protects older workers from the expansion of the reasoning in *Gross* to other employment laws. For instance, we are aware of decisions restricting application of other laws important to older workers – such as the ADA and ERISA, see *Serwatka v.*

Automation, Inc., --- F.3d ----, 2010 WL 137343 (7th Cir., January 15, 2010) (NO. 08-4010)(ADA) and *Nauman v. Abbott Laboratories*, CA 04-7199 (N.D. Ill. April 22, 2010) – based on the flawed logic of the narrow Supreme Court majority in *Gross*.

We believe the Protecting Older Workers Against Discrimination Act (POWADA), H.R. 3721, is a vital and reasonable effort to restore the law to the state of play prior to the *Gross* decision. At that time, employers were able to manage their proof obligations in ADEA cases. Virtually no court in the U.S. believed age had to be the only reason for an employer terminating an older worker for the worker to have a claim under the ADEA. But now, based on *Gross*, some courts have been embracing this new and onerous interpretation. And the same view has been applied to other civil rights laws to the detriment of older workers and other discrimination victims. This is not right. In the worst economic conditions in decades for older workers, Congress should act now to correct the misguided ruling in the *Gross* decision and pass POWADA.

Table 1.
Percent of Workers Giving Job Loss or End of Temporary Job as the Reason They Were Unemployed, by Age, December 2005, December 2007, and December 2009

Age and Reason for Unemployment	December 2005	December 2007	December 2009
Aged 55+			
Job loser/on layoff	21.0	23.8	14.0
Other job loser	33.8	36.8	55.8
Temporary job ended	8.3	8.2	8.6
Total	63.1	68.8	78.4
Under Age 55			
Job loser/on layoff	13.7	13.2	11.0
Other job loser	25.9	26.9	43.9
Temporary job ended	11.0	12.5	9.8
Total	50.6	52.6	64.7

Source: AARP PPI calculations of data in the Current Population Survey.

[1] M. Bendick, L. E. Brown, and K. Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination against Older Workers, *Journal of Aging & Social Policy*, 1999 *10*(4), 1999, pp. 5-23; J. Lahey, *Age, Women, and Hiring: An Experimental Study* (Chestnut Hill, MA: Center for Retirement Research at Boston College, 2006).

[2] AARP, *Staying Ahead of the Curve 2007: The AARP Work and Career Study* (Washington, DC: AARP, 2008).

[3] U.S. Equal Employment Opportunity Commission, April 29, 2010 at http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm.

[4] R. W. Johnson and C. Mommaerts, *Social Security Retirement Benefit Awards Hit All-Time High in 2009*, Fact Sheet on Retirement Policy (Washington, DC: Urban Institute, 2010).

[5] EBRI, "The 2010 Retirement Confidence Survey: Confidence Stabilizing, but Preparations Continue to Erode," *EBRI Issue Brief*, No. 340, March 2010 at www.ebri.org/pdf/briefspdf/EBRI_IB_03-2010_No340_RCS.pdf.