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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE COMMITTEE ON EDUCATION AND LABOR

Hearing About the Protecting Older Workers Against Discrimination Act

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I. Introduction

Good morning Chairman Andrews, Ranking Member Price, and Members of the Committee. I thank you and the entire Committee 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 -
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> (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
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> (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

[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, Fifth, 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 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,

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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] *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: *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).

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

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]

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

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[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").

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

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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).

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

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.